S260928

IN THE SUPREME COURT OF CALIFORNIA

In re A.R., a Person Coming Under the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL SERVICES AGENCY,
Petitioner and Respondent,

v.

M.B.,
Objector and Appellant.

After the Unpublished Order by the Court of Appeal
First District, Division One, Case No. A158143
Filed January 21, 2020

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE

AMICUS CURIAE COMMITTEE OF THE CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

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TO THE HONORABLE CHIEF JUSTICE
AND THE HONORABLE ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 29.1(f) of the California Rules of Court, the California Access to Justice Commission (Access Commission) respectfully requests permission to file the accompanying amicus curiae brief in support of M.B. Objector and Appellant.

Interests of Amicus Curiae

The California Access to Justice Commission was convened by the State Bar of California in 1997 and on October 1, 2019 transitioned to a California nonprofit public benefit corporation. The Access Commission's mission is to "work toward achieving equal access to justice for all Californians" and towards that end, it pursues long-term fundamental improvements in our civil justice system so that it is truly accessible for all. The Access Commission is a collaborative effort of all three branches of government and other stakeholders including lawyers, professors, and business, labor, and other civic leaders. The Access Commission is dedicated to ensuring that all Californians have access to justice and the ability to redress their legal rights. Its goals include making recommendations about the barriers to equal access to justice, addressing the justice gap by increasing access to legal aid, expanding pro-bono and self-help assistance and working to reduce access barriers by increasing language assistance and ensuring court processes and forms are understandable and usable to all Californians. It works closely with the State Bar of California, the Judicial Council, the California Lawyers Association, the Legal Aid Association of California, and other agencies to implement its far-reaching recommendations.

The Amicus Curiae Committee of the Access Commission was established in 2016 for the purpose of raising awareness about access to justice issues in pending litigation which, in the committee's opinion, have ramifications relevant to the mission of the Access Commission. The Committee is comprised of non-judicial members of the Access Commission. The Amicus Curiae Committee is authorized to participate in litigation where one or more of the following criteria are met:

a. The views of the Access Commission have been specifically requested by the court;

b. The issues to be briefed involve access to justice; or

c. Resolution of the issues briefed is likely to have a significant impact on access to the justice system.

Access to justice is involved in this case where a litigant may lose her opportunity to appeal an order adjudicating a fundamental right because of a procedural default for which she cannot reasonably be held responsible. This Court has agreed to decide whether to apply the longstanding doctrine recognizing the constructive filing of a notice of appeal to a proceeding that will decide the fundamental human interest in parental rights. The rules our justice system applies should transcend formalism, and as this Court has recognized, the formal difference between criminal and civil proceedings, at least where the interests involved in a civil case are important, should not preclude the application of the constructive filing doctrine. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 129.)

We recognize that access to justice is not the only interest to be considered; but the Access Commission's mission leads us to offer arguments based on our society's interest in a fair justice system that is as open and fair to all litigants as can be, without sacrificing the other interests involved. For these reasons, the Access Commission Amicus Committee

respectfully requests that the Court accept the accompanying brief for filing.

No party or counsel for any party, other than the Access Commission Amicus Committee's counsel, members of the committee, and the staff of the Access Committee, has authored the proposed brief in whole or in part or funded the preparation of the brief.

Dated: October 7, 2020

Respectfully submitted,

By: _____

Michael J. Levy, Chair
Catherine Blakemore, Vice-Chair

Amicus Curiae Committee of the
California Access to Justice
Commission

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AMICUS CURIAE BRIEF

AMICUS CURIAE COMMITTEE OF THE CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE* AND SOURCE OF AUTHORITY TO FILE

Pursuant to Rule 8.520(f) of the California Rules of Court, this brief is filed with an accompanying Application for Leave to File, which sets forth the interest in this matter of the Amicus Curiae Committee of the California Access to Justice Commission.

INTRODUCTION

Our justice system is not perfect. Unfairness and disappointment of legitimate expectations can result from the application of rules, such as the deadline for filing an appeal, which must be applied as written even in circumstances where the result is harsh. But where courts can properly reduce such unfairness and disappointment by interpretation — in this case, interpretation of what circumstances constitute "filing" — they should do so if the interpretation conforms with the words, function, and purpose of the rule.

This Court *can* properly interpret the doctrine of constructive filing as satisfied in the case of a parent who, before the deadline for an appeal, instructed her appointed counsel to file a notice of appeal from an order terminating her parental rights, and has responded promptly and diligently after learning that the notice of appeal reached the clerk late. Courts *should* so interpret the doctrine in appeals from termination of a birth mother's parental rights, given the fundamental importance of the interest at stake. Justice for the birth parents and their children, whose relationships with their birth parents may forever be severed, depends on the right to be heard. Neither wrongly-convicted criminal defendants, denied their fundamental right to liberty, nor parents whose fundamental right to a relationship with their children has been incorrectly terminated can obtain any adequate remedy in malpractice. Cases involving interests as important as these should as often as possible be adjudicated on the merits rather than by

default. Our system of justice requires public respect for the judicial processes and for the rule of law. That respect is elusive to those who through no fault of their own are subject by default to loss of their fundamental rights, especially when they were entitled to rely upon the government's aid (such as appointed counsel) to protect their interests.

ARGUMENT

I. COURTS CAN PROPERLY APPLY THE CONSTRUCTIVE FILING DOCTRINE TO CASES OF TERMINATION OF PARENTAL RIGHTS.

The California Supreme Court has consistently acknowledged that the 60-day period within which to file an appeal cannot be extended. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660; *In re Benoit* (1973) 10 Cal.3d 72; *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106.) Equally consistently, the Court has held that the doctrine of constructive filing does not extend the time to file an appeal, but applies in circumstances and to actions that "constitute[] a constructive filing within the prescribed time limit and satisfied the jurisdictional requirement as contemplated by law." (*Silverbrand*, *supra*, at p. 600, quoting *People v. Slobodian* (1947) 30 Cal.2d 362, 368-369.)

Accordingly, the cases discussed below have accepted a constructive filing subject to a necessary condition that the putative appellant acted to cause an appeal to be taken before the deadline expired. A litigant who took no action toward filing an appeal, whether from ignorance of the requirement or otherwise, cannot be deemed to have constructively filed an appeal. (See, e.g., *Benoit*, 10 Cal.3d at p. 89.) Because the timely filing requirement is jurisdictional, there must have been affirmative action by the putative appellant before the deadline. The action must not have been a wish or a gesture. The rationale for the doctrine requires an objective

standard — that a reasonable person would have believed that he or she had done what was required for the notice of appeal to be filed on time.[1]

This section will explain that the constructive filing doctrine has been applied only where a litigant took action to appeal before the deadline. In addition to this necessary condition for applying the doctrine, it has been applied where other circumstances were present. But the progression of cases in the California Supreme Court shows that none of those other conditions was always present. They are alternatives, and none is essential to applying the doctrine.

The briefs of the parties have provided a chronology of the doctrine's development to date. It developed originally in criminal appeals for the benefit of persons in custody. (See *People v. Slobodian* (1947) 30 Cal.2d 362; *People v. Calloway* (1954) 127 Cal.App.2d 504; *In re Gonzalves* (1957) 48 Cal.2d 638.) Indeed, a label for this branch of the doctrine, the "prison-delivery rule," might be taken to mean that only persons in the custody of the state may use the doctrine. But the doctrine has not been so limited. (See *People v. Martin* (1963) 60 Cal.2d 615, 616-619.)

In *Martin*, a criminal defendant was the putative appellant. While it can be inferred that he was in custody, that played no part in the rationale for applying the constructive filing doctrine. Mr. Martin, in pro per, moved for a new trial and informed the trial judge of his intention to appeal on a date within the time limit to appeal. The new trial motion was heard after the time to appeal from the judgment had elapsed. Mr. Martin filed a notice

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[1] *Silverbrand* recognized that the doctrine has been extended to a prisoner who gives a notice of appeal to prison officials before the deadline, even if that happened too late to reach the clerk in time. (46 Cal.4th at pp. 115-116, discussing *People v Dailey* (1959) 175 Cal.App.2d 101, 107, which relied on the lack of fault of the prisoner as well as administrative convenience.)

of appeal on the same day as the new trial hearing, after that motion was denied, and the trial judge ordered that the notice of appeal be filed. The Supreme Court reasoned that "[h]ad his notice of motion for a new trial been dealt with in a manner that was consistent with the court's recognition of the prior entry of judgment, defendant would have been able to file a notice of appeal which would have been timely as to the date of entry of the judgment." (*Martin*, *supra*, 60 Cal.2d at p. 619.) Arguably, the rationale of Martin was either the vindication of a litigant's reasonable expectations, or the narrower rationale of an estoppel against enforcement of the deadline.

The Supreme Court rejected the estoppel rationale in *In re Benoit*. There, the Court decided two consolidated cases. In one, Mr. Benoit had instructed his lawyer before the deadline to file an appeal. His representation was taken over by another lawyer, who was told that the first lawyer was processing the notice of appeal before the deadline — which did not happen. In the other case, Mr. Wycoff instructed his lawyer to appeal on the date of his sentencing. (10 Cal.3d at pp. 77-78.) The lawyer had prepared the notice but had left on vacation, and he did not realize that it had not been filed until Mr. Wycoff asked him, after the deadline. (*Id.*, p. 78, fn. 6.)

The Court discussed the history and rationale of the constructive filing doctrine and the implications of the period from 1961 to 1972, in which the doctrine was not used because of a 1961 amendment to Rule 31(a) of the Rules of Court, allowing acceptance of certain late notices of appeal, which was eliminated in 1972. Characterizing the rule before the amendment, the court stated:

> In summary, the appellate courts of this state for a number of years prior to the 1961 amendment to rule 31(a) . . . while adhering to the established rule that the time for filing a notice of appeal is jurisdictional, have sought to

> alleviate its harshness in certain compelling circumstances by holding that the appellant's efforts should be deemed to be a filing of the notice in time.

The Court continued:

> Thus, as we have explained, emerged and developed the principle of constructive filing which in our view embodies nothing more than a basis for judicial acceptance of an excuse for the appellant's delay in order to do justice. [Citation omitted] We think this principle has continued validity today as a judicial instrument for resolving questions of delay in filing notices of appeal which may arise under the 1972 amendment.

And the Court observed:

> Nowhere in this revised procedure, however, do we perceive an intention to clothe the general jurisdictional rule with an absolute character so as to foreclose all excuses for late filing.

(*Id.* at pp. 83-85.) The court acknowledged that previous cases had applied the constructive filing doctrine "(1) only to incarcerated appellants and (2) in special circumstances where the delay in filing the notice of appeal (a) has resulted from conduct or representations of prison officials upon which the prisoner relied and (b) has not been due substantially to fault on the part of the prisoner." (*Id.* at p. 86.) The Court concluded:

> Nevertheless we believe that in the interest of justice the principle should be extended to apply to situations like the instant one where the defendant is incarcerated or otherwise in custody after having been properly notified of his appeal rights by the sentencing judge and has made arrangements with his trial attorney to file a notice of appeal for him.

(*Id.*)[2] The Court characterized both Mr. Benoit's and Mr. Wycoff's efforts to see that their attorneys had carried out the instruction to appeal as diligent, and stated that constructive filing requires both reasonable reliance on the attorneys and diligence in acting to make sure that the attorneys had acted to file the appeals. (*Id.* at p. 89.)

In dissent, Justice Clark argued that estoppel — arising from the causal role of a state actor — is the basis for the constructive filing doctrine, and estoppel could not justify an extension for Mr. Benoit or Mr. Wycoff. The majority's rejection of Justice Clark's argument demonstrates clearly that estoppel based on a state actor's conduct is not required.[3]

We submit that questions about what other limitations should be imposed on permissible constructive filings can and should be answered with an eye to the importance of the interests involved and to providing access to substantive justice — rulings according to the merits — unless good reasons require imposing a default. In *Silverbrand v. County of Los Angeles,* the California Supreme Court articulated the framework for answering the questions:

> We long have recognized a "well-established policy, based upon the remedial character of the right of appeal, of according that right in

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[2] In the instant case, the parent relied on an attorney who was appointed by the government. That adds force to recognition of the doctrine as applied in *Martin* and similar cases. In this brief, we argue for a broader application because of the importance of the interest in parental rights.

[3] Justice Clark cited *People v. Lewis* (1933) 219 Cal. 410, 413-414, *People v. Riser* (1956) 47 Cal.2d 594, and *In re Del Campo* (1961) 55 Cal.2d 816, 817. While *Riser* can be considered to arise from the appellant's lack of diligence and the lack of evidence that he tried to appeal before the deadline, the holding of *Benoit* notwithstanding *Lewis* and *Del Campo* shows that the rationale based on state action-based estoppel does not limit the constructive filing doctrine.

> doubtful cases 'when such can be accomplished without doing violence to applicable rules.'" (*Hollister* [*Convalescent Hosp., Inc. v. Rico,*] 15 Cal.3d [660] at p. 674, 125 Cal.Rptr. 757, 542 P.2d 1349.) "[T]here are many cases in which this policy, implemented in accordance with 'applicable rules,' will lead to a determination, based on construction and interpretation, that timely and proper notice of appeal must be deemed in law to have been filed within the jurisdictional period." (*Ibid*. italics omitted) Although adhering to the established rule that the time for filing a notice of appeal is jurisdictional, these decisions seek to alleviate the harshness of the rule's application in certain compelling circumstances by holding that an appellant's efforts should be deemed to be a constructive filing of the notice within the prescribed time limits.

(*Silverbrand*, *supra*, 46 Cal.4th at p. 113.) For a litigant in custody, the Court concluded that the rationale for the constructive filing doctrine applies to civil cases in which a person in custody attempted to submit a notice of appeal before, but the notice reached the clerk after the deadline. (*Id.* at pp. 121-122.)

One reason for extending the rule to civil cases in *Silverbrand* was the importance of the issues in civil cases:

> [E]ven though a civil lawsuit does not challenge the conviction that resulted in the inmate's incarceration, civil cases involving prisoner litigants frequently concern important constitutional issues, such as prison conditions, deprivation of civil rights, *and the termination of parental rights*, as well as other significant matters, such as marital dissolution.

(*Id.* at p. 121; emphasis added.)[4]

It is not a disputed point that the termination of parental rights is as important as, or more important than, the issues involved in many criminal appeals. As Justice Ginsburg wrote for the United States Supreme Court, "parental termination decrees are among the most severe forms of state action." (*M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 124.) The California Supreme Court characterized a parent's interest in retaining and maintaining a parent-child relationship as a "fundamental liberty interest." (*In re Laura F.* (1983) 33 Cal.3d 826, 844.)

In summary, the major cases establish that to invoke the constructive filing doctrine it is a necessary condition that the putative appellant took affirmative steps such that, but for circumstances beyond his or her control, the appeal would have been filed before the deadline. This necessary condition has been accompanied by several respective categories of circumstances, each treated as a sufficient condition. The initial doctrine was based on the necessary condition being satisfied with a sufficient additional condition that the putative appellant was a self-represented person held in criminal custody. In another variant, the necessary condition was satisfied and the additional, sufficient condition was that the putative appellant gave a timely instruction to his lawyer to appeal a criminal conviction. In yet another variant, a putative appellant (without reference to being in custody) satisfied the necessary condition along with an additional, sufficient condition that a state actor led the putative appellant to

[4] The importance of issues in civil cases was not the entire rationale for the *Silverbrand* decision. The opinion also invoked the principle of equality as between self-represented prisoners, nonprisoners, and prisoners represented by counsel. (*Id*. at p. 121.) *Benoit*, however, had already applied the constructive filing doctrine to those convicted of crimes who instructed their lawyers to appeal, where the lawyers failed to do so before the deadline.

believe that his appeal would be timely. *Silverbrand* added that if the necessary condition is present, it is a sufficient additional condition to apply the constructive filing doctrine in a civil action if the putative appellant is a person in custody.

Several alternative types of sufficient conditions can each justify constructive filing when the necessary condition in *Benoit* is also satisfied. This establishes, logically, that no one of the additional sufficient conditions is essential to the doctrine. We respectfully submit that if the necessary condition is satisfied, the Court can recognize a new variant of the rule with an alternative sufficient condition "in order to do justice" (*Benoit*, *supra*, 10 Cal.3d at p. 84.) The fundamental human interest in parental rights (recognized in *Silverbrand*, *supra*, 46 Cal.4th at p. 121) can and should be recognized as a sufficient condition for applying the doctrine of constructive filing where the necessary condition — including the requirement of diligence emphasized in *Benoit* (*supra*, 10 Cal.3d at p. 89) — is also satisfied.

II. THE INTERESTS OF OTHERS IN FINALITY DO NOT REQUIRE REJECTION OF THE CONSTRUCTIVE FILING DOCTRINE.

We argue in favor of application of the constructive filing doctrine to orders terminating parental rights in order to do justice where the parent has satisfied the necessary conditions including the diligence that *Benoit* required.

The Minor's Brief argues that the interests of others in finality preclude recognition of the constructive filing doctrine in cases of termination of parental rights. First, the impact, if any, on the interests of others should be determined not by considering the impact of the time required for a timely-filed appeal by the parent. The period required for an appeal must be accepted by others because of the parent's right to appellate

review. Instead, what should be considered is any addition to that impact caused during the interval in which the third parties reasonably believed the termination of parental rights had become final.

The instant case is not a gauge for the time that would be added to an appeal by applying the constructive filing doctrine. The time required to decide a contested issue of first impression — whether the constructive filing doctrine applies to appeals from orders terminating parental rights — is far longer than will be involved once the doctrine has been accepted. The diligence requirement emphasized in *Benoit* (10 Cal.3d at p. 89) means that the amount of time that is added to the appeal proceeding should be measured in days or weeks.

The Minor's brief points to the possibility of an adoption in reliance on the termination of parental rights. It is our understanding, however, that the pace of adoption proceedings will rarely if ever be so brisk that they could commence after (and in reliance on) an order terminating parental rights and be completed before a diligent parent files a notice of appeal requesting application of the constructive filing doctrine. The fact that an adoption concluded subsequent to a termination order under ordinary circumstances would almost always demonstrate an absence of the requisite diligence for application of the doctrine. If an adoption did become final in that interval, the proper resolution of the case that would be based on other legal rules than the constructive filing doctrine.

We respectfully submit that the time added to the parent's appeal in circumstances where a constructive filing would be allowed does not justify an across-the-board rejection of the doctrine. Termination of parental rights is "among the most severe forms of state action." (*M.L.B. v. S.L.J.*, *supra,* 519 U.S. at p. 124.) Moreover, the interest of children in the parent-child relationship is fundamental as well. The best interests of the child may be

served by continuation of parental rights if that is the outcome of the parent's appeal.

> The relationship between parent and child is so basic to the human equation as to be considered a fundamental right, and that relationship should be recognized and protected by all of society . . . . Interference with that right should only be justified by some compelling necessity . . . .

(*In re Smith* (1980) 112 Cal. App. 3d 956, 968-969; see *Stanley v. Illinois* (1972) 405 U.S. 645, 651; *Van Atta v. Scott* (1980) 27 Cal.3d.424, 436.)

The child's best interests will necessarily be considered throughout the process, including any proceedings on remand after a successful appeal by a parent. The best interests of children do not depend on denying an appeal to a parent who sought to appeal in time, where another person was at fault for the missed deadline.

III. COURTS SHOULD APPLY THE CONSTRUCTIVE FILING DOCTRINE IN CASES OF TERMINATION OF PARENTAL RIGHTS.

The brief on behalf of the minor argues that constructive filing has not previously been allowed in these circumstances. While this is correct, as shown above, it does not preclude the Court from adopting the constructive filing doctrine to appeals from termination of parental rights.

The Minor's brief cites *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 867-868. That case decided a question we do not address: the availability of habeas corpus as a procedure to challenge an adoption after the time for an appeal from the adoption had lapsed.[5]

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[5] We note that *if* a habeas remedy — which is available to protect the fundamental liberty interests of criminal defendants — were not applicable

The Minor's brief relies on cases such as *In re A. M.* (1989) 216 Cal.App.3d 319, *In re Isaac J.* (1992) 4 Cal.App.4th 525, and *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254, holding that the special considerations in cases under Civil Code section 232 should render the constructive filing doctrine unavailable. If the necessary conditions for a constructive filing are met, including diligence by the parent, the delay in commencing the appeal will cause the child or third parties no more prejudice than if the parent's notice of appeal had arrived before the deadline.

More importantly, to maintain a parent-child relationship that was erroneously terminated serves the fundamental interest of the child as well as the parent. The best interest of the child does not justify cutting off the fundamental interest in parental rights without an appeal where the requirements of the constructive filing doctrine are met. In any event, the trial court upon any remand would have the responsibility to consider the best interests of the child at that point in time.

We respectfully submit that the constructive filing doctrine should apply to a parent whose parental rights have been terminated if:

(a) The parent took steps before the deadline for an appeal that a reasonable person would believe to be sufficient to cause a notice of appeal to be filed. As recognized in *Benoit*, giving the parent's lawyer the instruction to appeal is sufficient.

(b) The parent has acted diligently in monitoring the appeal and in seeking acceptance of the constructive filing after the notice of appeal fails to reach the clerk by the deadline. Delay by the parent resulting in a

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to parents after termination of their fundamental liberty interest in parental rights, that may be considered one more reason for applying the constructive filing doctrine in cases of terminated parental rights.

significant period of time passing before the parent seeks recognition of a constructive filing can defeat the constructive filing request.

The parent should be required to establish these elements by a showing of particularized facts, not mere conclusory assertions. If a third party objects, the parent should bear the burden of persuasion.

CONCLUSION

The relationship between parent and child is too important for justice to be deemed served by denying an appeal from a parent's termination order because of a procedural default that was not due to unreasonable conduct by the parent and that causes no more delay or prejudice to the child or third parties than would result from a timely appeal. Since, under the precedents, courts can apply the constructive filing doctrine to cases of termination of parental rights, they should do so in order to do justice.

Dated: October 7, 2020

Respectfully submitted,

By: 

Michael J. Levy, Chair
Catherine Blakemore, Vice-Chair

Amicus Curiae Committee of the
California Access to Justice
Commission

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this Application For Leave To File Amicus Curiae Brief and Brief of Amicus Curiae was produced using at least 13 point font and contains 5,191 words.

Dated: October 7, 2020

Michael J. Levy,

PROOF OF SERVICE

I declare that I, Catherine Blakemore, am one of counsel of record for the Amicus Curiae Committee of the California Access to Justice Commission. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on October 7, 2020, I served a copy of the following document:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE

BY ELECTRONIC SERVICE: I caused the document(s) to be sent to the persons at the electronic notification addresses listed with the TrueFiling Servicing Notification.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Sacramento, California, October 7, 2020.

/s/ Catherine Blakemore
Catherine Blakemore