

In re A.C. (7/20/11)

197 Cal. App. 4th 795; 130 Cal. Rptr. 3d 271

Fourth Appellate District

Issues:

1. Is an exit order awarding the custodial parent sole physical and legal custody and monitored visits for the other, with the only condition that parents were to decide on the monitor and if unable to do so the custodial parent would choose, an impermissible delegation of the right to determine visitation for the non-custodial parent?

2. If there is a conflict regarding visitation between the oral order stated by the court on termination of jurisdiction and the provisions regarding visitation in the written exit order on the judicial council form, which provisions prevail and how is the conflict resolved?

Facts:

Children are placed with father on an Home of Parent, father order. Father is receiving family maintenance services, mother family reunification services. At first WIC 364 hearing, court finds that conditions no longer exist requiring dependency jurisdiction. After a contested hearing the court terminated jurisdiction and awarded father sole physical and legal custody and monitored visits for mother. Parents were to decide on the monitor, and if unable to do so father could choose.

The written exit order on the judicial council form had the box checked for supervised visits with the added language “to be determined by the parents”. Mother appealed claiming that the written order on the judicial council form was an impermissible delegation to father of the right to determine whether mother should have any visits at all, citing In re T.H. (2010) 190 C.A. 4th 1119. The T.H. court specifically disapproved “to be determined by the parents” as an impermissible delegation to the custodial parent of the right to determine whether the non-custodial parent should have any visits.

Holding:

The language “to be determined by the parties” that was inserted on the judicial council form in this case violates the impermissible delegation rule espoused in T.H. On the other hand, the oral order that the court made in this case that the parties are to agree on the monitor or father can choose one if there was no agreement does not violate the impermissible delegation rule because this language does not permit the father to determine whether or not mother could visit.

The conflict between the oral pronouncement of visitation as contained in the reporter’s notes and that contained in the written order on the judicial council form is

resolved in favor of the court reporter's notes because the notes are presumed to be more accurate. The remedy is for the trial court to correct the exit order on remand to reflect the oral order made by the trial court on termination.

Query: What if the parties can agree on a monitor but the custodial parent will not agree on the time, place, or length of the visit? Doesn't the custodial parent still have the power to deny visits to the non-custodial parent even if the offending language is removed? Isn't the remedy the same in both cases, ie, go to the family court for a specific visitation plan?

In re A.D. (6/28/11)
196 Cal. App 4th 1319; 127 Cal. Rptr. 3d 519
Fourth District, Division Three

Issue:

Is failure to give notice in juvenile dependency court subject to harmless error or structural error analysis?

Facts:

A 12 month review hearing was held in the morning of January 3, 2011. Mother was not present. Mother had originally had custody of the children after disposition but during the next 18 months she had several dirty tests, was discharged from a program and had been incarcerated and had not informed the social worker. After disposition of a supplemental petition the children were detained. During the twelve months that followed, Mother had not complied with the case plan and had visited only sporadically. SSA's (Orange County Social Services Agency) recommendation was to terminate reunification and place fourteen year old A.D. in long-term foster care.

During the morning hearing, mother was not present. The court found notice proper, terminated services and ordered long-term foster care as the permanent plan. Mother's counsel did not ask for a continuance. The mother showed up in the afternoon and the court re-called the case because mother's counsel informed the court that mother had arrived and ask the matter be reheard. The court noted mother present and gave all parties an opportunity to be heard. Mother's counsel asked the court to vacate the orders stating "there may have been some notice issues". Counsel also stated that mother's situation had changed and stated further that counsel had not had any contact with the mother since March of 2010 and had only left a telephone message on December 30, 2010. Mother's counsel asked for a contested hearing and the court denied the request.

The court found there was no good cause or change of circumstance to justify modification of the orders and denied the motion to vacate. Mother appealed contending she did not have proper notice and that she had a statutory and due process right to a contested hearing.

Holding:

Affirmed: Failure to give notice in dependency proceedings is subject to aharmless error analysis. If the outcome of a dependency proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless, and reversal is not required. The court discussed the doctrine of structural error which developed in criminal cases and the difference between criminal & dependency cases, "the ultimate consideration in a dependency proceeding is the welfare of the child, a factor having no clear analogy in a criminal proceeding."(In re James F (2008) 42 Cal.4th 901). The court also found that the denial of a contested hearing was not an abuse of the court's discretion. "Mother's counsel did not seek a continuance of the hearing, and the court

was presented with a valid stipulation on which it based its finding.” “The notice defect was not the cause of mother’s tardy appearance.”

(In re A.J.) (6/30/11)
197 Cal. App. 4th 1095; 128 Cal. Rptr. 3d 341
Fourth Appellate Dist., Division Three

Issue:

Does Section 300(c) apply to a child if the child at *substantial risk of suffering serious emotional damage*.

Facts:

Mother obtained several restraining orders against father under false pretenses, falsely reported the child was abducted by father and falsely reported the child was sexually abused by father. After the court took jurisdiction, the mother continued to harass father with phone calls and threatening voicemails during the course of the case. She then falsely obtained a temporary restraining order from a family law court which gave her sole physical custody. Mother's attempt was thwarted by father and paternal grandmother but child was severely traumatized by the event. The child refused to visit mother after this event as she feared her mother would take her away in the future and she suffered several nightmares about the experience. The juvenile court declared the child a dependent child under section 300 (b), (g), and (c) and pursuant to 360 (d) found the child a dependent awarding sole physical and joint legal custody to father with monitored visits to Mother.

Mother appealed the jurisdictional findings.

Holding:

The Court of Appeal affirmed the 300 (c) finding by the trial court and found that the child's risk of suffering emotional damage was great based on the continued barrage of harassment by the mother and the child's fear and nightmares directly related to mother.

In re Andrew L. (2/8/11)
192 Cal. App. 4th 683; 121 Cal. Rptr. 3d 664
Division One, Fourth Appellate District

Issue:

Did the court err, at the six month review hearing, in granting a motion by the San Diego County Health and Human Services Agency to dismiss subd. (a) of the original 300 petition and amend subd. (b). to conform to proof.

Facts:

In February 2008, a petition was filed on behalf of infant Andrew, alleging that mother tested positive for Benzodiazepines and alcohol blood level of 0.25 at Andrew's birth. She had been brought to the hospital after a domestic violence incident involving the father. At disposition Andrew was placed with the father and mother was given monitored visits.

One year later in February 2009, mother gave birth to Matthew. He was born prematurely and placed in the NICU. In March of 2009, the court terminated the mother's reunification services in Andrew's case.

Matthew was also placed with his father at discharge from the NICU. In July 2009 father brought Matthew to the hospital. He was lethargic, had a fever and blood in his nose. He had never received immunizations or follow up care while in Father's custody. He also was filthy and appeared not to have received adequate care. It was also found that the father had left Matthew and Andrew in mother's care about 25 times.

A petition was filed as to Matthew alleging serious medical conditions, medical neglect, and allowing the mother to have unsupervised contact. A 387 petition was filed on behalf of sibling Andrew and both were removed from the father.

In August, 2009, the Agency filed an amended petition on Matthew alleging that he had a subdural fluid collection (hematoma) in the right front parietal area which medical providers stated was indicative of trauma.

In Oct. 2009, the court found the allegations true, continued removal and ordered FR services.

Subsequently, Matthew was not growing normally and an MRI indicated an underlying metabolic disorder. The medical provider now became less certain that the subdural hematoma had been caused by trauma.

In May 2010, the mother filed a WIC 388 petition arguing the original petition filed on behalf of Matthew should be dismissed and he should be returned to his parents. One week later, the Agency filed a motion asking under WIC 390, that the court dismiss the (a) allegation because of the change in diagnosis and also that the court amend the (b) allegation, deleting the language referring to the hematoma.

At 21(e) hearing was held in June 2010, the medical provider testified to the change in diagnosis. The court also heard testimony from social workers and from the mother. The agency suggested that if 390 motion was not the correct vehicle for dismissing the count and amending the original petition, then it was making an oral 388 motion. The court granted the 390 motion, dismissed (a) and amended (b) and denied the mother's 388 petition.

The father appealed arguing that 390 permits dismissal of the entire petition but not part after a true finding, and it was improper to strike words under 388. Father claims he was prejudiced because he was denied the right to challenge the modified petition.

Holding:

Affirmed. Dismissing the entire petition and filing a new petition would delay the proceedings to the child's detriment. The court stated "Regardless of the vehicle by which the agency sought to amend the petition, all parties were on notice of the change the agency was proposing and the juvenile court provided ample opportunity for the parties to full and fairly litigate the issues and their legal rights in the context of a full hearing."

The appellate court did note, however, that a WIC 388 petition was a better vehicle than a motion under WIC 390 to amend the previously sustained petition.

In re Anthony G. (3/30/11)
194 Cal App 4th 1060; 123 Cal. Rptr. 3d 660
Second Appellate District, Division One

Issue:

Did trial court appropriately sustain WIC (g) against the father when the child was otherwise provided for by mother and MGM?

Facts:

The Los Angeles County Superior Court adjudged appellant father's son a dependent of the court pursuant to Welf. & Inst. Code sec 300(b)(failure to protect) &(g)(no provision for support). The evidence showed that the child was dressed and well groomed and no visible marks or bruises, lived in a stable house with his mother and grandmother. Father had seen the child 1-4 times since his birth. He had never provided any financial support. Mother stated that she was struggling financially.

The trial court found that father had not contributed financially to the minors support and sustained 300(g). Father appealed.

Holding

The appellate court concluded that the juvenile court's finding that Anthony was a person described under section 300, subdivision (g) was not supported by substantial evidence because the record does not show the child was left without provision for support. It was immaterial that the father did not contribute financially to the child's support because no evidence suggested that the father's contribution was necessary. The mother and grandmother provided Anthony with support. That the father failed to contribute to that support does not justify jurisdiction under WIC 300(g).

In re B.C. (1/27/11)
192 Cal. App. 4th 129; 121 Cal. Rptr. 3d 366
Second Appellate District, Division Three

Issue:

Did the trial court err in declining to hold a hearing on the replacement of the child issue after receipt of acknowledgment of the mother's voluntary relinquishment of her parental rights?

Did the Court abuse its discretion when it granted the continuance request on February 2, 2010, continuing the .26 hearing?

Facts:

This case involves an appeal continuing a .26 hearing, an order which enabled the mother to timely file a relinquishment of parental rights. In this case, BC was born while mother was in custody and subject to a 5150 hold. Mother had no plans for the child's care and BC was placed in foster care. Mother appeared at the detention hearing in October '08, and then lost contact with the Dept. BC was placed in a foster home with foster parents with an approved home study.

In May '09, the maternal aunt contacted the Dept and stated that she would like to adopt BC. In June '09, the Dept. designated the aunt as the prospective adoptive parent. Minor's counsel requested that DCFS not change the child's placement without advance notice and prior court order. The Court issued a "do not remove" order. Mother was located in a mental health facility in Aug. '09.

A .26 hearing had been set for 8/28/09. DCFS continued to consider the maternal aunt as the prospective adoptive parent and the foster parents sought de facto parent status. A bonding study was ordered. The bonding study concluded, in part, that the child was attached to the foster parents and had an insecure attachment to the maternal aunt. The Dept. continued to recommend replacing the child with the maternal aunt.

In Jan. '10, it came to light that the mother was under a conservatorship. Mother's conservator was not prepared for the hearing. County Counsel conflicted off the case. The .26 hearing was continued to February 2, 2010. By that date, maternal aunt had only visited the child 3 times. On that day, Mother requested a 30 day continuance on the basis that the mother was in the process of formally relinquishing BC to DCFS. Over the foster parents and minor's counsel's objection, the case was continued to 3/9/2010. On 3/9/10, the court received receipt of the relinquishment during the course of the 366.26 hearing. The court terminated the .26 hearing, stating that because the mother had relinquished her parental rights, she no longer had the right to terminate mother's parental rights nor jurisdiction over the determination of where the child should be placed, and lifted the do not remove order.

Holding:

1) The trial court held that the dependency court erred in lifting the "do not remove" order without conducting a hearing to determine whether placement with the aunt was patently absurd or unquestionably not in the minor's best interests. The law is clear that when a voluntary relinquishment precludes a court from proceeding with the Welfare and Institutions Code section 366.26 hearing, the court has no authority to designate a current caretaker as a prospective adoptive parent. (*In re R.S.*, *supra*, 179 Cal.App.4th at p. 1152–1154.) Nonetheless, the court still retains its limited authority to disapprove an agency placement decision if the agency's decision is patently absurd or unquestionably not in the minor's best interests. (*Id.* at p. 1150.) In this case, the trial court erred in not considering whether placement with the child's aunt—as designated by mother and intended by DCFS—was patently absurd or unquestionably not in the child's best interests.

(366.26(n) designation applies only at or after the .26 hearing and because there was no WIC 366.26 hearing, the court could not designate a prospective adoptive parent.)

2) The court held that the trial court had abused its discretion when it granted mother's continuance request in order to perfect her relinquishment. WIC 352 provides that a trial court may grant a continuance for good cause shown, for the period of time shown to be necessary and when considering whether to grant the continuance, the court shall give substantial weight to a minor's need for a prompt resolution.... Written notice is required 2 days in advance, unless the court for good cause entertains an oral motion for continuance.

The Court of Appeal held that a dependency court need not grant a continuance in order to enable the parent to complete a pending relinquishment and "that it is *not* within a child's best interests to continue an already much-delayed Welfare and Institutions Code section 366.26 hearing in order to enable a parent to complete a last-minute end-run around an anticipated termination of parental rights. It further stated that "in a case such as this where 1) The hearing had been continued multiple times; 2) the parent intended to complete a relinquishment of parental rights designating adoptive custody to go to a relative; and 3) substantial questions had been raised as to whether placing the child with the relative was in the child's best interest, granting the continuance was not in the child's best interest and therefore constituted an abuse of discretion."

In re Brittany C. (1/20/11)
191 Cal. App. 4th 1343; 120 Cal. Rptr. 3d 338
Second Appellate District; Division Four

Issues

- 1) Can the father file and appeal on behalf of one of the children?
- 2) Did the juvenile court's order, in effect, deny mother visitation and abdicate its duty to order visitation by allowing the children to decide whether the visits should take place? Can the court rely on potential emotional damage to the children in making the determination to suspend visitation?

Facts

The Juvenile Court took jurisdiction finding that a severe family conflict existed that placed the children at risk of serious physical and emotional harm. Initially, the children had alleged physical and sexual abuse by mother and father, but it deteriorated into an ongoing feud with the children hurling allegations against mother and father and each other. It became difficult to separate fact from fiction.

In June 2009, the mother filed a 388 petition requesting conjoint counseling (with the quadruplets) and unmonitored visitation. The Juvenile Court went to extraordinary lengths to arrange conjoint counseling and visitation to no avail. The children refused to be in the same room with their parents, at one time leaving the visit and requiring the assistance of law enforcement to have them return to the Agency office.

After hearing from the conjoint therapist and ordering a 730 evaluation, the juvenile court suspended conjoint counseling and visitation and ordering the children into individual counseling.

Holding

Father cannot file an appeal on behalf of one of the siblings, even if she is on a home of parent father order. The child is in the dependency court because, in part, of the actions of the father. As long as she is a dependent of the court, there is a conflict of interest between her interests and father's. Therefore, he may not file an appeal on her behalf.

The AC found that the juvenile court's visitation order was appropriate. It noted that visitation must be as frequent as possible consistent with the well-being of the child. However, visitation must provide for flexibility in response to the changing needs of the

child and the family dynamics. A child's refusal to visit and his/her wishes are factors to be considered.

The AC noted the great lengths the juvenile court and the conjoint therapist went to in order to arrange visitation. It was only when no other options were available that the visitation and conjoint counseling were terminated. Mother relied on *In re C.C.(2009) Cal. App.4th 1481* to argue that the court could not suspend visitation unless it found that the children's physical safety would be harmed by further visits.

This court noted that detriment includes harm to the child's emotional well-being, noting that otherwise the court would be required to sit by while the child suffered extreme emotional damage cause by on-going visits. In this case the visits had deteriorated into little more than expletive-laced tirades or a total lack of interaction.

Finally, the children's wishes were not the sole factor in the court's decision to suspend visitation. The therapist halted the conjoint counseling sessions and the court was unwilling to continue visitation in a non-therapeutic setting. Counseling for the children without the parents was, perhaps, the only chance this family had of repairing the damage already done.

In re Bryan D. (9/13/11)
199 Cal. App. 4th 127
Second Appellate District, Division Eight

Issue:

Did trial court err in denying MGM's motion to be deemed Bryan's presumed mother, or in the alternative, his de facto parent. Was there sufficient evidence to support the juvenile court's assumption of jurisdiction.

Facts:

Bryan, a 12 year old boy came into the system after allegations that the MGM who raised him and was his primary caretaker left him home alone for over 12 days while she went out of the country without making appropriate childcare arrangements for him. Mother alleged that MGM had taken Bryan from her and had raised Bryan as her own until maternal aunt told him 2 years before that he was mother's son. Mother communicated with MGM once a month but did not know that the MGM had left the country. Petitions were sustained against mother and MGM in Orange County and case was transferred to L.A.

MGM filed a request to be considered a de facto parent and had counsel appointed. MGM and Bryan filed motions to deem MGM the presumed mother. Mother opposed the motion under Fam. Code 7611(d). Mother indicated she wanted to have a relationship with Bryan and had not pursued a relationship earlier due to MGM's threats and physical abuse. Bryan continually indicated that he considered MGM to be his mother as she was his primary caretaker and that he wanted to return to live with her but that he also wanted a relationship with mother. Court denied presumed mother and de facto parent mother motions but ordered DCFS to consider MGM for relative placement, conjoint counseling, and visits.

Holding:

The juvenile court's determination that MGM was not a de facto parent was reversed.

De Facto Parent Status- In this case five factors to determine de facto parent status were present i.e. 1) Bryan was psychologically bonded to MGM 2) MGM acted as the parent 3) MGM was only one with info about Bryan's upbringing 4) she had regularly attended his juvenile hearings and 5) there was a risk that a future proceeding would permanently foreclose her relationship with Bryan.

Further, MGM was not made ineligible due to the fact that there was a sustained petition against her. The court found that *In re Kieshia E.* requires that the caretaker have sustained a petition constituting sexual or other physical abuse to become ineligible for de facto parent status. The court disagreed with prior decisions suggesting that any sustained petition against a person, regardless of the nature of the conduct in question, would make them ineligible for de facto parent status finding that the harm must be

serious and substantial. If no *In re Kieshia E.* evidence is found then the courts should liberally grant de facto parent motions.

MGM's actions leaving Bryan home alone and failing to make appropriate short term child care arrangements for Bryan while she left the country did not constitute sexual or other serious physical abuse as required by *In re Kieshia E.* The court found that the fact that the dependency court indicated that MGM should be considered as a relative placement, provided counseling, and visitation was proof that there was no substantial evidence of betrayal or abandonment of her parental role.

Assertion of Jurisdiction – There was substantial evidence to support jurisdiction under WIC 300(b). Even though there was no actual evidence of harm, actual evidence of harm is not required since the purpose of dependency proceedings is to prevent risk and in this case child was at risk of substantial physical harm or illness.

Presumed Mother Status- Fam. Code 7611(d) has been applied to women in certain situations such as same-sex relationships. Other non-dependency cases suggest that if the bio MO is present and asserts an interest, 7611(d) should not apply. Court did not decide whether 7611(d) would apply in this case, finding that even if it did, MGM would not qualify because it requires that the person have held the child out as their natural child. MGM did not hold Bryan out as her son but as her grandson.

In re B.T. (2/9/11)

193 Cal. App. 4th 685; 122 Cal. Rptr. 651
Fourth Appellate Dist., Division Three

Issue:

Did 38 yr old mother's affair with 14 year old boy resulting in birth of child present risk to her children?

Facts:

BT is a child who was conceived during an unlawful sexual relationship between Debra T., an adult and Miguel M, a minor. Debra was 38 years old and married to Jesse when she began having a sexual relationship with her neighbor's 14 or 15 year old son, Miguel. According to Miguel, Debra instigated the relationship, which lasted about 6 months, where they had sex approximately twice every other weekend. According to Debra, Miguel was the instigator, and they had sex only three times. She had been intoxicated the first time and had realized only afterward that Miguel had had sex with her. She also admitted that she regularly drank beer at night. Debra also had three other children, ages 17, 12, and 9. The trial court assumed jurisdiction over BT pursuant to WIC 300 (b) and (d). The trial court based its ruling in part on the lack of judgment and impulse control demonstrated by Debra's relationship with Miguel. The court also found that Debra abused alcohol, leading to lapses in judgment.

Holding:

Reversed. The three elements for jurisdiction under section 300 (b) are: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) serious physical harm or illness to the child or substantial risk of such harm or illness. The third element requires a showing that at the time of the jurisdiction hearing the child is at substantial risk of serious physical harm in the future. Here, there the elements were not met because "BT was in fine shape while in Debra's home."

Inability to provide care due to substance abuse: Debra drank beer, but there was no evidence that the beer drinking rendered her incapable of taking care of her children or posed a risk to them. In this case, Debra drank beer, and various people opined that she drank more than she should. However, no one opined that she neglected or endangered BT. In fact, family members stated that beer had no effect on her behavior.

WIC 300 (d): No evidence that Debra or anyone else ever sexually abused BT. Debra never sexually abused any of her other children. Also, "[i]f Miguel's stories are credited, he was by his own admission a more than willing participant in the relationship, which is not surprising with an adolescent boy."

Jesse's failure to protect (300(b)): "Jesse had no reason to protect BT or the other children from Debra. She posed no danger to them."

In re C.F. (3/16/11)
193 Cal. App. 4th 549; 121 Cal. Rptr. 3d 881
Fourth Appellate District, Division One

Issue

Was the evidence sufficient to support the court's finding that the beneficial parent-child relationship exception to adoption preference is inapplicable?

Facts

Mother came into dependency under initial allegations that she had exposed her children, including a special needs son with Down's Syndrome, to domestic violence between her and her boyfriend. Mother later admitted to history of domestic violence and crystal methamphetamine use while caring for her children. At the 18 month review the children were returned to her, however, a supplemental petition was filed a few months later alleging mother had relapsed and had tested positive for drugs. She subsequently continued to test positive for drugs and resumed relationship with abusive boyfriend. After her relapse, mother was allowed supervised visitation but seldom visited the children. Later she did visit the children weekly but usually arrived late and had incidents where she did not make seeing the children the priority for her children. As the 366.26 hearing neared, mother's visits became more consistent. Her parental rights were terminated at the 366.26 hearing and the court found by clear and convincing evidence that the children were adoptable and that none of the statutory exceptions to adoption was applicable.

Holding

Mother did not meet the requirements of the beneficial parent-child relationship exception under WIC 366.26(c)(1)(B)(i). Sporadic visitation was insufficient to satisfy the first prong of the exception requiring maintaining regular visitation and contact with the child.

Mother also did not meet the second prong requiring that the child benefit from the continuing relationship. This prong requires the court to balance the strength and quality of the natural parent/child relationship against the security and sense of belonging in a new family. The parent must show that the parent/child relationship was providing a substantial and positive emotional attachment so that the child would be greatly harmed if the bond were severed. The parent must show that he or she occupied a parental role with the child.

The court cautioned that frequent visits with the child alone are insufficient to meet this burden as interaction between the parent/child would always confer some benefit to the child.

The court distinguished In re S.B. (2008) 164 Cal. App. 4th 289, arguing that the case was confined to its specific facts and does not stand for the proposition that a parent may establish the parent-child beneficial exception by showing that the child derives some measure of benefit from the parent/child contact. The court noted it had already distinguished In re S.B. in In re Jason J. (2009) 175 Cal. App. 4th 922 and cautioned counsel from continuing to file appeals relying on In re S.B.

In this case, the court found that the evidence showed that it was the maternal aunt and grandmother who met the physical and emotional needs of the children, including the special needs child, not the mother. Mother presented no evidence or bonding study showing that the benefits of maintaining her relationship with the children outweighed those of giving the children permanence.

In re C.F. (7/27/11)
198 Cal. App. 4th 454; 129 Cal. Rptr. 3d 537
Fourth Appellate District, Division Three

Issue:

Did the Court properly deny mother's motion/writ petition to have her name removed from the Child Abuse Central Index (hereafter CACI)?

Facts:

Wendy C., is the mother of C.F. Four days after the child received her six month immunizations in both her legs, the child was found screaming and crying in her crib and refusing to move. Her right leg was swollen and made a clicking sound when gently moved. Mother called the pediatrician. Two and a half hours later, the call was returned and the parents were advised to see the doctor the next day or to go to the emergency room. The next evening, at about 11:00 pm, the child was taken to the emergency room and was found to have a fractured right femur and facial abrasions. The pediatricians at Children's Hospital of Orange County suspected child abuse. After an eight day trial, the juvenile court sustained a petition on the ground that mother and father failed to protect the child due to the delay in seeking medical care for the child. Mother appealed the jurisdiction and dispositional findings, and the Court of Appeal reversed the trial Court findings. After the remittitur was issued, mother filed a motion in the juvenile court to seeking an order directing the Department to change its finding on a child abuse report from substantiated to unfounded and to transmit to the DOJ the modified finding with a request to remove mother's name from the Child Abuse Central Index (CACI). The trial court denied mother's motion. The juvenile court treated mother's motion as a petition for writ of mandamus under CCP Section 1085 or 1094.5 and denied the motion on the grounds mother failed to exhaust administrative remedies, the juvenile court lacks jurisdiction over petitions for writ of mandamus, and the motion was not related to CF's best interest.

Holding:

The appellate court held that the trial court did properly deny the mother's writ. Here, the remedy sought by the mother was an order directing the Department, an administrative agency, to take a particular action. Under the Child Abuse and Neglect Reporting Act (CANRA) the procedure by which an aggrieved party may challenge an agency's child abuse report is two fold: (1) the party must exhaust administrative remedies by completing the grievance process established by the State Department of Social Services and (2) if the grievance process does not provide the desired relief, the aggrieved party may file a petition for writ of mandamus pursuant to CCP Section 1094.5. Exhaustion of administrative remedies is generally required before a party may judicially challenge an agency's decisions.

The COA stated that the mother failed to exhaust her administrative remedies. Moreover, when the COA reversed the jurisdiction/dispositional findings, the juvenile court 's jurisdiction had, in effect, been terminated.

In re Daisy H. (2/8/11)
192 Cal. App. 4th 713; 120 Cal. Rptr. 3d 709
Second Appellate District, Division One

Issue:

Did the juvenile court commit error by sustaining a petition pursuant to 300 (a) and (b) based on old domestic violence and father's mental/emotional health?

Facts:

The juvenile court sustained a 300 (a) and (b) allegation stating that on prior occasions Father choked Mother and pulled her hair, and that once, while speaking to the minor Daisy, Father threatened to kill Mother. The evidence showed that mother said the choking and pulling of hair occurred in 2007, but Mother's later statements and court records indicated these events occurred in 2002. There was no evidence this 2002 incident occurred in the children's presence. Under 300 (b) the court also sustained an allegation that Father has mental and emotional problems which render him unable to provide regular care to his children, and that Father emotionally abuses his children by making derogatory statements about the mother. Each of the 300 (a) and (b) allegations included the accusation that Father's conduct "places the children at risk of physical and emotional harm." The court did not sustain a 300 (c) count finding that Father's name calling placed the minors at risk of "serious emotional damage." At disposition, the two minors were placed with their Mother. Father appealed. While the appeal was pending, the court closed the case with joint legal and physical custody to the parents with physical custody shared pursuant to a mediation agreement signed in the dissolution proceeding.

Holding:

The Court of Appeal held that the court erred in finding the children were at risk of "physical and emotional harm," and that the evidence was insufficient to support such a finding. Under 300 (a), there must be proof that the child suffered or is at substantial risk of suffering "serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." Here, there was no evidence that Father ever intentionally harmed any of his children, or that there was a risk of intentional harm. DCFS even admitted that the Father has not been abusive towards the children, or threatened them with abuse.

Pursuant to 300 (b) there must be proof that the child suffered or is at substantial risk of suffering, "physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child." Physical violence between parents may support jurisdiction under 300 (b) but only if the violence is ongoing or likely to continue and that it directly harmed the child physically or placed the child at risk of physical harm. Here, the violence between the parents either occurred in 2007, two years before the filing of the petition, or in 2002, years before the filing. The children denied ever witnessing violence between the parents, there was no evidence of

ongoing violence between the parents who were now separated, and the children said they did not fear their Father.

The Court of Appeal also found the court erred by relying on evidence of name-calling by the Father, evidence of past domestic violence, and Father's "mental and emotional problems" to find the minors were at risk of "emotional harm" under Section 300 (a) and (b). Neither 300 (a) or (b) provides for jurisdiction for "emotional harm." WIC 300 (a) and (b) state that a minor may be declared a dependent of the court if there is a substantial risk of serious physical harm. The Court also upheld the lower court dismissing the 300 (c) count based upon Father's name calling.

The Court of Appeal also held the evidence of Father's "mental and emotional problems" were insufficient to support a finding under 300 (b) as there was no evidence linking Father's alleged mental disturbances to any physical harm or risk of physical harm to the minors.

In re D.C. (5/23/11)
195 Cal.App.4th 1010; 124 Cal. Rptr.3d 795
Sixth Appellate District

Issue:

Where it is alleged that the child was subjected to an act of cruelty by a parent, does section 300 (i) require the petitioner to prove that a parent intended to harm the child?

Facts:

In June 2010, mother held her daughter under water in a park fountain for about 10 seconds, and then held her under water a second time as her daughter struggled to get air. A bystander ran into the fountain and rescued the daughter. Mother told police she had been trying to cleanse her daughter “physically and spiritually” and that she was attempting to rid her daughter of the fear of water. Mother had a history of substance abuse and mental illness, and admitted she had been using methamphetamine on a daily basis for several months. Mother said she wanted God to get the negativity out of her daughter which is why she put her daughter under water in the fountain. The 300 petition alleged several counts including a 300 (i) count for cruelty. Mother argued that she had no malicious intent and therefore she did not subject her daughter to an act of cruelty. The juvenile court found that mother’s actions were “entirely wilful” and that mother’s actions constituted cruelty. The juvenile court sustained the (i) count.

Holding:

The Court of Appeal held that a 300 (i) count can be upheld even if a parent did not intend to harm the child. The Court found that 300 (i) makes no mention of a parent’s state of mind. Instead, 300 (i) is only concerned with whether the act of cruelty occurred. Because dependency law is intended to protect children, the fact the act occurred is paramount. The Court held that “acts of cruelty” within the dependency context are intentional acts that directly or needlessly inflict extreme pain or distress. The acts shock the conscience. Furthermore, whether an act is considered cruelty must be considered within the totality of the child’s circumstances. The Court of Appeal also found that Child Cruelty under the penal code only requires general intent, and that specific intent is not required. Therefore, the Court reasoned that specific intent is not necessary for a finding of cruelty pursuant to 300 (i). Lastly, the Court upheld the 300 (i) count, finding the evidence presented to the juvenile court supported the allegation of cruelty. The juvenile court found correctly that the mother intended to do the action which constituted cruelty, regardless of whether or not the mother intended to harm her daughter.

In re D. R. (3/7/11)
193 Cal. App. 4th 1494; 122 Cal. Rptr. 3d 753
Second Appellate District, Division Three

Issue:

After a child is born and is released from the hospital without the alleged father signing the voluntary declaration of paternity, who is designated under Family Code 7551 to witness a voluntary declaration made during the pendency of a dependency matter?

Facts:

D. R. was born in November, 2009. The child was detained at the hospital due to the mother's extensive drug abuse history. Mother had five previous children removed from her care and all had been freed for adoption. At the hospital, mother identified R. R. as the father. However, he denied to the hospital social worker that he was the child's father and the social worker noted that although he was present in the hospital room with mother and child, he refused to hold the child or interact with her in any way. Most significantly, R.R. refused to sign the voluntary declaration of paternity.

At the initial hearing, mother identified R.R. as the father, said that no one else could be the father and that he had supported her throughout the pregnancy. The trial court ordered an HLA paternity test. (The test ultimately revealed he was the biological father.) In an interview with the agency social worker one month later, R.R. again denied paternity and refused any services.

In January, 2010, R.R. came forward, indicated he now wished to "step it up" and reunify with the child, but he still refused to participate in any services and that if his visits were to be monitored, he would not visit at all. He said he was "pretty sure" he was the father and indicated a willingness to sign the declaration of paternity.

At jurisdiction/disposition, the trial court sustained the petition, a declared the child a dependent and by-passed reunification for the mother pursuant to WIC 361.5(b) (10) (11) and (13). Indicating that the father had not done enough to perfect his standing as presumed, the trial court also denied reunification to the father. The court set a 366.26 hearing.

In May, 2010, R.R. filed a 388 petition stating that he had now signed the voluntary declaration which had been witnessed by mother's attorney. The court denied the 388 stating that the father had not carried his burden under 388 and that he still was an "alleged father" despite his assertion that he signed the voluntary declaration. The court then proceeded to terminate parental rights. The appeal followed.

Holding:

Affirmed. FC 7551 designates who is authorized to witness a voluntary declaration and that it must be filed within 20 days with the state DCSS. An attorney representing one of the parents is not one of the persons or entities designated in the code. While federal rules provide the states with discretion as to who may witness, once the state has acted to delineate those persons, broader federal regulations do not control.

The C of A also noted that there was no evidence that even if the declaration was properly witnessed, mother's attorney had not caused it to be properly filed within the 20 days.

Finally, even assuming that the father had properly signed and filed the voluntary declaration, his 388 would fail because he showed no true changed circumstances. Here, father never truly stepped up to assume his parental duties: He vacillated about paternity; failed to visit, and when he did, it was only after reunification services were terminated; and, did not interact appropriately with the child when he did visit. Thus, father failed to show true changed circumstances or best interest to the child to convince the court to grant the 388 petition.

In re D.W. (2/23/11)
193 Cal. App. 4th 413; 122 Cal. Rptr. 3d 460
Third Appellate District

Issue

Did juvenile court err when it found ICWA did not apply because the notice to the three bands of the Cherokee tribe and the Bureau of Indian Affairs misspelled the paternal grandmother's first name and failed to include her middle name?

Facts

At the jurisdictional hearing, father provided the court with an ICWA form stating that he may be half Cherokee.

At the disposition hearing the Agency informed the court that it was in the process of obtaining information from extended family members to notice the tribes.

At the six month review hearing, the social worker's report stated that ICWA did not apply after noticing the BIA and the three Cherokee bands. All three Cherokee bands stated that the child was neither a member nor eligible for membership in the tribe.

After the court set a WIC 366.26 hearing and subsequently terminated the parents' parental rights, father filed this appeal. Father claimed that the court erred when it found ICWA did not apply because the notices sent to the Cherokee bands and the BIA misspelled the paternal grandmother's first name and failed to include her middle name.

Holding

The court found that the father had not shown affirmatively that the spelling of the first name of the child's paternal grandmother used in the ICWA notice to three Cherokee bands and the Bureau of Indian Affairs was erroneous because the record did not establish which, if any, of the three spellings of the grandmother's first name was correct. Even assuming the ICWA notice incorrectly spelled the grandmother's first name and omitted a known correct spelling of her middle name, no prejudice appeared. There was no claim that any of the other information about the grandmother was incorrect, and the father had not shown that the inclusion of a misspelled first name could thwart a search that utilized the grandmother's correct last name, former last names, current address, and date of birth. Moreover, any error could not have been prejudicial because the ICWA notice included the correct names, birth dates, and birth places of the grandmother's mother and father. Because no tribe suggested that either great-grandparent had been a member or eligible for membership, it followed that the grandmother was not eligible regardless of how her name was spelled on the ICWA notice.

Earl L. v. Superior Court (9/20/11)
199 Cal. App. 4th 1490
Fourth Appellate District, Division Three

Issue

Did the juvenile court err when it terminated reunification services for the father at the 18 month review hearing and set the matter for a WIC 366.26 despite finding that the Agency provided inadequate reunification services between the 12 and 18 month review period?

Facts

Earl L. was detained from his parents due to domestic violence between the parents and mother's alcohol use. The juvenile court ordered reunification services for both parents. The father was incarcerated for the entire period of supervision. At the six and twelve month review hearings, the parents stipulated that the Agency had provided reasonable reunification services. At the eighteen month review, the juvenile court held that the Agency had not provided reasonable services to the father because the social worker had not contacted the father's prison to find out what programs were available to him nor provided him any other services. There had only been three visits with Earl L. In spite of the court finding that the Agency had not made reasonable efforts during the last review period, the court found that the Agency had made reasonable efforts overall, terminated reunification services and set the matter for a WIC 366.26 hearing. This appeal ensued.

Law

WIC 366.22(b) states that the "court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian."

WIC 366.26(b)(3) states that "the court may not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian."

Holding

The appellate court concluded that the juvenile court did not err by failing to extend reunification services beyond the 18-month permanency review. The court had previously made reasonable efforts findings at the 6 and 12 month review hearings and neither the father nor the mother made significant and consistent progress in establishing a safe home for the child's return. The father did not sign the case plan, declined to attend review hearings, and made no effort to alert his appointed counsel to any issues concerning reunification services. There was no probability the juvenile court would return the child to the physical custody of the father within the extended period of time.

There was not the smallest chance the father would benefit from additional reunification services. Therefore the court did not err in declining to continue the hearing under WIC 366.22(b).

In re E. S. (6/28/11)
196 Cal. App. 4th 1329; 127 Cal. Rptr. 3d 502
Fourth Appellate District, Division Two

Issue:

May a WIC 388 filed by a sibling motion be denied summarily if there is no threshold showing of a relationship between the sibling at issue and the petitioning sibling?

Facts:

Mother had three children removed. They were placed together. Mother never reunified. The oldest child, who had a strong sense of responsibility for his younger siblings, began to behave in a dangerous, violent, and sexual manner in the home. He was removed from that home. The caretaker of the younger children was identified as an adoptive home for the children. A.S. filed a WIC 388 to ask that all children be placed together, and/or to stop the adoption. Court denied the WIC 388 without a hearing. Petitioning child appealed.

Holding:

Affirmed. The court found that read together, WIC 388(b) and (d) both contemplated that the child at issue is not the petitioning child, but the child to be adopted. The court determined that a threshold showing for the petitioning sibling is that the child at issue has the requisite bond with the petitioning child. In this case, the facts were that the younger siblings did not have such a bond, due to a variety of reasons including the behavior of the petitioning child toward those siblings. They also held that the parent could assert the sibling bond in a WIC 388 hearing, as an exception, thus affording that sibling's wishes to be heard.

In re Frank R. (1/13/11)
192 Cal. App. 4th 532; 121 Cal. Rptr. 3d 348
Second Appellate Division, Division Three

Issue:

Can a trial court terminate the parental rights of a non-offending parent and, if so, what findings must be made under what burden of proof?

Facts:

Children detained from mother for child abuse. DCFS found father living in a motel, unemployed, receiving SSI for a work related injury (some of which was being directly sent to the children), and numerous old substance abuse convictions. He admitted to still drinking alcohol but denied being an alcoholic.

The only petition allegations against father were failure to provide under WIC 300(b) and (g). Father was made non-offending and allegations only as to mother were sustained. Despite being stricken from the petition, father submitted to jurisdiction.

Upon a finding of clear and convincing evidence of detriment as to mother, the trial court ordered suitable placement of the children. No findings of detriment were made as to father. Father did not seek custody or want family reunification services. Mother was given FR services, but father wasn't. Father was not required to do any programs. Father was given reasonable day visits and a bus pass to be able to visit. During the reunification period father never picked up his bus pass and visits were infrequent and irregular. At no time during this period of 2 years did father ever request custody.

At the WIC 26 Hearing, despite father's objection to an adoption, the trial court terminated parental rights as to both mother and father. Father appealed.

Holding:

Reversed. At disposition a court must make a finding **by clear and convincing evidence** that return of a child to either parent would be detrimental to the health and welfare of the child, even in the situation where a parent is non-offending under the WIC Petition, in order to later terminate that parent's parental rights at a 26 Hearing.

California must comport with the minimal due process requirements set forth by the U.S. Supreme Court in *Santosky v. Kramer* (1982) 455 U.S. 745, 758 before a State may terminate parental rights. Under *Santosky* minimal due process requires that allegations of parental unfitness be supported by at least clear and convincing evidence.

Here, the court cited *In re Gladys L.* (2006) 141 C.A. 4th 845 and *In re P.A.* (2007) 155 C.A. 4th 1197 for the proposition that although California does not use the term “parental unfitness”, its statutory scheme satisfies due process so long as a finding has been made as to each parent, by clear and convincing evidence, of detriment before termination of parental rights.

Guardianship of Christian G. (5/13/11)
195 Cal. App. 4th 581:124 Cal. Rptr. 3d 642
First Appellate District, Division Two

Issue:

In this case, the question presented to the California Court of Appeal was whether probate guardianship cases involving abuse, neglect or parental unfitness require a referral to Child Protective Services (CPS) so that CPS may determine whether or not to initiate dependency proceedings. The court held that under Probate Code §1513(c) such a referral is mandatory.

Facts:

In this case, the father, John, appealed from a court-ordered probate guardianship of his three-year-old son, Christian, arguing that the appointment violated his due process rights because a referral to CPS was never made, and dependency proceedings were not brought against him. John's brother, Mark, came to visit and found the child living in squalid living conditions. John and Christian lived in a mobile-home stacked with trash and boxes such that the actual living space amounted to only a four-foot by four-foot area. John often left Christian tethered with harness and leash outside in the yard. Christian's hair was so matted it could not be brushed, and his diapers were soaked through. Also, Christian appeared to be developmentally delayed as he did not talk, was not potty trained, and was very withdrawn and nonresponsive. Moreover, Mark described John as being unstable and having paranoid schizophrenia. Mark brought an ex parte petition for temporary guardianship to the probate court under guidance of CPS. CPS told him that if a relative was available to take custody of Christian, the matter could be handled through a guardianship petition. Neither John nor Christian was ever appointed an attorney. The petition was granted and Mark took Christian to live with his wife and their four children.

A probate court investigator was appointed to investigate the matter. His investigation was very thorough including the relative circumstances of both Mark and John. The investigation revealed that Christian had previously been declared a dependent after being removed from his mother's care. Christian's mother had relinquished her parental rights, and after parenting classes and showing the court that he had suitable living conditions, John was granted custody of Christian. John denied being a paranoid schizophrenic and there was no such diagnosis, however there was a diagnosis of posttraumatic stress disorder. The investigator concluded that whatever John's current diagnosis was, his mental illness made him incapable of understanding Christian's needs and following through with proper care and services to meet those needs.

The probate investigator also revealed that Mark had his own history of drug abuse and prior convictions for two robberies, including one involving a weapon, and that Mark had spent ten years in prison. Mark's wife had also battled substance abuse. Mark and his wife claimed that they had turned their lives around, had been sober for five years, and were committed to providing long-term care for Christian, including addressing his

special needs. The probate investigator concluded that Christian thrived in the care of Mark and his wife, and recommended that the guardianship was a suitable placement.

Law:

Probate Code §1513(c) states “[i]f the investigation finds that any party to the proposed guardianship alleges the minor’s parent is unfit, as defined by Section 300 of the Welfare and Institutions Code [WIC], the case shall be referred to the county agency designated to investigate potential dependencies. Guardianship proceedings shall not be completed until the investigation required by [WIC] Sections 328 and 329 ... is completed and a report is provided to the court in which the guardianship proceeding is pending.”

Holding:

The appellate court reversed the order appointing Mark and his wife permanent guardians for Christian and the case was remanded for compliance with Probate Code §1513(c). The court discussed at length the differences between a probate guardianship and a dependency guardianship, and found that a referral to dependency court was mandatory in this kind of situation. The court noted that in dependency court the focus is on the parent-child relationship and reunification if possible, whereas the probate code does not provide those same safeguards to a parent’s fundamental interests. Dependency proceedings have a more stringent standard for the long-term removal of a child from the home of parent. Another difference is the investigation that is undertaken when a guardianship petition is filed. In dependency court, CPS is required to undergo an extensive investigation that includes the parent’s circumstances, the qualifications of the proposed guardian, and what services may be provided to the parent to help the parent regain custody of the child. In probate court, however, any investigation is discretionary and focuses only on the qualifications of the proposed guardian. Additionally, probate court does not offer any kind of reunification services for the parent, and although the parent’s rights are not officially terminated, the parent effectively has no means to attempt to resolve the problem that caused the guardianship. Finally, in dependency court, all parties are appointed counsel, including the parents and the child. In probate court no such appointment is required and the parent will have an attorney only if he or she can afford one.

Here, there were clearly allegations of neglect and parental unfitness. Mark called CPS to report John and his inability to care for Christian. Mark told the probate investigator of all of John’s shortcomings as a parent and of his mental illness. The appellate court reasoned that the allegations made against John were of parental unfitness because the allegations would have brought Christian within the purview of WIC §300(b), and (c). The court recognized that under Probate Code §1513(c) such allegations of unfitness required a referral to CPS so that CPS could properly investigate the situation and bring dependency proceedings. Dependency court was developed in order to handle cases of abuse, neglect, and parental unfitness, and the Probate Code recognizes that probate court is not the proper forum for such allegations. If the investigation were to result in Christian being adjudged a dependent of the juvenile court, the juvenile court would have

exclusive jurisdiction to decide all custody issues. Likewise, both Christian and John would have been appointed counsel, regardless of whether they could afford one. Juvenile court would then have made determinations on what services would have been suitable for John so he could potentially regain custody of Christian.

Guardianship of H.C. (9/1/11)
198 Cal. App. 4th 160
First Appellate District, Division Three

Issue

Did the trial court err in denying mother appointed counsel in guardianship proceeding?

Facts

The child L.C.'s older sibling, Z.B., sought appointment as L.C.'s guardian because it was alleged that L.C.'s mother was using methamphetamine and had failed to protect the child from a molestor. A social worker had investigated the allegations and concluded that it was necessary to place the child either with her older sibling or in foster care. Because the older sibling had a criminal record including arrests and convictions for drug use and sales, the social worker did not want to file a dependency petition because the Adoptions and Safe Families Act would have prohibited placement with the adult sibling due to those convictions. Therefore, the social worker recommended that Z.B. seek guardianship through the probate court.

The court investigator recommended that the court deny Z.B.'s petition for guardianship due to his criminal history, probationary status, drug use, failure to support his oldest child, and Heather's pending criminal case. However, the investigator believed a guardianship was necessary because of L.B.'s dangerous lifestyle and failure to protect H.C. The investigator asked the child protective worker whether CPS would intervene if Z.B. and Heather were not appointed guardians. The caseworker said CPS would not intervene unless it received another referral.

Mother requested that an attorney be appointed to represent her on numerous occasions. The court denied mother's request for appointed counsel. The court also expressed reservations as to whether Z.B. and Heather were appropriate guardians, but it concluded that trying out the proposed guardianship was a preferable alternative to CPS intervention and H.C.'s placement in foster care with strangers and appointed Z.B. as L.C.'s guardian. Mother appealed.

Holding

The appellate court held that the mother did not have a constitutional right to appointed counsel because the appointment of a guardian pursuant to Probate Code 1514(a) was not analogous to a dependency proceeding with strong parental interest, weak governmental interest, and high risks of error. Rather probate guardianship was a private custody arrangement in which the state performed only a judicial role. (The state initiates no proceedings and carries no burden to prove anything, unlike dependency). The mother's interests did not outweigh the presumption that due process ensured appointed counsel only where loss of liberty was threatened.

When hearings in dependency cases may result in findings that later serve as the basis for terminating parental rights, courts have generally found a due process right to appointed counsel. However, the court noted that unlike the dependency scheme, none of the findings that can lead to termination are made in the initial guardianship proceeding. In addition, the sibling had not indicated that they were going to pursue adoption of L.C. in the future and that, in fact, they wished for her to maintain her relationship with her mother.

In re Hunter W. (8/30/11)

Second Appellate District, Division Four

Issue

- 1) Did the court err in denying a two hour continuance of the on-going 388 hearing?
- 2) Was there reason to know that the child would fall under the Indian Child Welfare Act?

Facts

Appellants are the parents of Hunter W. (born June 2009). In 2004, two of mother's children were killed in a car accident, in which mother fell asleep while driving. In 2006, mother's six-month-old baby fell off the bed and was wedged between the bed and dresser, resulting in the baby's death. Parents were convicted of child cruelty. On July 1, 2009, the Department of Children and Family Services (DCFS) filed a section 300 petition alleging that Hunter W.'s physical health and safety were at risk due to the history of child deaths while in mother's custody. It also was alleged that father had a history of substance abuse and criminal convictions, endangering Hunter's physical and emotional health and safety.

On July 1, 2009, mother signed an ICWA-030 form indicating that she may have Indian ancestry through her father and her paternal grandmother.

The court sustained the petition and suitably placed the child. No reunification services were offered to the parents and a WIC 366.26 hearing was set on 2/10/10. The parents did not appear at the February hearing in spite of good notice and the matter was continued until 9/24/10. On 9/22, mother filed a 388 petition. The court set the matter for hearing on 11/18/10 and trialed the WIC 366.26 hearing behind the hearing on the 388. On 11/18/10, the father filed a WIC 388 petition. The trial court continued both 388s until 11/23/10 with a trialing 366.26 hearing. On 11/23/10, the court started the contest and the social worker testified. The court then continued the matter until 12/6/10 for further hearing.

On 12/6/10, mother and father checked in at the morning calendar call but were not present in court at the start of the hearing two hours later. Father's counsel opined that the father might have gone to his program to get a letter from his therapist at her request. Mother's counsel had no idea where her client was. Appellant's counsel requested a two hour delay to locate the parents. The court denied the request and proceeded to finish the 388 hearing and the trailing WIC 366.26 hearing. (The court denied the parents respective 388's and terminated their parental rights.)

Holding

1) Yes. The appellate court found that the 2 hour continuance request was not governed by WIC 352 because the request for this short continuance would not have conflicted with the “need to provide children with stable environments” or jeopardize the child’s chances for a permanent placement. Because the trial court denied the parents of a fair hearing on their 388 petition, the order terminating parental rights and the denial of the parents 388 was reversed and remanded.

2) The trial court was affirmed. Here the child’s mother had told the court that she may have Indian ancestry through her father and her paternal grandmother. However, she did not know which tribe, whether the man in question was her biological father or any contact information for this man in order for the Agency to further investigate the claim. Mother stated she was not registered with any tribe. The appellate court affirmed the trial court’s finding that family lore is not reason to know that a child would fall under ICWA.

In re Jack C. III (2/15/11)
192 Cal. App. 4th 967; 122 Cal. Rptr. 3d 6
Fourth Appellate District, Division One

Issue:

Is the fact that the children were not yet enrolled in the tribe make them not Indian children?

Did the court err in refusing to transfer the case?

Facts:

Prior children in the system had not reunified with parents. Father indicated that his paternal grandmother (child's great grandmother) was a registered Chippewa Indian. He was not registered or enrolled. The family had lived on the reservation for two years in the 1960s. Six bands were noticed. All replied that Jack was not eligible for enrollment. The court found ICWA did not apply. Legal guardianship was eventually ordered for the children with the maternal grandparents.

Chaos ensued, and all children were removed from the maternal grandparent's custody. At the jurisdictional hearing father said his maternal great-grandparents (child's great-great-grandparents) were members of the Nett Lake Indian tribe, and his siblings were registered members. Social worker subsequently contacted the uncle who said he was a member of the Bois Forte Band of Minnesota Chippewa.

The social worker then noticed the Tribe with the additional information. The Tribe responded that the children were eligible for enrollment, and intervened. Father moved to transfer to Tribal Court. A continuance was granted. At the hearing Tribe responded. They were in agreement to terminate parental rights, and adoption by the maternal grandparents. They declined to request transfer. Finally, they stated that the father was not enrolled yet, and the children could not be enrolled until father enrolled. They determined that ICWA should apply, based on their Tribal meetings. They then said they wanted the Trial court to transfer to the Tribal court, at which time they would complete enrollments and then decide whether to accept the transfer officially. State court declined, citing timeliness and that the case was not ICWA. Subsequently the older siblings (in PPLA) were enrolled.

Holding:

The court of appeal held that although the children were not enrolled members of the Band at the time of the proceedings, they were "Indian children" within the meaning of WIC 224.1(a) because the Band considered them to be so. It was the tribe's prerogative to determine membership.

The court also held that it was error to find that there was good cause to deny the transfer petition based on the fact that the petition was filed after reunification services were terminated or to deny on the basis of inconvenient forum because there was no evidence that the tribal court was unable to mitigate the hardship by making other arrangements to hear evidence.

In re J.F. (5/11/11)
196 Cal. App. 4th 321
Fourth Appellate District, Division One

Issue:

Is the parent of a child in long term foster care (PPLA) required to provide a sufficient offer of proof to contest a post-permanency review hearing?

Facts:

The Juvenile Court denied the mother (G.F.) of a child (J.F.) in long-term foster care the right to a contested post-permanency review hearing, because it found the offer of proof on which the hearing was conditioned to be insufficient. Foster child J.F., now 15 years old, grew up in chaotic, unstable household, and was consequently made a dependent of the juvenile court in 2008. J.F. missed his mother G.F. and claimed not seeing her would “be the worst thing ever”. He did not want to live with his mother because she continued to live with his abusive stepfather. Consequently, the court ordered a plan of long-term foster care for J.F., with G.F. granted reasonable, supervised visitation.

Reports from the six-month post-permanency review indicated that J.F. no longer wanted to see his mother and that she “makes him mad.” After J.F. was moved to a new foster home, his mother made no attempts to see him. Reports from the twelve-month post-permanency review again stated that J.F. did not wish to see his mother. The mother, G.F. denied the factual accuracy of the report prepared for the twelve-month post-permanency review, and asked for a hearing on the issue of J.F. being reinstated to her care. The Court asked G.F. for an offer of proof, which she submitted, stating that the evidence would prove that J.F. wished to be reunited with his mother. The Juvenile Court found the offer of proof insufficient, and denied the mother, G.F.’s request for a contested hearing.

Holding:

The Appellate Court reversed the decision, holding that the parent of a child in long-term foster care is not required to submit an offer of proof to obtain a contested post-permanency review hearing. The parent of a child in long term foster care has a right to participate in the post permanency review. Furthermore, the Court may impose reunification services if the parent can prove by a preponderance of the evidence that reunification is the best alternative for the child. The parent has a due process right to a contested post-permanency review hearing.

In re J.H. (8/18/11)
198 Cal. App. 4th 635
Second Appellate District, Division Eight

Issue

Did the court err by not making a legal finding of biological paternity even when there was another presumed father?

Facts

Two fathers vying for paternity of J.H. J.H. was two when the petition was filed.

Tyrone M.

- he and mother not married nor living together
- mother identifies Tyrone M. as J.H.'s father
- appeared in court and filed JV-505 asking to be declared as presumed father
- stated he had told multiple people that he was J.H.'s father
- claims he saw him every other day, played with him... after George H went to prison and gave mother money on multiple occasions
- criminal history of drugs and rape

George H.

- he and mother married
- he signed paternity declaration in the hospital
- admits he is not J.H.'s biological father
- he says he provided day to day care for J.H. during the 17 months J.H. lived with him
- in prison for beating mother

The court held a paternity hearing. Denied Tyrone M's request for HLA testing. Found George H. to be presumed father and Tyrone M. to be alleged biological father. The court ordered services for the mother and George H. This appeal followed.

Law

California Rule of Court 5.635(h) states: If a person appears at a hearing in dependency matter or at a hearing under section 601 or 602 and requests a judgment of parentage on form JV-505, the court must determine:

- 1) Whether that person is the biological parent of the child; and
- 2) Whether that person is the presumed parent of the child, if that finding is requested.

Holding

The appellate court held that the juvenile court's parentage ruling was incomplete in that it failed to determine biological paternity and therefore the case was reversed and remanded for further proceedings.

The appellate court held that Tyrone M was not denied any due process rights because he was given notice and an opportunity to be heard regarding his paternity status. The appellate court also held that the trial court was correct in determining that Tyrone M. was not a presumed father. He and mother were not married and had never attempted to marry nor had he signed the paternity declaration. He had never taken any legal steps to establish his status as J.H.'s father nor had he ever received J.H. into his home and openly held him out as his son.

The appellate court also upheld the trial court's determination that George H. was a presumed father under FC 7611(d). (No indication in the record that FC 7611(d) was the basis upon which trial court determined George H. was the presumed father.)

The appellate court found that the trial court was not required to order genetic testing for Tyrone M. However, under rule 5.635(e) the juvenile court must make a parentage determination. It may do so either by ordering genetic testing or based on the "testimony, declarations, or statements of the alleged parents". Therefore the trial court was required to determine if Tyrone M was J.H.'s biological father and the case was remanded for it to do so.

The appellate court stated that it was not harmless error that the trial court did not establish biological paternity because that finding could have resulted in the trial court offering services to Tyrone M. if it believed it was in J.H.'s best interest to do so. In this case the appellate court suggested that reunification services for Tyrone M. might be in J.H.'s best interest because there was no "family" to reunite. In addition, if Tyrone's biological paternity was established, the Agency may consider his relatives as possible placements for J.H. Finally, the appellate court agreed that Tyrone could later file a 388 petition in an attempt to elevate his paternity status to that of a presumed father if new evidence or changed circumstances warranted such a motion.

In re J.S. (6/22/11)
196 Cal. App. 4th 1069; 126 Cal. Rptr. 3d 868
Sixth Appellate District

Issue

Did the trial court's failure to make an explicit finding at disposition supporting its action of terminating jurisdiction with a family law order granting the non-custodial parent custody, warrant reversal for further proceedings?

Facts

Two children, J.C. and J.S. were detained by the Agency when they were found in the car with their mother who possessed methamphetamine powder in her purse. The children had cuts and bruises and the children told the officers that the mother had been yelling at them and hitting them. Both children were originally placed with J.C.'s father. The Agency subsequently found J.S.'s father who had adjudged J.S.'s father by the family court three weeks after J.S.'s birth. The visitation between J.S. and his father had been sporadic. A few months later, J.S. was placed with his father. At the contested disposition hearing, the sole points of contention were 1) the nature of the visitation order and 2) whether the court should terminate its jurisdiction or, instead, exercise ongoing supervision over the matter. The court ultimately placed the child with his father and terminated jurisdiction. The court did not make a formal finding directed to this choice. (J.S.'s father had agreed to some voluntary services and the mother would be getting services on J.C.'s case). This appeal followed by mother.

Law

WIC 361.2(c) states "The court shall make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b).

Holding

The appellate court held that the trial court erred when it did not make a finding for the basis of its determination. However, since the appellate court could see no reasonable probability that had the trial court complied with the statutory requirement, it would have answered differently the question whether to terminate jurisdiction in this matter, the appellate court affirmed the trial court's decision.

In making the determination that the trial court did not commit substantive error, the appellate court stated that risk of harm is not the sole concern in a dependency proceeding and that the Legislature also recognized that the child's physical and emotional well-being may be served by the provision of services. However, in this case, the facts that the father had volunteered to participate in some services, the mother was being provided services in the J.C.'s case, the family could go to family law court to make changes to the orders as circumstances changed and there was no risk to J.S. from

his father persuaded the appellate court that the trial court had not committed substantive error when it divested itself of jurisdiction.

In re J.S. (10/14/11)
199 Cal. App. 4th 1291
Third Appellate District

Issue:

Can the juvenile court take jurisdiction over a youth who had gotten married while in her mother's custody and with her mother's consent, prior to the disposition of the case?

Facts:

The San Joaquin human services agency detained a nearly 16 year-old youth from her mother when her mother was arrested for physical abuse of the youth. At the initial hearing, the juvenile court released the youth to her mother. The juvenile court did not impose *any conditions* on the mother's continued custody or control of the youth. At the jurisdiction hearing, the juvenile court sustained amended language and set the disposition for contest. Thereafter, the mother took the youth to Nevada and allowed her to marry her boyfriend. The Agency then filed a motion to dismiss the dependency since the youth's marriage made her an emancipated minor and removed her from dependency jurisdiction. The juvenile court refused to dismiss the petition and proceeded to declare the youth a dependent of the court.

Holding:

The appellate court held that once the youth legally married (and she was, since her mother gave consent), the juvenile court is without authority to declare her a dependent. Here, the juvenile court did not put any conditions on the release of the youth to her mother even though the juvenile court had jurisdiction and authority to make orders. "The mere existence of authority to direct a parent's conduct in relation to his or her child does not in and of itself constitute *exercise* of that authority, and does not translate to automatic limitations on the parent's general rights absent some specific direction or order."

Side note: The Agency argued that the appeal was moot because the juvenile court dismissed the dependency after the appeal was filed. However, the Court of Appeal went ahead with the appeal because there were exit orders that were also on appeal and the reviewing court's decision in this appeal affects the outcome of the exit order appeal.

In re J.T. (5/17/11)
195 Cal. App 4th 707; 124 Cal. Rptr. 3d 716
Third Appellate District

Issue:

Does adult sister of freed child have standing to appeal the TPR of the mother?

Facts:

Child, age 10, was removed from mother's care for general neglect, substance abuse, emotional abuse and physical abuse. When J.T. was removed, two older sisters were also removed and placed together in foster care. After being offered reunification services, J.T. was eventually returned to the mother's care along with his siblings. Two years later, J.T. and his older sister were once again removed from their mother's custody, returned and then removed again. The siblings were placed separately. Mother was not offered further reunification services and a permanency hearing was scheduled. Sibling visits continued. J.T. was placed with paternal aunt. The child's sister then filed a WIC 388 petition, seeking standing at the permanency hearing to present evidence on the sibling relationship between herself and J.T. and to assert the sibling bond exception to adoption. The juvenile court granted this motion. Neither mother nor sister appeared at the permanency hearing or present evidence at the hearing. The juvenile court terminated parental rights. At that same hearing, dependency for the sister was terminated and she was emancipated. Both mother and his sister filed this appeal to the termination of parental rights.

Holding:

The appellate court agreed with the trial court that the sister did have standing to participate in the permanency planning hearing and that if the trial court had denied her WIC 388 petition, she would have had standing to appeal that denial.

However, the appellate court held that the sister does not have standing to appeal the termination of parental rights because the sister does not have a legally cognizable interest and is therefore not aggrieved. The court noted that the ultimate question is whether the adoption would be detrimental to the adoptive child, not someone else. "In raising the sibling relationship exception before the juvenile court, sister was not asserting her own interest or right. Rather, she was asserting the minor's interest on his behalf. In this way, conferring the ability to participate in the permanency planning hearing on sister is similar to conferring de facto parent status on a caregiver. The acquisition of de facto parent status does not confer standing to appeal from any juvenile court order; rather, it confers standing to challenge only orders pertaining to those things to which the de facto parent is entitled. Sister is not entitled to challenge the termination of parental rights nor does she have a right to block the minor's adoption. Thus, although sister was permitted to assert the sibling relationship exception to adoption and present

evidence on the issue, she has no standing to challenge the termination order because her legal rights are not impacted by that order.”

In addition, J.T.’s sister is an adult; her sibling relationship has nothing to do with the mother’s status over the minor sibling. J.T.’s sister is fully capable of having sibling relationship regardless of whether mother’s rights are terminated or not. Sister no longer bound by her relationship with the Mother.

There is not here a substantial interference with a child’s sibling relationship since the TPR does not have any legal effect on relationship between adult sister and the child. Thus, SIB relationship exception to TPR does not apply.

Karen P. v. Superior Court of Los Angeles County (11/9/11)

200 Cal. App. 4th 908

Second Appellate District, Division Five

Issue

- 1) Does a child who is the subject of a WIC 300 Dependency petition tender the issue of his or her sexual history in the litigation, within the meaning of Evidence Code section 996(a) by disclosing sexual abuse at the hands of a parent to authorities or by submitting to a forensic medical exam prior to the filing of the dependency petition?
- 2) Does the Department of Children and Family Services become a “party claiming through or under the [child],” within the meaning of Evidence Code section 996(b) by filing a WIC 300 dependency petition containing allegations that the child was sexually abused by a parent?

Facts

The Agency filed a petition alleging that the father had sexually abused and raped Karen P. The father subpoenaed medical records corresponding to the sexual history of the child. The child filed a motion to quash the subpoena. Counsel for the child argued the records were privileged under section 994 and therefore not discoverable by subpoena. The superior court denied the motion to quash based on a finding that the child’s medical condition was “being put at issue” within the meaning of section 996 and order the records produced for an in camera review after which the relevant medical records would be provided to the father. The child filed a writ petition.

Holding

The court of appeal held that the child did not tender her medical condition at issue within the meaning of section 996(a) when she disclosed the abuse to the social worker or to the police or when she submitted to a forensic medical examination. The court noted that the patient-litigant exception to section 996(a) compels disclosure of only those matters which the patient himself has chosen to reveal by tendering them in litigation. Since the child did not file the dependency petition, she did not waive her privilege pursuant to section 996(a).

The court of appeal also held that the Department of Children and Family Services did not become a “party claiming through or under the [child],” within the meaning of section 996(b) by filing a WIC 300 dependency petition containing allegations that the child was sexually abused by a parent. DCFS filed the dependency petition on behalf of the County of Los Angeles, not in a representative capacity of the child. Rather the child was a party in her own right in the dependency proceeding and was represented by her own counsel.

The appellate court vacated the order by the trial court denying the motion to quash the subpoena for the medical records.

In re K.C., (7/21/11)
52 Ca. 4th 231; 255 P. 3d 953
Supreme Court of California

Issue:

Does the mere fact that a parent takes a position on a matter at issue in a juvenile dependency case that affects his or her child constitute a sufficient reason to establish standing to challenge an adverse ruling on it?

Facts:

The father appeared at the WIC 366.26 hearing and stated he believed child should be placed with the grandparents. Neither the father nor his attorney offered any argument against terminating his parental rights. The court denied the 388 filed by grandparents, selected adoption as the permanent plan and terminated parental rights. Father sought review of 388 denial, Court of Appeal, 5th App. District dismissed his appeal.

Holding:

Dismissal affirmed. A parent's appeal from a judgment terminating parental rights conferred standing to appeal an order concerning the dependent child's placement only if the placement order's reversal advanced the parent's arguments against terminating parental rights. By acquiescing to the termination of his rights, father relinquished the only interest in the child that could render him aggrieved by the court's order.

In re Levi H. (7/8/11)
197 Cal. App. 4th 1279; 128 Cal. Rptr. 3d 814
Fourth Appellate District, Division One

Issue:

Did a voluntary declaration of paternity by the biological father rebutt the presumed father's status of the mother's husband?

Facts:

Levi was born in 2008 to mother Jade and father Andrew. The day after the birth, the parents signed a voluntary declaration of paternity witnessed by an employee of the Arrowhead Regional Medical Center where the birth occurred. Jade and Andrew married a few months later, but separated after less than three weeks of marriage, and divorced in 2009. According to Jade, Andrew stopped seeing Levi when he was four months old. Jade married Michael in 2010, and that year had a child named Maddox. Three months later, when Jade was away, and in Michael's care, Maddox suffered a serious head injury. San Diego Health and Human Services filed a petition.

At the detention hearing, Jade submitted a parentage questionnaire which stated Andrew is the father of Levi. Michael also submitted a parentage questionnaire for Levi indicating that he had lived with Levi since 2009 and had supported Levi with food, clothing, diapers, gifts, medical insurance and transportation. However, the declaration said that he did not tell anyone he was Levi's father. At the detention hearing, Michael was found to be the presumed father of Levi, and the court ordered a due diligence for Andrew.

On the date scheduled for the jurisdiction and disposition hearing, Andrew made his first appearance. Andrew asked that he be designated Levi's presumed father based upon his voluntary declaration of paternity. The court granted Andrew presumed father status, and Jade and Michael set the paternity issue for a contested hearing. At the contested hearing, Jade argued that she had signed the voluntary declaration of paternity under duress. The court found that the voluntary declaration of paternity rebutted the presumption in favor of Michael, and found Andrew to be Levi's presumed father.

Holding:

On appeal, Michael contended that the court erred by finding Andrew's voluntary declaration of paternity rebutted Michael's presumed father's status as to Levi. The appellate court found that a voluntary declaration of paternity duly completed and filed after 1996 has the same force and effect as a judgment for paternity. The court also found that the 7611 presumption (this was the presumption under which Michael was found to be the presumed father) is rebutted as a matter of law by a judgment establishing paternity of the child by another man. The court held that presumed fatherhood based on a voluntary declaration of paternity extinguishes the 7611 presumption. Michael claimed

that because he provided for Levi from the time the child was eight months old, he is Levi's "real" father, and deserved presumed father status over Andrew. The court held that Andrew's voluntary declaration of paternity trumped presumed father status under section 7611(d) despite any inequities.

In re M.C. (5/6/11)
195 Cal.App.4th 197; 123 Cal. Rptr. 3d 856
Second Appellate District, Division One

Issue:

May a child, born during the marriage of two women but conceived as the result of a premarital relationship between one of the women and a man, have three presumed parents?

Facts:

- 6/2006 Melissa and Irene began a relationship in 6/06 but it was one involving physical and verbal abuse, and Melissa' mental illness and drug and alcohol abuse.
- 2/08 Both became registered domestic partners.
- 5/25/08 They separated. Melissa met Jesus during this time and became pregnant with MC. Melissa moved in with Jesus for the first few months of the pregnancy.
- 7/24/08 Melissa petitioned to dissolve the domestic partnership with Irene and received a TRO against Irene.
- 9/08 Melissa and Irene reconciled; Melissa moved out of Jesus' home and did not tell him where she was going.
- 10/15/08 Melissa and Irene married in CA.
- 3/09 MC was born. Melissa's name is the only parent listed on the birth certificate. Irene was present at MC's birth. All three lived together for about 3-4 weeks until Melissa moved out with MC.
- 5/09 Irene filed an OSC in San Bernardino court seeking joint physical and legal custody of MC; Melissa opposed the request.
- 6/09 Melissa got a restraining order against Irene in the San Bernardino case. Also in 6/09, Melissa got in touch with Jesus who had moved to Oklahoma. Jesus began sending money to Melissa for MC and Melissa took MC to visit Jesus' family.
- 9/09 DCFS filed a petition against Melissa after her new boyfriend Jose A. attacked Irene with a knife. At the detention hearing, the court found Melissa to be the biological mother, Irene to be the presumed mother and Jesus to be an alleged father. At the time, Irene was unemployed, received GR and food stamps, and lacked transportation and appropriate housing for MC.
- 10/09 Jesus told DCFS when Melissa became pregnant, he took her into his home, provided for her financially, took her to doctor's visits, and had always intended to be the baby's father. When Melissa moved out, she did not tell Jesus where she would be living. In 2/09, he moved to Oklahoma. Jesus was engaged to be married. He and his fiancée were expecting a child. He worked as an assistant produce manager at a grocery store, had stable housing and had support from his family. Jesus wanted custody of MC.

The court eventually sustained allegations of a history of domestic violence between Melissa and Irene, that Melissa was incarcerated and that she had a history of substance abuse. The court then held a paternity and disposition hearing. At that hearing, the court found Jesus to be the presumed father, Irene to be the presumed mother and Melissa to be the biological mother. The court took jurisdiction over MC, placed her with her MGPs, and ordered reunification services for all 3 parents.

All 3 parents appealed on different grounds, specifically Melissa and Jesus on the parentage orders.

Holding:

While there is substantial evidence to support the parentage findings, there can only be two presumptive parents for a child. The Uniform Parentage Act (Family Code §7600 et seq.) governs parentage. [Good discussion of the law on parentage.] While recognizing the complicated and changing patterns of what makes a family, the juvenile court must still resolve competing claims of parentage. (The reviewing court was not willing to change the law to allow for 3 presumed parents and felt it was best left to the Legislature.) The procedure for doing so is in FC §7612 which states (1) a presumption under FC §7611 may be rebutted by clear and convincing evidence, and (2) if 2 or more presumptions arise under FC § 7610 or 7611 that conflict with each other or if a presumption under §7610 conflicts with one under §7611, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”

Here, there is no question that Melissa is the biological mother. As for Irene, she was married to Melissa when MC was born. They lived in the same home for a few weeks after MC was born. Irene claimed she planned to co-parent MC and considered herself MC’s parent. Irene also took steps to obtain custody of and visitation with MC. Irene satisfied the requirements as a presumed mother under §7611(d).

As for Jesus, he does not qualify as a statutorily presumed father under §7611(a) or (d) but he is a “quasi-presumptive father”. Jesus never married or attempted to marry Melissa. Upon learning about MC, Jesus did consistently and openly held out MC as his child. Jesus also opened his home to Melissa, supported her financially when she was pregnant, told his family she was pregnant with his child and made sure she got prenatal care. While he does not qualify as a presumed father under §7611(d), the juvenile court correctly found that Jesus is a presumed father under Kelsey S.

Given the three individuals, the juvenile court must weigh the conflicting presumptions among the three parents since there can only be two presumed parents. The reviewing court quoted the Supreme Court in its *In re Jesusa V.* ((2004) 32 Cal.4th 588) decision to say that “[a]lthough more than one individual may fulfill the statutory criteria that give rise to a presumption of [parentage], ‘there can be only one presumed father.’” The reviewing court also indicated that the Supreme Court continues to reject the notion of dual paternity or maternity where its recognition would result in three parents (in *Elisa B.* (2005) 37 Cal.4th 108).

In re Mickel O. (7/13/11)
197 Cal. App. 4th 586; 130 Cal. Rptr. 46
Fifth Appellate District

Issues

- 1) Was denial of maternal grandparent's 388 petition requesting placement of the children in their home and unsupervised visitation proper?
- 2) Was denial of supervised visitation to maternal grandparents proper?

Facts

Particularly acrimonious dependency case involving paternal and maternal grandparents. Two children, Mickel and Mallory initially lived with maternal grandparents but were removed due allegation that parents failed to protect the children, and that mother is suffering from mental illness, developmental disability or substance abuse. Children are placed with father but removed when mother attacks father and paternal grandmother in father's home. The children are placed with an aunt but are removed due to medical issues. Both sets of grandparents are considered for placement but children are placed with paternal grandparents because mother is residing in the home with maternal grandparents. Both maternal and paternal grandparents are granted de facto status at different points.

An initial bonding study indicated that Mickel was most bonded with maternal grandfather and related best to maternal grandparents' style of parenting but at same time appeared settled and safe with paternal grandparents. In an addendum report, the expert voices concerns about the social worker in the case indicating that the social worker had specifically asked for the expert not to provide any recommendations or provide the report directly to the court. The expert indicated that social worker was resistant to allowing her to interview the children in maternal grandparents home and that there appeared to be a "cloud of suspicion" over whether maternal grandfather was sexually inappropriate with Mickel which did not appear to have ever been investigated but which colored the social workers decisions on the case. The expert believed children should have initially been returned to the maternal grandparents but due to all the domestic violence and disruption children were most stable in the current home of paternal grandparents with regular visitation with maternal grandparents. A second letter explained that terminating contact with maternal grandfather would be detrimental to Mickel due to his emotional attachment to him. However, if maternal grandparents continue to try to disrupt the stability of the children's placement with paternal grandparents then it would be necessary to terminate visitation with them. A combined 366.26 and 388 hearing lasted 11 months at which the expert testified that she found no conclusive evidence that the maternal grandparents would pose a threat of harm to the children with unsupervised visits or that the bond between Mickel and maternal grandfather was unhealthy. He again recommended placement with parental grandparents and unsupervised visitation with grandparents. At the court hearing the court denied the 388 petition and terminated parental rights. Counsel for maternal grandparents then

requested increased supervised visits. The court denied the visitation arguing that that was encompassed in the 366.26 and that given that paternal grandparents would probably end up adopting the child, they should decide whether they would allow visitation. The court denied the maternal grandparents a final visit with the children.

Holding

Denial of the 388 was not an abuse of discretion. Although the record raised issues of credibility and impartiality on the part of the social workers in this case, evidence independent from that provided by the social workers, supported the denial of the 388. The expert testified that the children should not be moved from the home of the paternal grandparents. The expert also testified that the children would benefit from regular unsupervised visitation with the maternal grandparents, but only so long as the visitation could be handled without animosity and did not confuse or disrupt the children.

Termination of supervised visitation was an abuse of discretion. It was not an issue raised in the 388 petition but only came up after the 388 was decided when maternal grandparents' counsel requested more supervised visitation. Maternal grandparents were not afforded a full and fair hearing on termination of supervised visitation. The court assumed that the children would be adopted by the paternal grandparents but this had not been decided yet. Terminating supervised visitation excluded the maternal grandparents from being able to effectively participate. Further, it removed any incentive for the parental grandparents to allow the maternal grandparents to visit the children or mediate the issue of visitation. The court should have pursued the issue of mediation. The court reinstated supervised visitation, directed the court to calendar the case to discuss mediation and a visitation agreement, and directed the court to assign new social workers on the case.

The court also ruled that even though Mickel was most bonded to his maternal grandfather the evidence did show a substantial emotional attachment to the paternal grandparents justifying considering them for an adoption assessment; refused to judge credibility of witnesses on whether the paternal grandparents should have been given de facto status; found that no ineffective assistance of counsel by children's attorney had been established because maternal grandfather did not show that outcome would be different.

Concurring Opinions

Dawson- This case exemplified the benefits of dependency mediation programs which could have prevented the many hours and resources spent on this case. He exhorted the legislature and courts to consider funding mediation programs. (Merced did not have a court connected mediation program)

Poochigian- Expressed concern about the discretion used in this case which meant that one set of loving grandparents would never see their grandchildren again. Reasonable efforts should be made to encourage meaningful participation in counseling and

mediation such as by making it clear to parties that in making decisions on placement and adoption the fitness of the parties would weight their ability to value nurturing positive relationship with their grandparents. He advocated the use of using a “Postadoption Contact Agreement” to allow children who are adopted contact with birth relatives as part of the adoption agreement.

In re Miguel C. (8/26/11)
198 Cal.App. 4th 965; 129 Cal. Rptr. 3d 684
First District, Division Five

Issue:

Can the court place a child with a non-custodial parent without also making a removal order from the custodial parent?

Facts:

A petition was filed alleging that the mother suffers from a mental disorder, placed on a 5150 hold, abuses marijuana and has three children not in her care. In a report filed for the jurisdictional/disposition hearing, the Agency recommended family maintenance services for the father, but not for the mother.

The child had never lived with the father but had been having weekly visits with him that was going well. Father was “very effective with the minor and engaging”.

It was further reported that mother had been discharged from her program because of altercations with other residents. She was also reported as being angry and hostile. At the conclusion of the dispositional hearing, pursuant to 361(c), the court determined that returning the child to the mother “would cause substantial danger to Miguel and the alternative means are not available ...to protect(him)”.

The court then placed with the father and ordered family reunification services to the mother.(361.2 (a) & (b)).

Holding:

Affirmed: Pursuant to W&I 361.2 and Cal.Rules of Court rule 5.695, before the juvenile court could award custody to the noncustodial parent, it had to first remove from the custodial parent. Ample evidence supported the removal from the mother by clear and convincing evidence and placing with the non-custodial parent pursuant to 361.2 (b) (1-3).

In re N.M. (6/10/11)
197 Cal. App. 4th 159; 127 Cal. Rptr. 3d 424
Fourth District

Issue:

Can a parent challenge the sufficiency of the allegations in a dependency petition on appeal if he did not first raise the issue below? Similarly, can the parent appeal the dispositional orders if he failed to raise any objections at the trial level?

Facts:

Child claimed physical abuse and at Jurisdiction/Dispositional, father agreed to 300(a) language striking the most serious physical abuse allegations, with inappropriate discipline language remaining in exchange for his agreement to participate in therapy to address abuse issues. Matter goes via Melinda S. Father then appeals.

Appeal asserts that the language is not jurisdictional; there is not sufficient evidence to support the findings; there was insufficient evidence for removal and a suitable placement order; and, that the trial court abused its discretion in not terminating jurisdiction under 360(b) because prior to filing, the agency offered a Voluntary Family Maintenance Contract and father refused!

Holding:

Jurisdiction and Rocco M.

The C of A held that we need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child. The court may consider past events in deciding whether a child presently needs the court's protection.

Appeals of negotiated agreements

C of A held a parent cannot challenge the sufficiency of the allegations in a dependency petition on appeal if he did not first raise the issue below. It is well settled that attacks on the legal sufficiency of a petition cannot be challenged for the first time on appeal. (In re S.O. (2002) 103 Cal.App.4th 453, 459-460.) Forfeit!

Moreover, striking of language directly referring to more serious incidents of abuse was the result of negotiations aimed toward (1) eliminating the need for child to testify at the contested hearing, (2) satisfying father's adamant refusal to admit any action that had possible criminal exposure, and (3) bringing about the provision of services. **"We see no reason to allow an individual to negotiate a settlement and then challenge the agreed upon language for the first time on appeal"**.

Disposition negotiated settlement as a "Contract"

"He who consents to an act is not wronged by it." (Civ. Code, § 3515; see also Civ. Code, § 3516 ["Acquiescence in error takes away the right of objecting to it"].)

When a parent submits the jurisdictional issue to be determined by the juvenile court solely on the basis of the social worker's report, the parent does not waive his or her right to challenge the sufficiency of the evidence to support the court's jurisdictional finding. (In re Tommy E. (1992) 7 Cal.App.4th 1234.) This is to be distinguished from submitting the dispositional issue based on the social worker's recommendation, which precludes the parent from challenging the evidence to support the dispositional order because the parent has acquiesced to the recommendation. (In re Richard K. (1994) 25 Cal.App.4th 580.)

A parent's agreement to deal with the physical abuse issue in therapy is akin to an admission because otherwise there would be no need for therapy if the juvenile court was not going to take jurisdiction of the case. The negotiated settlement was essentially a contract; parties are entitled to enforcement of the terms of their agreement. Having received the benefits of the settlement, parent is precluded from attempting to better the settlement on appeal. By accepting the negotiated settlement—and its benefits—father implicitly waived his right to challenge the true finding under section 300, subdivision (a). (See People v. Hester (2000) 22 Cal.4th 290, 295.)

360(b) is discretionary

Whether to exercise the option under section 360, subdivision (b), is a discretionary call for the juvenile court to make; it may opt to do so, but it need not. "The court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accord with this discretion." (In re Christopher H. (1996) 50 Cal.App.4th 1001).

The upshot of this case is that it is still best practice to get a no contest plea to avoid these pitfalls. However, if that is not possible, when you are doing the Melinda S submission where the parties agree on watered down language in exchange for an agreement to a case plan, make your record that this was a negotiated agreement. You may also request a stipulation not to appeal. Note that no one is objecting to the sufficiency of the pleadings or case plan.

In re P.A. (8/29/11)
198 Cal. App. 4th 974
Fourth Appellate District; Division One

Issue:

Can the court use evidence of biological paternity to enter “a judgment establishing paternity” under FC 7612 (c) for the purpose of rebutting the presumption of paternity under FC7611 (d), without weighing the competing interests?

Facts:

Roger met mother when P A was 2 months old. He and mother married and he held self out as P.A.’s father and provided all of child’s basic needs. Roger found to be presumed per FC 7611(d). Mother and Roger were involved in a violent relationship.

Later, DNA showed Alvaro was biological father. Trial court decided that *the biological finding* entitled Alvaro to be the presumed father. Alvaro was not seeking custody and intended to return to Mexico.

Holding:

Biology does not determine the presumed FA.

7612(c) provides that a paternity presumption under 7611 is rebutted by a *judgment* establishing paternity of the child by another man. It is critical to distinguish a *judgment* from a *finding re a biological test*.

A scientific finding that Alvaro is P A’s biological father is not the same as a paternity judgment.

Where child has both a presumed and a biological father, court must hold an evidentiary hearing at which it reconciles the competing interests founded on the weightier considerations of policy and logic.

In re P.C. (9/8/11)
198 Cal. App. 4th 1533
First Appellate District, Division Two

Issue:

In a situation where a child has severe medical needs and there is currently no prospective adoptive home, can a court terminate parental rights finding that the child is generally adoptable and would be adopted within a reasonable time? Should there be different ethical guidelines for dependency counsel?

Facts:

Mother has a long history of mental health and substance abuse issues. She also has a long CPS history and with five other children, none of whom live with her. The child was born on 5/26/10 and was reported to be medically fragile with extensive medical problems, including intrauterine growth retardation, prenatal exposure to drugs and alcohol with a related myriad of physical and developmental malformations.

Child was declared a dependent in July, 2010, mother was denied reunification services and a 366.26 hearing was set. In the report, the agency stated that the child had a strong will despite the rather grim medical picture.

By the 366.26 date, the agency stated that, despite the ongoing medical issues, which were substantial, the child was adoptable. It noted that the chances of locating an adoptive home for the child would be easier if parental rights were terminated. A contested permanency hearing was held and the CPS worker testified. (Mother did not appear and her whereabouts were ultimately unknown). The Social Worker was a special needs worker who said she worked with hundreds of special needs children and placed dozens for adoption. She had done an extensive investigation into this Child's condition, speaking with the medical professionals and rehabilitation personnel, all of whom agreed that the child had many adoptable qualities. The court asked her how P.C. was in comparison with other children she had placed recently for adoption and she stated that in at least one case, the children were comparable.

The court found by clear and convincing evidence that the child was adoptable and terminated parental rights. The C of A quoted at length the court's rationale for its finding. Mother appealed.

Holding:

Affirmed. In this case, despite the medical needs of the child, there was substantial and extensive evidence from the social worker and the medical professionals of the child's adoptability. The C of A noted that the cases cited by mother were substantially different than this matter as those cases involved either a large sibling group or a much older child with severe medical problems. In contrast, the child is of a young age and the social worker as well as four other professionals attending to the child opined that she had considerable attributes that made her adoptable in spite of the medical issues.

Note

The C of A, at the end of the decision, commented about the fact that the appeal was prosecuted by mother's appellate counsel even though mother was not involved and counsel had no direction. While the court understood the ethical dilemma facing appellate counsel, it noted that time is of the essence for children in dependency cases and undue delays in permanence were not in the child's best interest. The Court seemed particularly disturbed that mother's appellate counsel asked for oral argument, further delaying finality. The court suggested that perhaps different ethical guidelines might be appropriate for dependency counsel.

In re. R.C. (6/14/2011)
196 Cal. App. 4th 741
Second Appellate Dist., Division Seven

Issue:

Does French kissing with a child fall within WIC Section 300(d)?

Facts:

32 year old Edwin claimed to be in love with 12 year old D.C. The two engaged in French kissing on three separate occasions and Edwin reported they were in love and he was waiting for her to turn 18. On one occasion, Edwin also touched D.C.'s waist while French kissing. The child's attorney argued against the Court sustaining any count under WIC Section 300 (d). The trial court indicated "the behavior is completely inappropriate. While I don't find it rises to a level of a (d), it clearly crosses the boundaries that should occur between adults and children."

Ruling:

The appellate court concluded that "French kissing" was inherently sexual. The appellate court asked itself "It is a permissible inference that this behavior, although inappropriate, was not sexual in nature or is the only reasonable inference under these circumstances that the man kissed the child "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of himself within the meaning of Penal Code Section 288?" The appellate court notes that there are no cases on point in California and cites the Practical Encyclopedia of Sex and Health (1993) in its holding when it determined that French kissing was inherently sexual.

The appellate court instructed the trial court to find the WIC (d) allegation true and reconsider whether reunification services ordered should include a sexual abuse program for perpetrators for Edwin and not the sexual abuse awareness/boundary issues program as the trial court ordered.

Samantha T. v. Superior Court of San Diego (7/6/11)
197 Cal. App. 4th 94; 128 Cal. Rptr. 3d 522
Fourth Appellate District

Issue:

Is a family friend of the children's mother a Non Related Extended Family Member (NREFM) within the meaning of WIC 362.7 and is placement with this person in the best interest of the children?

Facts:

The children had been declared dependent of the court due to significant neglect leading to the death of their sibling. The children were placed in foster care with an elderly caretaker who was unable to adopt due to her age. There were 28 approved families in San Diego who were willing to adopt both children, however the Agency focused their placements effort on the parent's close friends who resided in Sacramento. The oldest child, Samantha, and her therapist were opposed to the move. Samantha had no recollection of the proposed adoptive parents and the youngest child had never met them. Samantha wanted to stay in San Diego so she could have continued contact with her therapist and the current foster mother. She expressed fear and anxiety over the idea that she would be living near her parents.

Holding:

The proposed caretakers do not qualify as NREFMs because, while they have a close and long standing relationship with the children's mother, they do not have a close relationship with the children themselves. Furthermore, according to the dependency statutory scheme, even when a potential caretaker qualifies as a NREFM, an order placing a child with that NREFM must be in the best interest of the child.

The proposed caretaker's long-standing relationship with the children's parents presents an obvious and serious risk to Samantha's emotional stability and well-being. Any benefit to maintaining a relationship to the natural family is far outweighed by the disruption to relationships which are important to the children at this point in their lives.

In re S.H. (8/5/11)
197 Cal. App. 4th 1542; 129 Cal. Rptr. 3d 796
First Appellate District, Division Three

Issue

- 1) Did the juvenile court err by refusing to revisit the issue of whether the mother should receive reunification services after the minor's previously ordered legal guardianship was terminated and the dependency proceedings were reinstated for the purposed of establishing a new guardianship?
- 2) Did the juvenile court err by limiting the mother's visitation with the child to twice a year without first determining whether more frequent visitation would be detrimental to the child?

Facts

S.H. was declared a dependent of the court and removed from her mother's care and custody. Reunification services were denied to the mother under WIC 361.5(b)(4)(6)(10). A guardianship was subsequently ordered and dependency dismissed. Two months later the legal guardian asked that the legal guardianship be terminated because they were no longer willing to provide for S.H.'s care. Dependency was reinstated and a new permanency hearing was set four months later. At that hearing the Agency recommended the child be placed in a new guardianship. (The report also addressed mother's failure to participate in any services since the original denial or reunification services.) The mother asserted that she was entitled to be considered for reunification services before a new guardianship was entered into. The court denied the mother's request to reconsider the issue of reunification services, ordered a new guardianship and reduced mother's visits to two times a year. This appeal ensued.

Law

WIC 366.3(b) states: "If the court has dismissed dependency jurisdiction following the establishment of a legal guardianship... and the legal guardianship is subsequently revoked or otherwise terminated, the county department of social services or welfare department shall notify the juvenile court of this fact. The court may vacate its previous order dismissing dependency jurisdiction over the child. ... Unless the parental rights of the child's parent or parents have been terminated, they shall be notified that the legal guardianship has been revoked or terminated and shall be entitled to participate in the new permanency planning hearing. The court shall try to place the child in another permanent placement. At the hearing, the parents may be considered as custodians but the child shall not be returned to the parent or parents unless they prove, by a preponderance of the evidence, that reunification is the best alternative for the child. The court may, if it is in the best interests of the child, order that reunification services again by provided to the parent or parents."

Holding

- 1.) The appellate court held that the trial court did err when it read WIC 366.3 in such a way as to preclude the mother from reopening the issue of reunification services. The appellate court concluded that 366.3 applies to any change in guardianship, whether there is a petition to terminate a guardianship or to modify a prior guardianship order by appointing a successor guardian. (The court did find, however, that in spite of the trial court's error was harmless error because the mother would not have been able to show it was in the child's best interest to offer reunification services to the mother.)
- 2.) The appellate court held that the trial court did not err when it limited the mother's visits to twice a year. The appellate court stated that it is clear from the statutory scheme governing dependency proceedings that the Legislature did not intend the "frequent as possible" requirement to apply where, as here, a permanent placement has been ordered for the child. The appellate court stated that the trial court was properly focused on the minor's interest in deepening her attachment to her new caregivers without unnecessary disruption from mother who opposed the placement and acted at times with hostility towards the child's caretakers.

In re T.W. (7/18/11)
197 Cal. App. 4th 723; 128 Cal. Rptr. 3d 373
Second Appellate District, Division Eight

Issue

Did clerk's failure to include zip code on writ advisements render a legitimate basis for concluding that the mother did not receive the writ advisements?

Facts

The mother appealed from an order terminating parental rights to two of her 11 children. In her appeal the mother contends that she is entitled to challenge the court's disposition order, which denied her reunification services based upon her failure to reunify with the children's older siblings. The mother did not file a writ after the disposition order was entered. Mother claims that she failed to file a writ because she was never advised of her right to challenge the trial court's orders setting the 366.26 hearing because the court clerk mailed the written advisement of her writ petition rights to her correct address, but without including the zip code (she wasn't given an oral advisement because she didn't attend the hearing). The Department filed a motion to dismiss mother's appeal on the ground she failed to file a timely notice and petition for an extraordinary writ when the court entered its dispositional order.

Holding

The appellate court dismissed mother's appeal. The appellate court concluded that mother should not be relieved of the writ requirement to challenge the dispositional orders. Mother's address on the written advisement was correct, it just contained no zip code. It was not returned to the sender and mother offered no declaration that she had not received it. When mother does not state, either by declaration or otherwise, that she was unaware of the requirement to file a writ in order to preserve any right to appeal issues presented by the setting order, the appellate court found no legitimate basis for concluding that she did not receive the written notice of the writ requirement.

In re Z.W. (4/7/11)
194 Cal. App. 4th 54; 124 Cal. Rptr. 3d 419
Third Appellate District

Issue:

Did mother forfeit her right to object on appeal by failing to object in trial court to ICWA notices after the case was already reversed once for failure to send notice the Indian tribes?

Facts:

After the termination of parental rights, the appellate court reversed the order and remanded the matter back to the trial court to properly notice the Indian tribes. After much back and forth between the court and the parties, notices were finally resent to the appropriate Indian tribes. Parents' counsel submitted on the court finding that the notices were correct and that the child did not fall under the Indian Child Welfare Act. The trial court re-instated the order terminating parental rights. This second appeal followed. Mother claimed that ICWA notices were sent to the wrong people for receipt of ICWA notice. Mother relied on a list of agents published for services of process under ICWA by the BIA on 5/19/10. Because the new list was published prior to the final ICWA compliance hearing on 5/21/10, and the agents for service changed, mother contends that the notices were improper.

Holding:

The appellate court held that although the list of designated agents published annually in the Federal Register changed prior to the final ICWA compliance hearing, the ICWA noticing was valid because the last revised notices were mailed to the agents listed on the previous published list and received before the new list was published.

Also mother forfeited any claim concerning defects to the contents of the final ICWA notices because she did not object in the juvenile court. "When a case is remanded to the juvenile court for the purpose of curing ICWA notice defects and the parent is represented by counsel at the postremand compliance hearing and counsel raises no objection to new ICWA notices, an exception to the general rule of forfeiture may apply... Balancing the minor's interest in permanency and stability against the tribes' rights under ICWA may require a different result in such a case." "As a matter of respect for the children involved and the judicial system, as well as common sense, it is incumbent on parents on remand to assist the Agency in ensuring proper notice is given." (In re X.V., 132 Cal. App. 4th 794)

In Re Z.K.

10/25/11

Publication Order 11/22/11

3rd Appellate District

Issue:

Can a trial court terminate the parental rights of a parent absent clear and convincing evidence that custody of the child by that parent was detrimental to the child?

Facts

The child was born in 2004. At the time the parents were living in Nevada with the paternal grand-mother. After three months, the mother was forced out of then house by father and PGM and mother became homeless. When she returned to the family home, she discovered that the child, father and PGM were gone. Mother searched for months to locate the child with no success. She ultimately returned to her family in Ohio. Father and child relocated to California.

In 2008, the child was found wandering the streets, the father was arrested for possession of methamphetamines and the child was detained. Father told the child welfare agency that mother was in a mental institution, had abandoned the child and did not want anything to do with the child. The Agency reported that a due diligence search failed to locate the mother. The child was declared a dependent and reunification services were provided. However, father continued to use, was arrested numerous time for drug issues and eventually stopped visiting. The trial court terminated FR and set the matter for a 366.26 hearing.

Mother had, by that time, relocated to Ohio and was making efforts to better herself, including attending junior college and locating employment. In late 2009, the MGM discovered through an internet search that father was arrested. Mother then contacted the agency, the trial court was notified and counsel appointed for the mother. Mother reported that she wanted to be reunited with the child and was taking parenting classes. Mother was unable to attend many of the hearings due to limited finances, but she did have a visit with the child in March, 2010, which the social worker said was "successful."

The trial court continued the 366.26 hearing in order for Ohio to conduct a home study pursuant to the ICPC. Ohio denied the ICPC noting mother's lack of income, residing with her boyfriend in a small apartment and other safety issues related to the home.

The trial court continued the 366.26 hearing again so that a new home study could be conducted and that the mother undergo a psychological exam. Ohio reported that they had some difficulty getting mother's cooperation with the second home study.

At the 366.26 hearing, the agency recommended termination of parental rights. Mother's attorney requested a continuance, but the child objected, noting that the mother had not cooperated with the Ohio authorities. The trial court denied the continuance, found the child adoptable and terminated parental rights. Mother's appeal followed.

Holding:

Reversed! Describing the facts as a "nightmare scenario" the Court of Appeal, citing to In re Gladys L. 141 Cal.App.4th 845 and similar cases, noted that a parent's due process right to custody of his or her child cannot be infringed absent a finding of detriment. The C of A noted that the trial court never made a detriment finding as to mother. Thus, her parental rights cannot be terminated unless and until that has occurred.

The court went on to note that it is the agency's job to prove detriment, not the mother's obligation to prove no detriment. The court also noted that the agency and the trial court's reliance on the ICPC was misplaced. Per case law, an ICPC is not required to place a child with a parent (CRC 5.616(b) notwithstanding). The court also rejected the argument that the mother needed to file a 388 petition not the mother's obligation to prove no detriment; it is the agency's job to prove detriment.

The C of A was very harsh in its criticisms of all concerned, noting that the county welfare agency, the trial court and the mother's attorney all failed her and trampled on her due process rights.