

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Family and Juvenile Law Advisory Committee
Hon. Mary Ann Grilli and Hon. Susan Huguenor, Co-chairs
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DATE: August 16, 2004

SUBJECT: Juvenile Law: Appeal of Placement Orders After Termination of Parental Rights (Welf. & Inst. Code, § 366.28)
(adopt Cal. Rules of Court, rules 38.2 and 38.3) (Action Required)

Issue Statement

The Legislature has found that the delay caused by an appeal from a court order designating the specific placement of a dependent child after parental rights have been terminated may cause a substantial detriment to the child. Senate Bill 59 (Stats. 2003, ch. 247, Escutia) added section 366.28 to the Welfare and Institutions Code to specifically address this issue. The section provides that a posttermination placement order may only be appealed if certain procedural requirements are met, including the filing of a petition for extraordinary writ review. Welfare and Institutions Code 366.28(d) requires the Judicial Council to create a rule to implement the writ process.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2005, adopt rules 38.2 and 38.3 of the California Rules of Court to introduce the procedural requirements for appealing a posttermination placement order for a dependent child.

The text of the rules is attached at pages 5–10, and the text of SB 59 is attached at pages 23–24.

Rationale for Recommendation

The committee recommends adopting rules 38.2 and 38.3 to implement the writ process required by Welfare and Institutions Code section 366.28. These rules were numbered 39.1C and 39.1D when they were circulated for comment. However, at its August 27, 2004, meeting, the Judicial Council adopted the final installment of the Appellate

Advisory Committee, Appellate Rules Project Task Force renumbering and revision of the appellate rules of the California Rules of Court. The Appellate Rules Project Task Force has indicated that in order for the proposed rules to be consistent with the newly revised appellate rules they must now be renumbered to rules 38.2 and 38.3.

Existing law provides that when the juvenile court terminates parental rights, the court must, at the same time, order the child referred to the state Department of Social Services or a licensed adoption agency for adoptive placement. The law also provides that no petition for adoption may be granted until the appellate rights of the parties have been exhausted (Welf. & Inst. Code, § 366.26(j)).

Rule 38.2, Notice of intent to file writ petition to review order designating the specific placement of a dependent child after termination of parental rights under Welfare and Institutions Code section 366.28 and rule 38.3, Writ petition to review order designating the specific placement of a dependent child after termination of parental rights under Welfare and Institutions Code section 366.28 streamline the process for challenging the final adoption placement of a child after parental rights have been terminated.

Current law requires trial courts to defer to adoption placement decisions by a local child services agency pending the exhaustion of appeals rights, unless the agency abuses its discretion. The new rules will require shorter review of orders regarding local agency adoption placement decisions modeled after the “substantive writ” process set forth in rules 38 and 38.1. Those rules govern the writ process for appeals from termination of parental rights. Comments received on rules 38 and 38.1 from the renumbering and revision of the appellate rules invitation to comment period were considered in drafting this proposal.

Rules 38.2 and 38.3 conform to the new statutory requirements of Welfare and Institutions Code section 366.28. Rules 38.2 and 38.3 set forth the substantive writ process, which would apply to appeals from placement orders after termination of parental rights. Rule 38.2 sets out the procedures for filing a notice of intent to file a writ for a posttermination placement order, and is similar to rule 38, which sets forth the procedure for notices of intent to file a writ petition for termination of parental rights hearings. Rule 38.3 provides the same procedural and timeline requirements as rule 38.1.

There are some changes in proposed rules 38.2 and 38.3 that mirror the changes in proposed rules 38 and 38.1. These changes are as follows:

- Proposed rule 38.2(d) is new. The case law generally recognizes that the reviewing courts may grant extensions of time under these rules for exceptional good cause. The provision is derived from existing rule 38(d).
- Proposed rule 38.2(e) is changed. Existing rule 38.2 declares that if a party is notified of the order setting the hearing only by mail, the time to file a notice of

intent to seek writ review is extended by five days, for a total of 12 days, from the date of the order setting the hearing. Rule 38.2(e)(4) instead now extends the filing period by five days from the date the notification is mailed. The purpose of this substantive change is to ensure that if mailing of the notification is delayed, the party still has adequate time to prepare and file any notice of intent.

- Proposed rule 38.2(g)(2), in the interest of completeness, specifies that the clerk's transcript must include, in addition to all relevant items listed in proposed rule 37.1(a), the notice of intent and the proof of service of that notice.
- Proposed rule 38.3(b)(1) is new. It delineates the required elements of a writ petition filed under this rule.
- Proposed rule 38.3(c) restates the current rule 38.1(b) but conforms it to the requirements of case law and the relevant provisions of rule 14.
- Proposed rule 38.3(f)(4) is new and requires the clerk to certify and send any supplemental transcripts to specified parties under rule 38.1(h).

Alternative Actions Considered

The proposed rules are required by legislative mandate and are necessary to comply with governing law. No alternatives actions were considered.

Comments From Interested Parties

The invitation to comment on the proposal was circulated from April 5, 2004, through June 4, 2004, to the standard mailing list for family and juvenile law proposals, as well as the regular rules and forms mailing list. This distribution list includes judges, court administrators, attorneys, social workers, probation officers, mediators and other family and juvenile law professionals.

A total of 11 comments was received. Four of the commentators agreed with the proposal. Seven commentators agreed to the proposal if modified and suggested both substantive and technical changes. No commentators disagreed.

The majority of suggested technical and substantive changes were made. Several of the commentators made suggestions that would be procedurally inconsistent with certain provisions of rule 37, Appeals in juvenile cases generally, rule 38, Notice of intent to file writ petition to review order setting hearing under Welfare and Institutions Code section 366.26, and rule 38.1, Writ petition to review order setting hearing under Welfare and Institutions Code section 366.26.

One commentator suggested that items required to be part of the clerk's transcript, which are listed in rule 38.1, would not be necessary for the reviewing court to decide whether the adoption agency had abused its discretion in choosing a placement for the child.

However, the legislature intended that the writ process governing appeals from posttermination placement orders be procedurally consistent with the writ process for appeals from the termination of parental rights. In appeals concerning the permanent placement of a dependent child, the reviewing court should be provided with a complete record to assist that court in making a better-informed decision.

Other commentators sought clarification of the appropriate parties to receive notice of the intent to file the writ. Responses to these comments referred to the corresponding sections of the other rules for juvenile appeals.

The comments and the committee responses are summarized in the chart attached at pages 11–22.

Implementation Requirements and Costs

Implementation of the rules will require courts to retrain clerks and incur standard reproduction and postage costs.

Attachments

Rules 38.2 and 38.3 of the California Rules of Court are adopted, effective January, 1, 2005, to read:

1 **Rule 38.2. Notice of intent to file writ petition under Welfare and Institutions Code**
2 **section 366.28 to review order designating specific placement of a dependent child**
3 **after termination of parental rights**
4

5 **(a) Application**
6

7 Rules 38.2 and 38.3 govern writ petitions to review placement orders following
8 termination of parental rights entered on or after January 1, 2005.
9 “Posttermination placement order” as used in this rule and rule 38.3 refers to
10 orders following termination of parental rights. Rule 56 does not apply to
11 petitions governed by these rules.
12

13 **(b) Purpose**
14

15 The purpose of this rule is to facilitate and implement Welfare and Institutions
16 Code section 366.28. Delays caused by appeals from court orders designating
17 the specific placement of a dependent child after parental rights have been
18 terminated may cause a substantial detriment to the child.
19

20 **(c) Who may file**
21

22 The petitioner’s trial counsel—or, if the petitioner was not represented by
23 counsel at the hearing at which the posttermination placement order was
24 issued, the petitioner—is responsible for filing any notice of intent and writ
25 petition under rules 38.2 and 38.3. Trial counsel is encouraged to seek
26 assistance from, or consult with, attorneys experienced in writ procedure.
27

28 **(d) Extensions of time**
29

30 The superior court may not extend any time period prescribed by rules 38.2–
31 38.3. The reviewing court may extend any time period, but must require an
32 exceptional showing of good cause.
33

34 **(e) Notice of intent**
35

36 (1) A party seeking writ review under rules 38.2 and 38.3 must file a notice of
37 intent to file a writ petition and a request for the record.
38

- 1 (2) The notice must include all known dates of the hearing that resulted in the
2 order under review.
- 3
- 4 (3) The notice must be signed by the party intending to file the petition or, if
5 filed on behalf of the child, by the attorney of record for the child. The
6 reviewing court may waive this requirement for good cause on the basis
7 of a declaration by the attorney of record explaining why the party could
8 not sign the notice.
- 9
- 10 (4) The notice must be served and filed within seven days after the date of the
11 posttermination placement order, or if the order was made by a referee not
12 acting as a temporary judge, within seven days after the referee's order
13 becomes final under rule 1417(c). The date of the posttermination
14 placement order is the date on which the court states the order on the
15 record orally or in writing, whichever first occurs.
- 16
- 17 (5) If the party was notified of the posttermination placement order only by
18 mail, the notice of intent must be filed within 12 days after the date that
19 the clerk mailed the notification.
- 20

21 **(f) Sending the notice of intent**

22

- 23 (1) When the notice of intent is filed, the superior court clerk must
24 immediately mail a copy of the notice to:
- 25
- 26 (A) each counsel of record;
- 27
- 28 (B) each relevant party, including the child, the present custodian of the
29 dependent child, any legal guardian, and any person who has been
30 declared a de facto parent and given standing to participate in the
31 juvenile court proceedings;
- 32
- 33 (C) the probation officer or social worker;
- 34
- 35 (D) any Court Appointed Special Advocate volunteer; and
- 36
- 37 (E) the tribe of an Indian child.
- 38
- 39 (2) The clerk must promptly send a copy of the notice and a proof of service
40 list to the reviewing court, by first-class mail or facsimile. If the party
41 was notified of the posttermination placement order only by mail, the
42 clerk must include the date that the notification was mailed.
- 43

1 **(g) Preparing the Record**

2
3 When the notice of intent is filed, the superior court clerk must:

- 4
5 (1) immediately notify the reporter by telephone and in writing to prepare a
6 reporter’s transcript of the oral proceedings at the hearing that resulted in
7 the order under review and to deliver the transcript to the clerk within 12
8 days after the notice of intent is filed; and
9
10 (2) within 20 days after the notice of intent is filed, prepare a clerk’s
11 transcript that includes the notice of intent, proof of service, and all items
12 listed in rule 37.1(a).

13
14 **(h) Sending the record**

15
16 When the transcripts are certified as correct, the superior court clerk must
17 immediately send:

- 18
19 (1) the original transcripts to the reviewing court by the most expeditious
20 method to the reviewing court, noting the sending date on each original,
21 and
22
23 (2) one copy of each transcript to each counsel of record and any
24 unrepresented party and unrepresented custodian of the dependent child
25 by any means as fast as United States Postal Service express mail.

26
27 **(i) Reviewing court clerk’s duties**

- 28
29 (1) The reviewing court clerk must promptly lodge the notice of intent.
30 When the notice is lodged, the reviewing court has jurisdiction over the
31 writ proceedings.
32
33 (2) When the record is filed in the reviewing court, that court’s clerk must
34 immediately notify the parties when the record is filed in that court,
35 stating the date on which the 10-day period for filing the writ petition
36 under rule 38.3(c)(1) will expire.

37
38 **Rule 38.3. Writ petition under Welfare and Institutions Code section 366.28**
39 **to review order designating specific placement of a dependent child after**
40 **termination of parental rights**

41
42 **(a) Petition**

- 1 (1) The petition must include:
2
3 (A) the identities of the parties;
4
5 (B) the date on which the superior court made the posttermination
6 placement order;
7
8 (C) a summary of the grounds of the petition; and
9
10 (D) the relief requested.
11
12 (2) The petition must be liberally construed.
13
14 (3) The petition must be accompanied by points and authorities.
15

16 **(b) Contents of points and authorities**
17

- 18 (1) The points and authorities must provide a summary of the significant
19 facts, limited to matters in the record.
20
21 (2) The points and authorities must state each point under a separate heading
22 or subheading summarizing the point and support each point by argument
23 and citation of authority.
24
25 (3) The points and authorities must support any reference to a matter in the
26 record by a citation to the record. The points and authorities should
27 explain the significance of any cited portion of the record and note any
28 disputed aspects of the record.
29

30 **(c) Time to file petition and response**
31

- 32 (1) The petition must be served and filed within 10 days after the record is
33 filed in the reviewing court.
34
35 (2) Any response must be served and filed:
36
37 (A) within 10 days—or, if the petition was served by mail, within 15
38 days— after the petition is filed, or
39
40 (B) within 10 days after a respondent receives a request from the
41 reviewing court for a response, unless the court specifies a shorter
42 time.
43

1 **(d) Order to show cause or alternative writ**

2
3 If the court intends to determine the petition on the merits, it must issue an
4 order to show cause or alternative writ.

5
6 **(e) Augmenting or correcting the record in the reviewing court**

7
8 (1) Except as provided in (2) and (3), rule 12 governs augmentation or
9 correction of the record.

10
11 (2) The petitioner must serve and file any request for augmentation or
12 correction within 5 days—or, if the record exceeds 600 pages, within 10
13 days—after receiving the record. A respondent must serve and file any
14 such request within five days after the petition is filed.

15
16 (3) An order augmenting or correcting the record may grant no more than 15
17 days for compliance. The clerk and the reporter must give the order the
18 highest priority.

19
20 (4) The clerk must certify and send any supplemental transcripts as required
21 by rule 38.2(h).

22
23 **(f) Stay**

24
25 A request by petitioner for a stay of the posttermination placement order will
26 not be granted unless the writ petition shows that implementation of the
27 superior court’s placement order pending the reviewing court’s decision is
28 likely to cause detriment to the child if the order is ultimately reversed.

29
30 **(g) Oral argument**

31
32 (1) The reviewing court must hear oral argument within 30 days after the
33 response is filed or due to be filed, unless the court extends the time for
34 good cause or counsel waive argument.

35
36 (2) If argument is waived, the cause is deemed submitted not later than 30
37 days after the response is filed or due to be filed.

38
39 **(h) Decision**

40
41 (1) Absent exceptional circumstances, the reviewing court must review the
42 petition and decide it on the merits by written opinion.

1 (2) The reviewing court clerk must promptly notify the parties of any
2 decision and must promptly send a certified copy of any writ or order to
3 the court named as respondent.

4
5 (3) If the writ or order stays or requires action within seven days—or in any
6 other urgent situation—the reviewing court clerk must make a reasonable
7 effort to notify the clerk of the respondent court by telephone. The clerk
8 of the respondent court must then notify the judge or officer most directly
9 concerned.

10
11 (4) The reviewing court clerk need not give telephonic notice of the summary
12 denial of a writ, unless a stay previously issued and will be dissolved.

13
14 **(i) Right to appeal other orders**

15
16 This section does not affect the right of a parent, a legal guardian, or the child
17 to appeal any order that is otherwise appealable and that is issued at a hearing
18 held under Welfare and Institutions Code section 366.26.

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**Juvenile Law: Appeal on Placement Orders After Termination of Parental Rights (Welf & Inst. Code, § 366.28)
(adopt Cal. Rules of Court, rule 39.1C and rule 39.1D)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Hon. Barbara J. Beck Presiding Judge, Juvenile Court Superior Court of California, County of Santa Barbara Santa Maria Branch	A	N	<i>No specific comment.</i>	No response required.
2.	Mr. Saul Bercovitch The State Bar of California's Committee on Appellate Courts San Francisco	AM	Y	<p><u>Proposed Rule 39.1C (38.2)</u>¹</p> <p>The committee endorses the proposed rule, with three exceptions explained below.</p> <p>1. Subdivision (d) allows the petitioner to use the Judicial Council form for writ petitions and provides that the appellate court must accept petitions filed on the form. The committee believes subdivision (d) should be deleted. Rule 39.1C governs the <i>notice of intent</i> to file a writ petition, which is a different document than the petition itself. The language in subdivision (d), if it is included in rule 39.1, is unnecessary and could result in confusion. Rule 39.1D governs the writ petition itself, and sets forth the required content.</p> <p>2. Subdivision (g)(1)(B) (38.2(f)(1)(B)) requires the superior court clerk to mail a copy of the notice of</p>	<p>No response required.</p> <p>1. The text of proposed 39.1C(d) has been deleted for consistency with rules 38 and 38.1.</p> <p>2. Agree to modify the text to read that a copy of the notice of intent to file a writ</p>

¹ The proposed rules were circulated for comment as rules 39.1C and 39.1D from April 5, 2004 through June 4, 2004. On August 27, 2004, the Judicial Council adopted the proposed renumbering and revision of the California Appellate Rules of Court, submitted by the Appellate Rules Project Task Force. For consistency with the current numbering of the appellate rules, the rule, which circulated as rule 39.1C, has been renumbered as proposed rule 38.2 and the rule, which circulated as rule 39.1D has been renumbered as proposed rule 38.3. Throughout the chart, references to current rule sections appear in parenthesis and in bold following the previously circulated section reference.

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(adopt Cal. Rules of Court, rule 39.1C and rule 39.1D)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>intent to file writ petition to each party, including the minor and the parent. This provision does not take into account that at this point in the proceeding, the parents’ rights have been terminated and they should not be receiving notices about the child. In addition, unless represented by counsel, the minor should not receive a copy of the notice. Because subdivisions (i)(2)(38.2(h)(2)) and (j)(2)(38.2(i)(2)) also require the clerks to serve documents on “each party,” the parties at this stage of the proceeding should be defined.</p> <p>3. Subdivision (h)(2)(38.2(g)(2)) requires the superior court clerk to prepare a clerk’s transcript that includes “all relevant items listed in rule 37.1(a).” Those items include, among other things, the petition, all court minutes, all court reports, and the jurisdictional findings. The committee does not believe the reviewing court needs all this information to decide whether the adoption agency has abused its discretion in choosing the placement for the child.</p> <p><u>Proposed Rule 39.1D (38.3)</u></p> <p>The committee endorses the proposed rule, with three exceptions explained below.</p> <p>4. Subdivision (a)(1)(B)–(C) provides the petition must include the date on which the superior court made the order setting the hearing and the date on which the hearing is scheduled to be held. But unlike</p>	<p>petition should be mailed only to each relevant party.</p> <p>3. At this time the committee recommends that the reviewing court be provided with the relevant items listed in rule 37.1(a) in order to be consistent with the rules governing appeals in juvenile cases generally.</p> <p>No response required.</p> <p>4. Agree to delete 39.1D(a)(1)(C) and to modify the text of 39.1C(a)(1)(B)(38.3(a)(1)(B)) to read “the date on which the superior court made the</p>

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				<p>orders referring the case to a hearing under section 366.26, there is no hearing scheduled in the context of posttermination placement orders, so this requirement is inappropriate.</p> <p>5. Subdivision (f) (38.3(f)) provides that a petitioner’s request for a stay of the posttermination placement order will not be granted unless the petition raises issues of substantial complexity. But if the reviewing court decides that the court below acted capriciously, the reviewing court should be able to stay the lower court’s decision to prevent moving the child unnecessarily, whether or not the petition raises issues of substantial complexity.</p> <p>6. Subdivision (h)(3) provides that if the writ or order stays or prohibits proceedings set to occur within seven days, the reviewing court clerk must make a reasonable effort to notify the clerk of the respondent court by telephone. Again, this new rule does not apply in the context of posttermination placement orders because no future hearing is scheduled.</p>	<p>posttermination placement order”.</p> <p>5. Agree to modify 39.1D(f) (38.3(f)) so that the reviewing court may stay the lower court’s decision whether or not the petition raises issues of substantial complexity.</p> <p>6. Agree to delete 39.1D(h)(3).</p>
3.	Hon. John E. Dobroth Judge Superior Court of California, County of Ventura Ventura Branch	A	N	<i>No specific comment.</i>	No response required.
4.	Ms. Carole Greeley	AM	Y	<u>Proposed Rule 39.1C (38.2)</u>	

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(adopt Cal. Rules of Court, rule 39.1C and rule 39.1D)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	Attorney at Law Bay Area Dependency Chapter California Appellate Defense Counsel Fairfield			<ol style="list-style-type: none"> 1. 39.1C(c)(38.2(c)) should state that appellate counsel should be appointed to prepare the writ petition. 2. 39.1C(f)(1)(38.2(e)(1)) — there is no need to serve the notice of intent because 39.1C(g)(1) requires the clerk of the superior court to mail copies of the notice to the parties. 3. 39.1C(f)(3)(38.2(e)(3)) should be changed to permit counsel to sign the notice of intent to file a writ. 4. 39.1.C (f)(4) and (5) (38.2(e)(4) and (5)) refer to a hearing. To what hearing are these sections referring? 	<ol style="list-style-type: none"> 1. At this time the committee recommends against changing the text in order to be consistent with rule 38(c). 2. Agree to modify the text to delete the word “serve.” 3. At this time the committee recommends against changing the text in order to be consistent with rule 38(e)(3). 4. Agree to modify the text to clarify that 39.1C(f)(4) and (5)(38.2(e)(4) and (5)) refer to the hearing where the court issued a placement order after the termination of parental rights has occurred.

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(adopt Cal. Rules of Court, rule 39.1C and rule 39.1D)**

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				<p>5. The word “relevant” should be removed from 39.1C(h)(38.2(g)).</p> <p><u>Proposed Rule 39.1D (38.3)</u></p> <p>6. In section 39.1D(c)(38.3(c)) the requirement that the petition must be served and filed 10 days after the record is filed in the reviewing court is not a realistic amount of time.</p> <p>7. Requiring that the petitioner to serve and file a request for augmentation or correction within five days of receiving the record is unrealistic.</p>	<p>5. Agree to modify the text to remove the word “relevant” for consistency with rule 38(g)(2).</p> <p>6. At this time the committee recommends against modifying the text of the provision in order to be consistent with rule 38(i)(2).</p> <p>7. At this time the committee recommends against modifying text of the provision in order to be consistent with rule 38.1(e)(2)</p>
5.	Ms. Kim Hubbard President Orange County Bar Association Irvine	AM	Y	<p>1. General comment throughout 39.1C and 39.1D (38.2 and 38.3). We recommend changing references to the dependent “minor” to “child” to remain consistent with the Welfare and Institutions Code.</p> <p><u>Proposed Rule 39.1D (38.3)</u></p> <p>2. 39.1C(d) should be moved to 39.1D— this section referencing form JV-825 sets forth the format of the petition.</p>	<p>1. Agree to modify text to change “minor” to “child”.</p> <p>2. The text of proposed 39.1C(d) has been deleted for consistency with rules 38 and 38.1.</p>

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				<p>3. We propose that a “Notice of Intent to File Writ Petition and Request for Record, Rule 39.1C and 39.1D” Judicial Council form be created, similar to JV-820, the notice of intent form used for rule 39.1B writ petitions.</p> <p>4. 39.1C(g)(1)(B)(38.2(f)(1)(b)): The parent should not be included as a party entitled to notice and should be omitted from this subdivision. Additionally, the “present custodian of a dependent child” is not a legally recognizable “party” until the court grants that caretaker de facto parent status. We respectfully suggest the reference to the present custodian be moved to another subdivision or that section B be modified to say the following: “the present custodian of a dependent child and each party, including the dependent child, legal guardian and any person who has been declared a de facto parent and given standing to participate in the juvenile court proceedings.”</p> <p>5. 39.1C(g)(1)(D) (38.2(f)(1)(D)): As the Court Appointed Special Advocate does not have standing to participate in the proceedings, we would recommend omitting this subdivision.</p> <p>6. 39.1C(h)(2)(38.2(g)(2)) references California Rules of Court, rule 37.1(a), which at this time does</p>	<p>3. At this time the committee recommends that the issue of the suggested form being drafted be considered in a future RUPRO cycle.</p> <p>4. Agree to modify text to reflect that only relevant parties should receive notice. The reference to the present custodian is consistent with the language in rule 38.</p> <p>5. At this time the committee recommends against modifying the text in order for the provision to be consistent with rule 38(f)(1)(D).</p> <p>6. The appellate rules of the California Rules of Court have been in the process of</p>

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				<p>not exist.</p> <p>7. 39.1C(i)(2)(38.2(h)(2)): We recommend adding “and unrepresented custodian of a dependent child” after “any unrepresented party.”</p> <p><u>Proposed Rule 39.1D (38.3)</u></p> <p>8. 39.1D(a)(1)(B)(38.3(a)(1)(B)) & (C): As Welf. Inst. Code, § 366.28 references situations where the court has already made a decision involving placement, we recommend omitting (C) and replacing (B) with the following: the date on which the hearing was held.</p> <p>9. 39.1D(e)(4)(38.2(e)(4)) addresses sending supplemental transcripts and references 39.1C(g), which addresses “sending the notice of intent.” We suggest referencing 39.1C(i) instead, as that subdivision addresses the procedure for sending the record.</p>	<p>reorganizing and renumbering their rules. Rule 37.1 was part of the proposed appellate rules, which were out for comment and were approved by the Judicial Council on August 27, 2004.</p> <p>7. At this time the committee recommends against adding the suggested language in order to be consistent with the language of rule 38(h)(2).</p> <p>8. Agree to omit 39.1D(C) and to modify 39.1C(B) (38.3(a)(1)(B)) to read “the date on which the superior court made the posttermination placement order.”</p> <p>9. Agree to modify the text to reference the correct subsection, rule 38.2(h).</p>
6.	Ms. Cheryl Kanatzar	A	N	<i>No specific comment.</i>	No response required.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
7.	Court Program Manager Superior Court of California, County of Ventura				
8.	Ms. Joy Lazlo Reseach Attorney Superior Court of California, County of San Diego	AM	Y	<p><u>Proposed Rule 39.1C (38.2)</u></p> <p>1. The name of the proposed rule is misleading and reads as though § 366.28 is the authority for terminating parental rights. I suggest renaming the rule as follows: “Notice of intent to file writ petition under Welfare and Institutions Code section 366.28 to review order designating the specific placement of a dependent child after termination of parental rights.”</p> <p>2. The word “minor” should be replaced with the word “child” for consistency with other juvenile dependency rules.</p> <p>3. In 39.1C(g)(1)(D)(38.2(f)(D)) the word “special” should replace “child” for consistency with rule 1424.</p> <p><u>Proposed Rule 39.1D (38.3)</u></p> <p>4. 39.1D(a)(1)(B)(38.3(a)(1)(B)) should read “the date on which the superior court made the</p>	<p>1. Agree that the name of the rule will be revised to eliminate confusion about § 366.28, and to be consistent with titles used for appellate rules.</p> <p>2. Agree that the text will be modified so that the word “child” is uniformly used for consistency with other juvenile dependency rules.</p> <p>3. Agree to revise for consistency and use “Court Appointed Special Advocate (CASA) volunteer” in keeping with changes being made to other rules.</p> <p>4. Agree to modify the text as suggested.</p>

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**Juvenile Law: Appeal on Placement Orders After Termination of Parental Rights (Welf & Inst. Code, § 366.28)
(adopt Cal. Rules of Court, rule 39.1C and rule 39.1D)**

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				<p>posttermination placement order.”</p> <p>5. 39.1D(i)(38.3(i)) refers to “this section” but should refer to “this rule.”</p> <p>6. 39.1D(h)(1)(38.3(h)(1)) reads: “Absent exceptional circumstances, the reviewing court should review the petition and decide it on the merits by written opinion”. This is permissive language and is inconsistent with rule 39.1B(o), which uses the same language for appeals from termination of parental rights, but uses “must” instead of “should.” The language should be consistent and the word “should” should be replaced with “must.”</p>	<p>5. Agree to modify the text as suggested.</p> <p>6. Agree to modify the text as suggested for consistency with rule 39.1B(o).</p>
9.	Mr. Stephen V. Love Court Executive Officer Superior Court of California, County of San Diego	A	N	Would need to modify the current appeal procedures to incorporate the new provisions. Requires additional noticing as to the parties involved.	No response required.
10.	Ms. Janet G. Sherwood Attorney at Law Bay Area Dependency Chapter California Appellate Defense Counsel Corte Madera	AM	Y How can both Jan and Carole comment on behalf of the same group?	<u>Proposed Rule 39.1C (38.2)</u> 1. 39.1C(b): The third paragraph which purports to state the nature and extent of the juvenile court's authority to “intervene” in posttermination placement decisions is superfluous and legally incorrect subsequent to the decision in <i>DSS v. Superior Court (Theodore D.)</i> (1997) 58 Cal.App.4th 721. The decision in <i>Theodore D.</i> serves as the foundation for this statement, the Legislature amended Welf. & Inst. Code § 366.3(f) to provide that the juvenile court has	1. Agree to delete 39.1C(b).

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>the authority to make any orders necessary “to protect the stability of the child and to facilitate and expedite the permanent placement and adoption” of the child after reviewing a report that must be filed by the agency detailing placement efforts and progress. (Stats. 1998, ch. 1056, §18.5.) In enacting these amendments, the Legislature is presumed to have intended to change existing law. Because these amendments were enacted after the <i>Theodore D.</i> decision was issued, it must be presumed that the Legislature intended to overrule or revoke the limitations set forth in <i>Theodore D.</i> at least insofar as they can be read to limit the juvenile court’s authority to make whatever placement orders are necessary to facilitate the stability and adoption of the child. No court of appeal has yet considered or decided how and to what extent these later amendments impact the court’s holding in <i>Theodore D.</i> Because the law on this issue is not well-settled, it would not be appropriate for the Judicial Council or</p> <p>the rule to express any view as to the extent of the juvenile court’s authority to make placement decisions. The third paragraph of subdivision (b) should be deleted.</p> <p><u>Proposed Rule 39.1D (38.3)</u></p> <p>2. 39.1D(a)(1)(B)(38.3(a)(1)(B)) and (C): While the two pieces of information required by these</p>	<p>2. Agree to modify the text so that 39.1D(a)(1)(B)(38.2(a)(1)(B)) will read</p>

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				<p>subparagraphs are important in a proposed rule 38.1 writ proceeding, they would have no relevance to a review of a placement decision. They should be deleted.</p> <p>3. 39.1D(f)(38.3(f)): While this provision makes sense for proposed rule 38.1 writ proceedings, it makes no sense for these proceedings. The purpose of the implementing statute and the proposed rule is to streamline appellate review of posttermination placement orders in order to prevent long delays in achieving permanency and stability for the child. If that is the goal, then the basis for a stay ought to be facilitation of stability pending the outcome of the appellate review. It makes no sense to allow a placement change to be made pursuant to the juvenile court’s order when there is a possibility that the child will have to be returned to the placement from which s/he was moved or moved to another placement if the Court of Appeal later reverses that order. The basis for a stay in these proceedings should be whether implementation of the juvenile court’s placement order pending the appellate court’s decision is likely to cause detriment to the child if the placement order is ultimately reversed.</p>	<p>“the date on which the superior court made the post-termination placement order and (C) will be deleted.</p> <p>3. Agree to modify the text to reflect that the basis for a stay in this type of proceeding will be whether implementation of the trial court’s placement order pending the appellate court’s decision is likely to cause detriment to the child if the placement order is ultimately reversed.</p>
11.	Ms. Arnella Sims Los Angeles County Court Reporters Association Los Angeles	AM	Y	Proposed rule 39.1D(e)(38.3(e)) does not address a time limit or how the court reporter will be notified of an order augmenting or correcting the record. This information should be clarified in the rule in	Section 39.1D(e)(38.3(e)) states that rule 12 governs augmentation or correction of the record. Section 38.3(e)(2) requires that the petitioner must serve and file any

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				order to ensure timely compliance.	request for augmentation or correction within five days after receiving the record and a respondent must serve and file any such request within five days after the petition is filed.
12.	Ms. Terri White Court Program Supervisor Superior Court of California, County of Ventura	AM	Y	Proposed rule 39.1C(h)(38.2(g)(1)) states “notify the reporter by telephone and in writing to prepare a reporter’s transcript of oral proceedings...” I propose that it also state “the notice in writing should state the date it was mailed.”	At this time the committee recommends against modifying the text in order for the provision to be consistent with rule 38(g)(1).

BILL NUMBER: SB 59 CHAPTERED
BILL TEXT

CHAPTER 247
FILED WITH SECRETARY OF STATE SEPTEMBER 2, 2003
APPROVED BY GOVERNOR SEPTEMBER 1, 2003
PASSED THE SENATE AUGUST 19, 2003
PASSED THE ASSEMBLY JULY 7, 2003
AMENDED IN ASSEMBLY JUNE 11, 2003
AMENDED IN SENATE APRIL 8, 2003
AMENDED IN SENATE MARCH 18, 2003

INTRODUCED BY Senator Escutia

JANUARY 15, 2003

An act to add Section 366.28 to the Welfare and Institutions Code, relating to adoption.

LEGISLATIVE COUNSEL'S DIGEST

SB 59, Escutia. Dependent children: placement.

Existing law authorizes the juvenile court to determine the placement of children who are dependent children of the juvenile court.

This bill would provide that after parental rights have been terminated, an order that a dependent child is to reside in, be retained in, or be removed from a specific placement is not appealable, except as specified. The bill would also provide that this provision does not affect the right of a parent, a legal guardian, or the child to appeal any order that is otherwise appealable and that is issued at a hearing to terminate parental rights.

The bill would also require the Judicial Council to adopt a rule of court on or before July 1, 2004, to implement these provisions. The bill would provide that these provisions would become operative after the rule of court is adopted.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 366.28 is added to the Welfare and Institutions Code, to read:

366.28. (a) The Legislature finds and declares that delays caused by appeals from court orders designating the specific placement of a dependent child after parental rights have been terminated may cause a substantial detriment to the child. The Legislature recognizes that the juvenile court intervenes in placement decisions after parental rights have been terminated only in exceptional circumstances, and this section is not intended to place additional authority or responsibility on the juvenile court.

(b) (1) After parental rights have been terminated pursuant to Section 366.26, an order by the court that a dependent child is to reside in, be retained in, or be removed from a specific placement, is not appealable at any time unless all of the following apply:

(A) A petition for extraordinary writ review was filed in a timely manner.

(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

(C) The petition was summarily denied or otherwise not decided on the merits.

(2) Failure to file a petition for extraordinary writ review within the period specified by rule of court, to substantively address the specific placement order that is challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

(c) This section does not affect the right of a parent, a legal guardian, or the child to appeal any order that is otherwise appealable and that is issued at a hearing held pursuant to Section 366.26.

(d) The Judicial Council shall adopt a rule of court on or before July 1, 2004, to implement this section. This section shall become operative after the rule of court is adopted.