Supreme Court of California
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Supreme Court of California
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No. S260928

In the Supreme Court of the State of California

In re A.R., a Person Coming Under the Juvenile Court Law

Alameda County Social Services Agency,
Plaintiff and Respondent,

vs.

M.B.,
Objector and Appellant.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT AND AMICUS CURIAE BRIEF OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS

After the Unpublished Order filed January 21, 2020, by the Court of Appeal, First Appellate District, Division One, No. A158143

Alameda County Superior Court No. JD-028298-02

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to rule 8.520(f) of the California Rules of Court, the California Academy of Appellate Lawyers respectfully requests leave to file the attached amicus curiae brief in support of Appellant M.B.'s efforts to extend the construction filing doctrine to appeals from judgments terminating parental rights, where, despite the parent's diligence, counsel fails to file timely notice of appeal.

The California Academy of Appellate Lawyers is a non-profit elective organization of experienced appellate practitioners. Its goals include promoting and encouraging sound appellate procedures designed to insure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. The Academy has participated as amicus curiae in many cases before this Court, including, *Ryan v. Rosenfeld*, No. S232582 (argued Apr. 5, 2017), *Jameson v. Desta*, No. S230899 (review granted Jan. 27, 2016), *F.P. v. Monier*, No. S216566 (review granted Apr. 16, 2014), *Conservatorship of McQueen* (2014) 59 Cal.4th 602, and *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097.

The Academy has no interest in or connection to either party in this case. No party or party's counsel authorized the attached amicus curiae brief in whole or in part. Other than the Academy and its members, no person or entity, including any party or party's

counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The Academy seeks leave to file the accompanying brief because its experienced appellate practitioners have long supported measures to ensure fair access and a meaningful right of appeal for all litigants, especially the indigent. Specifically, the Academy filed an amicus brief in *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, in which this Court extended the constructive filing doctrine to ensure prisoners fair access to civil appeals.

Because the Academy believes the accompanying brief would assist the Court it in its resolution of this important issue, it respectfully request this Court's leave to file the amicus brief.

DATED: October 9, 2020

COLANTUONO, HIGHSMITH & WHATLEY, PC

LAW OFFICES OF ROBERT S. GERSTEIN

/s/ Robert S. Gerstein
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AMICUS CURIAE BRIEF

INTRODUCTION

The Academy supports Appellant's effort to extend the constructive filing doctrine to appeals from judgments terminating parental rights, where, despite the parent's diligence, counsel fails to file timely notice of appeal. In our view, the extraordinary importance of such a judgment, which works "a unique kind of deprivation," *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27, that is "final and irrevocable," *Santosky v. Kramer* (1982) 455 U.S. 745, 763, demands no less.

ARGUMENT

THE CONSTRUCTIVE FILING DOCTRINE SHOULD BE APPLIED TO ENSURE THAT PARENTS DEPRIVED OF THEIR PARENTAL RIGHTS HAVE A MEANINGFUL RIGHT OF APPEAL.

A. THE ORIGIN AND DEVELOPMENT OF THE CONSTRUCTIVE FILING DOCTRINE.

The constructive filing doctrine is founded on the principle that there are circumstances in which fairness requires litigants be deemed to have timely filed notices of appeal though the court received them after the statutory deadline.

The doctrine began with the prison delivery rule in *People v. Slobodion* (1947) 30 Cal.2d 362 and *People v. Daily* (1959) 175 Cal.App.2d 101, 107, holding that an inmate's delivery of a notice

of appeal from a criminal conviction to prison authorities a reasonable time before the due date constituted timely constructive filing of the notice. (*Slobodion, supra*, 30 Cal.2d at p. 367.) The prison delivery rule has now been incorporated into California Rules of Court, rule 8.25(b)(5). But this Court has extended it in significant respects.

In *In re Benoit* (1973) 10 Cal.3d 72, this Court extended the doctrine to cases in which defendants in custody arrange to have trial counsel file notice of appeal from their criminal convictions and counsel fails to timely do so. Then, in *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 121 this Court extended *Benoit* to civil cases brought by inmates, including those involving "prison conditions, deprivation of civil rights, and the termination of parental rights."

In each case, the Court has provided relief to those who have done "all [they] could to take the appeal," and then were "lulled into a false sense of security" by those whom they entrusted with filing the notice of appeal, but who failed to do so timely. *(Benoit, supra*, 10 Cal.3d at p. 86.)

B. THE DOCTRINE SHOULD BE APPLIED TO INDIGENTS APPEALING THE TERMINATION OF PARENTAL RIGHTS.

While indigent parents whose parental rights are terminated are not generally incarcerated, their situations are in relevant

respects similar to those of the inmates to whom the Court has extended the benefit of the constructive filing doctrine.

Just as inmates appealing criminal convictions seek to reclaim personal liberty, so those appealing termination of their parental rights seek to undo a uniquely severe deprivation: the final and irrevocable destruction of their legal relationship with their children. These litigants are "often poor, uneducated, or members of minority groups…" (*Santosky v. Kramer, supra*, 455 U.S. at p. 763.) Much like criminal defense counsel, their state-appointed counsel are also over-taxed and obligated to juggle enormous caseloads in these critical cases that may result, not merely in an infringement on, but an end to parents' fundamental right to the care, custody and control of their children.

Accordingly, the United States Supreme Court has recognized the deprivation of parental rights as worthy of constitutional protection. In *M.L.B. v. S.L.J.* (1996) 519 U.S. 102, the high court held that the relationship between parent and child is "sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." (*Id., at p.* 119, quoting *Santosky v. Kramer, supra*, 455 U.S. at p. 774 (Rehnquist J., dissenting). The Court has found the deprivation so "commanding" that due process requires that (1) termination be justified by "clear and convincing" proof (*Santosky v. Kramer*, *supra*, 455 U.S. at pp. 769–770), and that (2) parents be assured of effective assistance of counsel in termination proceedings. (*Lassiter v. Department of*

Social Services, supra, 452 U.S. at p. 27.) Though the *Lassiter* majority held that the Fourteenth Amendment extended a right to counsel only on a case-by-case basis, as determined by *Mathews v. Eldridge*'s balancing test (1976) 452 U.S. 18 at pp. 26–31 (but see the dissents of Justices Blackmun, *id*. at p. 34, and Stevens, *id*. at p., 59), California extends the right to competent appointed counsel to all indigent parents in dependency proceedings. (Welf. & Inst. Code §§ 317, 317.5.)

Here, the extension of the constructive filing doctrine to indigents subjected to termination of parental rights would provide relief to those who act diligently to entrust appointed counsel with timely filing their notices of appeal, but are denied effective assistance of counsel when counsel fails in that duty.

On the face of it, the severity of the deprivation, and the hardships under which those subjected to it typically labor, compel application of the doctrine under these circumstances. Without it, indigent parents will continue to be deprived of a meaningful opportunity to appeal the termination of their parental rights.

C. RESPONDENT'S AND MINOR'S ARGUMENTS ARE UNCONVINCING.

Respondent County Social Services Agency ("County") and counsel for the Minor argue against extending the constructive filing doctrine to such appeals, citing the interests of the minor.

(Respondent's Answer Brief on the Merits [RAB]; Minor's Brief on the Merits [MB]).

The County emphasizes the state's interests in "expedition" and "finality" in dependency proceedings. (RAB 33.) The "paramount consideration" in dependency cases is "child welfare," *In re J.A.* (2019) 43 Cal.App.5th 49, 56 (quoted at RAB 36), and the County concludes that to allow a parent to pursue a "belated appeal" is to undermine the child's crucial interest in a secure and stable home. (RAB 33.)

That was the basis on which *In re A.M.* (1989) 216 Cal.App.3d 319 and *In re Issac J.* (1992) 4 Cal.App.4th 525 explicitly rejected application of the constructive filing rule to judgments terminating parental rights. (RAB 33.) While recognizing the importance of a parent's rights, *A.M* held they should be subordinated to the "special need for finality" in termination cases, where adoption proceedings could be jeopardized. (*A.M., supra*, 216 Cal.App.3d at p. 322.) *Issac J.* acknowledged the important process for those whose parental rights are terminated, but held "the child's interest in finality" must prevail. (*Issac J., supra*, 4 Cal.App.4th at p. 532.)

Counsel for the Minor follows *Lassiter v. Department of Social Services, supra*, 452 U.S. 18, 27, in applying the balancing test of *Mathews v. Eldridge, supra*, 424 U.S. 319. Under *Mathews*, a court decides what process is due by weighing "the private

interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." (MB 24)

Counsel for the Minor starts by admitting that parents have liberty interests protected by due process, including the "liberty interest … in the care, custody, and management of their child," (*Santosky, supra*, 455 U.S. at p. 753; *In re Marilyn H*. (1993) 5 Cal.4th 295, 306), and a "derivative" liberty interest in the "accuracy and justice of the resolution" of an appeal. (*Santosky, supra*, 455 U.S. at p. 753; *In re Sade C*. (1996) 13 Cal.4th 952, 987–988.) (MB 24.)

But counsel for the Minor then the echoes the County's emphasis on the interest of the Minor and the state in "finality and expediency." (MB 26–30.) Finally, Counsel for the Minor contends that the risk of error in terminating parental rights is low, given a "plethora of protections" [MB 30] ending with "the right to appeal within 60 days of the termination order." (MB 24-25.)

Counsel for the Minor then balances those interests under *Mathews* and concludes that, once the 60-day deadline for appeal of a judgment terminating parental rights is reached, the minor's interests "in finality, permanence, stability, and the 'right to a settled life'" must prevail. (MB 33.)

Thus, while taking somewhat different approaches, both the County and Counsel for the Minor conclude that the predominance

of the minor's interest in finality and stability compels rejection of constructive filing of the notice of appeal.

According to the County, allowing constructive filing where appointed counsel fails to timely file the notice of appeal would "'sabotage the apparent legislative intention to expedite dependency cases and subordinate, to the extent consistent with fundamental fairness, the parent's right of appeal to the interests of the child and state.' (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1156)." (RAB 36–37.)

Minor argues that, given the minor's need for finality, "parent cannot seek appellate jurisdiction by blaming the failure of trial counsel to file a timely notice of appeal under the circumstances of this case." (MB 33.)

D. THE ACADEMY CONCLUDES THAT THE CONSTRUCTIVE FILING DOCTRINE SHOULD APPLY HERE.

It is not the Academy's role to take sides as to the relative weight of the interests of parents and children in this context. As past decisions affirm, all are weighty. Rather, the Academy's focus is solely the need to give indigent parents a fair opportunity to appeal from termination of their parental rights equal to that available to those who need not rely on state-appointed counsel to assert their rights.

Counsel for the Minor agrees that parents have a due-process-protected right to appeal termination of their parental rights. (MB 24.) The County does not go so far, but does not attempt to deny that parents have that right, if a timely notice of appeal is filed. (RAB 10.)

All Californians have the right to appeal final judgments involving issues far less weighty than that at bar. Whatever the dispute, the losing party has the right to a dispassionate second look from a panel of judges not involved in the original decision. That right is particularly important where, as here, the proceedings in the trial court are certain to be emotionally fraught for all, and circumstances of the parent and child often change over the course of lengthy trial proceedings.

The question here is whether, where the final judgment irrevocably terminates a fundamentally important human relationship, an indigent should be deprived of a fair opportunity to exercise that right equally with all other litigants. That is the result where an indigent parent, acting diligently, entrusts the filing of notice of appeal to state-appointed counsel, who then fails to timely file, and no remedy is provided.

This Court has held that *Mathews* balancing does not apply to certain "irreducible minimums" of due process. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212.) Such is arguably the case where, as here,

indigents are denied equal access to a fair opportunity to exercise their right to appeal. And, even assuming that an indigent's fair opportunity to appeal from a judgment terminating parental rights is subject to balancing under *Mathews*, the balance must be struck in favor of constructive filing.

That result is all the clearer when account is taken of the factor this Court added into *Mathews* balancing from the California Constitution: the need to show respect for "…the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society." (*People v. Ramirez* (1979) 25 Cal.3d 260, 269.)

Respect for this "dignitary interest" means governmental agency interactions with individuals must affirm them as "important in their own right," to be treated with "understanding, respect, and even compassion." (*Ibid*, quoting Saphire, *Specifiying Due Process Values* (1978) 127 U.Pa.L.Rev. 111 at 159.)

"The lifelong union of a man and a woman always has promised" nobility and dignity to all persons, without regard to their station in life." (*Obergefell v. Hodges* (2015) 576 U.S. 644 at 656.) The same is true of the lifelong status of parenthood, one of the most profoundly important pieces of a parent's human dignity.

Here, the State deprives an indigent of that dignified status, and then tells her she has irremediably lost her right to appeal that

loss, because her State-provided attorney failed in one of the most essential (and simplest) duties of an attorney: the filing of the timely notice of appeal. A measure of her dignity as a person "important in [her] own right," can and should be restored by applying the constructive filing doc trine to allow her appeal to go forward.

An appeal from a judgment terminating of parental rights will certainly put off for a substantial period the finality counsel for the County and the Minor seek with good reason, but no one questions the parent's right to appeal which, if exercised, will necessarily impose greater delay. On the other hand, a noticed motion in the Court of Appeal for recognition of a constructive notice of appeal (see *People v. Zarazua* (2009) 179 Cal.App.4th 1054) — the procedure Appellant urges (ABM 62-65) — can and should expeditiously provide a remedy, without substantially prolonging the appellate process.

The County worries constructive filing could allow an appeal filed months after the deadline. (RB 33, fn. 4.) Such an outcome can be obviated, however, by requiring the parent to be diligent, both in requesting counsel to file, and in following up a reasonable time after counsel ought to have done so. This safeguard is built into the constructive filing as currently applied, and would be extended here. (*In re Benoit* (1973) 10 Cal.3d 72, 86–89.)

The County discusses *In re J.A., supra,* 43 Cal.App.5th 49, 53 in which appeal was filed more than six months late. But the

appellant there did not even argue constructive filing, claiming instead she had not been advised of her appeal right. (*Id. at p.* 54.) Further, in rejecting the argument and dismissing the appeal, *J.A.* repeatedly emphasized the "extreme" delay. (*Ibid.*) Given the minors' interest in finality, there is no reason to expect application of the constructive filing doctrine in this context would allow so late an appeal.

CONCLUSION

For the reasons stated above and in Appellant's Opening and Reply Briefs on the Merits, the decision of the Court of Appeal should be reversed.

DATED: October 9, 2020

COLANTUONO, HIGHSMITH & WHATLEY, PC

LAW OFFICES OF ROBERT S. GERSTEIN

/s/ Robert S. Gerstein

Robert S. Gerstein
Attorneys for Amicus Curiae
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CERTIFICATION OF COMPLIANCE
WITH CAL. R. CT. 14(c)(1)

Pursuant to California Rule of Court 14(c)(1), the foregoing Amicus Brief of California Academy of Appellate Lawyers in support of Appellant, is double-spaced and was printed in proportionately spaced 14-point CG Times roman typeface. It contains 2,311 words. In preparing this certificate, I relied on the word count generated by MS Office Professional Plus 2016.

Executed on October 9, 2020, at Los Angeles, California.

/s/ Robert S. Gerstein
Robert S. Gerstein

PROOF OF SERVICE
In re A.R.;
Alameda County Social Services Agency v. M.B.,
California Supreme Court No. S260928;
First Appellate District, Div. One No. A158143;
Alameda County Superior Court No. JD-028298-02

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105-3659. On October 9, 2020, I served the following document(s) by the method indicated below:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT AND AMICUS CURIAE BRIEF OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 9, 2020, at Richmond, California.

/s/ Eileen Kroll

Eileen Kroll