DEPENDENCY UPDATE[1]

HOW TO HANDLE A DEPENDENCY WRIT

By Bradley Bristow[2]**, Staff Attorney**

The Writ Rule; Scope of the Article.

Welfare and Institutions Code[3], section 366.26, subdivision (l), provides that review of any order setting a section 366.26 hearing must be sought by a petition for extraordinary writ review. Similarly, section 366.28 provides writ as the remedy for review of a placement order made after parental rights have been terminated. The writ procedures are governed by California Rules of Court, rules 8.450, 8.542, and 8.456. Failure of the parent or child to seek extraordinary relief forfeits any further review of orders made at these hearings, and the orders made at these hearings are often very important. Responsibility for filing the notice of intent rests with the trial counsel and not with an appellate counsel who is later appointed. So trial counsel in a dependency case must be aware of the issues that must be raised by petition for extraordinary relief, and the procedures for pursuing writ relief in the appellate court.

This article identifies situations in which a petition for extraordinary writ review should be used to protect the legal rights of the parent or child. It includes reminders on how to preserve writ issues in the juvenile court for review by the appellate court. There is advice on how to draft a petition, including what is required to be included in the petition. Finally, the article will discuss the procedures of the reviewing court for submission and resolution of the writ.

Issues that May/Must Be Raised. Of course, the key consideration in deciding whether a petition must be filed is whether the issue arose at a hearing in which a section 366.26 hearing was set.

Review Hearings Terminating Services. Issues that often arise at review hearings in which services are terminated and a section 366.26 hearing is set include challenges to the decision not to return the child to parental custody (*see, e.g., Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689), and the reasonableness of the services offered the family. (*Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158.) However, if the order at the review hearing

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[3]All statutory references are to the Welfare and Institutions Code unless otherwise stated.

does not actually set a section 366.26 hearing because services are still being offered to one of the parents, or because the child is not adoptable and another permanent plan has been selected, then a writ is not required at that time.

Some Jurisdictional and Dispositional Orders. When reunification services are denied at the outset and the matter is set for a section 366.26 hearing, all issues arising out the jurisdictional findings and the dispositional orders are reviewed by writ. This includes everything from the evidentiary rulings, the sufficiency of the evidence supporting jurisdiction and the disposition (*Kimberly R. v. Superior Court* (2002) 96 Ca.App4th 1067), to the decision to deny services. (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450.) But, as stated above in connection with orders terminating services, an order denying services may be appealable if the section 366.26 hearing is not set.

Denial or Grant of a Modification Petition. Rulings on section 388 modification petitions are normally appealable. However, if the section 366.26 hearing was also set at the hearing in which the 388 petition was granted or denied, petition for extraordinary writ review is the proper remedy. (*In re Clifton V.* (2001) 93 Cal.App.4th 1400.)

Post-Termination Placement Decisions. Recently enacted section 366.28, provides that review of placement decisions made after parental rights have been terminated must be sought by petition for extraordinary relief.

What If There Are No Arguable Issues? It is well-established that counsel is not required to pursue a frivolous writ. (*Sue E. v. Superior Court* (1997) 54 Cal.App.4th 399.) When unsure whether or not the record will support an issue, the notice of intent should be filed so that the transcript may be reviewed in making the final determination whether a petition should be filed.

Preserving Issues and the Record. The rule requiring a timely and specific objection applies not only to evidence, but also to preserving issues for review. On decisions entrusted to the discretion of the juvenile court, such as the terms of a visitation order, or specific findings that a party requests, the issue will usually have to be raised in the trial court in order to preserve the issue for appeal. (*In re S.B.* (2004) 32 Cal.4th 1287.) And perhaps one of the most important objections needed when contemplating a writ is the specific challenge to the reunification service or services that the party contends was inadequately implemented by the social worker.

Admissions and Submissions. What issues are preserved by a "submission"? Which are preserved by an admission? A submission on a report preserves evidentiary issues, but a submission on a social workers recommendation is deemed an agreement with the recommendation. An admission or "no contest" plea preserves nothing. It is binding on disposition as well as jurisdiction. (*In re Troy Z.* (1992) 3 Cal.4th 1170.) So, of the three above non-trial resolutions, the submission on a report with a statement that the party does not agree with the recommendation is probably the one most likely to preserve contested issues on appeal.

Making a Record. While conducting the juvenile court hearing, counsel should keep in mind that the appellate court is bound by the four corners of the record, and thus a record should be made of all objections and all matters presented to the court that the litigant will need for the writ. Objections and testimony taken out of the presence of the reporter are all too typical problem areas for appellate review. When the objection or testimony is not reported, there is no basis upon which the appellate court may determine whether the alleged error occurred. In an appeal, this omission can be somewhat remedied by requesting the trial court to settle the record. But in a writ proceeding there is little provision in the rules for record settlement, and, even assuming that record settlement were available, the time constraints of writ proceedings would make it very difficult to use this procedure. So, all objections and testimony should be reported, or at least an attempt should be made to reconstruct what was said, in the presence of the reporter, while the memories of all participants are still fresh. Also, whenever the testimony of a witness at the hearing is refused, counsel should make an offer of proof as to the proposed testimony. (3 Witkin, Cal. Evidence (3d ed. 1986), Presentation at Trial, secs. 401-405.)

Filing the Notice of Intent.

Form. The Judicial Council form is JV- 820. It is available in "printable" and "fillable" form at: http://www.courts.ca.gov/forms.htm in the juvenile forms section, and in some of the practice books such as California Juvenile Dependency Practice (CEB 2005).

Preparing Notice. Under rule 8.450(e)(3), the notice is to be signed by the party if the party is an adult. Counsel may sign on behalf only upon a showing of good cause. (*Suzanne J. v. Superior Court* (1996) 46 Cal.App.4th 785.) An explanation should be provided establishing why the parent has not personally signed the notice, so that the reviewing court has immediate access to the reasons why the writ proceeding should not be dismissed. If no reason is immediately known, the notice should be supplemented, hopefully with documentation signed by the client establishing the justification. Note that, "The client resides outside of the county where counsel's law office is located," is not sufficient. The justification should show not only that the failure to sign was excusable but the action has the authority of the client.

Many attorneys find it helpful to keep a notice form in the client's file and have the client sign it during an interview or in court during or immediately after the hearing. The clients are sometimes difficult to locate on short notice!

Where Filed. The notice is filed with the clerk of the juvenile court. After the clerk serves the notice and its request for preparation of the record on the parties and the appellate court, the clerk and court reporters will be directed to prepare the record, At this point, jurisdiction immediately shifts to the appellate court.

When Filed. The notice must be filed within seven calendar days of the date of the order

setting the section 366.26 hearing. The time limit is extended to 12 days when the client receives notice of the order only by mail. The order date is either the date of oral pronouncement or the issuance of a written order, whichever is earlier.

For dates of orders issued by referees not sitting as temporary judges, rule 5.450 finality applies. (Rule 8.450 (e)(4)(E).) [Tip: When in doubt as to the date the order becomes final, use the earlier date. A premature notice will, at most, require refiling. A late notice may be difficult or impossible to excuse.]

Resolving Record Problems. As previously mentioned, the clerk, immediately upon receipt of a notice of intent, notifies the court reporters to prepare a transcript. That transcript is to be prepared within 12 days, and the clerk is to assemble, certify and send on to counsel or unrepresented parties the entire record within 20 days. (Rule 8.450 (f), (g).) So, it is fair to say that within three weeks of filing a notice of intent counsel may have a transcript and notification from the Court of Appeal that the petition is due within 10 days. (Rule 8.450 (i)(2).)
As in any appellate matter, the next step is to review the record for arguable issues, and determine which potentially arguable issues do not have a complete record. An incomplete record will have to be corrected immediately.

Required contents of record. You should receive all minute orders, notices of hearing, reports, and jurisdictional findings contained in the court file, anything related to the notice of intent, and a reporter's transcript of all proceedings making up the hearing on the order setting the section 366.26 hearing. (Rule 8.450 (g).)

Designating record. One may avoid the need to correct the record later by designating additional items in the notice of intent.

Motion to augment. Use a formal motion to augment when some of the record is missing because an informal supplemental record request to the clerk may be too slow to achieve any results before the petition is due. The motion to augment is normally due within five days of the filing of the record, but this time is extended to seven days in the case of records exceeding 300 pages or 10 days for records exceeding 600 pages. (Rule 8.452 (f).) Format of the motion is governed by rule 8.155 and sometimes by local rules of the appellate court. These rules may be found at the Judicial Council website: http://www.courts.ca.gov/rules.htm .

Unsuccessful augmentation. If the clerk does not have the requested items (and should), some attorneys have had success by attaching their own copies of the missing documents as exhibits to their petition and moving for augmentation. (But remember that this writ is unlike an original writ of habeas corpus in that the appellate court may only review matters that were before the juvenile court or that are subject to judicial notice.)

Extensions of time. Timeliness is next to godliness in handling matters before the

appellate court, and in a dependency writ it is crucial. As stated previously, an untimely petition may be defaulted. Counsel should never assume that the time for filing the petition has been extended for record correction, except when the court has so ordered. The court *may* extend time for up to 15 days. (Rule 8.450 (d).) Unless the augmentation order expressly grants an extension, an extension of time should be sought.

The courts consider an extension of time as a favor. The requesting party is expected to provide stamped envelopes addressed to all parties so as to save the court the time and expense in serving the parties with copies of the order extending time.

Filing the Petition. While, technically, use of a form is not required, and some attorneys continue to use a formal petition for writ of mandate format, use of the form provided by the Judicial Council, JV-825, which can be found at http:/www.courtinfo.ca.gov/forms/ in the juvenile forms section, serves as a good checklist for complying with the requirements of rule 8.452(a).

Contents; Beginning Work. The petition must contain certain statistical information, a memorandum of points and authorities and a statement of the facts. A procedural history (statement of the case) may be included. If you prepared a trial brief for the hearing, that might be modified as the basis of the petition. If not, it would be helpful to get a head start by beginning the drafting of the petition from memory of what happened at the hearing and your file copies of documents while awaiting receipt of the record. Make good use of the two to three weeks spent awaiting receipt of the record, as you may only have 10 days to complete the petition once the record has been completed.

Required Information. Regardless of whether the Judicial Council form or some other form is used, rule 8.452(a) requires the petition to include the identities of parties, the date the court made the order setting the section 366.26 hearing, the date on which the section 366.26 hearing is set to be heard; a summary of the grounds of the petition, and the relief requested.

Confidentiality. The record in a juvenile court matter, including the petition and response, may only be viewed by court officials, parties, their attorneys, and a few other persons authorized by rule or by the court. All documents, including the covers and text of briefs, must protect the anonymity of the parties. (Rule 8.400(b).) So, the practice is to use an initial for the last name of the family, or initials for both the first and last name of person when initializing the last name is not enough to protect the person's anonymity. (Rule 8.400(b)(2).) The anonymity extends also to any other minor or crime victim referred to in the brief.

Record References. In either case, record references will have to be added in once the transcript of the proceedings is received. The rules of court require a reference to the record for every statement of a fact in the brief, whether the fact was stated by a witness at the hearing or in a report. (Rule 8.404.(a)(1)(C).) This rule is strictly enforced by the appellate courts.

References to the record are “CT for the Clerk’s Transcript and “RT for the Reporter’s Transcript. A new rule requires designation of volume numbers of the cite. So “3 CT 321," for example, would be the reference to volume three of the Clerk’s Transcript at page 321.

Points and Authorities. Each legal point should be set forth under a separate heading summarizing the argument. (Rule 8.452(b).) Each point should contain, early on in the discussion, the standard of review for its resolution by the appellate court.

Addressing Standard of Review. The standard of review should be provided near the beginning of the legal argument. Most common among the standards of review to be used by the appellate court are review for substantial evidence, abuse of discretion, and independent review of the law, depending on the nature of the issue raised. (*Angela C. v. Superior Court* (1995) 36 Cal.App.4th 758.)

In resolving factual disputes, the reviewing court will usually look for “substantial” evidence supporting the trial court’s decision. The reviewing court will assume the trial court resolved questions of contested fact and inferences in favor of the prevailing party, and is not to substitute its own conclusions except when the trial court’s conclusions result from “mere speculation or conjecture.” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387.)

One of the most common criticisms by the courts of dependency writ petitions is that the petitions do not recognize the substantial evidence test, and do not marshal the evidence in such a way that the summary is helpful to the reviewing court. (*James B.* (1995) 35 Cal.App.4th 1014.) Instead, arguments challenging the sufficiency of the evidence should acknowledge the substantial evidence test and acknowledge and deal with all of the evidence offered on the contested points.

Similarly, review of the exercise of discretion is also a standard deferential to the trial court. The argument should assume the burden of establishing a “manifest” abuse of discretion – an action contrary to policy and justice. (*In re Robert L.* (1993) 21 Cal.App.4th 1057.) In making such an argument it is helpful to discuss juvenile policy and how the trial court’s decision fails to satisfy the goals of juvenile court law.

Providing Standard of Prejudice. It would be nice if all legal errors were reversible per se as “structural errors,” such as when a party was erroneously denied counsel in the juvenile court proceedings, or where the court erred in denying a hearing on a section 388 hearing when good cause was shown for a hearing. (*In re Daijah T.* (2000) 83 Cal.App.4th 666.) However, the great majority of errors will be determined under the test for review of constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, or will be reviewed for harmless error. (Cal. Const., art. VI, sec. 13.)

Under the *Chapman* standard of prejudice applicable to errors impacting constitutional

rights (such as failure to notify a party of a hearing or failure to grant an evidentiary hearing), the other party must demonstrate beyond a reasonable doubt that the error had no impact on the outcome. (*In re Angela C.* (2002) 99 Cal.App.4th 389.) This may be a difficult burden to meet, but it does not mean that the petitioner merely announces that the burden has shifted to the respondent. Instead, the petitioner should at least give some examples of how the decision may have had an impact. For example, did the error relate to a contested issue in the case? The answer may seem obvious, but it may not be so obvious to the court. It is best to explain it.

The harmless error standard (non-constitutional errors) requires even more active persuasion by the petitioner. The goal is to establish a reasonable probability that the party would have had a better result had the court not erred. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.App.4th 780.) This is somewhat less than showing the party would have won – a substantial likelihood of winning. The showing might be made by showing how the ruling might destroy any party's case, or the critical part the ruling played in a case that was particularly close.

Where to File Petition. The petition is filed in the appellate court. Copies are served on all parties and the juvenile court. (Rule 8.452 (c).) Addresses for all courts may be found on the Judicial Council's website.

When to File Petition. When an extension of time has not been granted, the petition must be *received* by the Court of Appeal within 10 days from the filing of the record. It is very important to remember that additional time is not allowed for mailing. (*Roxanne v. Superior Court* (1995) 35 Cal.App.4th 1008 [Former rule 40.1 mailbox rule does not apply even if the petition is in the mail on the last day for filing!].) Again, an untimely petition may result in default. When an extension of time is needed, that request should be sought and resolved before the due date for the petition. Do not assume from silence that the extension of time will be received and granted. Contact the clerk's office to determine the status of the request.

Opposition and Further Proceedings. Any opposition is to be filed within 10 days of the filing of the petition (or 15 days if the petition is served only by mail) or within 10 days of receiving a request by the reviewing court for a response (unless a shorter time is designated). (Rule 8.452(c)(2)). The rules do not provide for a reply.

Stay of Juvenile Court Proceedings. The reviewing court may stay the juvenile court proceedings upon an exceptional showing of good cause. (Rule 8.452(g).) Normally, the moving party will apply to the juvenile court for a continuance of the section 366.26 hearing before seeking a stay in the appellate court.

Submission and Decision. Rule 8.452 requires the Court of Appeal to issue a written decision deciding the petition on its merits absent exceptional circumstances. When denying a petition summarily, some courts often will not issue a formal written opinion, and if that is the case, the issues may be raised subsequently on appeal from the order terminating parental rights.

(*Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501.)

When the court grants writ relief requested and the order stays or prohibits imminent proceedings or addresses any other urgent matter, the clerk must notify the clerk of the juvenile court who must in turn notify the judge. (Rule 8.452(h).)

Oral argument. When the petition is not summarily denied, oral argument will normally be heard within 30 days after the response is filed or was due to be filed, unless time is extended for good cause. Oral argument may be forfeited by inaction. Some courts notify counsel of calendaring requirements. For example, the Third District has in recent years required the demand be made within seven days of the due date for filing the petition. Local procedures should be consulted.

Finality and Further Review. A summary denial is final immediately. A petition for review must be filed in 10 days. A decision issued after the issuance of an order to show cause or an alternative writ is final in 30 days. In that case the normal appellate deadlines for further review apply: 15 days for a petition for rehearing and 40 days for a petition for a review.

Continued Availability of Other Writ Relief. The courts have encouraged the use of traditional petitions for extraordinary relief (prohibition/mandate) even when the appellate remedy is technically available. (See, Code of Civ. Proc., secs. 1085, 1102; Cal Rules of Ct., rule 8.490.) The concern is that the parties' issues will be mooted by the passage of time or the parents or child will be otherwise prejudiced by the comparatively slow process of the appeal. (*In re Michelle M.* (1992) 8 Cal.App.4th 326, 330.) The writ process offers a faster resolution. So this remedy should be considered when an early decision is needed even when the section 366.26 hearing has not been set. For example, a traditional petition for writ of mandate was used to compel a juvenile court to conduct a hearing on a day-to-day basis. (*Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238.) And writ relief has not only been sought and obtained on conflict of interest issues, but also suggested by the California Supreme Court as being the most effective method for review of these issues. (*In re Celine R.* (2003) 31 Cal.4th 45, 60; see also, *Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423.) The format for traditional petitions is set forth in rule 8.490.