

## POST-JUDGMENT EVENTS AND EXTRAJUDICIAL INFORMATION

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Sometimes it is necessary to bring before the court information about events that postdate the judgment under appeal. Some districts, such as the First, ask counsel to keep the court apprized of post-judgment events that may render the appeal moot. Others, such as the Sixth, do not. Sometimes an adoption or other placement may have fallen through, and that fact is relevant to issues raised on appeal. For example, a child may be “adoptable” but only in the context of his or her placement with a particular family, or during a particular time-frame. (See e.g. *In re Elise K.* (1982) 33 Cal.3d 138.) In such cases, counsel may wish to bring such information before the court. In addition to petition for writ of habeas corpus, which is not discussed here, there are two other avenues advising the court about post-judgment events or other extrajudicial information: (a) judicial notice and (b) Code of Civil Procedure section 909 motion.

### JUDICIAL NOTICE

Although as a general rule an appellate court will ordinarily look only to the record made in the trial court, it has the same power to take judicial notice of a matter as a trial court. (Evid. Code, § 459, subd.(a),(c).)

**Compulsory Notice:** A court of appeal must take judicial notice of any matter properly noticed by the trial court and any matter that the trial court was required to take

notice under Evidence Code sections 451. (Evid. Code, § 459, subd.(a).) It must also take judicial notice of an optional matter if the trial court erroneously denied a properly-made request for judicial notice under Evidence Code sections 452 and 453. (Evid. Code, § 459, subd.(a) and Comment.)

**Optional Notice:** An appellate court may upon request take judicial notice of any matter specified in Evidence Code section 452 (e.g., the decisional, constitutional, or statutory law of any state, the records of any California court, federal court, or court of another state, facts and propositions that are of such common knowledge within the jurisdiction of the court that they cannot reasonably be the subject of dispute, and facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy). (Evid. Code, § 459, subd.(a).) Before taking judicial notice of an optional matter not noticed by the trial court, and of substantial consequence to the determination of the case, an appellate court must afford each party the opportunity present information relevant to the propriety of taking judicial notice and the tenor of the matter to be noticed. (Evid. Code, § 459, subd.(c).)

- ✓ In dependency appeals, as in criminal appeals, judicial notice may be used for legislative history materials when a statute's meaning is uncertain and in dispute. It may also be used for records in the court files of related cases. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86.)
- ✓ Although an appellate court may take judicial notice of the optional matters specified in Evidence Code section 452, it may decline to do so for other

jurisprudential reasons. Appellate courts are reluctant to consider matters not presented to and considered by the trial court in the first instance because of the perceived unfairness that would flow from permitting one side to press an issue or theory on appeal that was not raised below. (*People v. Cruz* (1996) 13 Cal.4th 764, 134; *People v. Meza* (1984) 162 Cal.App.3d 25, 33; *People v. Preslie* (1977) 70 Cal.App.3d 486, 493.)

- ✓ Portions of materials, even though judicially noticed, may also be subject to other evidentiary objections, like hearsay. (See, e.g., *In re David C.* (1984) 152 Cal.3d 1189, 1205; *People v. Rubio* (1977) 71 Cal.3d 757.) For these reasons, a motion pursuant Code of Civil Procedure section 909, or a petition for writ of habeas corpus, may provide a better alternative to judicial notice for presenting issues based on materials not presented to or considered by the trial court.
  
- ✓ In the First District, requests for judicial notice “shall not be made in the body of a brief or included as an attachment to a brief.” It must be made by separate motion. A motion seeking permissive notice “must include a showing of the relevance of the information to be judicially noticed.” (See **Local Rule 10(a)**.)

### **CODE OF CIVIL PROCEDURE SECTION 909**

“In all cases where a trial by jury is not a matter of right . . . reviewing court may make factual determinations contrary to or in addition to those made by the trial court. . . . The reviewing court may . . . take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal. . . . This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on all of the issues.” (C.C.P § 909. See also **Cal. Rules of**

**Court, rule 23**, “Findings and Additional Evidence on Appeal.”) *In re Elise K.*, *supra*, was an appeal from the termination of mother’s parental rights under former Welfare and Institutions section 232. During the pendency of appeal, Elise’s adoptive placement was terminated and she was returned to foster care. Both parties conceded Elise was not no longer adoptable due to her age, and therefore sought to bring “evidence of these postjudgment circumstances to the attention of the Court of Appeal” but that court refused to consider it. In a per curiam opinion, the Supreme Court accepted the parties’ stipulated reversal “in light of the subsequent material evidence concerning the adoptability of the subject minor.” (33 Cal.3d at p. 138.) In her concurring opinion, Chief Justice Bird elaborated on the court’s decision, and identified Code of Civil Procedure section 909, as well as the California Constitution, as the source of the court’s power and duty, “if compelling new circumstances arise which undermine the basis for a [termination of parental rights] order during a parent’s appeal from such an order,” to “take cognizance of and consider those changed circumstances.” (33 Cal.3d at p. 150.) See also *In re Jonathan M.* (1997) 53 Cal.App.4th 1234, 1236, fn.2 [4<sup>th</sup> Dist., Div.3 routinely accepts evidence per C.C.P. § 909 in dependency cases.]; *In re Marcus G.* (1999) 73 Cal.App.4th 1008, 1011, fn.2 [attachment to respondent’s brief properly stricken when not accompanied by motion to take evidence]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423, fn.3 [C.C.P. § 909 motion denied where evidence did not affect CA’s analysis].