DEPENDENCY WRIT PETITIONS DURING A PANDEMIC

Judicial Council of California, Center for Families, Children & the Courts
June 25, 2020 Webinar

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Introduction

The pandemic has been one of the most disruptive forces in our lives. The normal cycle of life has been altered. We no longer go to the office in the morning, the children do not go to school, and we do not come home at the end of the day to do our evening routine. We do not go out on weekends, we do not visit family like we used to, and summer started early and yet never started at all. When we do go out or meet people, our interactions are dramatically different. Always in the back of our minds is concern over the coronavirus.

Those who find themselves in the dependency system have many challenges to start with. But the pandemic has added to them. The normal way social services handles cases has been disrupted. Visits are more difficult to arrange and facilitate. Some services have been suspended or radically altered. Social workers are less able to interact with the parents, children, foster parents, and service providers.

The normal way the courts handle cases have been disrupted. Hearings have been delayed. When hearings occur, they often occur telephonically or by video. It is more difficult to talk to witnesses or bring them to a hearing.

All of this creates new legal problems that have not yet been resolved. Are truncated visits reasonable? Are the parents receiving reasonable services? Did the parents receive a timely and fair hearing? Many parents who might otherwise have been able to have their children returned are missing out due to no fault of their own. Often, their only hope is to fully litigate the issues in the juvenile court and, if that is unsuccessful, to file writ petitions in the Court of Appeal

One of the most challenging tasks for juvenile court attorneys under normal circumstances is to prepare and litigate a dependency writ petition. Filing anything in the Court of Appeal is difficult for a trial court attorney because the appellate court's procedures and expectations are different.

Preparing a writ petition is in itself time consuming, and time is in short supply in the juvenile court. To add to the problems, the deadlines for dependency writ petitions are very short. These challenges are even more difficult during a pandemic, with access to files and to court personnel limited and with new demands competing for attention.

I. The Notice of Intent to File a Dependency Writ Petition

A. The Duty to Advise and Prepare a Dependency Writ Petition

The dependency writ petition process begins with filing a notice of intent to file a petition. There are practical reasons why preparing a dependency writ petition is essential to representing the client. Victory in the Court of Appeal can drastically change the course of a case. Instead of the matter proceeding to the termination of parental rights stage, the parent is given another opportunity to reunify. Even if a particular petition is unsuccessful, appellate review helps ensure the juvenile court properly follows the law in future cases. Further, the process of preparing a writ petition becomes easier after doing it a few times. An effort in some cases now can make a big difference later.

Ethical requirements also mandate advising the client about seeking review by a writ petition. "It is the duty of an attorney to do all of the following: [¶] . . . [¶] [t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." (Bus & Prof. Code, § 6068, subd. (m).) A lawyer must "keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." (Rules of Prof. Conduct, rule 1.4(a)(3), emphasis deleted.)

A parent has at a right to a competent attorney. (Welf. & Inst. Code, § 317, subds. (a) & (b); *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1659.) Competent counsel has a duty to consult with the client whether to appeal an adverse decision and to properly pursue appellate review when there appears to be a meritorious issue or when directed to do so. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 479-481; *People v. Ribero* (1971) 4 Cal.3d 55, 65; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 582.) An attorney who fails to

file meritorious dependency writ petition against client's wish renders ineffective assistance of counsel. (See *Glen C., supra,* 78 Cal.App.4th at p. 582.)

A "lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence." (Rule of Prof. Conduct, rule 1.1(a).)) The scope of appointed counsel in juvenile court includes filing the notice of intent and the dependency writ petition. (Cal. Rules of Court, rule 8.450(c); *Rayna R. v. Superior Court* (1993) 20 Cal.App.4th 1398, 1404.)

Thus, counsel has the duty to advise a client of the right to pursue a dependency writ petition, to file a notice of intent to file a writ petition when directed to do so or when there appears to be a meritorious issue, and to file the dependency writ petition so long as it is not frivolous.

B. Hearings that can be Challenged Only with a Dependency Writ Petition

Generally, a party in the juvenile court has the right to appeal the judgment and any appealable order after judgement. (Welf. & Inst. Code, § 395.) The judgment is the disposition order. (*In re G.C.* (2020) 8 Cal.5th 1119, 1127.) Appealable orders after judgment include the decision in a review hearing, a petition for modification, and the disposition order of a subsequent or supplemental petition. When there is not an appeal from the judgment or an appealable order, the juvenile court's order generally cannot be challenged in a later appeal. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.)

There is no right to appeal, however, when the court sets the matter for a hearing under Welfare and Institutions Code section 366.26. Instead, trial counsel must file a dependency writ petition. (Welf. & Inst. Code, § 366.26, subd. (*l*).) This means there is not even a right to appeal the judgment if the court denies reunification services at the disposition hearing and sets the matter for the section 366.26 hearing. (*Rebekah R.* (1994) 27 Cal.App.4th 1638, 1646.) This applies not only to the decision to set the section 366.26 hearing but also to other rulings made during the hearing, including rulings on any section 388 modification petitions. (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 816.) Failure to file a writ petition renders unreviewable most decisions made at the hearing setting the section 366.26 hearing. (Welf.

& Inst. Code, § 366.26, subd. (*l*).)

Often overlooked, orders concerning placement after parental rights have been terminated cannot be challenged on appeal. Instead, they must be challenged by a dependency writ petition. (Welf. & Inst. Code, § 366.28; *A.M. v. Superior Court* (2015) 237 Cal.App.4th 506, 513-514.)

C. Filing the Notice of Intent

1. The notice of intent form

There is a form notice of intent to file, Judicial Council form JV-820 for section 366.26 petitions and form JV-822 for section 366.28 petitions. Forms are available on the California courts website, www.courts.ca.gov/forms.htm.

The notice of intent to file a writ petition should be signed by the client. (*Lisa S. v. Superior Court* (1998) 62 Cal.App.4th 604, 606-607; *Janice J. v. Superior Court* (1997) 55 Cal.App.4th 690, 692; *Suzanne J. v. Superior Court* (1996) 46 Cal.App.4th 785, 788.) It is often difficult to have a quiet rational discussion with a client at the end of a hearing. The court is anxious to move to the next case, and the client might be emotional. The best practice is to discuss before the hearing the option of filing the notice of intent and to arrive at the hearing with the form. The client can sign the form notice of intent before leaving.

The deadline for filing a notice of intent is tight. It must be filed in the juvenile court within seven days of the hearing setting the section 366.26 hearing (Cal. Rules of Court, rules 8.450(e)(4)(A)) or the decision after the termination of parental rights concerning placement (rule 8.454(e)(4)). The clock starts ticking when the judge makes the decision, not when a written order after hearing is signed. If the order was made by a referee not acting as a temporary judge, the party has an additional ten days to file the notice of intent as provided in rule 5.540(c). (Rules 8.450(e)(4)(E), 8.454(e)(4).) The deadline is 12 days if the individual is notified of the writ requirement "only by mail." (Rules 8.450(e)(4)(B), 8.454(e)(5).) For section 366.26 writ petitions, the deadline is extended an additional five days if the parent is notified only by mail and is living outside of California, and yet another five days if the parent is living outside of the United States. (Rule 8.450(e)(4)(C)-(D).)

The juvenile court lacks the power to extend the deadline. (Cal. Rules of

Court, rules 8.450(d), 8.454(d).) The Court of Appeal can grant leave to file a late notice of intent if there is a showing of circumstances beyond the client's control and the client exercised diligence in asserting the right to writ review. (See *In re Cathina W.* (1998) 68 Cal.App.4th 716, 723 [delay caused by court official].) Some Courts of Appeal rarely grant such a motion.

2. Deadlines to Watch

When the pandemic started, the appellate court issued temporary orders automatically extending certain deadlines. The orders have lapsed without being renewed. Practitioners must thus follow the normal deadlines despite the continuing pandemic.

Filing the notice of intent: 7 calendar days after the hearing setting the section 366.26 hearing or the decision after the termination of parental rights concerning placement. If the order was made by a referee not acting as a temporary judge, the party has an additional 10 days to file the notice of intent as provided in rule 5.540(c). An additional 5 days if the person is notified of the writ requirement only by mail. (Cal. Rules of Court, rules 8.450(e)(4), 8.454(e)(4).) Additional short extensions for the notice of intent to file a section 366.26 writ petition exists if the person is notified by mail and lives outside California or the United States. (Cal. Rules of Court, rule 8.450(e)(4).)

After the filing the notice of intent in the juvenile court, virtually everything else will be filed in the Court of Appeal.

Filing of the record by the court clerk: 20 days from the filing of the notice of intent. (Rules 4.450(h)(2), 8.454(h)(2).)

Motion to augment or correct the record: 5 calendar days from the receipt of the record. 7 days if the record is more than 300 pages. 10 days if the record is more than 600 pages. (Rules 8.452(e)(2), 8.456(e)(2).)

Filing the augmented record by the clerk: 15 days unless the Court of Appeal orders a shorter period. (Rules 8.452(e)(5), 8.456(e)(5).)

Filing the petition: 10 calendar days from the filing of the record. (Rules 8.452(c)(1), 8.456(c)(1).)

Filing the response: 10 days from the filing of the petition or 15 days if the petition was served by mail. Alternatively, 10 days from a request by the Court of Appeal. (Rules 8.452(c)(2), 8.456(c)(2).)

Petition for rehearing: 15 calendar days after the decision if it is not final. (Rules 8.268, 8.490(c).)

Finality: Immediately if the decision is to dismiss the petition as moot or deny the petition without issuing an order to show cause. (Rules 8.452(i), 8.456(h)(5), 8.490(a)(1).) Otherwise, the decision is final in 30 days unless the court orders a shorter period. (Rule 8.490(a)(2).)

Petition for review: 10 calendar days after the decision is final. (Rule 8.500(e)(1).)

Remittitur: When review is denied or the time for filing for review expires. (See rules 8.272, 8.489(d).)

D. Problems with Mootness

The filing of the notice of intent or even the petition itself does not stay proceedings in the juvenile court. (*In re Brandy R.* (2007) 150 Cal.App.4th 607, 609-611.) A stay can be requested in the Court of Appeal by filling out number 11 of the form petition. However, the space might be inadequate, and more should be explained in the memorandum of points and authorities. A request for a stay requires a showing of exceptional good cause. (Cal. Rules of Court, rules 8.452(f), 8.456(f).)

If a stay is not obtained, the juvenile court might terminate parental rights before litigation of the writ petition is concluded. Once the decision terminating parental rights becomes final, it cannot be challenged, and this will render the writ petition moot, causing it to be denied.(See *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1316-1317.) To avoid this problem, one can request the juvenile court to continue the section 366.26 hearing. If this fails, the petitioner should appeal the order terminating parental rights. The decision terminating parental rights is not final until the appeal is over.

II. Preparation of the Record

A. The Normal Record

Once the notice of intent is filed, the juvenile court prepares the record. (Cal. Rules of Court, rules 8.450(h), 8.454(h).) The record consists of two things. The reporter's transcript is the verbatim transcripts of the relevant court hearings. It does not normally include hearings prior to the contested hearing or when the ruling was made. If transcripts of previous hearings are desired, you should list those dates with the dates of the order or contested hearing in the notice of intent. Discussions in chambers, before a case is called, and sometimes in sidebar conferences are not reported and will not be part of the record. It is vital to make sure all important objections, offers of proof, and rulings are placed on the record.

The clerk's transcript contains documents in the court file. There is a list of a dozen items detailed in rule 8.407(a). It generally includes petitions, minute orders, social worker reports, and written orders. The list looks exhaustive, but some are surprised to learn certain things are not on the list. For example, exhibits are not part of the normal clerk's transcript, but they are considered part of the "record." If counsel believes an exhibit should be in front of the Court of Appeal, one can move to transmit them. (Rules 8.224, 8.407(e).) For discovery to be part of the record on appeal, there must be an attempt to enter relevant portions as an exhibit at the juvenile court hearing. If there are items in the court file that the petitioner believes should be part of the record, indicate what they are in the notice of intent under 6b of the form.

The clerk has 20 days to prepare the record. (Rules 8.450(h)(2), 8.454(h)(2).) Once it is filed in the Court of Appeal, counsel has 10 days to file the petition. (Rules 8.452(c)(1), 8.456(c)(1).)

Because the deadline for filing the petition is so tight, it is best for counsel to draft the writ petition while the court is preparing the record. This is why it is trial counsel's duty to prepare the writ petition and the job cannot, as a practical matter, be assigned to an appellate attorney. (See *John F. v. Superior Court* (1996) 43 Cal.App.4th 400, 407.) Once the record is received, citations to the record can be added. A review of the record might also trigger ideas for new issues that were not thought of before. But getting most of the work done before the record arrives will relieve some of the stress after the

record is filed.

Make sure the superior court clerk knows where to send the record. With people not working in the office during the pandemic, it is usually more efficient to have the record be sent directly to where counsel is working. Even under normal times, a court clerk might mistakenly send the record to the client because the notice of intent is signed by the client. Some court clerks confuse the notice of intent to file a dependency writ petition with a notice of appeal and send the record to the appellate project. Counsel might not know that the record has been filed or be able to track it down until after the deadline for filing the petition has passed. Be aware that the clerks in charge of the juvenile court are not always the ones in charge of preparing the record.

B. Augmenting the Record

If the record is incomplete, the petitioner may file a motion in the Court of Appeal to augment or correct the record. (Cal. Rules of Court, rule 8.155(a) & (c); see rules 8.410(b)(1), 8.452(e)(1), 8.456(e)(1).) The motion must be filed within five days of receipt of the record. (Rules 8.452(e)(2), 8.456(e)(2).) If the record is more than 300 pages, then the deadline is seven days, and it is ten days if the record is more than 600 pages. Respondent or the real party in interest may request an augmentation within five days after the petition is filed or an order to show cause is issued. (*Ibid.*) If a missing document is available in counsel's file, the movant may attach it to the motion to augment. (Rules 8.452(e)(3), 8.456(e)(3).) However, the record can only be augmented with material that had been presented to the court. If the Court of Appeal grants the motion to augment or correct the record, it will state the augmented or corrected record must be filed within 15 days or within a shorter period. (Rules 8.452(e)(5), 8.456(e)(5).) The deadline for filing the petition is extended by the same number of days. (Rules 8.452(e)(6), 8.456(e)(6).) If it is discovered after the deadline for filing an augment motion that the record is incomplete, the petitioner should prepare the petition and file an augment motion with the petition.

There have been many problems obtaining a complete and accurate record during the pandemic. Courthouses are understaffed and those preparing the records are not always properly trained on how to put the record together. One needs to carefully review the record once it arrives.

C. Nonparties in the Court of Appeal

De facto parents, prospective adoptive parents, and relatives are not parties in the dependency and are not entitled to most material in the juvenile court file, even if they wish to file or oppose a writ petition. Such a person must petition the juvenile court for disclosure of relevant records. (Welf. & Inst. Code, § 827, subd. (a)(6).) A petition for disclosure of juvenile records does not change the deadline for filing the notice of intent or the deadlines in the Court of Appeal.

III. Preparing the Petition

A. Deadline

As mentioned above, the deadline for filing the dependency writ petition in the Court of Appeal is ten days after the record is filed. (Cal. Rules of Court, rules 8.452(c)(1), 8.456(c)(1).) If the Court of Appeal grants the motion to augment or correct the record, it will state the augmented or corrected record must be filed within 15 days or within a shorter period. (Rules 8.452(e)(5), 8.456(e)(6).) The deadline for filing the petition is extended by the same number of days. (Rules 8.452(e)(6), 8.456(e)(6).)

A late petition will result in the proceeding being dismissed. (*Roxanne S. v. Superior Court* (1995) 35 Cal.App.4th 1008, 1012-1013.) Aim to finish drafting it at least two days before the deadline. The process of finalizing the petition can take considerable time. This includes proofreading, generating the tables, filing the document (usually electronically), printing, and serving the parties.

If it appears the deadline will not be made, file in the Court of Appeal a request for an extension of time *before* the deadline. This is a motion (technically, an application) that is electronically filed. Some Courts of Appeal have forms available on their websites. The request must include a declaration from counsel providing exceptional circumstances. (Rules 8.450(d), 8.454(d).) Ask for a certain amount of time for the extension. The Courts of Appeal are not eager to grant extensions to file writ petitions.

B. The Form Petition

There are four parts of a traditional writ petition: (1) the pleading, (2) the verification, (3) the memorandum of points and authorities, and (4) the exhibits. In addition, there must be a cover page, a table of contents, a table of authorities, and a certificate of word count. It must also include a proof of service. (Cal. Rules of Court, rules 8.452(c)(1), 8.456(c)(1).)

In dependency writ petitions, there is a form that supplies the pleading and verification. There are no exhibits but instead the record is produced by the court. Thus, the first step in preparing a dependency writ petition is to fill out the Judicial Council form JV-825. The form petition explains the names of the parties and the order being challenged, but it does not leave room for explaining the history of the case or why the juvenile court's decision should be reversed. Consequently, the form by itself is insufficient. The practitioner must also include a memorandum of points and authorities. (Cal. Rules of Court, rules 8.452(a)(3), 8.456(a)(3).) Accordingly, most people write in number 8, and sometimes number 6, of the form "See attached memorandum of points and authorities."

The cover can be the first page of the JV-825 form.

The table of contents and table of authorities are done last. There are software programs that can automatically generate the table of authorities. The practitioner must edit and fix errors in the generated table, but it is a good start. If you do not already have the software and if you are going to do more than a couple of petitions, it is worth buying it. There are also services online that generate tables for a fee. Typically, one lists in alphabetical order cases, then statutes, then miscellaneous sources including the Rules of Court. (See Cal. Rules of Court, rule 8.204(a)(1)(A).)

A certificate of word count verifies the petition is not longer than the word limit, which is 14,000 words. (See rules 8.204(c), 8.48(a)(6).)

The petition must be served on each attorney of record, the superior court, any unrepresented party including any child at least ten years old, the attorney of any sibling and any siblings at least ten years old, the child's Court Appointed Special Advocate volunteer, any de facto parent, and any tribal representative that had been served by the court of the notice of intent. (Cal. Rules of Court, rules 8.452(c)(1), 8.456(c)(1).) The proof of service must

list each party. Some of the parties can be served electronically through TrueFiling or by email. In such a situation, the proof of services should be modified to state a PDF version of the document was transmitted by electronic mail to the party(s) identified on the attached service list using the email address(es) indicated.

C. The Memorandum of Points and Authorities

Many appellate court practitioners start the memorandum of points and authorities with an introduction. This gives the reader a quick understanding of the important facts, the challenged order, and the claims of error.

Next comes the statement of case and facts. In dependency cases, it is often difficult to separate the procedural history from the factual history. Consequently, most appellate courts are used to seeing a combined statement of case and facts. (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522, fn. 2.) The Second Appellate District (Los Angeles), however, prefers a separate statement of the case and statement of facts. This section should provide sufficient background information for the reviewing court to understand the case, but it can focus on the issues being reviewed. At a minimum, it should be explained when the dependency petition was filed and generally what it alleged, when the child was placed out of the home, when the court made its disposition order, whether services were provided, when services were terminated if they had been provided, and what happened at the hearing being reviewed. The petition should provide the date of the order being challenged and the date the notice of intent was filed. While it is often beneficial to make the client look as good as one can, it is important to keep an objective tone and not to omit the bad facts. Each factual assertion must be supported by a citation to the record. No factual and procedural assertion can be made unless it is in the record. (Cal. Rules of Court, rules 8.452(b)(1) & (b)(3), 8.456(b)(1) & (b)(3))

Then, there is the actual legal argument, each claim of error should have a separate heading and often includes subheadings. (Cal. Rules of Court, rules 8.452(b)(2), 8.456(b)(2).) There is a conclusion at the end.

D. Elements of an Appellate Court Legal Argument

The most persuasive petitions have what appellate practitioners describe as a "complete" argument. The petitioner has the burden of proving entitlement to relief. This requires more than proving the juvenile court erred. Generally, one must: (1) show there was a proper objection in the juvenile court or the claim is otherwise cognizable; (2) set out the proper standard of review; (3) show how the juvenile court made a legal error, abused it discretion, or made findings that were not supported by substantial evidence; and (4) demonstrate this prejudiced the petitioner. The appellate court expects to see an argument outlined accordingly. There are exceptions. For example, an argument that there was insufficient evidence often does not require a showing of prejudice.

1. Cognizability

Appellate courts frequently find a claim of error forfeited or waived because it was not properly preserved in the juvenile court. Normally, a claim of error requires a proper objection or offer of proof in the juvenile court. It is important to show exactly what was said in litigating whether certain orders should be made. There are exceptions. By its nature, a claim of ineffective assistance of counsel is often based on the failure of counsel to make a proper objection or offer of proof. Some claims concerning insufficiency of the evidence do not require an objection. (See, e.g., *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1014.)

2. Standard of review

The standard of review in the appellate court is analogous to the standard of proof in the superior court. It is the burden the petitioner must overcome in showing he or she is entitled to relief on the merits. Thus, "the standard of review is the compass that guides the appellate court to its decision. It defines and limits the course the court follows in arriving at its destination." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.) In most situations, there are three possible standards of review.

Pure question of law are reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.) This means the appellate court does not defer to the juvenile court's ruling. It is the standard of review most favorable to the petitioner. For example, questions of statutory construction are reviewed de

novo. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529.) Federal constitutional issue are usually reviewed de novo. (*Cromer,* at p. 894; *People v. Tran* (2013) 215 Cal.App.4th 1207, 1217-1218.)

Questions of fact are generally reviewed for substantial evidence. (*Cromer, supra,* 24 Cal.4th at pp. 893-894.) This is the most difficult burden for the petitioner. "In reviewing a challenge to the sufficiency of the evidence supporting the . . . findings . . . , we determine if substantial evidence, contradicted or uncontradicted, supports them. In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court. We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate." (*In re I.J.* (2013) 56 Cal.4th 766, 773, internal quotation marks and citations omitted, brackets and ellipses in original.) While the good facts are important, an argument concerning the sufficiency of the evidence depends on addressing all of the bad facts and explaining how nonetheless there is not a rational inference to support the court's order.

In between is the abuse of discretion standard. Most of the juvenile court's decisions are reviewed for abuse of discretion. This means that the judge has wide authority in making its ruling. Two judges with the same evidence and the same law might legitimately arrive at different results. It is often said an abuse of discretion occurs only if the judge acts arbitrarily or exceeded the bounds of reason. Nonetheless, the standard is not so abstract. "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we shall call such action an 'abuse' of discretion. If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable,' i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.) Thus, the key in arguing abuse of discretion is to show the juvenile court applied the incorrect law, considered irrelevant facts or facts not supported by the evidence, or misunderstood the scope of its discretion.

One approach is to redefine the issue so that the de novo standard applies. For example, while evidentiary claims are usually reviewed for abuse of discretion, the court's understanding of the Evidence Code is reviewed de novo. (*People v. Grimes* (2016) 1 Cal.5th 698, 711-712.)

3. The merits of the claim of error

The petitioner must explain the relevant law and apply the facts to the law. Again, it must be assumed the court believed all of the bad facts. One must provide citations to the record and to the appropriate legal authority. It is the petitioner's job to show from information in the record that the juvenile court's order should be reversed. Everything the justices need to know should be in the petition. In the superior court, a judge often does not have a strong grasp of the issues until the hearing, and the written motion or petition is not as critical. In the Court of Appeal, the case is often decided from reviewing the first brief.

4. Prejudice

Even when it is shown that the claim is cognizable and the juvenile court acted improperly under the appropriate standard of review, the petitioner usually must also show prejudice. That is, the error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13.) This is based on the principle that a party is entitled to a fair hearing, not a perfect hearing, and reversal will occur only if the error mattered. A " 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonable probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The Supreme Court has "made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.)

There can be a more favorable standard of prejudice for the petitioner if the error violated the United States Constitution. A finding of federal constitutional error generally requires reversal unless "the beneficiary of a constitutional error [can] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; see, e.g., *In re Vanessa M.* (2006) 138

Cal.App.4th 1121, 1132 [preventing parent from testifying]; *In re Joann E.* (2002) 104 Cal.App.4th 347, 359 [appointment of guardian-ad-litem without an adequate hearing]; but see *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1153.)

A claim of ineffective assistance of counsel has its own standard of prejudice. One "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.)

D. Claims of Error

It is too soon to know how the courts will handle disruptions in dependency cases due to the pandemic. On one hand, the Fourteenth Amendment provides parents "the fundamental liberty interest of natural parents in the care, custody, and management of their child." (*Santosky v. Kramer* (1982) 455 U.S. 745, 753.) "The [California] Supreme Court has held the statutory procedures used for termination of parental rights satisfy due process requirements only because of the demanding requirements and multiple safeguards built into the dependency scheme at the early stages of the process. [Citations.] If a parent is denied those safeguards through no fault of her own, her due process rights are compromised." (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1505.) On the other hand, "[c]hildren, too, have fundamental rights, including the fundamental right to be protected from neglect and to 'have a placement that is stable [and] permanent.' " (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.)

A careful balancing of rights between the child and the parents is reflected in the law requiring reasonable services for the parent before deciding whether to free the child for adoption. However, the underlying assumption, that the state would generally provide reasonable services, has been compromised during the pandemic. While it is unfair to set a section 366.26 hearing because services have been disrupted, the fact remains that the parent might not have remedied the problems that led to the dependency. In the meantime, the state has a compelling interest to protect the child and provide permanence. The courts have not yet resolved this tension.

1. From the disposition order

Because the pandemic and ensuing budget cuts make providing services more difficult, it might be tempting for the department to recommend bypass more frequently. If the order being challenged is from the disposition hearing, the petitioner can challenge the disposition orders and jurisdictional findings. This can include sufficiency of the evidence for jurisdiction, the order removing the child, placement decisions, paternity or parenthood, insufficient notice under the Indian Child Welfare Act, the decision to deny services, and the visitation orders.

Issues to watch for during the pandemic is whether the department provided reasonable efforts before the disposition hearing to try to avoid removal. Further, whether the department conducted a proper assessment of relatives for placement can be an important issue. The Legislature has repeatedly said relative placement is preferred, starting at the time of an emergency placement. (Welf. & Inst. Code, §§ 281.5, 306.5, 309, subds. (d)(1) & (e)(1), 319, subd. (h)(2), 361.3, 361.45, subd. (a), 366.26, subd. (k), 16000, subd. (a).) Accordingly, the department is required to identify, locate, and assess relatives for possible placement within 30 days of removal. (Welf. & Inst. Code, § 309, subd. (e)(1).) If the court removes the child at the disposition hearing, it "shall make a finding as to whether the social worker has exercised due diligence in conducting the investigation . . . to identify, locate, and notify the child's relatives." (Welf. & Inst. Code, § 358, subd. (b)(2); *In re S.K.* (2018) 22 Cal.App. 5th 29, 37.) The department has an ongoing duty to timely assess and consider relative placement. (*In re Isabella G.* (2016) 246 Cal.App.4th 708, 720-721, 723; *In re R.T.* (2015) 232 Cal.App.4th 1284, 1300; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.)

Another issue is whether the court ordered reasonable visitation even if services are not being provided. "Visitation rights arise from the very 'fact of parenthood' and the constitutionally protected right ' "to marry, establish a home and bring up children." ' [Citation.]" (*In re Julie M.* (1999) 69 Cal.App.4th 41, 49.) "As to visitation, '[t]he relationship between parent and child is so basic to the human equation as to be considered a fundamental right, and that relationship should be recognized and protected by all of society . . . . " (*In re Smith* (1980) 112 Cal.App.3d 456, 428.) "[C]hildren have strong emotional ties to even the worst of parents." (*In re James R.* (2007) 153 Cal.App.4th 413, 429.) Indeed, "the child's interest in the parent-child relationship is at least as important and as worthy of protection of the

parent's interest." (*Ibid*.) "Continuity of the relationships is extremely important to children." (*Hansen v. California Dept. of Social Services* (1987) 193 Cal.App.3d 283, 292, internal quotation marks omitted.) Thus, due process (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) requires visitation to be as often as possible, unless the visits themselves are detrimental to the child. (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 756-757.)

2. From termination of services - reasonable services

If services are provided, a new potential issue is whether the services are reasonable in light of the pandemic. The dependency system "contemplates immediate and intensive support services to reunify a family . . . . A reunification plan must be appropriate for each family and be based on the unique facts relating to that family." (*Kristin W., supra,* 222 Cal.App.3d at p. 254, internal quotation marks and citations omitted.) The department must adjust the case plan as new problems arise. (See, e.g., *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1789-1796 [unreasonable services when there was no adjustment to services when the mother became hospitalized].) Nonetheless, services can be unreasonable if the parent is not given enough time to do the services in a modified case plan. (See, e.g., *In re M.F.* (2019) 32 Cal.App.5th 1, 15-16; *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1242 [on waiting lists for most of the reunification period]; see also *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 508-509; *Kristin W.*, at p. 255.)

A challenge for parents' lawyers is that often things fall apart on both sides. Just as the stressed courts and social services fail to do what is promised, stressed parents often fail to do what is required. It can be easy for the social worker to point to the parents' failures as the justification for terminating services, regardless of any shortcomings by the department. Careful investigation, however, might be able show that the parents' apparent failure was a result of unreasonable services. The department needs to understand the increased stresses the parent are facing and to modify the case plan accordingly.

When reasonable services have not been provided, the court shall provide six more months of services. (§§ 366.21, subd. (g)(2), 366.22, subd. (b); *M.F., supra*, 32 Cal.App.5th at p. 23 [beyond the 18 month review hearing]; *Elizabeth R., supra*, 35 Cal.App.4th at p. 1793.)

3. From termination of services - reasonable visitation

Reunification services can be unreasonable when visitation is unduly limited. (*In re T.W.* (2017) 9 Cal.App.5th 339, 346-348; *Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1425-1427; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 973-974.) This can be the result of a failure to implement visits as originally contemplated, when children resist visits, or when the department fails to progress the case to more liberal visitation. For example, in *Rita L., supra,* 128 Cal.App.4th 495, a trial home visit was not scheduled until near the end of the reunification period and then delayed beyond the hearing when the court terminated services. (*Id.* at pp. 508-509.)

Sometimes there is a failure to adjust to a change in circumstances. In *In re Brittany S.* (1993) 17 Cal.App.4th 1399, visitation did not occur when the mother was in custody. (*Id.* at p. 1407 ["Unfortunately, this appears to be a case where an incarcerated parent was destined to lose her child no matter what she did. We cannot condone such a result."]; see also *Elizabeth R., supra,* 35 Cal.App.4th at pp. 1791-1792 [failure to provide services while the parent was committed to a mental institution].)

4. Visitation after termination of services

The department often recommends decreasing visitation when the court terminates services. But the Legislature has directed that when the court terminates services, "[t]he court shall continue to permit the parent or legal guardian to visit the child pending the [section 366.26] hearing unless it finds that visitation would be detrimental to the child." (Welf. & Inst. Code, §§ 366.21, subd. (h), 366.22, subd. (a)(3).) It is important not to reduce visitation when terminating services for two reasons. First, as explained above, there is a due process right to maintaining the parent-child relationship, and the child naturally benefits from continuing the relationship unless there is overriding evidence to the contrary. Second, a strong parent-child relationship through regular visitation is a reason for not terminating parental rights. While it is proper to terminate parental rights when the relationship between the child and the parent drifts apart on its own, it violates due process for the state to interfere with the relationship leading up to the section 366.26 hearing. (*In re David D.* (1994) 28 Cal.App.4th 941, 954-955.)

5. Right to a fair hearing

Some courts were shut down for quite a while during the pandemic. Other courts were operating, but all that they were able to accomplish was to hold uncontested hearings remotely. It became more difficult to have timely contested hearings. Under the Fourteenth Amendment to the United States Constitution, there is a due process right to a contested hearing as provided by statute. (*In re Grace* P. (2017) 8 Cal.App.5th 605, 614-615 [a contested hearing was required on whether the parent-child relationship exception to adoption applied when there was regular visitation]; *In re J.F.* (2011) 196 Cal.App.4th 321, 332 [no offer of proof required for a contested hearing under § 366.3]; *David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 777-780 [right to a contested hearing in a review hearing].) A parent has a fundamental right to be present and testify. (See *In re Mark A.* (2007) 156 Cal.App.4th 1124, 1143-1144.) The parent has a due process right to present evidence. (*In re Armando L.* (2016) 1 Cal.App.5th 606, 620.) As in other civil cases, parties to a dependency proceeding have a statutory and due process right to cross-examine and confront witnesses. (*In re Malinda S.* (1990) 51 Cal.3d 368, 381, fn. 16.)

Parents in custody create additional challenges for the courts because it is now more difficult to transport them. Penal Code section 2625 requires the court to transport the parent who is in prison to a section 366.26 hearing if termination of parental rights will be considered (see *In re Jesusa V.* (2004) 32 Cal.4th 588, 599) or at any other hearing upon request of the prisoner (*id.*, at p. 623). The parent has the right to be present during a jurisdictional hearing. (*In re M.M.* (2015) 236 Cal.App.4th 955, 962.)

Be on the lookout for parents who do not appear in court or have not been participating at all in dependency proceedings. Because it has been more difficult to find parents and provide proper notice, there might be an issue of inadequate notice. Even if the department technically follows the statutes on trying to provide notice, due process can be violated if the department does not follow up on methods reasonably calculated to reach the parent. (*In re B. G.* (1974) 11 Cal.3d 679, 688-689.) "A judgment is void for lack of personal jurisdiction over the person where there is no proper service of process on or appearance by a party to the proceedings." (*In re D.R.* (2019) 39 Cal.App.5th 583, 590 [lack of due diligence when the department did not contact the father's relatives or try to find him through social media]; see also *In re Al.J.* (2019) 44 Cal.App.5th 652, 658-660, 665.)

6. Other potential issues

Were there sufficient grounds for bypass? Was there sufficient evidence of detriment for not returning the child? Was the court's paternity finding proper? Did the court properly rule on a section 388 modification petition? Were there evidentiary errors at the hearing? Were there procedural problems leading up to the hearing?

Pay attention to any potential issue concerning the Indian Child Welfare Act. The failure to provide proper notice does not require an objection. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267-1268.) It can be raised from any appellate proceeding, even if the decision was not made at the hearing being challenged in the writ petition, so long as there has not been an intervening appeal. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 12-14.)

7. No claims of error?

Sometimes it is difficult to find any issues. Counsel has a duty not to raise frivolous issues. (*Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 336.) If no meritorious issues can be found, a "no-issues" brief can*not* be filed; instead, counsel must either seek to withdraw or simply not file a petition. (See *Sue E. v. Superior Court* (1997) 54 Cal.App.4th 399, 404.) On the other hand, counsel has a duty not to abandon the client's cause. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 677; *Borre v. State Bar* (1991) 52 Cal.3d 1047, 1053.) If there is even a weak issue that can be raised, it should be raised instead of no petition at all.

One advantage of litigating in an appellate court is that the court is not bound by decisions from other Courts of Appeal or even the same Court of Appeal. (See *People v. Valladares* (2009) 173 Cal.App.4th 1388, 1393.) Thus, one can argue that even though the juvenile court was bound by decisions from higher courts, the Court of Appeal should not follow them. This, of course, requires a sound legal basis for arguing why the adverse authority was wrongly decided.

IV. Formatting and Filing the Petitions and any Motions

A. Format

The Rules of Court are very particular as to how a brief or a motion in the appellate courts should appear. Documents must be on 8½ by 11 inch white paper. (Cal. Rules of Court, rule 8.74(a)(7).) Do *not* use paper with line numbers on the left. (See rule 8.204(b)(5).) The margins are 1½ inches on the sides and one inch on the top and bottom. (Rule 8.74(b)(3).) There does not need to be a footer.

The font size must be at least 13 points. The font style must be serif face, preferably in Century Schoolbook. (Rule 8.74(b)(1).) Times Roman is disfavored. ALL CAPITALS SHOULD *NOT* BE USED FOR EMPHASIS. (Rule 8.74(b)(1).) The text shall be flushed left. (Rule 8.74(b)(4).) The text shall be 1½ spaced, except for headers, footnotes, and block quotations. (Rule 8.74(b)(3).)

The first page must include the caption as well as the attorney's name, bar number, address, telephone number, and email address. (Rules 8.32(a), 8.40(b)(1).) There must be a proof of service.

A cover page is not required for an application to extend time or for a motion. Applications and motions also do not need to have tables or certificates of word count, but they do require a proof of service.

Some Courts of Appeal have special rules concerning requests for extensions of time and certain motions. The practitioner should check the individual Court of Appeal websites.

B. Citation Style

The research attorneys and justices in the appellate courts are required to follow the California Style Manual. They really like it when practitioners follow the Style Manual. Petitions that do not give an impression of being less persuasive.

References to codes, regulations, rules of court, and constitutions are spelled out when they are in a sentence. The word subdivision is used for subparts of state codes, statutes, and Constitution, but not for rules of court

or federal law:

California Constitution, article I, section 28, subdivision (f)(1)
Welfare and Institutions Code section 300, subdivisions (b)(1) and (c)
California Code of Regulations, title 15, sections 1001 to 1003
California Rules of Court, rule 8.450(c)
United States Code, title 25, section 1903(8)

Citations are normally set apart in parentheses. When this is done, a standardized system of abbreviations is used. There is a comma after the word Code, a space is placed between § and the statute number, subdivision is abbreviated "subd.," and subdivisions is abbreviated "subds." The abbreviation "sec." can be used instead of the § symbol and "secs." for plural.

(U.S. Const., art. I, § 8, cl. 1.)
(U.S. Const., 14th Amend.)
(Cal. Const., art. I, § 28, subd. (f)(1).)
(Stats. 2003, ch. 813, § 7.)
(Bus. & Prof. Code, § 4022.)
(Code Civ. Proc, § 1987.1.)
(Evid. Code, §§ 350-352.)
(Fam. Code, § 7611, subd. (d).)
(Heath & Saf. Code, § 11350, subd. (a).)
(Pen. Code, § 288a, subds. (a)-(c).)
(Veh. Code, §§ 23152, subd. (a), 235153, subd. (a).)
(Welf. & Inst. Code, § 300, subds. (b)(1) & (b)(2).)
(Cal. Code Regs., tit. 15, § 3084.1, subd. (a).)
(Cal. Rules of Court, rule 8.450(c).)
(42 U.S.C. §§ 661-669b.)
(25 C.F.R. § 23.2 (2015).)
(82 Fed.Reg. 12986, 12988 (Mar. 8, 2017).)

Cases are cited with the year in the parentheses in the middle. Inside a parenthetical citation, the subsequent history of the case or a description of alterations to quotations are set aside by a comma. A description of the case is in brackets. They are usually in parentheses when the case is cited in a sentence. Parallel cites are usually not required, but when they are used, they are in brackets. Signals (such as "see, e.g.,") are not italicized. The abbreviation for footnote is "fn."

(*Hansen v. California Dept. of Social Services* (1987) 193 Cal.App.3d 283, 292, internal quotation marks omitted.)

(See *In re Jonathan M.* (1997) 53 Cal.App.4th 1234, 1237, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414 [concerning visitation].)

(*People v. Vela* (2017) 11 Cal.App.5th 68, 72, review granted July 12, 2017, S242298.)

(*Z.J. Gifts D-4, LLC, etc. v. Littleton, CO* (10th Cir. 2002) 311 F.3d 1320, cert. granted *sub nom. Littleton, CO v. Z.J. Gifts D-4, LLC, etc.* (2003) __ U.S. __ [123 S.Ct. 5112].)

(*Valdivia v. Brown* (E.D. Cal. Jan. 24, 2012 No. CIV S-94-671 LKK (GGH)) 2012 WL 219342 at pp. *4-*13.)

For subsequent citations to the same case, use the word *supra* in place of the year and leave out the first page of the case while referring to the jump cite as "at p. x" or "at pp. x-y."

(*In re Brittany S., supra,* 17 Cal.App.4th at p. 1407, fn. 7.)
(*Tracy J. v. Superior Court, supra,* 202 Cal.App.4th at pp. 1427-1428.)

If the same case is cited in the same paragraph with no intervening citations, one can use *id*. There is not a comma after *id*. Use *ibid*. if one is citing the same page of the same case.

(*Id.* at p. 152.)
(*Ibid.*)

Practitioners often cite to the record by using the abbreviation "CT" for the clerk's transcript and "RT" for the reporter's transcript. The volume number must be given and is usually placed before CT and RT. Many people give the page number without saying "at p." One normally does not need to put in the line number of the reporter's transcript. An augmented transcript might start with the letter A or Aug., and a supplemental transcript with the letter S or Supp.

(3CT 641.)
(4RT 1202-1203.)
(1ACT 15-18.) or (1 Aug. CT 15-18.)
(2SCT 21.) or (2 Supp. CT 21.)

The abbreviation for petition is "petn." One can view the California Style Manual at the website of the Sixth District Appellate Program: www.sdap.org.

Juvenile court proceedings are confidential. (Cal. Rules of Court, rule 8.401(b).) Nonetheless, one should not identify people, particularly children, who are "innocently involved in appellate court proceeding" as to whom potentially damaging or embarrassing disclosures are made. (Cal. Style Manual (4th ed. 2000) § 6:18, pp. 224-225.) Use of first name and the initial of the last name is appropriate when the name is common. (Rule 8.401(a); see *In re Edward S.* (2009) 173 Cal.App.4th 387, 392, fn. 1.) Otherwise, use their initials. The parents and foster parents should also not be named. Nor should anyone related to them if this would reveal their identities. This can create an alphabet soup in the brief, and it is more clear sometimes to refer to the participants by their roles: mother, father, child or minor, maternal grandmother, and so on. While age is often relevant, birth dates should not be given unless they are particularly important to the argument. If certain information is contained in the petition that is confidential to other parties, an unredacted version must be filed under seal and a redacted version filed for all parties to see. (See rules 8.45-8.47, 8.74(c)(8).)

C. TrueFiling

Documents in the Courts of Appeal must be electronically filed. (Cal. Rules of Court, rule 8.71.) The document must be in a text-searchable portable document format (PDF). (Rule 8.74(a)(1).) The practitioner must add an electronic bookmark with a description for each heading, subheading, and the first page of a component of the document. (Rule 8.74(a)(3).)

The pagination on the document must match the electronic pagination. (Rule 8.74(a)(2).) This means the cover of the petition will often be the first page of the JV-825 form and constitutes page 1. Page 2 will be the table of contents. Page 3 will be the table of authorities. If the table of authorities is only one page, pages 4 and 5 will be the remainder of the form. The first page of the memorandum of points of authorities might fall on page 6 or so. Once the tables are generated, the page numbers of the memorandum of points and authorities must be changed and the tables must be adjusted accordingly.

The file cannot be more than 25 megabytes or 300 pages. Refer to rule 8.74(a)(5) for formatting a document that is multiple volumes. An electronic

signature is permitted. (Rule 8.75.) The filer must provide his or her address and email address and give notice of any changes. (Rules 8.72(a)(2) & (a)(3), 8.78(d).)

To file, the practitioner must register at TrueFiling by going on its website, https://tf3.truefiling.com. Once registered, one only needs to log in for future filings. Assistance on how to use TrueFiling can be found on its website and also at website of the courts at https://www.courts.ca.gov/37423.htm and https://www.courts.ca.gov/2dca.htm. Material is also available at the website of the Central California Appellate Program (CCAP) at https://www.capcentral.org/procedures/truefiling/step_tf_guides.asp.

A party must consent to be electronically served. Electronically filing a document in the appellate court constitutes consent to be electronically served in the case. There is a fee for filing and an additional small fee for electronically serving the parties through TrueFiling. Some people save money by electronically serving the parties through their own email system. Alternatively, parties can be served the old fashioned way.

V. What's Next?

A. Response

A response may be filed within ten days after the filing of the petition, 15 days if the party is served by mail. (Cal. Rules of Court, rules 8.452(c)(2)(A), 8.456(c)(2)(A).) A response is not required unless the Court of Appeal requests one, in which case it must be filed within ten days or the time specified by the court. (Rules 8.452(c)(2)(B), 8.456(c)(2)(B).)

B. Oral Argument and decision

If the petition is not summarily denied, oral argument will be scheduled to be held within 30 days, unless it is waived. (Rules 8.452(g), 8.456(g).) The petitioner speaks first, followed by the opposition and then there is the petitioner's rebuttal. It is uncommon for a side to request more than 15 minutes for oral argument, and the petitioner will want to reserve some of the time for rebuttal. Three justices sit on a panel, and the oral argument is normally held in the Court of Appeal courthouse.

The appellate courts have been functioning during the pandemic. The

justices, research attorneys, and most of the clerks have been working remotely. Personal appearance at oral argument have not been permitted. Parties have been appearing telephonically. Some courts have begun experimenting with oral arguments by video. Like all new technology, some of the glitches still need to be worked out.

Oral argument in the appellate courts are more formal. It is often best to prepare a strong short beginning and hope for questions. Nonetheless, prepare a longer explanation of why the court should rule in your favor in case questions are not forthcoming. Be ready to answer questions concerning the weaknesses of the case. Have a short conclusion ready for the end. The court seldom announces its decision at oral argument.

C. Rehearing Petition

The Court of Appeal loses jurisdiction to modify a decision when the decision becomes "final," A decision denying the petition without issuing an order to show cause or dismissing the petition as moot is final immediately. (Cal. Rules of Court, rules 8.452(i), 8.456(h)(5), 8.490(a)(1).) Otherwise, the decision is final in 30 days unless the court orders a shorter period. (Rule 8.490(a)(2).) A party may file a petition for rehearing within 15 after the decision is issued if it is not final. (Rules 8.268, 8.490(c).)

Petitions for rehearing are not common. A rehearing petition should be filed if a petition for review will be based on facts or an issue that the Court of Appeal omitted or misstated in its opinion. (Rule 8.500(c)(2).) An answer to a petition for rehearing may not be filed unless requested by the court order. (Rule 8.268(b)(2).) Rehearing petitions are usually short and to the point.

A rehearing petition and the opposition begin with a cover. The cover consists of the caption, the title of the document ("Petition for Rehearing"), and the attorney's identifying information below. There must be a table of contents, a table of authorities, certificate of word count, and proof of service.

D. Review Petition

A petition for review can be filed in the California Supreme Court within 10 days after the decision is final. (Cal. Rules of Court, rule 8.500(e)(1).) If the decision becomes final on a weekend or holiday, this does *not* extend the deadline for filing the review petition. However, if the deadline

for the review petition falls on a weekend or holiday, the petition can be filed on the following court date. A petition for rehearing does *not* change the finality of the Court of Appeal decision, even if the court modifies the opinion, unless the court formally grants rehearing or modifies the *judgment*. (See rule 8.366(b)(3).) The review petition shall not be more than 8400 words. (Rule 8.504(d).)

The petition for review begins with a cover. The cover consists of the caption, the title of the document ("Petition for Review"), and the attorney's identifying information below. The caption includes both the Court of Appeal case number and the Superior Court case number. The Supreme Court supplies its own case number after the petition is filed. The tables of contents and authorities follow the cover. The actual petition begins with a concise, nonargumentative statement of the issues presented. (Rule 8.504(b)(1).) The petitioner must then explain the reason for granting review. (Rules 8.500(b), 8.504(b).) The petition should specify when the Court of Appeal issued its decision, explain if a rehearing petition had been filed, and the result of any such petition. (Rule 8.504(b)(3).) The decision of the Court of Appeal must be attached as an exhibit. (Rule 8.504(b)(4) & (b)(5).) There must be a certificate of word count and proof of service. The Court of Appeal must be served with the review petition.

A review petition must be electronically filed through TrueFiling. (Supreme Ct. Rules Regarding Electronic Filing, rule 3(a)(1)(A).) The pagination of the attached decision need not correspond to the electronic page number of the entire petition for review. (Rule 10(a)(2).) One can thus refer to page number of the opinion itself. Normally, one must also send a paper copy of the petition to the Supreme Court within 48 hours. (Rule 5(a).) The Court, however, issued an order during the pandemic that no paper copies should be submitted.

E. Remittitur

The remittitur ends the jurisdiction of the appellate courts. (See Code Civ. Proc, § 912.) It is issued when review is denied or the time for seeking review expires. If the petitioner prevails, the juvenile court must comply with the decision of the Court of Appeal once the remittitur is issued. (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 774, fn. 5.)

VI. Traditional Petitions for Writ of Mandate and/or Prohibition

A. The Petition

Dependency writ petitions evolved from traditional petitions for writ of mandate and/or prohibition. They are different, however, and arise under different circumstances. Dependency writ petitions can be filed only as permitted by Welfare and Institutions Code section 366.26, subdivision (*l*) and 366.28.

If there is a desire to challenge a juvenile court order and time is of the essence such that an appeal would be inadequate, a traditional writ petition can be filed. This can be useful for challenging, for example, the failure to hold a timely hearing as required by statute due to emergency orders issued during the pandemic, or to challenge orders concerning visitation, services, or placement in light of problems that have arisen from the pandemic.

There is no form for a traditional writ petition. The practitioner must draft the entire document. The petition begins with a cover page. The cover consists of the caption, the title of the document ("Petition for Writ of Mandate and/or Prohibition"), and the attorney's identifying information below. The caption includes the Superior Court case number. The Court of Appeal will supply its case number when it is filed. If a stay is requested, this must be mentioned prominently on the cover. (Cal. Rules of Court, rule 8.486(a)(7).) The table of contents, table of exhibits, and table of authorities follow.

A petition must (1) identify the parties and assert the petitioner's has a beneficial interest in obtaining the relief sought; (2) provide the reasons for a stay if one is being requested (3) explain how the respondent court acted without or in excess of its jurisdiction or how it has failed to act as prescribed by law; (4) assert there is no plain, speedy, or adequate remedy at law; (5) explain why the petition is timely; (6) explain the petition is being filed in the Court of Appeal to correct the problem in the Superior Court; (7) detail how petitioner objected to the court action or threatened action; and (8) make the claims for relief while also providing the underlying facts of the claim. The petition must include a prayer for relief and a verification. Then, there must be a supporting memorandum of points and authorities, exhibits, certificate of word count, and a proof of service. The superior court needs to be served. There is a 14,000 word limit. (Code Civ. Proc, §§ 1084-1086, 1103, 1104; Cal.

Rules of Court, rules 8.486.)

(1) A beneficial interest exists if the petitioner has standing. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.)

(2) When a stay is requested, a statement to that effect ("STAY REQUESTED") must be placed on the front cover of the petition. (Rules of Court, rule 8.486(a)(7)(B).) The petition must explain the urgency of the matter and why a stay is necessary. The trial court and department involved and the name and telephone number of the trial judge, whose order the request seeks to stay must appear either on the cover or at the beginning of the petition. (Rule 8.486(a)(7).)

(3) A writ of mandate can be issued when an inferior court or agency has failed to act as prescribed by law. (Code Civ. Proc, §§ 1084, 1085; *People v. Superior Court (Mitchell)* (2010) 184 Cal.App.4th 451, 456.) A writ of prohibition can be issued when an inferior court or agency has acted without or in excess of its jurisdiction. (Code Civ. Proc, § 1102.) Because the distinction between the two is not always clear, many people file a petition for writ of mandate and/or prohibition. Some cases suggest that a writ is not available to compel a court or agency to perform a "discretionary" act. Other cases, however, state that writ review can be used to correct an abuse of discretion when there is not an adequate remedy by appeal or the court acts with a misunderstanding of the law. (*Shorts v. Superior Court* (2018) 24 Cal.App.5th 709, 719.)

(4) An extraordinary writ will not be issued if an appeal provides an adequate remedy. (Code Civ. Proc, § 1086.) Even when a remedy by appeal exists, however, it might be inadequate. For example, the petitioner might suffer irreparable harm if relief is not granted in an expedited manner. (See, e.g.. *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 299, fn. 4 [appeal inadequate because of delay].)

(5) Some statutes specify a time period within which to file a writ petition. (See, e.g, Code Civ. Proc, § 170.3, subd. (d) [the only means of challenging the denial of a motion to recuse a judge is by a petition for writ of mandate within ten days of the order].) These statutory time limits are jurisdictional. (*People v. Superior Court (Brent)* (1992) 2 Cal.App.4th 675, 683.) When there is no statutory deadline, the petition should be filed within the same time period designated for filing a notice of appeal; that is, 60

calendar days. (*St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 771, fn. 14.) Because time is of the essence in dependency matters, the sooner the petition is filed, the better.

The prayer for relief normally requests the granting of an alternative writ, the issuance of the writ, and any other relief which may be appropriate in the interest of justice. If a stay is requested, this should be specifically mentioned in the prayer for relief. When the petitioner seeks a peremptory writ in the first instance, the petition must give notice to the opposing party and to the court. This is usually done by requesting a peremptory writ in the first instance in the prayer for relief. (See Code Civ. Proc, §§ 1088, 1107; *Palma v. U.S. Indus. Fasteners, Inc.* (1984) 36 Cal.3d 171.)

The attorney may verify the petition when the facts are within the attorney's knowledge. Also, the attorney may verify the petition when a party is unable to do so and the attorney explains why the verification is not made by the party. (Code Civ. Proc, § 446; *St. Mary, supra,* 223 Cal.App.4th at pp. 771-772, fn. 14.) A verification should not be based on information or belief. (*North Shuttle Service, Inc. v. Public Utilities Com.* (1998) 67 Cal.App.4th 386, 392, fn. 4.)

The petition must be accompanied by a memorandum of points and authorities which do not need to repeat facts contained in the petition. (Rule 8.486(a)(5).)

The court does not prepare a record for a traditional writ petition. It is the petitioner's responsibility to provide the necessary exhibits. If the client is indigent, counsel should move the juvenile court to order the preparation of reporter's transcripts of relevant hearings, which the petitioner will need to attach as exhibits. If preparation of the transcripts takes too long, the petitioner may prepare a declaration to be an exhibit to the petition providing a summary of the oral proceedings and explaining there has been a delay in producing the transcript. The reporter's transcripts should be filed in the Court of Appeal as a supplemental exhibit as soon as it is available.

The requirement to have each document consecutively paginated for electronically filed documents applies to exhibits attached to a petition. Since it is difficult to write a petition and refer to exhibits without knowing in advance what page the exhibit will fall on, it is usually easier to file the exhibits in a separate document entitled, "Exhibits to the Petition for Writ of

Mandate and/or Prohibition." Nonetheless, one should be aware that page 1 of the exhibits will be the cover page, page 2 will be table of exhibits, page 3 normally will be a page that only states "Exhibit A," and the first page of exhibit A will then fall on page 4.

B. Subsequent Procedure

A preliminary opposition can be filed within ten days of the petition to try to persuade the court not to issue an alternative writ. The court may request a preliminary opposition and give a deadline in its request. Otherwise, an opposition is optional. (Code Civ. Proc, § 1107; rule 8.487(a)(1).) The preliminary opposition must include a memorandum and a statement of any material fact that was missing from the petition. (Rule 8.487(a)(2).)

Upon receiving the petition, the court may: (1) deny the petition without an opinion or argument; (2) issue an alternative writ or order to show cause ordering the respondent or real party in interest either to act as the petitioner has requested, or show cause in the appellate court why it should not be ordered to do so; or (3) notify the parties that it is considering issuing a peremptory writ in the first instance. (See Cal. Rules of Court, rule 8.487(a).)

A peremptory writ in the first instance is the process of issuing the writ without first issuing an alternative writ first. (Code Civ. Proc, §§ 1088, 1107.) The California Supreme Court has cautioned that this may occur only when the petitioner's right to relief is obvious or unusual urgency justifies expediting the writ application. (*Brown, Winfield & Canzoner, Inc v. Superior Court* (2010) 47 Cal.4th 1223, 1241.) If the court notifies the parties that it is considering issuing a peremptory writ in the first instance (frequently called *Palma* notice after *Palma v U.S. Indus. Fasteners, Inc., supra*, 36 Cal.3d 171), the respondent or any real party in interest may file an opposition. This may be the only opportunity to oppose the petition. (See rule 8.487(a)(4).) Unless the court orders otherwise, the opposition must be filed within 30 days after the court issues its notification. (Rule 8.487(b)(2).)

A return is the formal response to the court's issuance of an alternative writ or an order to show cause; it is the vehicle the respondent or real party in interest uses to dispute the factual and legal allegations set out in the petition. (Rule 8.487(b)(1).) If the respondent or real party in interest fails to deny material allegations, the court may deem them admitted. (*Rodriguez v. Municipal Court* (1972) 25 Cal.App.3d 521, 526.)

The petitioner may file a reply (also called a replication) to the return. Factual matters alleged in the return that are not controverted in the reply are deemed true. (*Miller v. Eisenhower Med. Ctr.* (1980) 27 Cal.3d 614, 625, fn. 10; *Epstein v. Superior Court* (2011) 193 Cal.App.4th 1405, 1408.) The petitioner may not raise a new claim in the reply. (*People v. Superior Court (Maury)* (2006) 145 Cal.App.4th 473, 485, disapproved on other grounds in *Barnett v. Superior Court* (2010) 50 Cal.4th 890.) Instead, a supplemental petition must be submitted with a motion for leave to file it. The court may then summarily deny the supplemental petition or issue an order to show cause on the new claim.

Oral argument may be available following issuance of an alternative writ or order to show cause. (*See Kowis v. Howard* (1992) 3 Cal.4th 888, 899.) However, there is no oral argument when the court summarily denies a writ petition (*ibid.*) or when the court issues a peremptory writ in the first instance (see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1242).

The procedures concerning rehearing petitions, review petitions, finality, and remittiturs are the same for traditional writ petitions and for dependency writ petitions.

VII. Resources Available

Resources are available. The California Rules of Court are available online at https://www.courts.ca.gov/rules.htm. The local rules of court of each Court of Appeal is available on their websites. Most procedural rules are detailed in the rules of court. There is also information about local rules, emergency rules and orders due to the pandemic on the websites of the appellate courts.

Staff attorneys at the local appellate project can provide guidance in framing legal arguments and answering questions about appellate procedures. The appellate projects also have material available on their websites. Much of it concern criminal law, but there is some material concerning dependency practice and appellate procedure.

The websites are:

California Supreme Court (San Francisco, Los Angeles, and Sacramento) https://www.courts.ca.gov/supremecourt.htm.

First District Court of Appeal (San Francisco), https://www.courts.ca.gov/1dca.htm.
First District Appellate Project (FDAP), 475 Fourteenth Street, Suite 650, Oakland CA 94612, 415-495-3119, www.fdap.org.

Second District Court of Appeal (Los Angeles), https://www.courts.ca.gov/2dca.htm.
California Appellate Project, Los Angeles (CAP-LA), 520 S. Grand Ave., 4th Floor, Los Angeles CA 90071, 213-243-0300, www.cap-la.org.

Third District Court of Appeal (Sacramento), https://www.courts.ca.gov/3dca.htm.
Central California Appellate Program (CCAP), 2150 River Plaza Dr., Ste. 300, Sacramento CA 95833, 916-441-3792, www.capcentral.org.

Fourth District Court of Appeal (San Diego, Riverside, and Santa Ana), https://www.courts.ca.gov/4dca.htm.
Appellate Defenders, Inc. (ADI), 555 West Beech Street, Ste. 300, San Diego CA 92101, 619-696-0282, www.adi-sandiego.com.

Fifth District Court of Appeal (Fresno), https://www.courts.ca.gov/5dca.htm.
Central California Appellate Program (CCAP), 2150 River Plaza Dr., Ste. 300, Sacramento CA 95833, 916-441-3792, www.capcentral.org.

Sixth District Court of Appeal (San Jose), https://www.courts.ca.gov/6dca.htm.
Sixth District Appellate Program (SDAP), 95 South Market Street, Suite 570, San Jose CA 95113, 408-241-6171, www.sdap.org.

Sample dependency writ petitions and arguments are available at the FDAP website at http://www.fdap.org/r-dependency_materials.shtml.

There is also material available at the California Dependency Online Guide (CalDOG) at https://cadependencyonlineguide.info/index.jsp.