

## **Motions to Deem an Appeal a Writ in the Fifth District How to get results faster for your dependency client**

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In two separate dependency actions arising out of the same Fifth District county, minors were removed from their fathers and the Department recommended placement with the noncustodial mothers and dismissal of jurisdiction. The trial court in both cases refused to follow the recommendation, noting that it disapproved of the mother's lifestyle. The minors were placed in foster care and the mothers appealed. (*Trisha R.* and *Kimberly R.*) In another dependency action, father was stopped by police and arrested for a parole violation, as well as a citation for failing to use a child safety seat for the two-year old minor, who was subsequently detained by CPS. Father and the minor had lived with the paternal grandmother for most of the minor's life and grandmother had legal authority to care for the minor in the event of an emergency. CPS refused to release the minor to grandmother, but instead detained and filed a section 300(g) petition (incarcerated parent fails to provide support). The petition was sustained and the minor was placed outside the home; father appealed. (*Marty U.*)

These three recent Fifth District appeals all have something in common: they are cases where an appellate remedy will likely be inadequate because it is too slow to achieve the necessary results. They are the type of case which appear likely to prevail on appeal, yet the minors would be potentially be further harmed by their continued out-of-home placement while the appeals were pending.

In each of these three cases, appellate counsel filed a motion to deem the appeal a writ in the Fifth District Court of Appeal. In *Trisha R.* and *Kimberly R.*, since the Department had originally recommended placement of the minor with the appellant, appellate counsel also successfully sought the concurrence of the Department in the motion. The appellate court granted the motions, deeming the proceedings to be writ proceedings, and putting the parties on an expedited briefing schedule. Counsel then filed petitions for writ of mandate or prohibition. The Department notified the court that it did not oppose the relief sought, and would not be filing a traverse. The Fifth District Court of Appeal in both cases granted relief. (In *Kimberly R.*, the court ordered the minor placed immediately with his mother. In *Trisha R.*, the court granted the relief, and counsel sought the issuance of an early remittitur in order to facilitate the placement of the minor with his mother.) In both cases, relief was granted to the mothers within two months of the filing of the motion to treat the appeal as a writ.

In *Marty U.*, appellate counsel followed a slightly different procedure -- yet still successful. She filed the motion to deem the appeal a writ along with the appellant's opening brief. The Fifth District Court of Appeal here granted the motion, and "deemed" the appellate brief to be the petition. The parties were placed on an expedited briefing schedule. County Counsel agreed to a stipulated reversal, which the court accepted. Once again, the court's opinion was filed about six weeks after the filing of the opening brief, allowing the minor to be returned quickly to his

family. (*Note*: CCAP believes that this is the less restrictive approach, and for that reason, we recommend it as the more flexible procedural approach.)

The Fifth District has previously noted the court's power to treat an appeal as a petition for writ of mandate, such as where the appeal was from a nonappealable order (*In re Albert B.* (1989) 215 Cal.App.3d 361), or where the appeal is from both appealable and nonappealable orders. (*In re Kristin W.* (1990) 222 Cal.App.3d 234). The court looks to whether the appellant has a plain, speedy, and adequate remedy at law to review the trial court's orders, and whether there will be an undue burden to file a petition for extraordinary writ. Further, the court looks to whether a delay in resolving the issues may have a detrimental impact on the minors.

These three recent cases demonstrate the Fifth District's continued willingness to treat an appeal as a writ proceeding in other kinds of appropriate cases. Here, there was no question that the orders were appealable and could have marched through the normal course of an appellate case. Yet, the court was receptive to expediting the resolution, given the merits of the case, and the detrimental impact on the minors which would be caused by months in foster care during normal progression of the appeal. And, both procedures were acceptable to the court: either by first filing a motion to deem the appeal a writ proceeding and then filing a writ, or by filing a motion to deem the appeal a writ along with the opening brief. Both procedures resulted in equally expedited briefing schedules and speedy resolutions for the clients.

Is there a downside to turning your appeal into a writ proceeding? There may be. First, consider with the original writ filings (as in *Trisha R.* and *Kimberly R.*) whether you can accommodate the expedited briefing schedule. (Once the appeal has been deemed a writ proceeding and you have proceeded by way of an original writ petition filing, you cannot request extensions of time. For this reason, CCAP believes that the more flexible filing may be the *Marty U.* approach -- file the AOB along with a motion to deem the brief a petition.) Second, the decision may become final immediately, leaving the court no power to rehear or modify that decision. (Cal.Rules of Court, rule 24(b)(2)(A)(3).) Deadlines for a petition for a review are also on a tighter timeline (e.g. 10 days instead of 40 days in some cases).

If these are not concerns in your case, the merits of your issue are strong, and delay will not serve your client's interests, a motion to deem your appeal a writ is something you may want to consider. CCAP's motions bank contains a sample motion and writ form.\*\*\*