IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE D.P., A Person Coming Under the Juvenile Court Law	No. S267429
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent,	Court of Appeal No. B301135
v.	Los Angeles No. 19CCJP00973
T. P. Objector and Appellant.	

APPELLANT, T.P.'s, OPPOSITION TO RESPONDENT'S MOTION TO AUGMENT THE RECORD WITH NEW EVIDENCE AND FOR JUDICIAL NOTICE

After the Unpublished Decision by the Court of Appeal,
Second District, Division Five,
Filed February 10, 2020

MEGAN TURKAT-SCHIRN (SBN 169044)
269 S. Beverly Drive, #193
Beverly Hills, CA 90212
schirn@sbcglobal.net
(310)279-0003
Attorney for Appellant, T.P.

Under Appointment By the Supreme Court of California Under the California Appellate Project Los Angeles's Independent Case System

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE D.P.,	)	
A Person Coming Under	)	
the Juvenile Court Law	)	No. S267429
	)	
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LOS ANGELES COUNTY	)	Court of Appeal No.
DEPARTMENT OF CHILDREN	)	B301135
AND FAMILY SERVICES,	)	
Plaintiff and Respondent,	)	Los Angeles No.
	)	19CCJP00973
v.	)	
	)	
T. P.	)	
Objector and Appellant.	)	

Memorandum Of Points And Authorities
In Opposition of Motion To Augment And
For Judicial Notice

On August 25, 2021, Respondent Los Angeles County Department of Children and Family Services ("DCFS" or "Department") filed a motion to augment the record with new evidence consisting of (Exhibit 1) the Declaration of Duke Ngyuen, and for this Court to take judicial notice of (Exhibit 2) DCFS's Completion and Submission of the BCIA 8582, Child Abuse or Severe Neglect Indexing Form, and (Exhibit 3) California Department of Social Services: Grievance Procedures For Challenging Reference To the Child Abuse Central Index. Appellant opposes Respondent's motion and argues that it should be denied for all three proposed exhibits.

I.
Respondent's Motion For Additional Evidence Is Untimely And Not A Proper Use of Civil Procedure Section 909

Respondent claims this Court should grant the motion to receive new evidence because "a reviewing court may receive additional evidence in an appropriate situation, such as a case involving the best interests of a child" and such new evidence "must enable the reviewing court to affirm the judgment, not lead to a reversal." (Motion, at p. 7.) Respondent opines the new evidence is relevant because "it shows DCFS did not file a report with the DOJ regarding the underlying juvenile dependency case" and that this "renders father's arguments in the regard meritless and is submitted in support of affirming the Opinion." (Motion, at pp. 7-8.) Respondent is wrong.

As a general rule, augmentation does not function to supplement the record with materials not before the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; see also Cal. Rules of Court, rule 8.155(a)(1)(A) [a reviewing court may order the record augmented to include "[a]ny document filed or lodged in the case in superior court"]. Respondent claims that in exception to this general rule, this Court may receive additional evidence under Code of Civil Procedure, Section 909, because this is a case "involving the best interest of a child." (Motion, at p. 7.) As all dependency matters focus on the welfare of the dependent child, Respondent's

argument would imply new evidence can routinely be submitted in any dependency appeal, as some sort of general dependency appeal exception. As held by *In re Zeth S.* (2003) 31 Cal.4th 396, Respondent's argument is inaccurate.

As explained in *In re Zeth S.*, *supra* 31 Cal.4th at p. 405, "It has long been the general rule and understanding that an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." *Zeth S.* rejected the submission of new evidence by minor's appellate counsel because "consideration of postjudgment evidence of changed circumstances to reverse juvenile court judgments and remand cases for new hearings, would violate both the generally applicable rules of appellate procedure, and interfere with the very purpose of expediting termination of parental rights proceedings." (*Id.* at p. 413.) Thus, as held by *Zeth S.*, absent exceptional circumstances, postjudgment evidence is inadmissible in a juvenile dependency appeal. (*Ibid.*)

Respondent's reliance on *In re Elise K.* (1982) 33 Cal.3d 138, to show that there are exceptional circumstances in this case to permit the additional evidence is also unavailing. *Elise K.* concerned an appeal from a termination hearing so the minor could be adopted but while the appeal was pending circumstances changed so that the child was no longer adoptable due to her age. Both parties in a stipulation sought to bring the evidence of these

postjudgment circumstances to the attention of the court of appeal. Justice Bird agreed to accept that stipulation to consider "this limited type of postjudgment evidence." (*Id*. at pp. 139-140.) In this case, unlike *Elise K*., there is no stipulation by the parties to accept the new evidence, and the new evidence is not a change of circumstances related to the minor. Thus, Exhibit One is not the limited type of postjudgment evidence contemplated in *Elise K*.

Respondent's reliance on Code of Civil Procedure, section 909 for admission of the new evidence is also misplaced. Section 909, provides for the admission of new evidence where "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 some or all of the issues." (Code Civ. Proc., § 909.)

Reviewing courts are not equipped to undertake an appreciable amount of evidence taking on appeal. (*Crofoot Lumber, Inc. v. Lewis* (1962) 210 Cal.App.2d 678, 681.) Hence, "[t]he power to invoke the statute should be exercised sparingly, ordinarily only in order to affirm the lower court decision and terminate the litigation, and in very rare cases where the record or new evidence compels a reversal with directions to enter judgment for the appellant." (*Tupman v. Haberkern* (1929) 208 Cal. 256, 269; See *Monsan Homes, Inc. v. Pogrebneak* (1989) 210 Cal.App.3d 826, 830, disagreed with on another point

in *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1607–1608, fn. 5; *In re Glorianna* K. (2005) 125 Cal.App.4th 1443, 1451.)

In the dependency context section 909 allows appellate courts to "accept evidence in dependency cases to expedite just and final resolution for the benefit of the children involved." (*In re Carrie M.* (2001) 90 Cal.App.4th 530, 535.) That right, however, should be exercised sparingly. (*In re Zeth S., supra,* 31 Cal.4th at p. 405.) "Absent exceptional circumstances, no such findings [based on the receipt of evidence outside the record on appeal pursuant to section 909] should be made." (*Id.* at p. 408, fn. 5.) This is not an appropriate case for the application of section 909, as Exhibit One has no bearing on a final resolution for the benefit of the children involved in these proceedings.

The proposed new evidence, the declaration of the emergency response social worker that he responded to the initiating referral, also does not compel this Court to terminate litigation. It does not resolve whether an appeal of a jurisdictional finding is moot when a parent has been stigmatized by the finding, whether a parent could be stigmatized by a future placement on the Child Abuse Central Index due to dismissal of an appeal as moot, or the underlying appeal as to Appellant's challenge to the jurisdictional findings. None of these pending issues are settled or even addressed by admission of Exhibit One.

Exhibit One is also unnecessary as it provides cumulative information since the detention report already states that Duke

Nguyen was the emergency response worker, which is a nonissue. Respondent's assertion that father is not currently placed in the Child Abuse Central Index does not render his appeal meritless and is not even new evidence.[1] Whether there is a current placement is not an issue this Court has asked the parties to establish and does not answer whether unchallenged jurisdictional findings *could result in a current or future placement* on the Child Abuse Central Index which appellant would be barred from challenging if his appeal is dismissed as moot. Respondent's motion attempts to sidestep and obfuscate the relevant issue that jurisdictional findings made by a court of competent jurisdiction, once affirmed, could subject a parent to a future listing pursuant to the mandatory reporting requirements. (Pen. Code, §§ 11165.7, 11165.9, 11166, 11169, subd.(a).)

Further, the new evidence was never submitted to the superior court and cannot be admitted to the record under California Rules of Court, rules 8.155 (a)(1)(A) or 8.340(c).

Respondent's motion is also untimely, with no reasonable explanation or showing of good cause. (Cal. Rules of Court, Rule 8.416 (d)(2), (f).) Under rule 8.416(d)(2), a respondent must serve and file a motion to augment the record within 15 days after the appellant's opening brief is filed, but under rule 8.416(f) "the

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[1] Appellant's Opening Brief On the Merits has already stated that to date appellant "has not received notice under Penal Code Section 11169, subdivision (c), of his inclusion in the CACI." (AOB at pp. 40-41.)

reviewing court may order extensions of time but must require an exceptional showing of good cause." Appellant's Opening Brief was filed on July 22, 2021. Respondent did not move to augment the record until August 25, 2021. There has been no good cause established for the delay in filing and Respondent's motion does not provide any explanation for its untimely submission. Thus, Respondent's should be denied as untimely and because the document is not relevant to the resolution of this matter. (*In re N.V.* (2010) 189 Cal.App.4th 25, 30.)

II.

The Motion For Judicial Notice Should Be Denied As Exhibits Two and Three Are Not Regulations Or Legislative Enactments

Respondent claims Exhibits Two and Three are subject to judicial notice under Evidence Code Sections 452, subdivisions (b) and (d), and 459, subdivision (a) as "regulations and legislative enactments" issued by or under the authority of the United States or any public entity in the United States, and court records. (Motion, at p. 8.) Respondent is wrong.

Respondent's motion asserts that Exhibit Two is "a regulation enacted by the County of Los Angeles by and through its Agency DCFS" and is therefore a proper subject matter for judicial notice. (Motion at p. 8.) The first sentence in Exhibit Two describes the document as a "policy guide" to provide guidance.

(Motion, Exhibit 2.) Respondent provides no authority that a DCFS "policy guide" is a regulation or legislative enactment. As a "policy guide" the DCFS document is merely an interpretative document. As such it is not binding and is not necessarily even authoritative. Thus, Respondent's motion mischaracterizes Exhibit Two.

Respondent admits that Exhibit Three is a "guideline" promulgated by the State of California but opines it should still be treated as a proper subject matter for judicial notice. (Motion at p. 8.) As a guideline, Exhibit Three is also merely an interpretative document. Exhibits Two and Three are also not records from any court of any state. Therefore, Evidence Code Sections 452, subdivisions (b) and (d), and 459 do not authorize judicial notice of either exhibit. (Evid. Code § 452, subds. (b) & (d), § 450, subd. (a).)

The case *In re H.C.* (2017) 17 Cal.App.5th 1251 is instructive in addressing judicial deference to county policy guidelines. In *H.C.*, the San Diego County Department of Social Services published an All-County Letter regarding eligibility for married nonminors in the extended foster care program. (*Id* at p. 1263.) In reliance on the All-County Letter, the juvenile court granted the county's request to terminate the nonminor's extended foster care due to her marital status. (*Ibid.*) The Fourth District, Division One reversed explaining that applicable state laws for nonminor dependents do not mention marriage and contrary to the agency's contention, the All-County Letter, was

"merely an interpretation of the statute" which did not override statutory authority. (*Id.* at p. 1268-1270).

In reaching that decision, *H.C., supra,* 17 Cal.App.5th at 1268-1270, explained the degree of deference that courts should accord to an All-County Letter published by the Department of Social Services describing policies and procedures depends "on the substance of the All-County Letter as a quasi-legislative rule or merely an interpretation of the statute." The appropriate degree of judicial scrutiny lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other. (*Ibid.*) "Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Ibid.*) "Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative." (*Ibid.*)

Respondent's Exhibits Two and Three are similar to the All-County Letter in *H.C.*, in that they are agency interpretations, and are not binding or necessarily even authoritative. Exhibit Two is not a "regulation" and was not "enacted" as claimed by Respondent. As merely a policy guide it has not undergone the traditional rigors of administrative rulemaking. In this case, as in *H.C.*, this informal document does not warrant a great deal of deference. (*Ibid; See Doe v. City of Los*

Angeles (2007) 42 Cal.4th 531, 545 [Role of court to ascertain and declare what the statute contains, not to rewrite the statute to conform to an assumed intention that does not appear in its language]; *Vasquez v. State of California* (2008) 45 Cal.4th 243, 253.)

Respondent's Exhibit Three is also a policy guideline that does not appear to offer much assistance in statutory interpretation as it merely repeats the language of Penal code Section 11169, subdivision (d) and (3), that a judgment by a court of competent jurisdiction bars an individual from seeking a grievance hearing to challenge inclusion in the index. (Exhibit 3.) A reviewing court will not order documents to be added to the record except on a showing that they are material to and will assist in a determination of the appeal on its merits even though such documents may have been before the trial court. (*Steele v. International Air Race Ass'n of America* (1941) 47 Cal.App.2d 61.)

Thus, Respondent's Exhibits Two and Three, as policy guidelines, do not assist in the determination of this appeal, do not replace the independent judgement of this Court to interpret statutory authority relating to the Child Abuse Central Index reporting requirements, and Respondent has not provided legal authority that DCFS and Department of Social Services interpretative guidelines are subject to judicial notice.

Conclusion

For all the foregoing reasons, the motion for additional evidence and for judicial notice should be denied as untimely, not

authorized by statutory authority, and unnecessary to assist in the evaluation of the issues in this appeal.

Date: September 7, 2021

Respectfully submitted,

Megan Turkat Schirn

Megan Turkat Schirn
CA State Bar No. 169044
Attorney for Appellant, T.P.

Certificate of Compliance

Counsel of record hereby certifies, the enclosed brief complies with the form requirements set by the California Rules of Court, rule 8.204(b), and has been produced using 13-point Century Schoolbook. The text of this brief includes 16 pages and 3,109 words, excluding the cover, tables, signature block and this certificate, according to the word count feature of the computer program used to prepare this brief.

Date: September 7, 2021

Respectfully submitted,

Megan Turkat Schirn

Megan Turkat Schirn
Attorney for Appellant, T.P.

Megan Turkat-Schirn, Esq.
SBN 169044
269 S. Beverly Dr., #193
Beverly Hills, CA 90212
Attorney for appellant T.P.

In Re: *D.P.*
Supreme Court No. S67429
Court of Appeal No. B301135
Juv. Case No. 19CCJP00973

Declaration of Service

I, the undersigned, declare that I am over 18 years of age, residing or employed in the County of Los Angeles, and am not a party to the instant action. My business address is listed above, and my e-service address is *schirn@sbcglobal.net*. On July 22, 2021, I served the attached APPELLANT'S OPPOSITION TO RESPONDENTS MOTION AUGMENT THE RECORD by placing true copies in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of the following persons at the following addresses:

Hon. Craig Barnes
Los Angeles Juvenile Court
201 Centre Plaza Dr., Suite 7
Monterey Park, CA 91754

Court Of Appeal
Second Dist., Div. 5
300 S. Spring St. North Tower
Los Angeles, CA 90013

T.P.*
*Address on record

On July 22, 2021, I also transmitted a PDF version of this document via email, to each of the following using the email address indicated:

Office of the County Counsel: *appellate @counsel.lacounty.gov*
California Appellate Project: *capdocs@lacap.com*
Minor's Counsel: Springsong Cooper, Esq.: *coopers@clc-la.org*
Mother's Counsel: Landon Villavaso, Esq.: *landon@lvlaw.org*
Father's Trial Counsel: *saraydarians@ladlinc.org*

Executed on September 7, 2021 at Los Angeles California Megan Turkat Schirn
Megan Turkat Schirn

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Name: **IN RE D.P.**
Case Number: **S267429**
Lower Court Case Number: **B301135**

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turkat schirn, megan (169044)
Last Name, First Name (PNum)