

NOTICE OF APPEAL AND AUTHORIZATION TO APPEAL IN DEPENDENCY CASES

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I. NOTICE OF APPEAL

- **General information about appeals in dependency cases:**

Welfare and Institutions Code section 395 governs appeals in dependency cases. See also Code of Civil Procedure section 917.7 and California Rules of Court, rules 39, 39.1. See, specifically, rule 39.1A, the experimental statewide "fast-track" rules applicable to appeals terminating parental rights under section 366.26 and Family Code sections 7802, 7807, 7808, 7820-7829, 7890, 7892 [formerly, Civ. Code, § 232].

As a general rule, an appeal stays further proceedings in the trial court regarding matters embraced in or affected by the judgment or order appealed from. This and other basic appellate principles are codified in Code of Civil Procedure sections 901 through 923 apply in juvenile dependency proceedings, at least to the extent they are not inconsistent. (*In re Natasha A.* (1996) 42 Cal.App.4th 28, 39.)

However, one exception to the general rule is contained in Code of Civil Procedure section 917.7, which provides, in pertinent part: "The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil

action, in an action filed under the Juvenile Court Law, or in a special proceeding"

The dispositional order adjudging the minor to be a dependent child of the court necessarily changes and affects legal custody and may change and affect visitation as well. All subsequent review hearings are proceedings "as to" those provisions of the dispositional order, and, hence, are not stayed by the taking of an appeal. (*Ibid.*)

Generally, a trial court loses jurisdiction to vacate its own judgment once a party notices an appeal. It also loses jurisdiction to take most other actions related to its judgment. It may, however, enter orders which only determine ancillary or collateral matters. A matter is not considered ancillary or collateral if its resolution impacts the effectiveness of the appeal. (See *People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434, fn. 3.) The juvenile court's order vacating its judgment obviously impacts the effectiveness of an appeal then underway on that judgment because it eliminates the subject matter of the appeal.

- **Filing of a notice of appeal:** A party in a dependency case has 60 days from the order to be challenged in which to file a notice of appeal. (Calif. Rules of Court, rule 39(b).) A notice of appeal is filed when it is delivered to the clerk of the juvenile court and received by the clerk to be left on file. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1376, fn. 3.) A notice of appeal is limited in scope: a notice of appeal which refers only to an order entered on one date by one judge does not permit the briefing of a completely separate issue addressed by a different judge in

a subsequent order. (*In re Brandon M.* (1997) 54 Cal.App.4th 1387, 1400-1401.)

- **Right to speedy appeal:** It is error for the trial court to order appellant's parental rights terminated but indefinitely stay that order pending completion of adoptive home study, leaving appellant in limbo as to the status of the termination order and her ability to immediately appeal that order. Such action by the court is inconsistent with the fundamental policy of dependency law which seeks to resolve cases expeditiously. (See, e.g., § 395 [dependency appeal has precedence over all other cases].) (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1248.)
- **Late notices of appeal:** However, in a dependency case, unlike other civil cases, the operative date of the order for purposes of timing the filing of the notice of appeal runs from the date of the **oral pronouncement, not the date of the written order.** (*In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337.) There is a major difference between the appellate courts' treatment of notices of appeal in dependency cases and in criminal cases under *In re Benoit* (1973) 10 Cal.3d 72. There is no doctrine of "constructive filing" in dependency. (*In re Ricky H.* (1992) 10 Cal.App.4th 552.) Due to the purported need for finality, the courts are unlikely to excuse a late notice of appeal, especially on an appeal from a parental rights termination. (*In re Isaac J.* (1992) 4 Cal.4th 525, 531, and cases cited therein.) However, it may still be possible for the appellate courts to set aside exceptional defaults. Look for the following situations:

- Other parent's appeal timely:** When one parent in a parental rights termination case timely files, but the other is late, there is a strong interest in resolving the cases together. California Rules of Court, rule 1463(a) provides, in part: "The court may not terminate the rights of only one parent under section 366.26 unless that parent is the only surviving parent, or the rights of the other parent have been terminated . . . or the other parent has relinquished custody of the child to the welfare department." If the court of appeal reverses one parent's parental rights but does not even allow the other parent to appeal, a statutory violation could occur. (But see, *In re Caitlin B.* (2000) 78 Cal.App.4th 1190, 1195.) In addition, the interest in a timely and final result was not so strong when there was another appeal pending.
- Written order states that the party has 60 days to file a notice of appeal from its date:** It is not uncommon to see a written order with boilerplate language wrongly advising the parents they have 60 days from its date to file a notice of appeal. In this case, the parent should argue that the department should be estopped from arguing untimeliness.
- Written order required:** Some statutes require that the order be issued in written form. For instances, when jurisdiction is terminated and exit orders to family law court are issued under section 362.4, the filing of a formal

written order in the family court is required. (See also (*In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337; accord, *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254.)

- **Where child removed from caretaker without court order:** Where child is removed from caretaker custody pursuant to department's exercise of its placement discretion, not pursuant to court order, no order triggers the 60-day notice period with which to calculate whether the appeal is timely. Dismissal of an appeal for untimeliness would be improper. (*In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1488.)

II. AUTHORIZATION TO APPEAL

Courts of appeal in dependency cases have been moving away from the once sacrosanct rule that an attorney's signature on a notice of appeal is all that is needed to show the intent of the party. As will be illustrated below, courts are now requiring a showing of authorization from the client before accepting a notice of appeal signed solely by the attorney. In addition, the notice of intent to file a writ under rule 39.1B(f) must be signed by the party or a showing of good cause for the failure to do so must be made. (*Lisa S. v. Superior Court* (1998) 62 Cal.App.4th 604, 606-607.)

- **General rule: appellant or his attorney may sign the notice of appeal in a dependency case:** Under California Rules of Court, rule 1, a notice of appeal must

be signed by the appellant or by his attorney. (*In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043.)

- **Attorney's authority to execute notice of appeal is presumed:** In the absence of a satisfactory showing that parent did not authorize counsel to sign notice of intent, notwithstanding his removal as counsel of record at the hearing, counsel's necessary authority to execute notice of appeal is presumed. (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 910.)
- **Client disappeared :** Because an attorney cannot appeal without the client's consent, a notice of appeal shown to have been signed by an unauthorized attorney is ineffectual in preserving the right of appeal. Where client has disappeared, client's authorization for trial counsel to appeal orders will not be imputed. (*In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043.)
- **Client absent from section 366.26 hearing:** A client's actual consent is required for an appeal from an order terminating parental rights pursuant to section 366.26. No such consent appears where client is absent from section 366.26 hearing without explanation and only counsel's signature appears on the notice of appeal; appeal dismissed. (*In re Sean S.* (1996) 46 Cal.App.4th 350, 352-353; note that the court, however, did briefly discuss the issues here on their merits: see fn.2.)