

# APPELLATE DEFENDERS ISSUES

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## NOTES FROM THE DIRECTOR by Elaine A. Alexander

Topics currently dominating the scene include:

### *Three Strikes and Adverse Consequences*

Published cases interpreting the Three Strikes law to require virtually the maximum conceivable sentence in many cases are now coming out in torrents. We need to stress more than ever the advice, already given many times over, to warn clients when they face the possibility of a greater sentence if they pursue an appeal. The court itself has expressed concern over the number of appeals that have had such a result, and attorneys who fail to be vigilant on the matter run grave risks for their clients and themselves.

To reiterate:

(1) Analyze each case for possible adverse consequences to the client. Consult ADI if there is a shadow of a doubt whether the sentence was authorized by law. You are not only reviewing established law in making this analysis: you may well be called on to anticipate future court decisions.

(2) If there is a reasonable chance of adverse consequences, warn the client. The warning should include the nature and likelihood of the risk of adverse consequences, the nature and likelihood of the benefits of pursuing the appeal, and the possibility that the consequences might occur even without the appeal.

(3) Ask the client to make the decision what to do. Tell the client that failure to respond will mean the appeal will go forward, with the attendant risks of adverse consequences that you have outlined.

*These steps need to be taken before the appellant's opening brief is filed.* It would be hard to overstate the importance of doing the analysis and warning and getting the client's decision early in the process. After the AOB is filed, it will often be too late.

We would be glad to assist attorneys in analyzing their cases under current law and helping them get a handle on where the law might be going.

### *Swain Error*

In a recent case, People v. Swain (1996) 12 Cal.4th 593, the California Supreme Court held that specific intent to kill is an element of conspiracy to commit murder and that instruction on implied malice is error.

Attorneys currently handling conspiracy to commit murder cases of course should review the record to see if Swain error was committed. If so, it could be raised in the opening brief or a supplemental opening brief, depending on the stage of the case. If the case is post-submission but still at some stage of the direct appeal, including a petition for review, please consult ADI on how to raise the issue.

In addition, Swain conceivably could affect a number of past convictions. We will be researching the possible retroactivity of the decision and developing some sample arguments to use in raising it on habeas corpus, if that would be available. Meanwhile, it would be useful for attorneys to review their past cases to see if they had any where Swain error might have occurred and the client might still be incarcerated.

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## Claims

We are now well into the second year of the program using the appellate projects rather than the courts to review the bulk of compensation claims. As predicted, all of the projects have had to make some adjustments as we move toward greater statewide uniformity.

For example, we have discovered that it is necessary to classify issues (as simple, average, complex, etc.) somewhat differently and more strictly than before. The criteria to be reviewed have not changed: we consider quality, page length, depth and complexity of research and analysis, use of "recycled" materials or long quotations, novelty of issues, conciseness versus wordiness, materiality, response of the AG and court, and similar factors. But how these factors considered together are to be labeled within the classification system has changed to be more consistent with practices elsewhere in the state.

Although the claims review process is now more streamlined, we have a lot more claims going through the system than before. By the end of fiscal year 1995-96, the Fourth Appellate District will have seen a caseload increase of about 800 cases since 1993-94. At two claims per case, that's about 1600 more claims, to be handled by essentially the same size staff. We do give claims high priority, and our goal is to get them out of the office in ten working days (assuming they are routine and it is not necessary to contact the panel attorney or get more information). Most of the time we meet that goal, but often there is some delay; we apologize for those delays that are our fault and will keep striving to improve our "claims fast track."

As always, to help in the streamlining process, panel attorneys should submit explanations for any items that exceed the guidelines or that may not be self-evidently justifiable. Our staff attorneys often cannot take the time to search out explanations that should have been provided, and may just cut to the guidelines or another reasonable level. ■

## MISCELLANEOUS

### Division Three Habeas Petitions Should Address Issue Of Evidentiary Hearing

Division Three advises appellate counsel that if they will not be able to handle an evidentiary hearing in connection with a habeas corpus petition they have filed, *they should say so in the petition itself, offer reasons, and ask for an appropriate remedy.*

Often appellate counsel will not want to handle trial court proceedings arising after an order to show cause returnable before the superior court is issued. They may not be from the Orange County area. Or they may have no or minimal trial experience. Or they may find themselves potential witnesses in the case. Our experience is that the Orange County superior court is not particularly receptive to relieving appellate counsel or appointing co-counsel for an evidentiary hearing.

Appellate counsel who file a habeas petition in the Court of Appeal should consider whether they would be available to handle the evidentiary hearing if an OSC issues. If they do not want to do it, they should state their position and reasons in the **petition**. They should also state what remedy they are requesting the Court of Appeal to provide; for example, they might ask to be relieved altogether or to have co-counsel appointed for the purpose of the evidentiary hearing. Please *consult with ADI about this*, so that if other counsel is to come into the case, we can participate in the selection. ■

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## Reminder: Abandonments Of Appeal In Independent Cases

In a small but significant number of cases, clients elect to abandon their appeals. The reasons vary. No arguable issues may appear. A client may decide the relief sought by the appeal is undesirable, such as when the withdrawal of a guilty plea could ultimately mean a longer sentence. Other adverse consequences could occur. There may be personal considerations, such as protecting a family member from further testimony in the event of a retrial.

ADI strongly encourages panel attorneys in independent cases to consult with us before filing an abandonment. This helps insure the panel attorney will accurately assess the consequences of proceeding with the appeal and the client will be fully informed of the possible benefits and risks before making the final decision.

Many independent cases are not assigned to an ADI staff attorney until the opening brief is filed, so a panel attorney whose client is contemplating abandonment will probably end up consulting with the duty attorney of the week. If an abandonment is filed, the panel attorney should include with ADI's copy a cover letter briefly explaining the reason for the action and the name of the ADI staff attorney who consulted on the case. This will help insure the ADI staff attorney most familiar with the case is officially assigned to it and will process the evaluation and compensation claim.

If for some reason the panel attorney files the abandonment without first contacting ADI, he or she still should send a cover letter explaining why the client decided not to go forward. If there has been no prior consultation, it is ADI's policy to follow up on the reason for an abandonment. A short explanatory letter will expedite this procedure and enable us to process both attorney evaluations and compensation claims more efficiently. ■

## Alert Re: 15% Credits Limitation In Violent Felony Cases

Newly enacted Penal Code section 2933.1 limits credits (both presentence and prison) to 15% for defendants convicted of violent felonies listed in Penal Code section 667.5. Two problems may arise from this new law. First, trial counsel, unaware of the new statute, may have advised clients considering plea agreements that they would be eligible for half time credits. If a defendant was

induced to enter a plea based on the attorney's assurance he would be eligible for half time credits, he could seek to challenge the plea based on ineffective assistance of counsel via habeas. And, if it could be established the prosecutor ever referred to half time credits during plea negotiations, it might be argued this was a term of the plea agreement which should be specifically enforced. Arguably, the People would be estopped from now complaining half time credits are illegal. Some cases hold parties are barred from challenging illegal sentencing acts they agreed to as part of a plea agreement. (See, e.g., People v. Webb (1986) 186 Cal.App.3d 401.)

The second problem concerns a related adverse consequence which may occur in both guilty plea and jury trial cases. In some cases, judges may have erroneously awarded 1-for-2 Penal Code section 4019 presentence custody credits in violent felony cases, rather than section 2933.1 credits. It is not known if Corrections is routinely catching this error and having it corrected, but if not, then maintaining an appeal would seem to increase the risk the error will be discovered and corrected. In any event, the client must be informed of the risk. ■

## Redaction Of Jurors' Information From Record On Appeal

Do the recent amendments to Code of Civil Procedure sections 206 and 237<sup>1</sup> seem to require appellate counsel to redact (delete) juror information from appellate records, before sending the records on to the clients? The statutes do not address this situation. However, the amendments absolutely prohibit releasing juror information once the records have been sealed by the court, and provide stiff penalties for unauthorized disclosure.

From the time of its enactment in 1988, section 206 focused on protecting jurors from unwanted postverdict intrusions. That section requires the court to inform jurors they have an "absolute right to discuss or not to discuss the deliberation or verdict with anyone." (Sec. 206, subd. (a).) It also requires the "juror's consent" before either the defense or prosecution may discuss the case with a juror. (Sec. 206, subd. (b).) The statute authorizes the court to impose **monetary** sanctions in accordance with section 177.5 for any contact without juror consent. (Sec. 206, subds. (c) and (d).)

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In 1992, the Legislature passed a bill which added subdivision (f) to section 206<sup>2</sup> and created section 237, a new statute establishing a procedure for sealing juror information. (Stats. 1992, ch. 971, §§ 2, 3.) The 1992 version of section 237 provided that the court, at the conclusion of a criminal jury proceeding, "**may, upon a juror's request**, motion of counsel, or on its own motion, order that all or part of the court's record of personal juror identifying information be conditionally sealed upon finding that a compelling governmental interest warrants this action." (Sec. 237, subd. (b), emphasis added, 1992 ed.) It also allowed the court to keep the information sealed despite a request for access if there was a continuing governmental interest. (Sec. 237, subd. (c).)

The recent 1995 amendments (Stats. 1995, c. 964 (S.B. 508), § 3) rewrote section 237, substantially strengthening juror protections. The current version of this section provides, inter alia: "Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information, including names, addresses, and telephone numbers, **shall be sealed** until further order of the court as provided by this section." (Sec. 237, subd. (a)(2), emphasis added.) Section 1 of Stats. 1995, c. 964 (S.B. 508) provides: "The Legislature finds and declares that jurors who have served on a criminal case to its conclusion have dutifully completed their civic duty. It is the intent of the Legislature in enacting this act to balance the interests of providing access to records of juror identifying information for a particular, identifiable purpose against the interest in protecting the jurors' privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system."

The conditional sealing of the record upon request has now been replaced by a mandatory duty to seal the information. Thus, in every criminal jury case since January 1, 1996, juror identification should be, or should have been, automatically sealed by the court.

Section 237, goes to provide a detailed procedure to access juror information, and directs the court to set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the identifying information. However, if there is a showing on the record of facts that establish a compelling interest against disclosure, the court "shall not set the matter for hearing." (Sec. 237, subd. (b).) "Compelling interest" is very loosely defined as including, but not limited to, protecting

jurors "from threats or danger of physical harm." (Sec. 237, subd. (b).)

As penalties, section 237 does not differ from the earlier versions. However, these penalties are severe. Section 237, subdivision (e) provides that any court employee who has legal access to juror information sealed under subdivision (a) and knowingly and in violation of a court order issued pursuant to subdivision (a) discloses the information, "shall be guilty of a misdemeanor." (Sec. 237, subd. (e).) Subdivision (f) provides as follows:

Any person who intentionally solicits another to unlawfully access or disclose juror information contained in records sealed under subdivision (a), knowing that the records have been sealed, or who knowing that the information was unlawfully secured, intentionally discloses it to another person **shall be guilty of a misdemeanor.** (Sec. 237, subd. (f), emphasis added.)

Neither section 206 nor section 237 specifically address the situation where jury identifying information has accidentally been left in the record on appeal. Although neither section 206 nor 237 specifically require the appellate attorney to take it upon themselves to delete juror identifying information from the appellate records where the clerk or the court has forgotten to do so, the possibility of monetary sanctions or being found guilty of a misdemeanor make it wise to do so. Thus, to avoid any appearance of a violation of the provisions, the best course for the appellate attorney who notices juror identifying information in a record, would be to personally redact that information before sending the transcripts onto the appellant. The attorney should go through the record and note the sections where such identifying information is present. Then, one could take a black marking pen and cross out those sections, photocopy the entire page, then place the photocopied page of the blackened-out portions in the record, instead of the original page. It would also seem prudent for the attorney to not give out this information to any person, including the trial attorney or a defense investigator, in the absence of a valid court order. Any potential civil liability resulting from unauthorized disclosure by the appellate attorney is a topic saved for another day.

#### ENDNOTES:

1. All statutory references are to the Code of Civil Procedure unless otherwise noted.

2. The 1992 edition of section 206, subdivision (f) provided that defense counsel "may"

request addresses and telephone numbers to "communicate with jurors for the purpose of developing issues on appeal or any other lawful purpose" and that the court "shall" provide the information requested to counsel. ■

## Retention Of Files In Criminal Matters, ... For Life

Attorneys have the ethical obligation to retain client files in criminal cases *indefinitely*. In L.A. County Bar Association Formal Opinion No. 420, dated October 25, 1983, the Committee stated that the file is the client's property, and *nothing* other than the client's express permission limits the duty to preserve it. The information contained in criminal files may have a presently unforeseeable future impact on the client's liberty interests. Therefore, in the absence of written instruction by the client, the client's file relating to a criminal matter in the possession of an attorney should be retained by the attorney and not destroyed.

Transcripts, on the other hand, may be sent to the client when the remittitur issues, provided that you have a good client address. ■

## Late Compensation Claims

Effective **July 1, 1996**, ADI will begin charging panel attorneys \$11.90 per file for the costs of retrieving, transporting, and refileing files that are retrieved from storage for claim purposes. Panel attorneys are urged to file their claims promptly to avoid these charges. Panel attorneys may submit their claims to ADI after the opinion issues and it is known that no petition for review will be filed.

ADI currently sends files to storage three months after the remittitur issues. Effective **July 1, 1996**, claims submitted to ADI later than three months after the remittitur has issued must be accompanied by a check for \$11.90 per file. Claims that are submitted without payment to cover ADI's retrieval costs will be returned, unprocessed, to the panel attorney. ■

## Proof Of Service On Trial Counsel

The Office of the Public Defender has requested that when appellate counsel serves a brief on the public defender as trial counsel, appellate counsel identify the trial deputy by name. Otherwise, the brief may not be routed correctly.

Briefs being served on the District Attorney's Office should have the Deputy District Attorney identified as well. ■

## ADI Issues Bank To Be Made Available For Purchase On Disk

The purpose of the ADI issues bank is to provide panel attorneys with recent briefs and cases pertaining to issues that come up frequently in our work. The criterion for inclusion of an issue in the bank has been that the issue must be a current issue of great interest or an older one which recurs frequently. Emphasis has been placed on including recurring issues and panel attorneys should be aware that because of the lag time between updating, the issues bank is not intended to keep attorneys abreast of "cutting edge" issues. Sample arguments are intended to be starting points for research and **must** be Shephardized to update the case law contained within them.

Until recently the issues bank has only been available indirectly to panel attorneys. To obtain a copy of an issue in the bank, the panel attorney had to go through the ADI staff attorney assigned to the case, or for an unassigned case, through the ADI attorney of the day.

The issues bank is now available to panel attorneys on disk form. These disks contain "shrunken" files which can be "expanded," copied onto your hard drive and utilized in Word Perfect format. If you have software which can transform Word Perfect formatted files into your own word processing format, you can also make use of these disks.

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Assuming there is sufficient interest among the panel to make the project feasible, ADI intends to market two different versions of the briefbank. The criminal version contains over 400 briefs covering a wide variety of topics in adult and juvenile criminal law, including pre-trial, trial and post-trial issues. The one year subscription price of \$50 plus applicable sales tax includes the initial release plus a six month update.

The civil version contains over 110 issues pertaining to juvenile dependency law. The one year subscription price (including initial release plus a six month update) is \$25 plus applicable sales tax.

Both the criminal and civil disk set will also include a forms directory which contains over 90 samples of documents and forms which are often used in our everyday work.

If you are interested in purchasing one or both of these brief bank disk sets, please send your name, address and telephone number to:

Appellate Defenders, Inc.  
Attention: Christie Quinn  
233 "A" Street, Suite 1200  
San Diego, CA 92101-4010

Specify whether you want the criminal disk set, the civil disk set, or both. Also specify whether you prefer 3 1/2" or 5 1/4" double-sided, high density disks. **PLEASE DO NOT SEND PAYMENT AT THIS TIME.** Assuming there is sufficient interest to allow ADI to go forward with this project, you will be notified and requested to send in payment. We are currently targeting a date of mid-May to make this decision. If you are interested, please return your request prior to that time.

For more information regarding this offer or the briefbank in general, please contact Patrick DuNah at (619) 696-0284, ext. 31. Whether or not the proposed sale goes through, ADI attorneys will still provide sample arguments to panel attorneys when they are found to be applicable or as requested. To find out whether a particular argument you seek is contained in the briefbank, please contact the staff attorney assigned to your case, or if no staff attorney has been assigned, the attorney of the day. ■

### ADI Staff Telephone Extension List:

<b>Executive Director:</b>	(619) 696-0282
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Bell, Paul	30
Bookout, Randy	38
Cohen, Howard	24
DuNah, Patrick	31
Geyerman, Cheryl	23
Hibbs, Mary	11
Jauregui*, Anna	34
(*formerly Anna Hitchcock)	
Kay, David	21
Meisner Keller, Joyce	61
Mishkin, Cindi	55
Nicholas, Blair	59
Nichols, Diane	12
Norris, Ronda	56
Rankin, David	33
Rose, Leslie	32
Sada, Stefanie	37
Salisbury, Bill	29
Simoncini, Carmela	28
Sorman, Cindy	22
Tillman, Beatrice	35
Weinman, Michael	60
Woodward, Kristine	25
<b>Legal Administrator:</b>	
Ernie Palacio	40

## ADI Paralegal Terminal Digit Case Assignments\*

Terminal Digit(s)	Paralegal	(619) 696-0284
0 - 1	Kathy Guerra	Ext. 41
2	Melia Wasserman	Ext. 39
3 - 4	Dawn Arney	Ext. 43
5	Randy Wright	Ext. 42
6 - 7 - 8	Amanda Doerrer	Ext. 62
9	Kathy Guerra	Ext. 41

\*Note: Any questions regarding cases pending in the Supreme Court should be directed to Melia Wasserman at (619) 696-0284, ext. 39. ■

## KUDOS

We know that excellent work often goes unrecognized because it is done in unsuccessful cases. But we think it is important to recognize successful efforts so we can all be aware of issues that may benefit our clients. Kudos are listed alphabetically by attorney name. ["A" indicates a panel assisted case, "I" a panel independent case, and "ADI" a staff case.]

**Neil Auwarter, P. v. Skowronski, #D023071,** PC §667.9, subd. (a), "vulnerable victim" enhancement was found to have been improperly imposed on a subordinate term for a non-"violent" felony, in violation of §1170.1, subd. (a). Enhancement ordered stricken, and aggregate term reduced from 9 to 8 years. (ADI)

**Susan Bauguess, P. v. Sanchez, #E015061,** \$3,000 restitution fine reduced to \$200 minimum because trial court made an express finding of inability to pay. (I)

**Philip Bronson, P. v. Welch, #E014763,** Case remanded for court to consider favorable recommendation for housing at CYA, which court did not consider at first sentencing hearing. Abstract of judgment ordered amended to add credit for days spent in custody for diagnostic evaluation pursuant to W&I §707.2. Minute orders corrected to reflect correct disposition of enhancements. (I)

**Martin Nebrida Buchanan, P. v. Bennett, #G012404,** By way of habeas, the Court of Appeal reversed the denial of a motion to suppress evidence where by reason of ineffectiveness of trial counsel who substituted in for the Orange County Public Defender, a meritorious ground for suppression of evidence was not presented. Original trial counsel had intended to proceed on a motion to suppress on the ground the police unlawfully seized appellant's motel room when they sealed it, without a warrant, an exigency, or probable cause to believe a weapon would be found therein. (I)

**Susan Cardine, P. v. Lopez, #D019573,** Court of Appeal reversed VC §10851 count for trial court's failure to instruct sua sponte on the LIO of joyriding and reversed receiving stolen property count for trial court's failure to instruct jurors they could not convict defendant of both taking and receiving the same vehicle. (A)

**Dawn Chan, P. v. Rivera, #D023257,** Remanded for new sentencing hearing so trial court can exercise its discretion to reduce offense to misdemeanor in three strikes case. (A)

**James Crowder, P. v. Parra, #E016434,** Judgment modified to reflect credit of 5 additional days. (I)

**Michael Dashjian, P. v. Bryson, #D021794,** Judgment reversed & remanded for new probation hearing of limited scope where failure to give defendant adequate notice of time of his probation revocation hearing deprived him of due process. Defendant was informed after a stalking case preliminary hearing that the proceeding had also been the molestation case probation revocation hearing. (I)

(Kudos Continued on Page 17)

## HOT TOPICS IN DEPENDENCY, FREEDOM FROM CUSTODY, AND CONSERVATORSHIP CASES

by Carmela F. Simoncini, Staff Attorney

### DEPENDENCY CASES

#### A. Jurisdictional Issues

The Second Appellate District recently affirmed a jurisdictional and disposition order in In re Matthew S. (1996) 41 Cal.App.4th 1311, finding there was substantial evidence to support the orders. The mother had some pretty weird delusions regarding the medical condition of her son (she imagined mutilation of his genitals while she was in South America and murdering the doctor when she returned to the country to find him in a "septic state;" there was no evidence of any injury, etc.) and her supposed marriage to an actor. While the children were temporarily placed in protective custody, they were permitted to return to their mother's home prior to the adjudication hearing. The petitions alleged, among other things, the children were at risk due to the mother's serious emotional problems.

At the hearing, experts testified there was little or no risk the mother would be violent, and it was conceded the children wanted to remain with their mother. She was described as having a rich and complex delusional system which had increased and deepened since her divorce. It was noted she had been denied AFDC because she stated she had expensive homes and was married to actor Gregory Harrison on the application.

The court found true the allegations Matthew was at risk due to his mother's serious emotional problems stemming from her intense delusions with violent themes that involved the child. It also found true the allegations Matthew was at risk of developing emotional problems by reason of his being included in mother's delusions. On appeal, the mother challenged the jurisdictional findings pursuant to Welfare and Institutions Code section 300, subdivisions (b), (g) and (c), asserting CPS had created more stress in her life than it alleviated.

The Court of Appeal affirmed. It ruled there was no evidence Matthew had suffered, or that there was substantial risk he would suffer, serious physical harm or illness as a result of mother's mental condition. (Welf. & Inst. Code, §300, subd. (b); Id., 41 Cal.App.4th at 1319.) It also concluded there was no evidence he had been left without any provision

for his support. However, it did find that though there were positive aspects in the home environment, which justified allowing them to remain there, and although they had not yet suffered harm at the hands of their mother, "substantial evidence points to potential serious emotional harm." (Id., 41 Cal.App.4th at 1320.) It noted a mother's delusions bring a foreboding sense of dread, danger and catastrophe to the lives of her children, who are confused by them. The court expressed concern that if the mother's condition deteriorated, the child would need assistance, but it recommended that the department assist in an unobtrusive manner.

The dissent expressed the view that speculation about potential harm, in the absence of any, and speculation that some catastrophic event could occur was expressly the type of jurisdictional basis the Legislature had eliminated in the 1989 amendments. (Id., 41 Cal.App.4th at pp. 1321-1324 [Stone, P.J., dis. opn.]

In In re John W. (1996) 41 Cal.App.4th 961 [mod. at 42 Cal.App.4th 232b], Division Three of the Fourth Appellate District reversed an order terminating dependency jurisdiction but with an order precluding modification of the juvenile court's custody award for one year. The court held the order precluding modification for a year was an unwarranted extension of juvenile court jurisdiction into the future where no basis for juvenile court jurisdiction existed, in light of unproven allegations.

However, the appellate court did not remand to the juvenile court; instead, it remanded the matter to the **family court**, where, it concluded, this case should have been all along. "Child custody disputes between divorced parents, neither of whom pose a risk of real detriment to the child, should not be waged at taxpayers' expense in the juvenile courts." (Id., 41 Cal.App.4th at 965.)

In John W., the mother had coached the minor into alleging the father had molested him. There were no medical findings to support the allegations and a psychologist learned the mother had "ma[de the child] lie." "I lie when mommy makes me lie." The parties originally stipulated to an order that the petition be sustained based upon

"serious emotional damage" under subdivision (c) of Welfare and Institutions Code section 300. After the 6 month review hearing, the court terminated jurisdiction and ordered custody be equally split, indicating it felt it had to do so because each parent was equally loving and neither parent was better or worse than the other; it further ruled that its orders should not be modified before Fall, 1995.

Both parents appealed the non-modification order, and the father also appealed from the award of joint custody. The Court of Appeal reviewed the statutory framework of exit orders and concluded the juvenile court erred in assuming it had no discretion other than to split physical custody. It concluded that just because custody with neither parent would pose any danger to the child does not mean that both parents are equally entitled to half custody. A child's best interests are not necessarily served by shuttling between two parents, particularly during the school year and particularly when the parents live in separate counties.

In remanding to the Family Court, the Court of Appeal went on to say, "...the misuse of the juvenile dependency system to litigate custody battles is not only unfair to taxpayers, but to litigants as well" because "a litigant may be unfairly prejudiced ... when the battlefield is shifted to the juvenile courts. At that point he or she faces not only an embittered ex-spouse, but a government adversary paid at public expense." (In re John W., supra, 41 Cal.App.4th at 975.) It went on to admonish that "Juvenile courts must be vigilant to prevent unsubstantiated allegations of monstrous behavior ... from becoming a means of leverage in a custody fight, or a ticket to free legal services and psychotherapy." (Id., 41 Cal.App.4th 975-976.) Thus, jurisdiction may not be predicated on a "tense" atmosphere caused by a divorce, because if taxpayers have to foot the bill for lawyers, social workers and psychotherapists every time there is a "tense" psychological "environment" where a child is involved in a divorce case, there would be no money left for anything else. (Ibid.)

## B. Review Hearing Issues

On appeal from an order terminating reunification services following an adjudication on a supplemental petition pursuant to Welfare and Institutions Code section 387, the Second District Court of Appeal has held that the issue of forum non conveniens may not be raised for the first time on appeal. In In re Christopher B. (1996) \_\_\_ Cal.App.4th \_\_\_ [96 Daily Journal D.A.R. 2881], the maternal aunt, who lives in Tennessee, appealed

from orders removing dependent children from her custody and denying her services.

The two children had been placed with the aunt in Tennessee under the Interstate Compact for Placement of Children. They had been in her custody for 7 years and parental rights had been terminated. However, the Tennessee child protective services agency removed the children as a result of inappropriate discipline by the aunt, and the Tennessee authorities sought to return the children to the sending state under the ICPC.

On appeal, the aunt argued that California should not have exercised jurisdiction because of the forum non conveniens doctrine. However, the Court of Appeal observed the doctrine is not jurisdictional and in dependency litigation, non-jurisdictional issues must be the subject of objection or appropriate motions in the juvenile court or be deemed waived. (In re Christopher B., supra, [96 Daily Journal D.A.R. at p. 2883].)

In In re Edward H., Jr. (1996) \_\_\_ Cal.App.4th \_\_\_ [96 Daily Journal D.A.R. 2939], the Fifth District Court of Appeal affirmed an order terminating reunification services where the father was unwilling to admit to a molestation of one of his children. The juvenile court had declared two of Edward, Sr.'s children dependents pursuant to Welfare and Institutions Code section 300 because the father had physically abused one child, the living quarters were filthy, and there was inadequate food.

Subsequently, a section 387 petition was filed when an older sibling of the two dependent children reported being sexually molested by the father. The trial court made a true finding on the 387 petition, and amended the reunification plan to include therapy to address the molest issue. (The opinion does not disclose whether a separate 300 petition was brought as to the molested sibling, but I assume so.)

At the 12 month review, the court terminated services and set a hearing pursuant to Welfare and Institutions Code, section 366.26. Although both parents had made progress toward alleviating the conditions which led to the dependency of the two boys, and although the father had attended several sessions of court ordered group psychotherapy for sex offenders, the father continued to deny molesting the daughter. Later, both parents brought 388 petitions. The father's petition alleged he had complied with reunification orders. He attached a letter from the county mental health department

which disclosed the father had participated in daily therapy, had showed some progress and appeared stable. The referee denied the request for hearing on the petition.

On appeal, the reviewing court noted the father's petition and its supporting attachment did not show the requisite changed circumstances to justify the relief requested because there was no indication anywhere that father had satisfied the requirement that he acknowledge the molest and complete treatment designed for sexual abuse offenders. The opinion contains a lengthy analysis of the 388 petition procedure, and the purpose for the requirement of a prima facie showing of changed circumstances which must precede the decision to order an evidentiary hearing.

Specifically, the court noted that "prima facie" showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. It observed that "general, conclusory allegations," or a petition containing only "general averments," are insufficient. There must be specific allegations describing the evidence constituting the proffered changed circumstances or new evidence. (In re Edward H., Jr., *supra*, [96 Daily Journal D.A.R. at p. 2941].)

From the same reviewing court, we get the recent holding of Deborah S. v. Superior Court (1996) \_\_\_ Cal.App.4th \_\_\_ [96 Daily Journal D.A.R. 3063], a decision following a petition seeking extraordinary relief following an order setting a permanency planning hearing pursuant to Welfare and Institutions Code section 366.26. In that case, involving multiple children who were either abused or neglected or both, one of the minors had been severely abused, within the meaning of Welfare and Institutions Code section 300, subdivision (e). At the disposition hearing, the department recommended that services be denied with respect to the minor who had been severely abused, but recommended reunification services with respect to the other children. The court denied reunification services as to all of the children.

The mother argued the denial of services was erroneous under section 361.5, subdivision (b)(6), as to the three children who were not severely physically abused. The court viewed her contention as seeking a holding that the court may only deny services as to the specific child who personally suffered the abuse. The court held the language of the statute permitted denial of services as to a child if "the minor" has been adjudicated a dependent as a result of severe abuse. It interpreted the language in quotes as referring only to the minor who has been

adjudicated a dependent, and not in reference to the minor who has been abused. The court reasoned that the abusive parent's risk of recidivism was not necessarily limited to the previous victim and the parent may very well pose a risk of serious threat to his or her other children.

In In re Natasha A. (1996) 42 Cal.App.4th 28, the Fourth District held that a juvenile court's refusal to modify a no-visitation order was proper where the father's request was made orally and not by way of a petition pursuant to Welfare and Institutions Code section 388. (What happened to informality in juvenile court procedure? Or is that reserved for the government?) In this case, the minor was removed from parental custody pursuant to a sustained petition alleging molest, so visitation was denied. The father appealed those orders, which were affirmed. However, while the appeals were pending, the father made a request for supervised visits, which the juvenile court denied, and, later, the court declined to hold review hearings pending the outcome of the appeal. The father appealed from those orders as well.

The reviewing court followed the holding of In re Elaine E. (1990) 221 Cal.App.3d 809, which prevents a parent from presenting evidence on the issue of visitation either at a review hearing, termination hearing, or any other hearing unless he first shows changed circumstances pursuant to section 388. The court did disapprove of the juvenile court's refusal to hold further review hearings during the pendency of the first appeal, however.

Notice that if visitation had been ordered, and the department wanted to cancel visits or obtain an order to discontinue them at the next review hearing, there is no authority requiring a filing of a formal 388 petition. Perhaps counsel faced with such a recommendation in a pre-hearing report should object to a modification of a visitation hearing in the absence of a formal petition alleging change of circumstances. It seems only fair that the governmental agency with all the resources--not to mention the burden of proof--should have to do at least as much as the parent in order to modify a prior order.

Is there a new presumption of detriment being applied at review hearings? Check this out: At an 18 month review hearing, the parents were found to have corrected the problems which led to the juvenile court's exercise of dependency jurisdiction pursuant to Welfare and Institutions Code section 300, subdivisions (a) and (b) (inappropriate discipline [spanking with a belt]); the court specifically found that return of the minor to

his parents would pose no risk of harm to the minor's physical well-being. (In re Joseph B. (1996) 42 Cal.App.4th 890.) However, the court did find the minor's mental health at "grave risk" if returned home, because the minor had indicated he did not want to return home and would not feel safe there. Nevertheless, the court ordered the minor returned to the parents, and the minor and the department appealed.

The Third District Court of Appeal reversed the order. It held that "Consistent with the purpose of the dependency scheme, the question whether to return a child to parental custody is dictated by the well-being of the child at the time of the review hearing; if returning the child will create a substantial risk of detriment to his or her physical or emotional well-being ... placement must continue regardless of whether that detriment mirrors the harm which had required the child's removal from parental custody ... ." (Id., p. 900.)

This decision causes me concern, especially where the potential emotional harm was based on speculation by the minor and department. His fear of the father cannot be said to have a factual basis where it related to fear of the corporal punishment which had been addressed in the reunification services. Moreover, there is the possibility of extending this rule to prevent return whenever the minor does not want to go home because he likes his foster home better than his family's home. This does not bode well for most of the families in the system, who, for the most part, are poorer than the foster families with whom the children may be placed. Without a factual showing of specific emotional harm, related to the causes which led to the dependency, I envision a statewide tail wagging the dog.

### C. Permanent Plan Issues

In In re Heraclio A. (1996) 42 Cal.App.4th 569, a Sixth District case, the minor's original permanent plan had been guardianship, and dependency jurisdiction had been terminated. About a year after the termination of jurisdiction, the department filed a petition pursuant to section 388 to modify the permanent plan from guardianship to adoption, because the guardian wished to adopt.

The court held the juvenile court retained jurisdiction to hear a 388 petition because section 366.3 provides the court may continue "jurisdiction over the minor as a dependent minor of the juvenile court following the establishment of a legal guardianship or may terminate its dependency

**jurisdiction and retain jurisdiction over the minor as a ward of the guardianship."** [Emphasis added.] (In re Heraclio A., supra, 42 Cal.App.4th at p. 574.)

I do not understand how the court reached its conclusion that 388 applied, but some of the discussion reveals it felt the juvenile court was simply modifying the previous permanent plan based upon a change of circumstances. Somehow wardship jurisdiction relating to the guardianship was translated into dependency jurisdiction to make a new permanent plan. I do not know if a petition for review has been filed. However, I sincerely hope so. I am troubled by a couple of points: (1) the permanent plan was not merely being modified, because it had been fully executed. In other words, it was passed the plan stage. (2) Without pending dependency jurisdiction, how can any dependency orders be made? (3) There was ongoing guardianship jurisdiction, but proceedings were not instituted there.

In In re Malcolm D. (1996) 42 Cal.App.4th 904, an order terminating parental rights was affirmed where the mother claimed she did not receive proper notice of the permanency planning hearing, and where, in her absence, her appointed attorney was permitted to withdraw as her counsel.

Of note in the opinion is a discussion of the effectiveness of a notice of appeal signed by the attorney who had been relieved. The Fifth District Court of Appeal acknowledged the holding of In re Alma B. (1994) 21 Cal.App.4th 1037, on which authority the department had grounded its motion to dismiss the appeal. The Court of Appeal rejected the position, relying instead upon Seeley v. Seymour (1987) 190 Cal.App.3d 844, in which a notice of appeal signed by the son of the appellant (who had forged the appellant's signature) was deemed effectual under the presumption he was authorized to so act in the absence of a clear and satisfactory showing he lacked the authority.

On the merits, the court held it was error to relieve the appointed attorney in the absence of notice to the client, but held the error was harmless. Before reaching that point, however, the Court addressed the issue of good cause to vacate appointment of counsel, in light of the holding of In re Ronald R. (1995) 37 Cal.App.4th 1186. In that case, the court had observed that nothing in the record suggested appointed counsel's inability to contact the client was due to inefficiency, incompetency or any other like reason, which would constitute good cause, as required by section 317.

The Malcolm D. court found the fact counsel was unable to contact the mother did not necessarily mean the mother had a change of heart about the issue of adoption or that she no longer sought to contest the department's recommendation. Further, it did not preclude counsel from challenging the department's evidence regarding the child's adoptability and the suitability of the child's prospective adoptive parents. (Id., 42 Cal.App.4th at p. 916.) "Even assuming the Department's evidence was unassailable, counsel's lack of contact with her client would still not necessarily prevent counsel from safeguarding the mother's procedural rights." (Ibid.)

However, the Court declined to apply the principles of In re Nalani C. (1988) 199 Cal.App.3d 1017 and found the parent's failure to appear at the hearing constituted a waiver, in light of the fact she had adequate notice of the hearing. The court did recommend a procedure for counsel who wish to be relieved due to lack of client contact: First, the attorney should seek a continuance before requesting to withdraw as the parent's counsel. Assuming there is no good cause for a continuance or a continuance would not be in the minor's interest, the attorney should, depending on the circumstances, either request substitution of counsel or establish some good reason which adversely affects or concerns his or her ability or fitness to perform the duty of counsel for the parent that would warrant an order relieving the attorney. In addition, the attorney must show notice to the parent of the prospective motion to withdraw. (In re Malcolm D., supra, 42 Cal.App.4th at pp. 918-919.)

In Janet O. v. Superior Court (1996) 42 Cal.App.4th 1058, the Second District Court of Appeal held that appointed counsel for the parents may be relieved upon being presented with evidence indicating that the parents have lost interest in the proceedings and no longer desire counsel, but only upon proper notice to their clients. Before the various counties begin a rush to rid themselves of a financial burden by relieving a bunch of appointed counsel, be sure to examine the procedural context in which this holding was made.

The dependency was initiated in 1989 as to three minors. By 1990, two of the children had been placed with grandparents under a guardianship, and jurisdiction was terminated. The third minor, Valerie, was placed with a paternal aunt and her dependency was soon the subject of a supplemental petition involving a fourth child, Alfonso. By 1993, the department reported that neither parent had visited either of the two yet-dependent children for a year. In December 1993, parental rights as to Valerie were terminated and jurisdiction was

terminated following entry of a decree of adoption. As to the remaining child, guardians were appointed in January, 1995, but the dependency proceedings were not terminated. In July, 1995, the court relieved the attorneys appointed to represent the parents. It found good cause under Welfare and Institutions Code section 317 based upon the impossibility of counsel representing their clients if the attorneys had no contact with them.

The appellate court agreed that since the petitioners had not been in contact with their attorneys for over a year, had failed to keep the court advised of their current address in violation of section 316.1, subdivision (a), and had not attended a court hearing for over 3 years, the attorneys were unable to perform the duties imposed upon them. Under these circumstances, a juvenile court should be permitted to conclude that petitioners no longer desire representation and find good cause to relieve counsel.

However, the petition for writ of mandate was granted. The court held that before counsel may be relieved pursuant to section 317, the court should conduct a hearing with notice to the concerned parent. Compare with Ronald R., supra.

Following termination of reunification services, a non-caretaker relative is not entitled to preference for placement made as part of a permanent plan for adoption. In In re Sarah S. (1996) \_\_\_ Cal.App.4th \_\_\_ [96 Daily Journal D.A.R. 2622], the list of competing prospective adoptive parents resembles the title of 1960's movie, with the list including the custodial grandparents, their close friends Ken and Pat, and the maternal uncle and aunt (Ed and Kathy). The grandparents-caretakers apparently wanted their grandchild adopted by their friends Ken and Pat, whom they referred to as distant relatives, but did not tell Ken and Pat that the maternal uncle was also interested in adoption. The juvenile court became understandably frustrated with the grandfather's manipulation of matters by the time of the permanency planning phase.

The original plan contemplated adoption by the uncle and aunt (Ed and Kathy) because they were entitled to preference under the statute while Ken and Pat were not "legal relatives." The recommendation subsequently changed to adoption by Ken and Pat because of the bond which had been allowed to develop during subsequent months and grandfather's careful connivance. The uncle and aunt had only been able to visit a few times because they lived in Arizona, but were still desirous of adoption. Ultimately, the juvenile court concluded Sarah should be adopted by Ken and Pat. Ed, Kathy and the mother appealed, asserting that Ed and Kathy

were entitled to preference for adoption as relatives.

The Court of Appeal disagreed. It concluded Welfare and Institutions Code section 361.3 does not apply to all placements. Section 366.26, subdivision (k), gives preference for adoption to a relative **caretaker** or foster parent who has cared for a dependent child for whom the court has approved a permanent plan for adoption or who has been freed for adoption. The court held that since the language of section 366.26, subdivision (k) applies **notwithstanding any other provision of law**, it overrides section 361.3, when it comes to adoptive placements.

In a similar vein, the Court of Appeal ruled a parent lacks standing to challenge sibling visitation order in a proceeding to terminate parental rights pursuant to section 366.26. In In re Nachele S. (1996) 41 Cal.App.4th 1557, the court noted the parent was not challenging the termination of her rights, but, rather, sought remand so the juvenile court could provide for ongoing and frequent visitation between the siblings as part of the permanent plan. However, the court concluded the mother was not aggrieved because the siblings' connection with the proceeding is their interest and relationship.

This holding is saddening in light of the fact that after a parental termination, the only natural relationship a minor has left is the sibling relationship, which is not on firm ground unless recognized as a protected interest. Minor's counsel should be sensitive to these issues to forestall potential emotional problems in the future.

Division 5 of the Second Appellate District has recently held that although subdivision (l) of Welfare and Institutions Code section 366.26, which requires a timely writ petition in order for a parent to appeal from an order setting a hearing pursuant to section 366.26, does not apply to pre-January 1, 1995 orders, the failure to object to the finding of reasonable services waived the right to assert error on appeal as to that order. (In re Kevin S. (1996) 41 Cal.App.4th 882.)

In Kevin S., the reviewing court noted the mother-appellant had submitted the matter on the **recommendations** in the social study prepared by the Department of Social Services. The Court of Appeal highlighted that term. (Id., 41 Cal.App.4th at p. 886.) So why are trial attorneys submitting on "recommendations?" If one has no evidence to present, one should carefully point out only that one has no evidence to present. Or, one could submit on

the **information** contained in the reports. Or, one could expressly reserve the right to argue the sufficiency of the information in the reports to support the recommendations and conclusions. At least that way no issue would be waived.

Not included in the Court of Appeal's decision was any acknowledgment of the rule that issues relating to the sufficiency of the evidence to support a judgment are **never** waived by a failure to object. (See People v. Martin (1973) 9 Cal.3d 687, 693-694 [even when tantamount to a plea, upon appeal following a submission based on preliminary hearing transcript, the defendant may litigate the sufficiency of evidence]; see also, People v. Neal (1993) 19 Cal.App.4th 1114, 1122, citing People v. White (1981) 117 Cal.App.3d 270, 279.)

In another case addressing reunification efforts provided on behalf of incarcerated parents, an order terminating parental rights was reversed by the First District Court of Appeal in In re Precious J. (1996) 42 Cal.App.4th 1463 [96 Daily Journal D.A.R. 2173], for failure to provide reasonable services. The incarcerated mother appealed from the judgment terminating her parental rights, challenging the juvenile court's findings, made at both the six month and twelve month hearings, that reasonable services had been offered to her, on the grounds the reunification plan adopted by the juvenile court was not adequately tailored to the case, and the department had failed to facilitate visitation.

As to the first ground, the court held the objection to the adequacy of the plan itself could be raised, despite the fact other courts have ruled the objection untimely. Citing In re Cicely L. (1994) 28 Cal.App.4th 1697, the court acknowledged that some courts have adopted the view that since the dispositional hearing is a final judgment, any subsequent order is appealable, and that the findings made at the earlier review hearings must be appealed as orders after judgment. However, Division Two of the First District reasoned that the California Supreme Court had not adopted this view, and implied instead that the order terminating parental rights is the final judgment.

The Court then went on to analyze the adequacy of the reunification plan, which contained no services to address the problem which led to the removal, to wit: mother's proclivity for engaging in petty thefts. In this regard, despite its concerns over this critical omission, it concluded the mother had waived any objection by expressly agreeing to the plan. However, it reached a different conclusion vis-a-vis the adequacy of the visitation component of the

services. It noted the plan required the mother to visit the minor on a schedule set up by the department, but that the department had failed to arrange even a single visit.

Responding to the department's argument that mother waived this right by failing to raise the subject below, the court noted mother did raise it by making her desire for visitation "abundantly clear at the dispositional hearing," and she had been assured by both the court and the department that visitation would occur. Further, it observed "the Department, not Carmen, had the obligation to make a record at the six month and twelve month review hearings establishing that reasonable services were provided." (*In re Precious J.*, *supra*, \_\_\_ Cal.App.4th \_\_\_ [96 Daily Journal D.A.R. at 2177].) The Court went on to say that the mother's conduct while she was out of custody does not excuse the department from doing its job. (*Id.*, [96 Daily Journal D.A.R. at p. 2178].)

In a case dealing with the procedural problems inherent where the order denying reunification services occurs at one hearing, but the order referring the matter for a hearing pursuant to section 366.26 is not made in the same proceeding, the Fifth District Court of Appeal has held the order terminating services is immediately appealable. In *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, the mother sought extraordinary relief from the order referring the matter for a 366.26 hearing, and challenged the prior ruling denying her reunification services pursuant to section 361.5, subdivision (b)(5) [parent incapable of utilizing services due to mental illness].

The court relied on the premise that in juvenile dependency matters, all orders starting chronologically with the dispositional order are, with one exception, appealable judgments. The order denying services was made at the dispositional hearing in May, 1995. The mother did not appeal, and more than 60 days had elapsed before the extraordinary proceedings were instituted. The court found the factual and procedural posture of the case made it fit the rule in *In re Cicely L.*, *supra*, 28 Cal.App.4th 1697, in which the previous ruling was considered to be a final judgment, and was res judicata. Compare with *In re Precious J.*, *supra*.

## FREEDOM FROM CUSTODY CASES

The California Supreme Court has held that an indigent respondent is not entitled, as of right, to appointed counsel. However, in *In re Bryce C.* (1995) 12 Cal.4th 226, the Supreme Court did acknowledge that appellate courts have discretion to appoint counsel for a parent in any other appeal in which the parent's custody and control of a child is

at stake, and should exercise that discretion whenever the appearance of counsel may reasonably affect whether parental rights are terminated. Because the Court of Appeal in *Bryce C.* did not exercise the discretion it had, the Supreme Court remanded the matter for that purpose.

In *Bryce C.*, the father was a respondent in an action brought by the stepfather of the minor, to declare the child free from the father's custody and control. The trial court denied the petition upon a determination the father had not abandoned the child and the stepfather appealed. The respondent father requested that the Court of Appeal appoint counsel for him, but his request was denied upon a finding that respondent was not entitled to appointment of counsel on appeal under Family Code section 7895, because the child was not freed from his custody and control.

Citing *Appellate Defenders, Inc. v. Cheri S.* (1995) 35 Cal.App.4th 1819, the Supreme Court noted that the legislative intent underlying Family Code section 7895 and its predecessor was to codify the rule in *In re Jacqueline H.* (1978) 21 Cal.3d 170, holding that indigent parents appealing from orders terminating parental rights were entitled to an effective appeal and thus to appointment of counsel on appeal.

However, because of the differing positions of appellant and respondent, it did not extend that rule, as a matter of right, to respondents. It thus concluded that when the Legislature decreed that counsel must be appointed for appellants from a judgment freeing the child from parental custody and control, it impliedly withheld the absolute right to counsel to respondents whose rights have not been terminated. Nevertheless, the fact the Legislature did not **require** the appointment of counsel does not mean that appellate courts lack **discretion** to appoint counsel.

The concurring and dissenting opinion by Justice Kennard points out that representation by counsel is critical both at trial and on appeal, because lack of representation can be every bit as devastating whether a parent has prosecuted the appeal or is responding to an appeal brought by another party. The majority had opined that an appellate court should appoint counsel for the respondent whenever the issues are complex or it contemplates reversing the judgment. However, the dissent noted the appellate court will not know if it contemplates reversal until it has studied the record and read the opening brief. Delaying an appointment until this stage would unreasonably prolong the appellate process.

In a similar situation, and relying on some of the same authority (namely Appellate Defenders, Inc. v. Cheri S., supra), the Second Appellate District, Division 5, held in December that a minor was entitled to separate counsel on appeal where a conflict of interest exists or when it would be in the minor's best interests. In In re Mary C. (1995) 41 Cal.App.4th 71 (mod. at 41 Cal.App.4th 1523c), the parents appealed from an order terminating parental rights pursuant to Welfare and Institutions Code section 366.26. At the trial level, counsel was appointed to represent the minor. On appeal, the minor's trial counsel requested that counsel be appointed for the minor.

The Court of Appeal concluded the County Department of Children and Family Services should represent the minor's interests in her parents' appeal, and denied the motion to appoint separate counsel for the minor. It felt the approach of Jacqueline H. and Appellate Defenders, Inc. v. Cheri S. in defining the scope of a parent's right to counsel on appeal applied equally to minors in section 366.26 appeals. It acknowledged that where a minor was represented by separate appointed counsel in the superior court, the child may, depending on the circumstances, have a right to her or his own attorney on appeal.

The Court of Appeal went on to point out two situations in which the appointment of separate counsel for the minor was mandatory: (1) where a conflict of interests exists, and (2) when it has been shown to be in the best interests of the child to require the assignment of counsel. Respecting the latter, the court noted that where the appellate court is not satisfied with the quality of briefing by counsel for the local agency, protection of the child's best interests may require appointment of counsel. This seems to harken back to the standard imposed by the Supreme Court in Bryce C.--that appointment of counsel may be required when reversal is contemplated.

## PATERNITY CASES

Let's return to surrogacy issues, which we have not seen for a while. In Jaycee B. v. Superior Court (1996) 42 Cal.App.4th 718, Division Three of the Fourth Appellate District (which seems to be the hub of the surrogacy industry) recently concluded that the family court had jurisdiction to order pendente lite child support pending final determination of the husband's paternity. This case shows how surrogacy can go sour: the husband and wife entered into a surrogacy contract under which a sperm and an egg from anonymous donors were artificially united and implanted in the uterus of yet

another woman. The contract contemplated that the married couple would be the legal parents.

Approximately a month prior to birth, the married couple separated and instituted dissolution proceedings. When the child was born, the wife assumed custody as provided under the contract. Later she sought child support from her soon-to-be-ex-husband. The husband challenged the jurisdiction of the family court to award even temporary support because there had never been a determination the child was a "child of the marriage." The trial court agreed and recommended the wife obtain an order from the probate court decreeing the child had been adopted. Minor's counsel filed the petition seeking a writ of mandate challenging the trial court's order.

The Court of Appeal granted the writ, holding it did not need to decide at this juncture whether the child is legally the husband's daughter because the wife had made a sufficient showing that the child would be so determined, ultimately. (Id., 42 Cal.App.4th at p. 721.) It held that under the facts as were stipulated by the parties, the family law court has jurisdiction to make an order forcing the husband to pay temporary child support until the issue of parenthood has been finally decided.

## INDIAN CHILD WELFARE CASES

In In re Bridget R. (1996) 41 Cal.App.4th 1483 [mod. at 42 Cal.App.4th 1193a], the Second Appellate District held the Indian Child Welfare Act cannot be applied to invalidate a voluntary termination of parental rights. The court adopted the reasoning of other state courts in holding the ICWA must be limited to children who are not only of Indian descent, but who also belong to an "existing Indian family."

The Court reasoned the ICWA applies to any child who is either (1) a member of an Indian tribe, or (2) eligible for membership, and the biological child of a member of a tribe. However, it noted some courts have declined to apply the Act where a child is not being removed from an existing Indian family, because, in such circumstances, ICWA's underlying policies of preserving Indian culture and promoting the stability and security of Indian tribes and families are not furthered. (Id., 41 Cal.App.4th at 1498.)

It thus joined the increasing number of jurisdictions to extend the "existing family doctrine," which holds that ICWA applies only if the child himself (or herself) has lived in an Indian family or

community. (Id., 41 Cal.App.4th at pp. 1499-1500.)

[See my "Thought for the Day," post, and check out the next case. I foresee California Indian Legal Services getting a lot more business for its culture-seeking operations.]

In In re Larissa G. (1996) \_\_ Cal.App.4th \_\_ [96 Daily Journal D.A.R. 2904], the Fourth District Court of Appeal held that pursuant to the ICWA, a trial court erred in transferring jurisdiction to the Navajo Nation over the objection of the parent. The reviewing court analyzed several out-of-state cases which interpret the provisions of 25 U.S.C. 1911 as conferring upon the parent of an Indian child not domiciled or residing on the reservation veto power over a transfer of jurisdiction.

The Court observed that two sometimes competing interests are involved: a parent's interest in raising a child as he or she sees fit and the tribe's interest in fostering its community by preserving Indian families. It concluded the ICWA accommodates these interests in two ways: As to Indian children domiciled on the reservation, the interests are presumed to coincide and section 1911, subdivision (a) gives an Indian tribe exclusive jurisdiction over child custody proceedings. However, when the child is domiciled off the reservation, relationships shift under the Act and the parents' interests may be primary, but the Tribe will nonetheless be afforded certain rights.

Although the court reversed the order transferring jurisdiction to the Tribe, it found the placement with relatives was proper.

## MISCELLANEOUS

Remember In re Tiffany G. (1994) 29 Cal.App.4th 443? That was the case in which the Fourth District Court of Appeal upheld a trial court's order restraining the parents from disseminating information regarding abuses by the department in the dependency system to various governmental agencies. The Court of Appeal in that case held that keeping such information confidential promoted the children's best interests, and disclosure would violate the children's right of privacy.

Well, take a look at In re Keisha T. (1995) 38 Cal.App.4th 220 [modified at 39 Cal.App.4th 583d]. Apparently, Rule 1423(b) of the California Rules of Court directs courts to balance the interests of the minors, other parties, the petitioner, **and the public** in determining whether material in a dependency file should be disclosed.

In Keisha T., the paper had learned from sources which it did not want to reveal that Sacramento County did not have enough staff to protect children. The department did not oppose inspection of the files by the Sacramento Bee newspaper, but did oppose copying and disclosure of the records. The minors and their families objected to the disclosure of information in the files. The declarations in support of disclosure emphasized the need for "public education" and "awareness of the juvenile justice system."

The appellate court rejected the argument of the minors that the press should not have access to the files because it would disseminate the information by publishing it in violation of section 827, subdivision (a), saying they read the anti-dissemination provision too narrowly. It held the press did not have a First Amendment right to inspect the records, but that section 827 does not prohibit any disclosure that may further dissemination of the juvenile court records. Instead, it recognized the exclusive authority of the juvenile court to determine who receives and disseminates information. It construed the language prohibiting dissemination in section 827 to simply prohibit the individual who receives access to the juvenile court records from independently making a decision to disclose the records.

And you thought the language which said the contents of the records "shall not be disseminated by the receiving agencies to any persons or agencies, other than those persons or agencies authorized to receive" them meant just that.

The court went on to hold the broader balancing test of Rule 1423(b) directs the juvenile court to balance the interests of the minors and other parties to the proceeding, the interest of the petitioner, and the interests of the public. It reasoned the legislative intent in Welfare and Institutions Code section 10850 was not that its confidentiality provisions be used as a shield to hide from public scrutiny the functioning of publicly funded agencies. (Id., 39 Cal.App.4th at p. 238.) I guess that depends upon whether the publicly funded agency agrees not to hide behind the shield, since that was the parents' argument in Tiffany G.

I would note that the same rule cited by the Court, Rule 1423(b), also limits disclosure under circumstances where there is a reasonable likelihood the records will disclose information or evidence "of substantial relevance to the pending litigation, investigation, or prosecution." I wonder how the Reporter's Shield Law fits this profile.

THOUGHT FOR THE DAY:

"I wasn't raised with any culture. I was raised American." (Quote from Shelley Yoder, 3/23/96 San Diego Union-Tribune, "Legal Team Stands Tall with Indian Tribes.") The article profiles the California Indian Legal Services, an agency which stands up for the rights of Native Americans. The article mentions that many of the office's clients are "urban Indians," adopted at birth and raised by white families, who are seeking their roots and culture.

This leads me to another thought: when saving children from the families, and placing them in foster and adoptive homes either goes out of fashion or out of federal funding, we can develop a new specialty, representing adults who have survived their rescue in undoing the damage. Having read of two unrelated, adopted adolescents whose emotional problems relating to their adoptions led them to commit incredibly violent acts recently, I only hope the new specialty is not devoted to development of a new defense to special-circumstance homicide.

Another Thought: Guess what west coast state is one of at least 21 states under court supervision, pursuant to a consent decree, because they have failed to take proper care of children who had been abused or neglected? It's true. The New York Times reported on Sunday, March 17, 1996, that California's child welfare program is now carried out under court orders or consent decree due to violations of foster children's constitutional right to be protected against physical harm or psychological abuse while in foster care. THAT'S ALL FOLKS!

Remember to walk softly, and keep your Civil Tongue. ■

**Kudos** (Continued from page 7)

**Patrick DuNah**, 1) P. v. Durkee, #D024680, Restitution order stricken and case remanded to the trial court for a restitution hearing. 2) P. v. Castro, #D022385, \$8,000 restitution fine reversed for violation of due process rights where fine was imposed in defendant's absence after he had been deported. Order of defendant to pay attorneys fees and probation costs should he ever re-enter the United States also stricken because these fees were not properly assessed. 3) P. v. Calkins, #G016467, Denial of PC §1538.5 motion reversed. Police asked defendant permission to search her backpack and defendant replied "don't you have to have a warrant?" Police responded they did not. Police spoke with defendant for five more minutes and then re-asked defendant permission to search. Defendant consented this time. Subsequent consent to search was tainted by officer's earlier lie that he did not require defendant's permission. Court disagreed with A.G.'s inspired argument that officer was not in fact lying to defendant because officer did not need a warrant to search if defendant consented. While officers do not have to tell a defendant they have right to withhold consent, if they do speak on the subject they must tell the truth. (ADI)

**Suzanne Evans**, In re Dwayne A., #D024416, Reversal was ordered after incarcerated presumed father was denied 1) notice of the dependency, 2) appointment of counsel, 3) reunification services, and 4) attendance at the W&I §366.26 hearing. Because merely setting a new §366.26 hearing would not remedy the father's inability to participate from the inception of the dependency or allow him consideration of relative placement, remand was for new hearings and twelve months of services. (A)

**Linda Fabian**, In re Ashley S., #D023206, Termination of parental rights was reversed for lack of reasonable services where father had moved to Arkansas to be near minor who was placed there with relatives. Father completed all the court ordered programs but had difficulty finding steady employment and thus could not find adequate housing. Court held Department had a duty to assist dad in finding employment or housing. (I)

**Robert Gehring**, P. v. Kosal T., #D022582, Judgment reversed as to true finding of assault with a firearm on a peace officer and the accompanying firearm allegations due to lack of evidence to support juvenile court's findings. (I)

**Meyer Goldstein, In re Natasha A.**, #E015967/E014958, In a published partial reversal, the court reversed the trial court's order suspending further regular reviews pending resolution of appeal of a visitation order because W&I §364 requires regular review hearings to determine whether continued supervision was necessary. (I)

**Laura Gordon, P. v. Johnathan V.**, #D023277, Double jeopardy violated when juvenile court dismissed petition at close of People's case, then reinstated petition based on new evidence presented during defense case. (I)

**Patrick Hennessey, P. v. Glasgow**, #D021465, Felony child abuse sentence stayed because crime arose from same conduct resulting in murder conviction. (I)

**Handy Horiye, P. v. Gonzalez**, #G015823, Court stayed conspiracy to commit assault with a firearm when defendant was also convicted of first degree murder as the conspiracy merged pursuant to §654. (I)

**Robert Howell, P. v. Saucedo**, #D021435, Conviction for forcible lewd act (PC §288 subd.(b)) reversed where court failed to instruct jury with CALJIC No. 10.42 (element of force), defining an essential element of offense. (I)

**Sharon Jones, 1) P. v. Khong**, #G015970, Concurrent term reversed and ordered stayed pursuant to PC §654. Defendant convicted of both grand theft auto and possession of stolen money order with intent to defraud. COA held money order was possessed for the purpose of acquiring the stolen car and therefore both offenses incident to one objective. COA makes analogy to drug cases where defendant cannot be punished for both sale and possession of the same drug. (I) 2) **P. v. Skjerpe**, #E015186, Reversed for new trial where trial court, in a prosecution for perjury based on defendant-police officer's testimony at a preliminary hearing, erred in failing to submit the issue of the materiality of the false testimony to the jury. (I)

**Greg Kane, In re Michael L.**, #D023877, Judgment in adoption case reversed per stipulation of the parties, after step-father decided not to adopt minor and parties agreed there was no reason to terminate natural father's parental rights. (A)

**Pierce Kavanagh, In re Anthony S.**, #D024125, Six month review order continuing minor in foster care reversed for lack of substantial evidence of detriment. Minor was initially removed because he was medically fragile and his parents failed to recognize his failure to thrive. By the time

of the 6-month review, the child was no longer medically fragile and the parents had obtained training and therapy to learn how to recognize and deal with children's health issues. However, other unsubstantiated "concerns" based on father's background resulted in continuation of the dependency. The Court of Appeal held that when consideration was given only to evidence pertaining to the allegations of the petitions, there was no substantial evidence to support Anthony's continued removal. (A)

**Pearl Gondrella Mann, P. v. Adams**, #E015574, Judgment modified to stay count two pursuant to PC §654. (I)

**Frederick Marr, In re Natasha A.**, #E015967/E014958, In a published partial reversal, the court reversed the trial court's order suspending further regular reviews pending resolution of appeal of a visitation order because W&I §364 requires regular review hearings to determine whether continued supervision was necessary. (I)

**Michael McPartland, P. v. Lyon**, #E015534, Trial court erroneously concluded victim was unavailable for trial and admitted preliminary hearing testimony where D.A. had not made diligent efforts to secure witness' presence at trial. One count felony non-forcible child molestation reversed, one count misdemeanor child molestation reversed. (I)

**Lori Mendez, P. v. Branch**, #D021568, Sentence on prior conviction for which probation was revoked modified to the two years which was imposed at time probation granted; sentencing judge on new offense had imposed 3 years. (A)

**Cindi Mishkin, P. v. Urquidez**, #D022620, Three strikes case remanded to allow trial court to exercise its discretion to determine whether the crimes constituted misdemeanors or felonies. (ADI)

**Laurel Nelson, P. v. Griffin**, #G014283, Restitution finding reversed and matter remanded for new restitution hearing. Two-year taking of more than \$100,000 enhancement (PC §12022.6) reversed where code section was amended before sentencing to require taking of more than \$150,000 and here jury found taking of only \$100,000. (A)

**David Rankin, P. v. Brian D.**, #E014416, Remand ordered because juvenile court delegated responsibility of determining direct restitution to CYA. Court of Appeal orders trial court to make the determination in open court and to apply credit for any restitution fines also imposed. (ADI)

**J. Michael Roake, P.** v. Woodman, #D022364, Assault with a firearm conviction reversed because it is a lesser included offense of assault with a firearm upon a peace officer. (A)

**Steven Schorr, P.** v. Beasley, #E015481, Judgment modified to stay count 3 pursuant to PC §654 and to reconfigure the sentence on count 5 to comport with the agreed-for bargain as to the determinate term. (A)

**Richard Schwartzberg, P.** v. Spencer, #E014900, One enhancement pursuant to PC §667.8 (kidnapping in commission of sex offense) stayed where trial court had erroneously imposed two enhancements for two sex offenses arising out of only one incident. (A)

**J. Courtney Shevelson, P.** v. Riddle, #D022322, Trial court's denial of motion for acquittal (PC §1118.1) reversed: evidence of cocaine usage some time within eight hours of blood test is insufficient to establish dominion and control necessary for possession conviction. (I)

**Howard Stechel, P.** v. Cross, #E011525, Vicarious arming enhancement stayed pursuant to PC §654. (A)

**Joseph Tavano, In re Larissa G.**, #D024180, Mother appealed 1) suspension of visits at 6 month review, and 2) transferring jurisdiction to Navajo Nation under ICWA, where mother objected to transfer. Court reversed order suspending visits because there was no evidence her problem adversely affected her children. Thus, Court could not conclude children's best interests required suspension of visits pending progress in reunification plan. In the published portion of the opinion, the court agreed mother had veto power over the transfer of the case to the Indian Nation under the ICWA but held the placement order, which placed children with paternal relatives, was proper. (I)

**Beatrice Tillman, P.** v. Sharp, #E015039, Court of Appeal reversed restitution order of \$50,000 to the insurance company because a defendant who is sentenced to state prison cannot be ordered to pay direct victim restitution to an insurance company which merely reimbursed the true victim. The case was remanded to allow the trial court to reconsider the amount of a restitution fine, if any, to be imposed. (ADI)

**Lizabeth Weis, P.** v. Perry, #G016112, Vehicle taking reduced to joyriding because of misleading jury instructions; People given the option

of retrying the vehicle taking count. (A)

**Michael Weinman/Paul Bell, P.** v. McIntyre, #D023470, People's appeal was severed from the defendant's appeal by motion of the Court of Appeal. The People's appeal proceeded first and resulted in a reversal of the trial court's dismissal of strike priors. On petition for review the California Supreme Court granted and transferred with directions to vacate the opinion and reconsider the matter in conjunction with the defendant's appeal. (ADI)

**Alisa Weisman, P.** v. Anderson, #D023103, Three strikes case reversed and remanded to permit trial court to exercise discretion (to reduce the current wobbler to a misdemeanor) where trial court had expressly stated it lacked the authority. (I)

**Sharon Wrubel, P.** v. Guerrero, #E014742, Abstract of judgment amended to strike all references to enhancements which had been dismissed rather than stricken. (I)■

## Panel Attorneys Please Note:

To help with the claims process, the checklist on page 23 must be filled out and returned with claims in Three Strikes cases. (Ordinarily it would be submitted with the interim claim, if one is filed.) Please be sure to make photocopies for future use.

Case Name \_\_\_\_\_ Case Number \_\_\_\_\_

Attorney \_\_\_\_\_ Date \_\_\_\_\_

Interim

Final

### "THREE STRIKES" CLAIMS CHECKLIST

*For each argument briefed pertaining to the "Three Strikes" law, these questions must be answered in order to process your claim:*

Did you use ADI or other briefbank materials in preparing the argument? Y N

If not, why not?

If so, briefly identify the briefbank materials used and describe any modifications you made.

Was this the first time you have raised this "Three Strikes" argument? Y N

*Please add any explanations relevant to evaluating your claim for the Three Strikes arguments.*

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