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Attorney for Defendant and Appellant

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION [NUMBER]

In re [CHILD’S INITIALS],) COURT OF APPEAL
) No.: [CASE #]
A Person[s] Coming Under)
The Juvenile Court Law) SUPERIOR COURT
) No.: [CASE #]
[SPECIFIC COUNTY & AGENCY)
TITLE],)
) **APPELLANT’S MOTION**
Plaintiff and Respondent,) **TO AUGMENT THE**
_____) **RECORD ON APPEAL**
v.) **AND TO EXTEND TIME**
) **FOR FILING THE**
[PARENT’S INITIALS] (mother/father),) **OPENING BRIEF**
)
_____)
Objector and Appellant.

TO THE COURT OF APPEAL AND TO ALL PARTIES OF RECORD IN THE
ABOVE-CITED CASE:

**I.
REQUEST TO AUGMENT THE RECORD ON APPEAL**

Appellant hereby requests, pursuant to California Rules of Court, rules 8.340(a)
and (b) and 8.408(e), that the record on appeal be augmented to include the following
documents:

1. [DETAILED DESCRIPTION OF DOCUMENT] The reporter's transcript of the [DATE] November 6, 2003, [SPECIFIC HEARING] detention hearing, [COURT JUDGE] before the Honorable Cynthia Bashant, [DEPARTMENT #]in Department 5, [COURT REPORTER] with Caroline Hofeld (#7329), as reporter. [RECORD CITE] The proceedings are referenced in the clerk's transcript, pages 356-357. [HEARING TIME] The hearing commenced at approximately 8:30 a.m. and continued until an unknown time on that day.

2. The reporter's transcript of the June 1, 2004, six month status review hearing, before the Honorable Cynthia Bashant, in Department 5, with Caroline Hofeld (#7329), as reporter. The proceedings are referenced in the clerk's transcript, pages 374-376. They commenced at approximately 8:30 a.m. and continued until an unknown time on that day.

3. The reporter's transcript of the December 1, 2004, 12 month review hearing, before the Honorable Cynthia Bashant, in Department 5, with Caroline Hofeld (#7329), as reporter. The proceedings are referenced in the clerk's transcript, pages 379-380. They commenced at approximately 8:30 a.m. and continued until an unknown time on that day.

BACKGROUND

[REASON ADDITIONAL DOCUMENTS ARE NECESSARY.] The probable issue on appeal is the propriety of the Indian Child Welfare Act (ICWA) notices provided to the Blackfoot and Cherokee tribes and the Bureau of Indian Affairs (BIA).

At the detention hearing heard November 6, 2003, the San Diego Health and Human Services Agency (agency) reported that the ICWA may apply and further that notices had been sent on the previous day to the BIA and Cherokee tribes. (1 C.T. p. 8.)

[RECORD CITES REQUIRED THROUGHOUT.] The paternal grandmother and father were present in court. (2 C.T. p. 356.) The court deferred the ICWA issue. But at the jurisdictional hearing held December 1, 2003, the court found that the ICWA did not apply. (2 C.T. p. 359.)

Then on June 1, 2004, during the six-month status review hearing, at which the paternal grandmother was present, the court again addressed the ICWA and ordered the Agency to re-notice the tribes. (2 C.T. p. 375.)

At the 12-month status review hearing held December 1, 2004, the agency provided some notices, as well as the responses to the notices previously sent. (2 C.T. pp. 218-229.) The court directed that all notices sent to the Cherokee tribes be provided to the court. (2 C.T. p. 379.) That order was reiterated at the pre-trial status conference held December 27, 2004. (2 C.T. p. 381.)

On January 4, 2005, the court found proper notice was provided to the Blackfoot

tribe and the BIA, but not the Cherokee tribe. (2 C.T. p. 383.) Almost a month later, on January 26, 2005, the court found proper notice was provided to the Cherokee tribe. (2 C.T. p. 386.) On February 2, 2005, the court found that the ICWA did not apply because the agency reported no tribes had responded to the notice. (2 C.T. p. 388.)

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO AUGMENT THE RECORD ON APPEAL**

It is well-settled that” [o]n appeal there must be an adequate record to enable the court to pass upon the questions sought to be raised.” (*People v. Apalatequi* (1978) 82 Cal.App.3d 970, 973.) “Further, this court has repeatedly affirmed in recent years the importance of an adequate record as one of the basic tools of an effective appeal.” (*In re Steven B.* (1979) 25 Cal. 3d 1, 8; citing *March v. Municipal Court* (1972) 7 Cal.3d 422, 423; *People v. Barton* (1978) 21 Cal.3d 513, 518.)

The test for augmentation of the "normal record" in an indigent's appeal is that an appellant must establish "with some certainty how the [additional] materials he requests may be useful to him on appeal." (*People v. Gaston* (1978) 20 Cal.3d 476, 482; Cal. Rules of Court, rule 8.404.)

Any assertion that appellant has not demonstrated “arguable issues” and that, therefore, the augment motion should be denied is based upon the same reasoning as the Attorney General posited in *Gaston*. That reasoning was soundly criticized and rejected by the California Supreme Court. The court recognized that a “Catch-22” is created since “in order to know whether arguable issues exist outside the normal record, a

conscientious counsel would need to see a transcript of the proceedings; but in order to see a transcript of those proceedings, counsel must be able to allege that arguable issues exist.” (*People v. Gaston, supra*, 20 Cal.3d at p. 483, fn.7.) Therefore, the Supreme Court has applied the doctrine of liberal construction to the augment procedure and calls for “free permissive use of the augmentation procedure.” (*Ibid.*)

Here information was provided that appellant had Indian heritage and despite the fact that he and his mother were present in court on numerous occasions, inadequate information was provided in the notices. As a result, the tribes did not respond and the court found that the ICWA did not apply. (2 C.T. p. 388.) Thus it is imperative that the transcripts of those relevant hearings be made part of the record to see whether additional information was provided orally during the hearings which is not reflected in the current record. In fact, it is incumbent upon appellate counsel to obtain this material in order to provide appellant with effective assistance of counsel on appeal, as is his right.

In *In re L.B.* (2003) 110 Cal.App.4th 1420, the appellate court criticized the failure of appellate counsel to procure the reporter's transcript of a hearing at which relevant information about the minor's possible Indian heritage may have been presented. The court stated, "It is appellant's responsibility to provide a record that is adequate for appellate review of their claims; as they have failed to do so, we are unable to fully evaluate what measures the juvenile court may have taken in regard to the claimed

errors." (*In re L.B., supra*, 110 Cal.App.4th at p. 1424.) The court then affirmed the trial court's action. (*Id.* at p. 1427.)

II.
REQUEST FOR AN EXTENSION OF TIME TO FILE
APPELLANT'S OPENING BRIEF

Appellant's opening brief is currently due on [DATE]. Appellant respectfully requests an extension of time of 20 days from the filing of the augmented record in which to file the opening brief. I agree that any additional time granted may be deducted from the period provided under California Rules of Court, rules 8.412(d) and 8.416(f) and (g).

No detriment to the minor will result from an extension of time since he is currently placed in relative care with his adoptive family.

Respectfully submitted,

Date: _____

[ATTORNEY NAME]
Attorney for Appellant