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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF XXX

10 JUVENILE DIVISION

11 IN THE MATTERS OF ) No.: XXX  
12 )  
13 A. and B. ) BRIEF ON THE NECESSITY OF  
14 ) PRESENCE OF PARENT AND NEED FOR  
15 minors. ) JV-195 FORM TO PROCEED UNDER W&I  
16 ) 360(a).  
17 )  
18 ) Dept. X  
19 )  
20 ) May X, 2009

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21 **I**

22 **STATEMENT OF FACTS**

23 The Court in this matter took jurisdiction over the minors A. and B. on April X, 2009.  
24 Presumed father is in the custody of the X County Department of Corrections until August X,  
25 2009. Father has determined that the best interests of the minors will be fulfilled by this court  
proceeding by Welfare and Institutions Code (hereinafter W&I) section 360(a) whereby letters of  
guardianship would issue and the cases could be dismissed in lieu of adjudicating the children  
dependents of the court.

1 Counsel for the minors have raised two legal questions: 1) whether or not the Court may  
2 proceed to issue a guardianship under W&I section 360(a) without a parent (in this case the  
3 mother) being present, and a related issue, 2) whether or not the Court can proceed under W&I  
4 360(a) unless it has received a formal waiver of reunification services, memorialized on Judicial  
5 Counsel form JV-195. Minor's counsel indicated both that parents would need to be present and  
6 that a JV-195 form are necessary for the Court to proceed under W&I 360(a). On April X, 2009,  
7 County Counsel orally indicated support of minor's counsel's position on the second question.  
8 Father's counsel indicated a view opposite to minor's counsel as to both questions, and submits  
9 this brief in support of that position.  
10

## 11 II

### 12 DISCUSSION

- 13  
14 **1) If notice and due diligence to contact mother have been made, her presence in**  
15 **order to advise the court of her lack of desire to receive family reunification or**  
16 **family maintenance services is NOT necessary for the court to issue letters of**  
17 **guardianship pursuant to W&I 360(a).**

18 Notice affords a parent the opportunity to be heard. Notice is fundamental to due  
19 process. Indeed, it is said to be jurisdictional in nature, meaning that without proper notice, a  
20 court might not have jurisdiction to proceed. *Oats v. Oats* (1983, 2nd Dist.) 148 Cal.App.3d 416,  
21 420.

22 To require a previously non-custodial parent who is not seeking custody to have  
23 "...advised the court that the parent is not interested in family maintenance or family  
24 reunification services," (W&I section 360(a)) is exactly analogous to an assertion made by a  
25 prior non-custodial father in *In re Robert L.* (1996 6th Dist.) 45 Cal.App.4th 619. In that case,  
though presumably properly noticed, father never requested custody of his children. He was

1 subsequently barred from asserting legal error by the trial court because it had not ordered  
2 services according to W&I sections 361.5 (or 361.2). W&I section 361.5(a) states, in relevant  
3 part: "the juvenile court shall order the social worker to provide child welfare services to the  
4 child and the child's mother and statutorily presumed father or guardians." W&I section 361.2  
5 requires the court to determine the existence of a prior non-custodial parent in order to possibly  
6 prevent an out-of-home placement. However W&I section 361.2 conditions the provision of  
7 custody or services to any prior non-custodial parent with "If that parent requests custody...".  
8

9         The appellate court was clear in *Robert L.*: "Provision of services to a non-custodial  
10 parent who does not seek custody will not serve this purpose [the return of children to parental  
11 custody], and therefore such services are not required to be offered or provided." Ibid. at p. 628.  
12 The *Robert L.* case is further instructive (also at p. 628) inasmuch as it guides us to interpret the  
13 statutes within the statutory scheme in which they are written. Indeed, a basic rule of statutory  
14 construction, which father will not belabor to cite at this time, says that statutes shall not be  
15 interpreted in such a way as to render their resultant application absurd. Father does not intend  
16 in any way to belittle the important legal question raised by minor's counsel, rather father wishes  
17 the court to consider all pertinent legal contexts and perspectives in making its statutory  
18 interpretation.

19         The analogy is that if mother has been properly noticed, and is therefore deciding to not  
20 seek custody and not participate in the decisions which will impact her children's future, then it is  
21 not logical to prevent the court from acting in the best interests of the minors. The need to be  
22 present, according to W&I section 360(a) is related to the provision of family maintenance and  
23 family reunification services. If mother is not entitled to such services, as is the case here, then it  
24  
25

1 cannot follow that the legislature intended the court to have an advisement of disinterest in  
2 receiving such services before proceeding to place the children in a guardianship.

3           **2)     Father need not fill out a formal waiver of reunification services form in**  
4           **order for the court to have authority to order a guardianship under W&I**  
5           **360(a).**

6           W&I section 360(a) states that in order for the court to order a guardianship, the parent  
7 must advise the court that s/he "...is not interested in family maintenance or family reunification  
8 services,". Nowhere in the statute is there a requirement that the formal JV-195 waiver of  
9 reunification services be filled out and submitted to the court. The code section where a JV-195  
10 is required is in W&I section 361.5(b)(14). There are some very significant and fundamental  
11 differences in these two statutes:

12           1) In the first place, following a disposition hearing where a court follows W&I section  
13 361.5(b)(14) a 366.26 hearing is set (see W&I section 361.5 (f)). At the W&I section  
14 366.26 hearing there is a possibility that parental rights might be terminated and the child  
15 or children can be freed for adoption. No such possibility exists when following W&I  
16 section 360(a)—no W&I section 366.26 hearing is set and there is no contemplation of  
17 adoption.

18           2) W&I section 361.5(b)(14) indicates that a parent, in addition to the same requirement  
19 of 360(a) that s/he is not interested in receiving family maintenance or reunification  
20 services, must also indicate that the parent is also not interested in "...having the child  
21 placed in his or her custody...".

22           JV-195 (see blank form attached) indicates, consistent with the requirements of W&I  
23 section 361.5(b)(14), that a parent, in waiving reunification services, does not want custody of  
24 nor to reunify with the child. Furthermore, it requires a parent to acknowledge that upon  
25

executing the waiver form there is a chance to lose parental rights. Notably, neither such requirement is part of what is required under 360(a), so it is not surprising that there is no statutory requirement to fill out the form.

For the above reasoning, it is of course confusing as to why the Judicial Council would, in Rule of Court 5.695(b)(1)(B), require a parent to fill out a JV-195 in order to order a guardianship under W&I section 360. Certainly Rules of Court that are in contradiction to statute are by definition null and void. In some ways, requiring a parent to fill out a form that indicates a need to unnecessarily waive potential rights is certainly not consistent with the statute. See Rule of Court 5.501(c).

XXX  
Attorney for Father  
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