

[Attorney Info]

Attorney for Appellant, Charles [Doe]

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**IN RE Charles D., Jr.,  
a Person Coming Under the  
Juvenile Court Law**

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**DEPARTMENT OF HEALTH AND  
HUMAN SERVICES,**

**Plaintiff and Respondent,**

**vs.**

**CHARLES D., SR.,**

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**Defendant and Appellant.**

[Case Number]

**Sacramento County  
No. [case number]**

**REQUEST FOR JUDICIAL  
NOTICE**

[California Code of Civil  
Procedure section 909;  
California Rules of Court,  
rule 8.252(b)]

**To the Honorable, Arthur G. Scotland, Chief Justice and Associate Justices of the  
Court of Appeal, Third Appellate District:**

Appellant, Charles D. Sr., moves this court for an order making factual determinations in its decision on appeal in this case.

1. This motion is made under Code of Civil Procedure section 909 and California Rules of Court, rule 8.252(b) and on the ground that the juvenile court's factual determination at the Welfare and Institutions Code section 366.26 hearing regarding Charles D. Jr.'s adoptability has been undermined by post-adjudication events, specifically his removal from the home of his prospective adoptive parent at her request.
2. The specific additional factual determinations requested are as follows:

(a.) Charles D. Jr.'s prospective adoptive parent, his paternal aunt, Lisa D., has requested the minor's removal from her home, resulting in his placement in a group home setting. (Exhibits A and B.);

(b.) In response to Lisa D.'s request to have Charles D. Jr. removed from her home, the Department filed a Welfare and Institutions Code section 387 petition which has been sustained by the juvenile court. (Exhibit A and Declaration of ATTORNEY);

(c.) As the juvenile court determined at the Welfare and Institutions Code section 366.26 hearing that Charles D. Jr. was not generally adoptable, but rather, was specifically adoptable only by his aunt Lisa D., the juvenile court's finding of adoptability has been undermined by its post-adjudication order removing Charles D. Jr. from Lisa D. (Exhibits A-C and Declaration of ATTORNEY.)

3. This motion is based on this notice, as well as on the attached exhibits, the declaration of ATTORNEY, the memorandum of points and authorities, and the record on appeal in this proceeding.

DATED:

Respectfully submitted,

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ATTORNEY, Attorney for  
Appellant, Charles D., Sr.

**MEMORANDUM OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE**

**JUDICIAL NOTICE OF SUBSEQUENT ORDERS  
OF THE JUVENILE COURT AND THE DOCUMENTS  
CONSIDERED BY THE COURT IN MAKING THESE  
ORDERS MAY BE JUDICIALLY NOTICED  
BY THIS COURT AND ARE APPROPRIATE FOR  
JUDICIAL NOTICE IN THIS CASE**

**A. Evidence Code sections 452 and 459 authorize this court to take  
judicial notice of the requested items.**

Evidence Code section 459 provides, in pertinent part, that a “reviewing court may take judicial notice of any matter specified in Section 452.” Among those items set forth in Evidence Code section 452 which may be judicially noticed are: “(c) official acts of . . . judicial departments of . . . any state of the United States and (d) “records of (1) any court of this state . . . .” (Evid. Code, sec. 452, subds. (c) & (d)(1).) Evidence Code section 453 converts permissive judicial notice into mandatory judicial notice whenever a party seeking judicial notice has advised each adverse party of the items sought to be judicially noticed and provided them with sufficient information concerning the items sought to be judicially noticed.

Attached to this request are the following documents: (1) a Welfare and Institutions Code section 387 petition filed by the Department of Health and Human Services on August 2, 2004 in the dependency proceedings involving Charles D. Jr.; (2) the Department’s detention report filed in support of the Welfare and Institutions Code section 387 petition and; (3) a minute order from an August 12, 2004 detention hearing

held regarding the section 387 petition. In addition, appellant requests that judicial notice be taken of a September 7, 2004 minute order of the jurisdictional proceedings held regarding the section 387 petition. A copy of that minute order is not attached. The reasons for this are set forth in the attached declaration of ATTORNEY.

The documents listed above are “records” of a court of the state of California, as defined by Evidence Code section 452, subdivision (d)(1). In addition, the minute orders appellant asks to be judicially noticed reflect “official acts” as defined by Evidence Code section 452, subdivision (c). A copy of this request has been served on each adverse party. Accordingly, appellant submits that the requested items may be judicially noticed by this court pursuant to section 459.

**B. The factual determinations requested by appellant in this request for judicial notice, supported by the attached documents, satisfy the exceptional circumstances exception to making findings of fact on appeal pursuant to California Code of Civil Procedure section 909**

The minute order and documents that appellant has asked this court to judicially notice are admissible pursuant to the opinion of the California Supreme Court in *In re Zeth S.* (2003) 31 Cal.4th 396, Code of Civil Procedure section 909 and California Rules of Court, rule 8.252(b). In *Zeth S.* the Supreme Court observed that

‘[a]lthough appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 and rule 23<sup>1</sup> of the California Rules of Court, the authority should be exercised sparingly.’ [Citation.] Absent exceptional

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<sup>1</sup>Now rule 8.252(b).

circumstances, no such findings should be made. [Citations.] (*Id.* at p. 405.)

Critical to the court's decision in this case to deny the request to make additional findings of fact was the fact that no party had contested the juvenile court's conclusion that the child was adoptable. (*Id.* at p.406.) It therefore left open the question of whether such evidence might be accepted where such a conclusion is being challenged and where there is evidence that the child is no longer adoptable. (*Id.* at p. 414, fn. 11.)

The exception circumstances exception applies in the instant case. This is a case where appellant has challenged on appeal the likelihood-of-adoption finding made by the juvenile court at the Welfare and Institutions Code section 366.26. (See AOB, filed concurrently with this request, pp. 19-30.) This is also a case in which the post-termination evidence, when viewed in conjunction with the juvenile court's evidentiary finding regarding Charles' specific adoptability by his aunt, shows that it is extremely unlikely that Charles will ever be adopted.

The social worker opined at the Welfare and Institutions Code section 366.26 hearing that Charles was not generally adoptable because of his age (14) and history of failed placements. (1 CT 873.) She believed he was specifically adoptable by his paternal aunt, Lisa D., because she had initiated the adoption process. (1 CT 873.) A psychologist who performed a bonding study of Charles and Lisa D. opined that adoption was in Charles best interest *only* if he was adopted by Lisa D. (1 CT 883.) The records appellant has asked this court to judicially notice show that Lisa D. has requested Charles' removal

from her home, and in turn show that Charles will *not* be adopted by Lisa D., the only person both the Department and a psychologist who evaluated Charles felt could adopt him.

The records appellant has asked this court to judicially notice therefore demonstrate that Charles will, almost without question, become a legal orphan. Appellant submits that the inevitability of his son becoming a legal orphan constitutes a “compelling new circumstances”<sup>2</sup> warranting consideration by this court of his son’s changed circumstances and certainly falls within the “exceptional circumstances” which the *Zeth S.* court recognized might warrant making additional findings of fact pursuant to Code of Civil Procedure section 909.

### CONCLUSION

For the foregoing reasons, appellant respectfully requests that this court take judicial notice of the four records referenced above for the purpose of determining whether it is currently likely that Charles D. Jr. will be adopted by a standard of clear and convincing evidence. Judicial notice is appropriate as it will aid in this court’s disposition of the issues raised by appellant on appeal.

DATED:

Respectfully submitted,

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ATTORNEY, Attorney for  
Appellant, Charles D., Sr.

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<sup>2</sup>*In re Elise K.* (1982) 33 Cal.3d 138, 150.

**DECLARATION OF ATTORNEY IN SUPPORT  
OF REQUEST FOR JUDICIAL NOTICE**

I, ATTORNEY, declare as follows:

1. I am an attorney licensed to practice law in the State of California and am the attorney of record for appellant, Charles D., Sr.
2. On May 25, 2004, the parental rights of appellant were terminated at a section 366.26 hearing held in the Sacramento County Juvenile Court. (1 CT 885.)
3. On June 18, 2004, appellant filed a timely notice of appeal from the order terminating his parental rights. (1 CT 889.)
4. The record on appeal was transmitted to the court of appeal by the superior court clerk on September 16, 2004.
5. Appellant respectfully requests, in the interests of justice, that this court take judicial notice of the following:
  - a. a Welfare and Institutions Code section 387 petition, filed August 2, 2004 (see Exhibit A);
  - b. the social worker's detention report read and considered by the court for an August 12, 2004 detention hearing regarding the section 387 petition (see Exhibit B);
  - c. the minute order of the August 12, 2004 detention hearing held regarding the section 387 petition (see Exhibit C) and;
  - d. the minute order of the September 7, 2004 jurisdiction hearing held regarding the section 387 petition (not attached, see paragraph number 6, below);

6. A copy of the September 7, 2004 minute order is not attached to this request for judicial notice and obtaining a copy is not practicable. When I reviewed the trial court's file on September 27, 2004, the juvenile court clerk verified that this minute order had not been prepared. On a subsequent trip to the superior court to request a copy of this minute order, the clerk with whom I spoke refused to give me a copy. The reasons given were that she had been told by a juvenile court referee that I was not entitled to a copy as I was appellate counsel for a parent whose rights had been terminated and the document I was requesting was generated after my client's parental rights had been terminated. While I could petition the juvenile court pursuant to section 827 for a copy of the September 7, 2004 minute order, time constraints on appeal make this impractical.

7. Moreover, I have spoken with both counsel for the Department and the minor. I therefore have it on information and belief that at the September 7, 2004 hearing, the section 387 petition was sustained, thereby removing Charles Jr. from his paternal aunt. Charles Jr. was, at that time, ordered placed in a group home.

8. It is my information and belief, after speaking with Charles Jr.'s trial counsel, that he remains out of Lisa D.'s home at her request. The Department investigated placing Charles J. with his paternal uncle, Edward D., but appears to have decided against this due to the uncle's criminal record. It is my information and belief that Charles Jr. is therefore no longer in a potential adoptive home, nor has such a home been found for him.

9. While the items I am asking to have judicially noticed concern postjudgment events, good cause exists for this motion in that the postjudgment evidence stands to completely undermine the legal underpinnings of the juvenile court's order terminating appellant's parental rights.

The May 25, 2004 juvenile court order at issue in this appeal terminated appellant's parental rights to his now 15-year-old son, Charles D. Jr. (1 CT 885, 889.) At the termination of parental rights hearing, the Department recommended that parental rights to Charles Jr. be terminated and that he be adopted by his paternal aunt, Lisa D. (1 CT 873, 875-876.) At the time the Department made this recommendation, Charles Jr. had been a dependent of the Sacramento County Juvenile Court for approximately six years. (1 CT105.) He had been under a permanent plan of long-term-foster care since July 27, 2000. (1 CT 361, 364.)

With Charles Jr.'s consent, he was placed in the home of Lisa D. on July 30, 2003. (1 CT 760, 764.) After approximately six months, Lisa D. asked that she be allowed to adopt Charles Jr. (1 CT 790.) Charles Jr. wanted his aunt to adopt him. (1 CT 790.) Pursuant to a section 388 petition filed by the Department, the juvenile court scheduled a section 366.26 to address modifying Charles Jr.'s permanent plan. (1 CT 810, 813, 815.)

In recommending adoption at the section 366.26 hearing, the social worker noted, as follows, in her report: "[b]ased on Charles' age and history, he is not generally adoptable. Charles is an older teen who has been in more than a dozen placements. Charles has

currently made the request of his aunt to be adopted. Charles, however is specifically adoptable as Lisa [D.] has initiated the Adoption process on behalf of her nephew.” (1 CT 873.)

The record reflects, as the social worker’s assessment report indicated, that Charles Jr. had been placed in numerous foster homes throughout his dependency. (1 CT 869.) The majority of his placement moves were precipitated by the foster parents’ request to move him because of behavioral problems they were no longer able and/or willing to tolerate. (1 CT 367, 385, 420, 491, 498, 535, 629, 630, 869.) In fact, the record reflects that Charles Jr. was placed with Lisa D. for a period of time early on the dependency proceedings and was removed from her home after several months at her request because she could not handle his argumentative and aggressive behavior toward her. (1 CT 218.) His foster placement changes were the result of behaviors described as confrontational, verbally assaultive, and belligerent. (1 CT 498, 557.) Additionally, Charles Jr. exhibited behavioral problems at school. (1 CT 450, 508, 516, 569, 710, 752-53.) He had been under the treatment of a psychiatrist for several years for attention deficit hyperactivity disorder, with varying degrees of success. (1 CT 524-530, 593-601, 648-655, 765-772, 883-845.)

As noted above, the records sought to be judicially noticed pertain to hearings held subsequent to the section 366.26 hearing. These records reflect that subsequent to the juvenile court entering an order terminating appellant’s parental rights and authorizing

Charles Jr.'s placement with Lisa D. for adoption, Charles Jr. was removed from Lisa D.'s home and placed in a group home. (See Exhibit A and B.) Further, it appears from the minute order of the August 12, 2004 proceedings that it is not anticipated that Charles Jr. will be returned to his aunt. (See Exhibit C.)

The items asked to be judicially noticed are relevant to a critical issue on appeal, namely whether, given Charles Jr.'s age and history of behavioral problems, there is substantial evidence to support the juvenile court's finding that it is likely that Charles Jr. will be adopted. The postjudgment evidence attached to this request goes to the very heart of this issue, and in fact suggests that the juvenile court's order terminating parental rights has been undermined, especially given that the juvenile court found Charles Jr. to be specifically adoptable by Lisa D., with whom is no longer living. Charles Sr. submits that it is imperative that this court take judicial notice of the requested records as this post-judgment evidence will permit it to avoid the unwanted outcome of Charles Jr. becoming a legal orphan.

If called as a witness I could and would competently testify to all of the foregoing of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 29, 2004 at \_\_\_\_\_, California.

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ATTORNEY

## II

### **COMPLIANCE WITH THE PROVISIONS OF EVIDENCE CODE SECTION 453 MAKES JUDICIAL NOTICE OF A DOCUMENT SPECIFIED IN EVIDENCE CODE SECTION 452 MANDATORY**

Evidence Code section 453 makes it mandatory for a court to take judicial notice of any document described by section 452 if a party requests such notice and gives the adverse parties notice of the request such that they are able to respond to the request. Respondent minors submit that they have complied with the requirements of section 453 by serving the other parties to the appeal with a copy of this request, to which is attached a copy of the document sought to be judicially noticed.

### **CONCLUSION**

For the foregoing reasons, respondent minors respectfully request that this court take judicial notice of the attached reporter's transcript reflecting new disposition orders made by the Sacramento County juvenile court on February 4, 1998. Judicial notice of this document is appropriate as it will aid in the disposition of certain issues raised by appellant in the instant appeal.

DATED:

Respectfully submitted,

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[ATTORNEY], Attorney  
for Appellant, Charles D., Sr.