WAIVER, FORFEITURE & MOOTNESS

IN DEPENDENCY CASES

(2025)

Waiver is the intentional relinquishment or abandonment of a known right; ***Forfeiture*** is the loss of a right to appeal an issue based on failure to timely assert issue at trial. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2, superseded on another ground as stated in *In re S.J.* (2008) 167 Cal.App. 953, 962.) The purpose of the rule "is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*Id*. at p. 1293.) ***Mootness*** is when circumstances change and, as a result, it is impossible for the reviewing court to grant effectual relief.

1.) WAIVER

With the exception of issues regarding subject matter jurisdiction which cannot be waived (*In re A.M.* (2014) 224 Cal.App.4th 593, 598), the primary way that appellate counsel can challenge a waived issue is to argue that due process precludes application of the waiver rule.

Generally, it is "[a] consequence of [Welfare & Institutions Code][1] section 395 that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." (*In re Meranda P*. (1997) 56 Cal.App.4th 1143, 1150.) This "'waiver rule'" holds "that an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order," even when the issues raised involve important constitutional and statutory rights. (*Id*. at p. 1151.)

This rule, however, is not absolute. The waiver rule will not be enforced if due process forbids it; i.e., if the error was entirely legal and fundamental. For example, where trial counsel conceded jurisdiction which did not exist, the waiver doctrine cannot be applied to foreclose mother from challenging trial counsel's effectiveness at adjudication on appeal from an order terminating her parental rights. (*In re S.D*. (2002) 99 Cal.App.4th 1068, 1079; see also *In re M.F.* (2008) 161 Cal.App.4th 673, quoting *In re Janne J.* (1999) 74 Cal.App.4th 198, 208 ["Relaxation of the waiver rule is appropriate when an error 'fundamentally undermines the statutory scheme so that the parent would have been

[1] Statutory references are to the Welfare and Institutions Code, unless otherwise noted.

kept from availing himself or herself of the protections afforded by the scheme as a whole.'"].)

ISSUES TO LOOK FOR:

1) How did the petition resolve? Submission on Recommendation vs. Submission on Reports.

   • "Submitting on the recommendation" is agreeing to the orders that coincide with that recommendation and waives the right to challenge the orders. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589.)

   • Submitting the matter on the social worker's reports in evidence, and not on the recommendations, does not forfeit the right to appeal the adverse order, unless a specific objection is required. (*In re T.V.* (2013) 217 Cal.App.4th 126, 136.)

2) Is the parent challenging the sufficiency of the allegation or sufficiency of the evidence?

   • The *In re David H.* court gave two reasons for concluding that the provision of Code of Civil Procedure section 430.80 which allows a challenge to the facial sufficiency of a petition to be raised for the first time on appeal does not apply to dependency proceedings. (*In re David H*. (2008) 165 Cal.App.4th 1626, 1639-1640.)

   • Mother waived argument that petition failed to state a cause of action by failing to contest the sufficiency of the petition below. (*In re S.O.* (2002) 103 Cal.App.4th 453, 460.)

   • Mother argued at trial that the court should not take jurisdiction under section 300, subdivision (a) but was okay with the court assuming jurisdiction under subdivision (b) (these allegations related solely to the father). The appellate court concluded that, by setting the case for trial, mother had not waived her ability to argue on appeal that the jurisdiction findings were not supported by sufficient evidence. Sufficiency of the evidence is not waived but is "necessarily and inherently raised" in every contested trial regarding factual issues. (*In re Isabella F.* (2014) 226

Cal.App.4th 128, 136-137.)

- Parents did not object to Indian expert's report, but argued on appeal the Indian Child Welfare Act (ICWA) detriment finding was not supported by proof beyond a reasonable doubt (that continued custody by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child). Appellate court noted failure to object may waive an objection to specific evidence, but a sufficiency of the evidence claim is not waived by failure to object. (*In re M.B.* (2010) 182 Cal.App.4th 1496, 1506.)

- The claim of insufficient evidence to support the judgment is not waived by the failure to object at trial. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623.)

3) Did the parent fail to challenge a prior ruling because they were not represented by counsel? Were they appointed counsel and was counsel ineffective?

4) Did the parent need a guardian ad litem or have one appointed in error? (*In re Joann E.* (2002) 104 Cal.App.4th 347, 353-354; *In re S.D.* (2002) 99 Cal.App.4th 1068.)

5) Can appellate counsel argue that trial counsel relied on the agency?

- Reliance on the agency does not constitute a waiver. Counsel's stipulation to due diligence was not a waiver of that issue as trial counsel was entitled to rely on SSA's representation that the agency could not locate the client. (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1117.)

6) Can appellate counsel argue the court lacked jurisdiction?

- The lack of fundamental juvenile court jurisdiction is not waived or forfeited. (*San Joaquin County Human Services Agency v. Marcus W.* (2010) 185 Cal.App.4th 182, 187-188 [statutory requirements for assuming dependency jurisdiction to order a blood transfusion were not met].)

- The issue of whether California had jurisdiction over dependency proceedings as to Louisiana-born child under Uniform Child Custody

Jurisdiction and Enforcement Act (UCCJEA) did not implicate trial court's fundamental jurisdiction over dependency matter, and, thus, mother and father forfeited UCCJEA issue by failing to raise it before trial court. (*In re J.W*. (2020) 53 Cal.App.5th 347, 355.) However, the court in *In re L.C.* says the *J.W.* decision did not settle the question. There may be other reasons why the forfeiture might not apply to a UCCJEA issue on appeal. (*In re L.C.* (2023) 90 Cal.App.5th 728, 737-740.)

7) Does it involve the ICWA?

   • Case law is clear that the issue of ICWA notice is not waived by the parent's failure to first raise it in the trial court. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707-708.)

2.) FORFEITURE

A reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been made but was not made in the trial court. The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. Dependency matters are not exempt from this rule.

Application of the forfeiture rule is not automatic; the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. This is particularly true in dependency cases where considerations such as permanency and stability are of paramount importance. (*In re S.B., supra,* 32 Cal.4th at pp. 1292-1293.)

ISSUES TO LOOK FOR:

1) Can appellate counsel argue this is an important and purely legal question? If so - the court has the discretion to consider the issue notwithstanding the parents' failure to object. (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 479; *In re Anthony Q.* (2016) 5 Cal.App.5th 336, 345.)

   • The sufficiency of the evidence for an amended petition is <u>not forfeited</u> if not raised below. *(In re Anthony G.* (2011) 194 Cal.App.4th 1060, 1064.)

2) Is it an important issue of state law?

- A juvenile court did not appoint a guardian ad litem for minor despite statute requiring it do so**.** This issue was not raised below but the court exercised discretion to review the issue because of the importance of the federal and state statutes relating to appointment of guardians ad litem in dependency proceedings. (*In re Charles T.* (2002) 102 Cal.App.4th 869, 873.)

3) Was an objection in the court futile?

- Was it prevented by stare decisis? At post-permanency review hearing father objected to court's requirement for an offer of proof as a condition for an evidentiary hearing; the hearing was continued to brief the issue; counsel withdrew objection after reading *Sheri T. v. Superior Court* (2008) 166 Cal.App.4th 334 (which held an offer of proof was required). Father pressed issue on appeal, arguing *Sheri T.* was bad law. Appellate court found the issue was not waived. To press the objection would have been futile because the trial court was required to follow *Sheri T.* precedent (stare decisis) which required an offer of proof. (COA still ruled against father). (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1177.)

- Was there an unanticipated change in the law? Counsel could not have anticipated change in the law that now required objection to admission of felony conviction (prior law held the convictions were admissible without limitation). (*People v. Turner* (1990) 50 Cal.3d 668, 703.)

- Was an objection prevented by the juvenile court orders? The alleged father's request for paternity testing, made after he just learned of the child at the section 366.26 hearing, was denied as irrelevant because reunification services would not be granted. Court of Appeal concluded father's argument regarding presumed father status was not waived, though it was not asserted below. A formal request would have been futile because every request he made (paternity testing, visits, reunification services) was denied by the court. (*In re Baby Boy V***.** (2006) 140 Cal.App.4th 1108, 1116.)

4) Does the appellate argument rely on new authority that could not have been anticipated?

- Juvenile court's review of social study before jurisdiction hearing could be challenged on appeal despite lack of objection. The interpretation of the statute prevalent at that time permitted the court to consider the report. Counsel could not be expected to anticipate the later appellate court decision that the court could not consider the report for jurisdiction. (*In re Gladys R.* (1970) 1 Cal.3d 855, 861.)

5) Was there no opportunity object?

- A guardian ad litem was appointed on motion by mother's counsel conducted in chambers outside mother's presence. The proceedings happened so quickly it was unlikely mother knew what had occurred until after the fact, so she could not be expected to object. (*In re Sara D.* (2001) 87 Cal.App.4th 661, 671.)

- The failure to object to an order for involuntary AIDS testing did not preclude review where it appears counsel was "utterly surprised by the court's ruling and had little opportunity to react," the requirement was not recommended or requested, issue arose "fleetingly" at the end of the disposition hearing, and none of the statutory requirements for imposing involuntary testing were present. (*In re Khonsavahn S.* (1998) 67 Cal.App.4th 532, 537.)

6) Were there unclear or inconsistent terms in the court's orders?

- The juvenile court removed a child from mother and placed child with father in another country while retaining dependency jurisdiction in California without ordering further measures to enforce its continuing jurisdiction**.** The court stated it could have concluded that mother forfeited the issue or invited error, but it was concerned the juvenile court would lack the ability to enforce any further orders that may be necessary or appropriate without the orders she argued were necessary**.** (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1242.)

- "Selection of "another permanent planned living arrangement" was ordered as a permanent plan without further explanation by court. Mother challenged the order on appeal but had not raised it below. The court exercised its discretion to clarify application of "another permanent planned living arrangement" as it relates to permanent plans. (*In re Stuart*

S. (2002) 104 Cal.App.4th 203, 206.)

• A juvenile court terminated jurisdiction after finding the section 366.26, subdivision (c)(1)(A) exception applied and ordered that the minor should maintain her bond with mother and ordered visits twice a year**.** On appeal, mother argued court should have maintained jurisdiction to oversee visitation but did not raise this issue below. The court exercised its discretion to hear the issue because the orders were *fatally inconsistent* with each other. (*In re K.D.* (2004) 124 Cal.App.4th 1013, 1018-1019.)

7) Are the Courts of Appeal divided, and the resolution of the issue will add certainty and stability to the child's life? (*In re S.B., supra,* 32 Cal.4th at pp. 1287, 1292-1293.)

8) Was there a due process error such as terminating parental rights without first making a finding of detriment or parental unfitness first? (*In re D.H.* (2017) 14 Cal.App.5th 719, 728; *In re T.G.* (2013) 215 Cal.App.4th 1, 13-14.)

9) Was it an important legal issue?

• **Whether court can delegate to a guardian the power to determine visitation**. (*In re S. B*., *supra*, 32 Cal.4th at p. 1294.) The issue is not waived because it is an important legal issue. The court noted the split of authority on the issue, the ambiguity in the statute, the special considerations in dependency cases (permanency and stability for the minor), and that resolving the issue would lend certainty to the child's visitation. The court held the power to determine visitation could be delegated to the legal guardian.

• **Whether visitation order improperly delegated to guardian the power to determine visits.** The issue is not waived because it raised a pure question of law. The facts were not disputed, and the legislature made it clear the court, not the guardian, makes the visitation order. (*In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1313-1314.)

• **Whether the phrase "exceptional circumstances" in section 366.26, subdivision (c)(1)(D) *(relative does not want to adopt due to exceptional circumstances)* is unconstitutionally vague**. Not forfeited because it raised a pure question of law. Court noted "[b]ecause the principle of forfeiture does

not apply to a question of law; it is inappropriate for the purpose of defeating an inquiry into the constitutionality of a statute." (*In re P.C.* (2006) 137 Cal.App.4th 279, 287.)

- **Whether termination of services that occurred before six months passed was improper**. Father claimed a section 388 petition had to be filed before termination could occur prior to the passage of six months, and one had not been filed. The court found that the issue was not forfeited because it involved an important legal issue and that juvenile court could terminate services early if it was in the child's best interest. (*In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1239, result superseded by section 388, subd. (c)(1), which requires a section 388 petition to be filed for this purpose.)

- **Whether services could be denied under section 361.5, subdivision (b)(10).** Agency argued mother's submission forfeited (waived) issue because her attorney signed the "stipulation" form commonly used in Orange County. The court observed the issue was purely a legal one that could be resolved without regard to whether it was waived. The court criticized use of this "short cut" form stipulation by bench officers and criticized attorneys for using the form which is ambiguous and fails to adequately state a party's position. (*Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1188.)

- **Whether the court erred when it required a parent to prove that placement was in the child's best interest rather than requiring the Agency to prove that placement with the parent would be detrimental to the child.** The court exercised its discretion and reviewed the claimed error de novo despite the lack of objection at trial *in part* because the facts were undisputed, making the issue a question of law. (*In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1501.)

Appellate counsel must make sure that their arguments have legal support. If an argument in an appellate brief is supported by only an opinion or argument of appellant's counsel without "citation to any recognized legal authority," that argument may be deemed waived for failure to present supporting substantive legal analysis. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *In re A.C.* (2017) 13 Cal.App.5th 661, 672-673.) However, appellate counsel should consider if they can argue the opposition forfeited an argument by failing to provide legal support.

3.) MOOTNESS

The reviewing court can only resolve continuing controversies. An appeal may become moot when circumstances change and, as a result, it is impossible for the reviewing court to grant effectual relief. In dependency appeals, there are numerous situations where mootness may arise. For instance, an issue may become moot because: the child may be returned to the parent; the juvenile court made superseding orders that were not appealed; parental rights were terminated and there was no appeal; jurisdiction was terminated, and there was no appeal; or the child reaches 18 years of age.

The reviewing court decides whether a case is moot on a case-by-case basis. (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1489; *In re Dani R.* (2001) 89 Cal.App.4th 402, 404.)

ISSUES TO LOOK FOR:

1) Is there a continuing controversy? Can appellate counsel argue that the findings will continue to bind the parties or could have consequences in collateral proceedings? (See *In re Rashad D.* (2021) 63 Cal.App.5th 156, 167; *In re C.C.* (2009) 172 Cal.App.4th 1481, 1489.) Will the purported error infect the outcome of subsequent proceedings? (*In re A.R.* (2009) 170 Cal.App.4th 733, 740.)

2) Is the issue one of continuing public concern?

   - **What constitutes an emergency for detention.** (*In re Raymond G.* (1991) 230 Cal.App.3rd 964.)

   - **Challenges to a determination that a parent's housing is inadequate without prior warning to the parent of the issue**. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394.)

   - **The "public interest" exception to the mootness doctrine.** (*In re Petra B.* (1989) 219 Cal.App.3rd 1163.)

3) Is it an issue involving statutory interpretation which could evade review? (*In re Marquis H.* (2013) 212 Cal.App.4th 718, 725.) Is the issue otherwise capable of repetition yet evading review? (*In re Natasha A.* (1996) 42 Cal.App.4th 28, 38.)