

MOOTNESS AND WAIVER: IMPEDIMENTS TO APPELLATE REVIEW IN DEPENDENCY CASES

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In evaluating issues in dependency cases for appellate review, an essential consideration is whether the issue is still ripe for court consideration and is not moot. An additional consideration is whether the issue has been preserved by an objection in the trial court or by earlier appeal and has not been waived. This outline is broadly divided into mootness and waiver, and includes suggestions on how to present a defaulted claim. The mootness section identifies typical situations where the question of mootness may be raised and the legal basis for avoiding mootness challenges. The waiver section identifies claims which can be raised for the first time on appeal, circumstances which may constitute a waiver, and suggestions for arguing defaulted claims.

I. MOOTNESS¹

Mootness Defined. Due to the constantly changing situations of children and their families in the juvenile court, the question is often raised whether an appeal has been

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rendered moot by the subsequent modification of the juvenile court order. Mootness is defined as follows:

“The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot effect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.”
(*Consol. Etc. Corp. v. United A. Etc. Workers* (1946) 27 Cal.2d 859, 863 [Citations omitted].)

Typical Situations. In dependency cases, questions of mootness may be raised by the County Counsel on a motion to dismiss or by the reviewing court on a request for supplemental briefing in the following situations:

- Where the custody of the children has been returned to the parents.
- Where a detention order has been superseded by jurisdiction and disposition.
- Where an appeal is followed by a parental rights termination that is not appealed
- Where the juvenile court has subsequently terminated jurisdiction.
- Where the child has since turned 18 years of age.

In the above situations, it is important for the parent’s or child’s attorney to determine whether there is in fact a continuing controversy such that it would be inappropriate to dismiss the appeal. In those cases, the dismissal should be opposed.

And, as will be discussed, there are a few preventive measures that counsel may take to

reduce the probability of dismissal of an otherwise valid appeal. Both trial and appellate counsel, in the representation of the client, should consider taking those preventive actions.

Also note that in “**serial appeals**”, where the parent has appealed several orders, some districts take the position that so long as an appeal is pending and appellant wishes to have the matter remanded to the juvenile court, the juvenile court must have ongoing jurisdiction -- either because the case is still being heard in juvenile court or because a parent has filed a notice of appeal from the order terminating jurisdiction. Thus, even if a parent does not otherwise object to the termination of jurisdiction, if the parent wishes to have the court of appeal rule on issues arising from orders previously made (including but not limited to the jurisdictional finding), then the parent must file a notice of appeal from the order terminating jurisdiction so as to preserve the right of the court of appeal to make a remand order. These courts believe that they are fully justified in finding a challenge to the finding of jurisdiction, for example, moot if there has been no notice of appeal filed from order terminating jurisdiction. Presumably, too, the parent's appellate counsel must somehow keep that subsequent appeal open (by not filing a *Sade C.* brief) even if there are no issues other than the issues in the earlier appeal.

Legal Basis for Avoiding Mootness Challenges.

Continuing Controversies The strongest basis for challenging mootness is to establish that issues remain needing resolution by the court of appeal which will have

an adverse impact on the parties. For example, an appeal challenging the sufficiency of evidence supporting juvenile court jurisdiction is not made moot by the return of the children to the parents' custody. That is so because the juvenile jurisdiction is still pending, with all of its limitations on parental rights.

However, even if the juvenile court terminates jurisdiction or makes orders benefitting the parent, there may continue to be a controversy between the parties in pending or future cases. An example would be where future rights of the parties may be affected, such as a mother's right to visitation. (*In re Dylan T.* (1998) 65 Cal.App.4th 765: [reversing order precluding incarcerated jail visitation because of child's young age in spite of the fact mother was out of custody and visiting child]; *In re Michael D.* (1996) 51 Cal.App. 4th 1074, 1081, fn.2.: [denying motion to dismiss appeal as moot where while the matter was pending on appeal the child was returned to his mother]; *In re Joel H.* (1993) 19 Cal.App.4th 1185: [termination of jurisdiction and return to the mother did not render it impossible to grant former caretaker any effectual relief; child may once again become a dependent and former caretaker could effectively offer her services should they be needed in the future].)

Another example where the parent may be adversely affected in the future would be where the county relied on the fact that jurisdiction had been sustained in the present case as proof of prior neglect or abuse. Indeed, two subdivisions of section 300 of the Welfare and Institutions Code authorizes assumption of jurisdiction over a child based on

prior allegations concerning a sibling.²

Also it should be argued that the parties' issues should be addressed so that they may "clear their names." (*In re Dana J.* (1972) 26 Cal.App.3d 768, 771 [a delinquency case where the court said the appeal is not moot where "the matter of a besmirched name remains"]; note, however, the First District case of *In re Michelle M.* (1992) 8 Cal.App. 4th 326 found the reasoning of *Dana J* inapplicable because it was a delinquency case, and not a termination of parental rights case.)

Furthermore, the fact that jurisdiction was sustained might be used against the parents when they apply for further licensing, such as a foster home license. A case establishing this point is *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 542, where the Supreme Court addressed the issues on appeal even though the applicant had withdrawn its license application, because the issues would hinder its future applications.

And it should be noted that a termination of jurisdiction is not necessarily the same thing as a dismissal of the petition. In fact, when a petition is sustained and custody is awarded, followed by a dismissal of jurisdiction in favor of the family court, the

²Subdivision (a) expressly states a court may find there is a substantial risk of serious future injury to a child based on the history of repeated inflictions of injuries on the child's siblings. Similarly, subdivision (j) authorizes assumption of jurisdiction where the child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions.

jurisdictional findings are final and may not be challenged in the family court. In this situation, the appeal should not be dismissed. (*In re Joshua C.* (1994) 24 Cal.App.4th 1544.)

Other court errors may have continuing effects despite subsequent modification. Thus some attorneys have successfully challenged dispositions removing children from the home even after the children have been returned home. Many other appeals are dismissed in this situation. The decision whether or not the appeal should be dismissed depends on the facts of the case.³ (Cf., *In re Kristin B.* (1986) 187 Cal.App.3d 596, 603-606.)

The recent case of *In re Jessica K.* (2000) 79 Cal.App.4th 1313 presents a typical example of when an appellate court dismisses an appeal as moot. Here, the mother appealed the juvenile court order denying her section 388 petition to return the children to her custody. The juvenile court had subsequently terminated her parental rights as to the children, and the mother did not appeal that order. As the order terminating rights was final and nonmodifiable, the appellate court could not grant relief between the parties, requiring a dismissal of the appeal.

³ Quite often a deputy county counsel will contact the parent's appellate counsel to tell the attorney that the children are going to be returned to the care of the parents, and requesting the attorney to agree to a dismissal of the appeal. Dismissal is not recommended until: 1) the children are in fact returned home; and 2) the appellate attorney is satisfied that there is not a continuing controversy for resolution by the reviewing court. The appellate projects are available for consultations concerning whether an appeal should be dismissed.

Similarly, although most appeals are dismissed upon the child becoming an adult, again there may be continuing controversy as to the underlying facts of jurisdiction, or the child may suffer continuing disabilities beyond age 18, as a result of the petition sustained in the juvenile court. Again, the situation should be examined on a case-by-case basis.

Continuing Public Concern When all other theories of a “continuing controversy” have failed, the argument should be pursued that the issue is one of continuing public concern, i.e., an issue of substantial public interest beyond that in the present litigation which is capable of repetition, yet evades review. (*In re Natasha A.* (1996) 42 Cal.App.4th 28, 38; *In re William M.* (1970) 3 Cal.3d 16, 23, fn.14 [“We should not avoid the resolution of important and well-litigated controversies arising from situations which are ‘capable of repetition, yet evading review.’ [Citations.]”]) Under this theory, an appeal of a detention hearing was permitted in *In re Raymond G.* (1991) 230 Cal.App.3d 964, 967, even though detention orders are generally reviewable only by writ, and the case had subsequently proceeded to jurisdictional and disposition. The court noted that the appeal would be addressed on the merits because the issue, the standard applicable to emergency removal of child, was one of those “capable of repetition yet evading review.” Likewise, in *In re Kieshia E.* (1993) 6 Cal.4th 68, 75, fn.5, the California Supreme Court held that the question whether a child abuser may intervene as the victim's de facto parent in proceedings which arose from the abuse is not moot even when the potential de facto parent dies. Additionally, in *In re Marquis D.* (1995) 38

Cal.App.4th 1813, 1823, the court of appeal considered the county's erroneous practice of bypassing placement with non-custodial parents. And again, in *In Renee S. v. Superior Court* (1999) 76 Cal.App.4th 187, the court found it appropriate to resolve the issue of failure of the juvenile court as a matter of policy to hold timely hearings, notwithstanding that the dependency proceedings had already been concluded and the children had been returned to parental custody. The court reasoned such a policy would likely cause delays in future proceedings and was contrary to statutory requirements. (See also, *In re Jeanette H.* (1990) 225 Cal.App.3d 25 [reaching merits of appeal involving significant issues regarding the juvenile court's discovery policy]; *In re John W.* (1996) 41 Cal.App.4th 961 [reaching merits of appeal involving significant issues regarding the use of the juvenile dependency system to subsidize private child custody disputes]; *Roe v. Wade* (1973) 410 U.S. 113, 125 [35 L.Ed.2d 147, 93 S.Ct. 705; *In re William M.*, *supra*, at pp. 23-24, and cases therein cited.)

Although the appellate court addresses mootness on a case-by-case basis, the detention hearing is normally mooted after jurisdiction and disposition is had. Proceeding by appeal on a detention issue may not be productive unless it can be shown that the detention order being challenged is part of a standing rule in the juvenile court. Even if it is a matter of continuing public concern, it may be better addressed by writ.

Preventive Measures.

Contact the Trial Attorney A parent's valid appeal may be mooted by subsequent legal inactivity of that parent. One example of this occurs when the parent has sought an order at one hearing but fails to take action to preserve the controversy at a subsequent hearing. This may moot the appeal from the previous hearing if it appears that the party has abandoned his or her request. (*In re Michelle M.*, *supra*, at pp. 329-330 [jurisdiction subsequently terminated and parent did not appeal].) An even more aggravated example occurs where, after an appeal is filed, the juvenile court matter subsequently proceeds to parental rights termination, and the parent does not appeal that order. This moots the pending appeal. (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1316-1317.) A timely appeal from the subsequent order may have saved the previous appeal. (*Id.*, at p. 1317; *In re Kristin B.*, *supra*, 187 Cal.App.3d at pp. 603-605.)

It is incumbent upon the appellate attorney and the trial attorney to ensure that subsequent inactivity is a matter of the parent's knowing choice rather than ignorance or inadvertence. The appellate attorney should call the attorney with a reminder to make necessary challenges at the upcoming hearing, and if appropriate, file a subsequent appeal. It is not necessary to make futile challenges to preserve issues that are no longer before the court. (*In re Christie D.* (1988) 206 Cal.App.3d 469, 475-476 [holding that a party does not have to contest disposition to preserve previously raised jurisdictional issues].) If, on the other hand, if the issue on appeal is denial of placement with one

relative, and the client seeks and obtains placement with another relative at the subsequent hearing, that activity may endanger the appeal. Again, the appellate attorney should advise the parent and the trial attorney of these considerations to prevent an inadvertent default.

Expedite the Appeal Also, the appellate attorney should consider the impact of the way the appellate case is handled upon the continuing effectiveness of the appeal.

The appellate attorney should ask the following questions:

- What will be the effect of seeking another extension of time?
- Should the record be corrected in the traditional way or can this be expedited?
- Can the appeal itself be expedited by having it deemed or joined with a writ that the appellate attorney has reminded the trial attorney to file?
- If not, can an application be made to the trial court to stay or continue the section 366.26 hearing, so that the previous appeal can be heard?
- Should an appeal from the denial of the petition to modify be consolidated with the section 366.26 hearing to avoid the possibility of the court deciding the parental rights termination appeal first?

II. WAIVER

Generally, a failure to object to an error or failure to appeal an earlier error waives the claim for purposes of appellate review in dependency cases. The theory being that any other rule would permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware. (*In re Riva M.* (1991) 235 Cal.App.3d 403.) Additionally, some submissions also constitute waiver of appeal. This section first describes the limited types of claims which are not waived because of a failure to object or to appeal. It is followed by a description of what constitutes a waiver and suggested arguments when faced with such waived claims.

Examples of claims which can be raised for the first time on appeal:

- **Sufficiency of the Evidence:** Sufficiency of the evidence issues are never waived as long as there was not a no contest plea, an admission, or submission on the recommendation. (*In re Tommy E.* (1992) 7 Cal.App.4th 1234; *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798; also see below.)
- **Sufficiency of the Petition to State a Cause of Action:** a challenge to the facial insufficiency of petition, arguing that it fails to state a cause of action, can be raised for the first time on appeal because it is "akin" to a demurrer. (*In re Alysha S.* (1996) 51 Cal.App.4th 393; but see *In re Shelley J.* (1998) 68 Cal.App.4th 322.).
- **Denial of constitutionally adequate notice of allegations:** (*In re Troy D.* (1989)

215 Cal.App.3d 889, 896.)

- **Pure Question of Law:** a party may raise for the first time on appeal a pure question of law presented by undisputed facts, including a constitutional question.

(Hale v. Morgan (1978) 22 Cal.3d 388, 394; In re Jasmine C. (1999) 70

Cal.App.4th 71, 78, fn.3; In re Tania S. (1992) 5 Cal.App.4th 728, 735)

- **The Waiver Rule not enforced if Due Process forbids it:** *Meranda P. (In re Meranda P. (1997) 56 Cal.App.4th 1143.)* did not create an **absolute** bar to review of ineffective assistance, right-to-counsel, or other claims tardily presented on a

.26 hearing appeal. There must be some **defect that fundamentally undermined**

the statutory scheme so that the parent would have been kept from availing

himself or herself of the protections afforded by the scheme as a whole.

Furthermore, to fall outside the waiver rule, **defects must go beyond mere errors**

that might have been held reversible had they been properly and timely reviewed.

To allow an exception for mere "reversible error" of that sort would abrogate the

review scheme and turn the question of waiver into a review on the merits. (*In re*

Janee J. (1999) 74 Cal.App.4th 198, 208-209.)

- **Error so elemental that waiver rule relaxed:**
 - Failure to give required **notice of rule 39.1B rights** is an elemental which requires that waiver rule be relaxed. (*In re Cathina W. (1998) 68*

Cal.App.4th 716, 719-724.)

- Failure to **order reunification services**. (*In re John B.* (1984) 159 Cal.App.3d 268, 275; see also *In re Jeremy C.* (1980) 109 Cal.App.3d 384, 392.)
- Failure to raise issue of **independent counsel for minors** so long as the juvenile court knew, or reasonably should have known, of the possibility of a conflict of interest. (*In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 563-564.)
- Failure to object to the **exclusion of trial counsel** from in chambers hearing at which minor testifies does not operate as a waiver of the right to counsel or the right to confront witnesses. (*In re Laura H.* (1992) 8 Cal.App.4th 1689, but see *In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1200.)

Examples of Circumstances Which Constitute a Waiver:

- **Petition: plea of no contest:** Plea of no contest to petition allegations waives right to sufficiency of the evidence challenge on appeal. (*In re Troy Z.* (1992) 3 Cal.4th 1170.)
- **Petition: Admission:** Admission that the allegations of a dependency petition are true effectively waives objections to the technical sufficiency of the pleading. (*In re Rodger H.* (1991) 228 Cal.App.3d 1174, 1181.)

- **Submission on recommendation of social worker's report:** Submission of the social worker's recommendation waives right to challenge court order on appeal. (*In re Richard K.* (1994) 25 Cal.App.4th 580; *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798.)
- **Note: submission on report only is not a waiver of appeal:** in submitting the matter, parent was only agreeing to permit the juvenile court to decide the truth of the petition on the basis of the social worker's report, not agreeing with the social worker's recommendation; thus, appeal on sufficiency not waived. (*In re Tommy E.* (1992) 7 Cal.App.4th 1234; *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798.)
- **Also note that agreement with dispositional order does not waive right to challenge jurisdictional findings on appeal:** (*In re Jennifer V.* (1988) 197 Cal.App.3d 1206, 1209-1210.)
- **Stipulations and/or failure to attack at later hearings:** Stipulation at six month review that conditions still exist which would justify the initial assumption of jurisdiction under section 300 is a concession which waives challenging jurisdictional order on appeal. (*In re Eric A.* (1999) 73 Cal.App.4th 1390.)
Stipulation to the service plan waives appellate challenge to the plan itself; failure to challenge adequacy of the services at review hearing precludes appellate challenge. (*Miguel V. v. Superior Court* (1999) 73 Cal.App.4th 9, 13.)

- **Failure to appeal:** Subsequent challenge to adequacy of reunification services barred due to failure to appeal dispositional order. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 46 - 47); subsequent challenge to adequacy of reunification services barred by failure to challenge them earlier. (*L.A. Department of Children and Family Services v. Superior Court* (1997) 60 Cal.App.4th 1088, 1092-1093); 'waiver rule' is such a substantial bar to appeal that the appellate court can decline to carve out an exception to waiver rule even though the issues raised involve the important constitutional and statutory rights to counsel and to the effective assistance of counsel. (*In re Meranda P.* , *supra*, at p. 1150.)
- **Failure to object to:**

 - **Assessments:** to the lack of a **preliminary assessment of the prospective guardian**, a parent waives her right to claim failure to obtain that assessment on appeal. (*In re Dakota S.* (2000) 84 Cal.App.4th 494, 502); to **statutorily mandated information in adoption assessment**, waives appellate challenge. (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 885-887.)
 - **Notice:** Issue of asserted lack of notice that social services agency would **seek to preclude reunification services** is waived for appeal by parent's failure to object in the trial court. (*Marlene M. v. Superior Court* (2000) 80 Cal.App.4th 1139); Failure to assert **improper notice of section 366.26 hearing** in juvenile court operates as a waiver of that assertion on appeal.

(*In re Lucas B.* (2000) 79 Cal.App.4th 1145, 1152.)

- **Evidence:** failure to object to improper or inadmissible evidence waives challenge on appeal. (*In re Clara B.* (1993) 20 Cal.App.4th 988, 1000.)

What To Do When the Issue Was Not Preserved: If the error alleged cannot be placed into one of the above mentioned categories of absolute right to appeal when not preserved below, conceivably some of the suggestions below may make the issue viable. Included in this discussion are criminal cases which also provide arguments for review of defaulted claims since California Rules of Court, rule 39 provides that rules governing criminal cases and appeals apply to juvenile proceedings unless otherwise specified. (*In re Shelley J.* (1998) 68 Cal.App.4th 322.)

- **Argue that reaching issue now will forestall IAC claim:** the court may consider claim of error otherwise waived by failing to raise it below in order to forestall any claim of ineffective assistance of counsel. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.)
- **Argue that issue is pure question of law:** can some part of the issue be characterized as a constitutional question. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 78, fn.3; *In re Tania S.* (1992) 5 Cal.App.4th 728, 735)
- **Argue that court has discretion to reach merits:** “An appellate court is

generally not prohibited from reaching a question that has not been preserved for review by a party. Indeed, it has the authority to do so. . . Whether or not it should do so is entrusted to its discretion.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6, citations omitted.)

- **Argue that the question of whether there was a waiver is close and difficult:** “Because the question of whether defendants have preserved their right to raise this issue on appeal is close and difficult, we assume that defendants have preserved their right, and proceed to the merits.” (*People v. Champion* (1995) 9 Cal.4th 879, 908 n.6, citations omitted.)
- **Argue that judicial economy favors reaching the merits:** possible argument in a serial appeal situation. (See also *In re Kacy S.* (1998) 68 Cal.App.4th 704, 713.)
- **Argue ineffective assistance of counsel:** Argue that trial counsel’s failure to preserve the error constituted incompetent representation and prejudiced your client in violation of the Sixth Amendment right to effective representation. The claim, however, will be reviewed under the more onerous IAC standard, which can even be more difficult in dependency cases than in criminal ones. (*In re Janee J.* (1999) 74 Cal.App.4th 198, 208-209.)
- **Argue because the state of the law was unsettled, court of appeal may not presume from a silent record that the trial court applied the law correctly:** this argument may be possible in a case where there is a split of authority, such a

failure of the petition to state a cause of action, as noted above.

- **Argue that there was no meaningful opportunity to object:** Defendant will not be deemed to have waived sentencing error where defendant did not have a meaningful opportunity to object. (*People v. Bautista* (1998) 63 Cal.App.4th 865, 868-871.)
- **Argue that where issue could not have been decided by lower court because lower court was bound by authority appellant asks appellate court to overrule, the claim is properly raised in the appellate court in the first instance:** “Defendant insists the plaintiff waived this argument by failing to raise it in the Court of Appeal. (Cal. Rules of Court, rule 29(b)(1) [‘As a matter of policy, ... the Supreme Court normally will not consider: [¶] ... any issue that could have been but was not raised in ... the Court of Appeal ...’ (Italics added.)].) The contention is specious. The Court of Appeal must follow, and has no authority to overrule, the decisions of this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because the issue now presented could not have been decided below, it is properly before us in the first instance.” (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1.)

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