APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

June 2016 through March 2017

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JURISDICTION

In re Marcus C., Jr. (2017) 8 Cal.App.5th 1036 (2d Dist., Div. 2) [L.A.]
The agency and minor asserted, and the Court of Appeal agreed, there was no substantial evidence to support dismissal of the petition and the juvenile court abused its discretion by refusing to amend the petition to conform to proof when the facts in the agency's report were familiar to the parents, were presented to the parents prior to the jurisdiction hearing, and amending the petition to conform to the facts did not prejudice the parents. Case began after 2-year-old Marcus, Jr. fell from a 2-story window into some bushes. Neighbors and relatives confirmed the parents did not supervise Marcus properly and used marijuana often. Further, Marcus, Jr., was neglected in that he was not current with immunizations, had a speech delay, and displayed behaviors concerning for an autism spectrum disorder. Marcus did not receive any medical care or services to address these issues. [M. Keiter respondent father; L. Fields respondent mother]

In re M.R., et al. (2017) 8 Cal.App.5th 101 (2d Dist., Div. 5) [L.A.]
Where the facts of single incident of drunk driving are serious, substantial evidence supported the juvenile court's finding of jurisdiction. Case began after mother was arrested while driving 80 mph on the highway with father and their 2 children in the car. The children, aged 4 years old and 21 months, were not properly restrained. Both mother and father claimed mother had only 2 drinks at a social gathering but her blood alcohol level was .14 percent. The juvenile court found the single incident sufficient to find jurisdiction. The Court of Appeal affirmed finding the facts of the incident serious and also considered the parents had not begun any treatment at the time of the jurisdiction hearing and the parents were less accepting of responsibility over time. At the initial interview, the parents were more accepting of wrongfulness and open to agency intervention. At the last interview prior to the jurisdiction hearing, the parents denied mother was drunk and claimed they did not need agency involvement.

In re Carl H. (2017) 7 Cal.App.5th 1019 (1st Dist., Div. 3) [San Francisco]
The juvenile court found all the allegations against father untrue but sustained a single allegation against mother and then mistakenly dismissed the petition believing it was required to return the child to father as a non-offending parent. Two petitions were filed – one for the son and a 2d for the daughter and each was appealed. The opinion involves only the petition for Carl, Jr. and was appealed by both mother and son. Mother and Carl's father, Carl, Sr., relied on maternal grandmother to provide child care sometimes. Prior to the dependency, when Carl, Jr. was 6 years old, he was in grandmother's care when he ingested one of her methadone pills and had to be hospitalized. After this Carl, Jr.'s younger sister, Melody, also ingested methadone while at grandmother's home and did not survive. After a multiple-day jurisdiction hearing between Nov 2015 to Jan 2016, the court did not find any of the (b) allegations true in

Carl's petition. The only allegation sustained was the (f) allegation that mother cause the death of another child through abuse or neglect. The juvenile court also rejected the (j) allegation involving the death of Carl's sibling. Because no allegation was sustained against Carl's custodial father, the court found Carl, Jr. was a dependent but then believed it had to dismiss the petition and return Carl to his father. The appellate court held Carl, Jr. had not forfeited his right to challenge the dismissal of the petition because it appeared all of the participants were unclear on the governing law in the situation. The Court of Appeal found the dismissal problematic for several reasons including the lack of findings and failure to comply with the mandates of sections 361.2, 390, of 362, or rule 5.696 (a). Lacking an apparent statutory basis and unjustified by the factual circumstances, the dismissal of the petition was reversed. [J. Olson, father of daughter; S. Gorman, daughter; L. Barry, respondent-father Carl, Sr.]

In re Yolanda L., et al. (2017) 7 Cal.App.5th 987 (2d Dist., Div. 8) [L.A.]
In a case of 1st impression, the appellate court found improper storage of a loaded gun in the closet constituted a risk sufficient to support dependency jurisdiction. Father was the primary caregiver for the children while mother worked. Father was under surveillance by the DEA and after he was arrested with 3 lbs. of methamphetamine in his truck, a loaded gun was found in a bag in the closet. Mother was unaware of father's criminal activity. The trial court properly removed the children from father and placed with the mother based on removal of father from the home. Father argued jurisdiction may not be based on a single episode of endangering conduct in the absence of evidence that such conduct is likely to recur. Based on a pre-existing investigation by law enforcement of father and father's admission that he had transported drugs before, the Court of Appeal found it was reasonable for the trial court to conclude this was not a singular incident. Further, since father was an unemployed security guard with a permit to carry a firearm, his lack of insight into the danger of a loaded weapon within reach of small children indicated a potential for future risk.

In re M.R., et al. (2017) 7 Cal.App.5th 886 (4th Dist., Div. 2) [San Bernardino]
The trial court erred in finding the section 300, subd. (g) allegation true because the agency presented no evidence father was unable to make plans for his children while he was in jail and he affirmatively asserted his ability to make arrangements for their care with immediate family. Case began when mother left her 5 children with the maternal grandmother and disappeared. Father appealed the jurisdiction findings against him along with the court's finding that the oldest child had more than one presumed father. As to jurisdiction, father argued, and the Court of Appeal agreed, the trial court improperly found the 300(g) allegation against father true because the agency presented no evidence father was unable to plan for his children's care and he affirmatively asserted he could arrange for their care with immediate family. The appellate court reversed the

(g) allegation. [M. Thue, mother; S. Rollo, father; M. Goode, oldest child (Ro.R.)] [See under Paternity]

In re Z.G., et al. (2016) 5 Cal.App.5th 705 (4th Dist., Div. 3) [Orange]
Where the parents' actions were a substantial factor in the death of Z.G's sibling (H.L., Jr.), the trial court correctly found jurisdiction based on section 300, subd. (f), but erred in granting reunification services under section 361.5, subd. (c) because reunification was not in the children's best interest. The parents appealed from the jurisdiction/disposition orders and the children appealed from the disposition orders granting reunification services. The Court of Appeal found substantial evidence supported jurisdiction based on subd. (f) because of the following facts: the parents were co-sleeping with H.L., Jr. (Junior), mother had not slept for 2 days because of her methamphetamine use, she relied on and used concentrated cannabis wax to sleep and, finally, when father left for work he placed Junior back in bed with mother and Z.G. even though he was aware of mother's drug use. These actions were sufficient to show a substantial factor in the sibling's death. As for reunification services, the appellate court determined this case was not one of the rare instances when a parent who has been responsible for the death of a child through abuse or neglect will be able to show that reunification services are in the best interest of another child. [L. Barry, children; M. Cella, mother; M. Levine, father]

In re A.F. (2016) 3 Cal.App.5th 283 (3d Dist.) [Sacramento]
The Court of Appeal affirmed the jurisdiction/disposition orders based on mother's continued use of alcohol with her methadone and bipolar medications and her continued denial she had a problem with alcohol even though her behavior was against medical advice. Eight-year-old A.F. was detained after mother's live-in boyfriend died from an apparent overdose. The mother and A.F. lived in a garage where mother's methadone was within A.F.'s reach and mother became extremely intoxicated from mixing methadone and alcohol. A.F. was placed with his father with a safety plan but he allowed A.F. to return to mother. Father tested positive for marijuana and benzodiazepines, has a bipolar disorder, extreme depression and auditory hallucinations. Even though the allegations against father were not challenged, the appellate court used its discretionary authority to review the allegations against mother. The court held jurisdiction against mother was supported by substantial evidence because she has a substance abuse problem, she leaves her methadone and psychiatric medications unlocked and within reach of A.F., she admitted to being intoxicated and that she continues to drink alcohol even though it is dangerous, possibly lethal, to mix with methadone, and her honesty, memory and judgement were all negatively affected by her behavior. As for removal from mother, the appellate court found mother's failure to appreciate she needed to secure her methadone and that she failed to appreciate the serious and possibly fatal consequences of using alcohol and methadone together proved there was no reason to

believe the conditions would not persist if A.F. was returned. Denial is often a factor relevant to determining whether persons are likely to modify their behavior in the future.

In re S.N. (2016) 2 Cal.App.5th 665 (3d Dist.) [Trinity]
The trial court failed to comply with the requirements to obtain a valid waiver at the contested jurisdictional hearing but the appellate court held the error was harmless because the evidence for jurisdiction was overwhelming. At the detention hearing, the trial court advised mother of her rights at the jurisdiction hearing. However, at the time of the contested jurisdiction hearing, the trial court did not properly advise mother before accepting the parties' submissions. The appellate court held it was error of a constitutional dimension to accept a waiver of the right to a contested jurisdiction hearing based only on counsel's representations. Even with the error, the Court of Appeal found jurisdiction was supported by overwhelming evidence including mother drove erratically while under the influence which was witnessed and even videotaped by bystanders, she had a single car collision with an embankment, caused S.N. to sustain bruises and ligature marks and failed to obtain medical care for her, and told S.N. to lie to the police and say there was a deer in the road so mother would not get into trouble. The reviewing court considered the contrary evidence mother planned to present at the contested hearing including the traffic collision and ambulance reports. Even so, the appellate court was convinced the outcome of the jurisdictional hearing would have been the same regardless of the error.

UCCJEA

In re R.L. (2016) 4 Cal.App.5th 125 (4th Dist., Div.1) [San Diego]
The child's temporary hospital stay in a state incident to birth is insufficient to confer home state jurisdiction under the UCCJEA but where temporary emergency jurisdiction is appropriate, and where no other jurisdiction is a home state, emergency jurisdiction ripens into a final determination. In addition, the Hague Service Convention does not apply when a parent makes a general appearance and consents to personal jurisdiction regardless of prior defects in notice. Parents appealed from the termination of parental rights. Father contended the jurisdiction orders, and all subsequent orders, must be reversed because the juvenile court did not have home state jurisdiction under the UCCJEA and father contended he did not receive notice per the Convention on the Service Abroad of Judicial and Extrajudicial Documents (Hague). Mother joined in father's arguments. During the pregnancy, mother traveled between Las Vegas and Tijuana, Mexico. She arrived in San Diego and gave birth to the child where mother and child tested positive for methamphetamine. The child was detained in a dependency proceeding. As a matter of 1st impression, the Court of Appeal found a temporary hospital stay in a state incident to birth was insufficient to confer home state jurisdiction. A court of this state can properly exercise emergency jurisdiction under Fam. Code section 3424 but the better practice is to confer with any other court which might have jurisdiction over the child (in this case, Mexico) and provide notice. Father is a

Mexican national and father had significant connections to Mexico in that he lived in Baja, California. The agency argued temporary jurisdiction continued and became a final custody determination because no other state had grounds for jurisdiction. The appellate court found Mexico could not be the child's home state either since she had never lived there. Thus, even if the California court erred in not contacting Mexico the error does not warrant reversal unless there is a showing of prejudice. Here, the parents cannot show prejudice because mother was not living in Mexico for six months prior to the birth, she did not get medical care in Mexico nor did she have a job, income or other indicators that Mexico was her home. Father did not acknowledge R.L. until she was more than a year old and he did not file any action in Mexico. Consequently, neither parent could not show they were prejudiced by the juvenile court's failure to contact Mexican authorities. [T. Chucas, mother; M. Vogelmann, father]

Adoption of K.C. (2016) 247 Cal.App.4th 1412 (2d Dist., Div. 6) [Santa Barbara]
Mother and step-father petitioned for termination of father's parental rights and stepparent adoption of the child and the Court of Appeal held the UCCJEA does not apply to adoptions. Mother and father met in Ecuador and were married briefly after the child was born and father moved to the U.S. Father filed a petition in New York where the family lived for custody and visitation. Father was granted visitation but later visits were suspended and never restored. The custody proceedings were dismissed. Mother met the prospective adoptive father and moved to California. In October 2011, mother took the child to visit his father in New York. It was father's last visit. Mother and father were divorced in 2012 and mother was granted sole custody and father was ordered to pay child support. Mother's husband filed a petition to declare father's consent to adoption was not required (Fam. Code, § 8604(b)) and to terminate father's parental rights (Fam. Code § 7822). The trial court determined father failed to support the child or have meaningful contact with the child for well over a year. The court ruled father's consent was not necessary per section 8604 and ruled father abandoned the child and terminated father's parental right per section 7822. Father contended the trial court lacked subject matter jurisdiction to modify the New York custody order based on the UCCJEA. The appellate court reviewed the plain language of Fam. Code section 3423 - the statute relied on by father, and found this section does not govern adoption proceedings. Since both sections 8604 and 7822 apply to adoption proceedings and the UCCJEA does not apply to adoption, father's claims must fail.

<u>Dual Jurisdiction (Dependency & Delinquency)</u>

In re Ray M. (2016) 6 Cal.App.5th 1038 (4th Dist., Div. 1) [Imperial]
The trial court in Kern County erred in holding a section 241.1 hearing when notice was not provided to the county in which Ray already had a dependency proceeding or to Ray's dependency attorney and, because proper notice was not provided per section 241.1 and rule 5.512, the Imperial County juvenile court had the authority to

revisit the Kern County court's assessment in a new section 241.1 hearing. Ray was detained with his older brother after mother was arrested for disturbing the peace and child endangerment while intoxicated and belligerent and the home was found in deplorable conditions. As the case proceeded, Ray disclosed serious physical abuse by mother including being beat with belts, pipes, wires and being burned with metal utensils. Mother steadfastly refused to cooperate with the agency or visit the children. Ray struggled academically and with anger issues and was diagnosed with ADHD. He was eventually sent to a series of group homes and was experimenting with drugs and alcohol and engaged in aggressive behavior. In Imperial County, after Ray was arrested for robbery of a convenience store, the juvenile court held a section 241.1 hearing and determined the agency had not helped Ray adequately deal with the underlying trauma Ray had suffered in his mother's care. Ray's interests were best served by remaining a dependent and being provided with additional services through the dependency system. Ray continued to have problems and eventually was placed in a group home in Kern County. Later, he was arrested for brandishing a knife at another resident and a section 602 petition was filed. A joint assessment was prepared and Kern County juvenile court recommended wardship for Ray. Kern County adjudged Ray a ward of the court and Ray's delinquency matter in Kern County was pending transfer to Imperial County. Back in Imperial County juvenile court, Ray's dependency attorney alerted the court that he had not received notice of the determinations made in Kern County. The Imperial County court acknowledged the error but decided it did not have authority to revisit the Kern County court decision. Ray appealed the delinquency court's orders declaring him a delinquent and placing him with his maternal grandmother and the dependency court's order denying his petition to reconsider the Kern County court's decision under section 241.1. The Court of Appeal considered the issue of whether the Imperial County juvenile court had the authority to remedy the Kern County court's failure to provide notice by revisiting the section 241.1 assessment. The agency did not dispute that Imperial County juvenile court and the parties' attorneys had not receive the notice required. The appellate court determined the error was not harmless because in juvenile dependency litigation, due process focuses on the right to notice and the right to be heard. The Court of Appeal found the juvenile court had the authority both under the Welfare and Institutions Code and article VI, section 1 of the California Constitution to rectify the acknowledged error that occurred before the case was transferred to Imperial County. The juvenile court's orders were reversed and the case was remanded for the trial court assigned to Ray's dependency matter to conduct a hearing under section 241.1. [R. Pfeiffer, minor]

In re J.S. (2016) 6 Cal.App.5th 414 (4th Dist., Div. 1) [San Diego]
The appellate court found the juvenile court acted within its discretion by designating J.S. a dual status child and acted within its discretion in detaining J.S. in juvenile hall rather than releasing her to the county child welfare agency. When J.S. was 13 years old she was hospitalized multiple times for suicide attempts and cutting

herself. She had been raped by her biological father between 6 and 9 years old and suffered from sexual trauma, night terrors, feelings of detachment, difficulty falling and staying asleep and concentration problems. She became a dependent and was placed in a group home. J.S.' family was unwilling or unable to care for her and, six months later, J.S.'s mother moved out of state. That same month, J.S. began to damage property at the group home. A month later, in a psychiatric hospital, J.S. engaged in an altercation with another minor patient. J.S. was diagnosed with PTSD and major depressive disorder with psychotic features and a delinquency petition was filed alleging she committed vandalism and used force and violence against another minor. After initially recommending J.S. continue as a dependency, the agency and the probation department recommended J.S. be designated a dual status child under section 241.1. The trial court's finding relied on the fact that J.S. had been receiving agency services but her aggression had increased and she had become a danger to others. Further, the dependency system alone had not been successful in rehabilitating J.S. and she needed to be held accountable as she would be in the delinquency system. The juvenile court refused to dismiss the delinquency petition, adjudged J.S. a ward under section 602 and designated her a dual status youth. The agency would be the lead agency and the dependency court would serve as the lead court. J.S. volunteered to enter a residential treatment facility out of area and the trial court ordered that J.S. be detained in juvenile hall until a bed became available. The appellate court rejected J.S.'s claims that it was error to designate her a dual status youth, it was error to detain J.S. at juvenile hall, and the collateral consequences warranted reversal. The Court of Appeal did not find any abuse of discretion in the juvenile court's orders and affirmed. [N. Gold, minor]

DISPOSITION

Removal

In re Anthony Q. (2016) 5 Cal.App.5th 336 (2d Dist., Div. 7) [L.A.]

Even though the trial court incorrectly relied on section 361, subd. (c) to remove Anthony from his father because father was not in the home, the trial court had authority under other statutes to order removal from father. Now 10-year-old Anthony has had 2 prior dependency proceedings. At the start of the case, Anthony was living with his step-grandmother, father was not in the home, had been "acting crazy" and was believed to be homeless. Although the juvenile court cited to the incorrect statutory provision, the removal of Anthony was justified and citation to the incorrect statute was harmless error. The trial court had authority to remove from a currently nonresident custodial parent or otherwise to prevent the exercise of that parent's right to the legal and physical custody under sections 361, subd. (a) and 362, subd. (a). [K. Lee, father; C. Gabrielidis, child]

In re Julien H. (2016) 3 Cal.App.5th 1084 (2d Dist., Div. 1) [L.A.]
Trial court erred in removing Julien from his father's custody pursuant to section 361, subd. (c) since Julien was not residing with his father but the court had other statutory authority to remove the child and father was not prejudiced. Father did not challenge the order declaring Julien a dependent but contended the juvenile court had no authority to limit his access to Julien. Placement with father placed child at risk because father abuse marijuana, alcohol and prescription medications and he had mental and emotional problems. The appellate court held that although the statutory basis removing Julien was incorrect the error did not warrant reversal because father failed to show the court's reliance on this code section was prejudicial. Sections 361, subd. (a) and 362, subd. (a) provide the juvenile court with authority to limit the access of a parent with whom the child does not reside and thus effectively remove the child from the noncustodial parent.

In re Michael S. (2016) 3 Cal.App.5th 977 (2d Dist., Div. 1) [L.A.]
Father argued, but the Court of Appeal disagreed, that section 361, subd. (c)(1) does not permit removal from just one custodial parent. The parents were living together with Michael and his 3 maternal half-siblings when one of his sisters disclosed sexual abuse by father. Mother alleged domestic violence which had placed her in the hospital. At the detention hearing, the trial court placed the 3 half-siblings with their father, returned Michael to mother, and issued a temporary restraining order. After a contested jurisdiction hearing, the juvenile court removed Michael from his father and ordered a permanent restraining order. Based on statutory language, father asserted the Legislature contemplated leaving a child with a custodial parent while placing limits on the other custodial parent as an alternative to removal under section 361. Although the appellate court acknowledged father's argument had some force, the court did not believe section 361.2 should be read to preclude removal from only one custodial parent in all situations as a matter of law.

In re Andrew S., et al. (2016) 2 Cal.App.5th 536 (2d Dist., Div. 7) [L.A.]
The trial court improperly found a section 300, subd. (g) allegation against father based on his incarceration because no evidence was presented that he could not make arrangements for his children, improperly removed the children from father based on section 361, subd. (c), because he was not living in the home and failed to fulfill its duty under the ICWA to investigate father's claim of possible Indian heritage. The juvenile court found the 300, subd. (g) allegation was a failure to protect akin to a subd. (b) allegation, rather than a failure to provide and found the (g) allegation true. The appellate court held this was improper because the agency offered no evidence that father was unable to arrange for the care of his children even though he was jailed in another state. Next, father argued, and the Court of Appeal agreed, the trial court improperly removed the children from father under section 361, subd. (c) since he was a

noncustodial parent who had lived out of the family home for 3 years. The jurisdiction findings and disposition orders were reversed. On remand the trial court was directed to consider custody with father under section 361.2 and to revisit its determination that the ICWA did not apply. [M.Keiter, father] [See under the ICWA]

Bypass Provisions

In re E.G. (2016) 247 Cal.App. 4th 1417 (4th Dist., Div. 3) [Orange]

The Court of Appeal found that where mother was offered drug treatment as a result of a deferred entry of judgement (PC 1000) such a program qualifies as court-ordered drug treatment for purposes of bypass section 361.5, subd. (b)(13) and bypass was proper. E.G. was born when both mother and father were in jail. Mother arranged for care of E.G. with an unrelated woman but, 2 months later, E.G. was removed from this placement for extremely unsafe and unsanitary conditions. The agency recommended bypass of reunification services based on mother chronic problems with drug abuse for the last 6 years and her failure to comply with the deferred of entry of judgement program. Mother testified she chose to not participate in drug treatment and to serve her criminal sentence instead. Finding the drug deferral program was certified by the county's drug program administrator, had to meet several minimum requirements, and mother chose jail time for failure to cooperate, the program was analogous to treatment ordered by a court as required by section 361.5, subd. (b)(13). [N. Williams, respondent-mother; M. Turkat-Schirn, respondent-father; J. Moran, minor]

Visitation

In re Matthew C. (2017) 9 Cal.App.5th 1090 (1st Dist., Div. 4) [San Francisco]

Where child was a victim of a tremendous amount of physical suffering while in his mother's custody, the trial court was proper in denying visitation at the detention hearing and in continuing the suspension of visits at disposition for mother "until there is some progress" by her since she showed bad judgment in returning to father and possible domestic violence, in continuing to drink alcohol, and in failing to participate in reunification services or appear at court. Matthew was originally detained after the parents were involved in a fight including slapping and punching within 3 feet of newborn Matthew. He was placed with his mother so long as she remained in residential rehabilitation. Mother left and absconded with Matthew after a few weeks of sobriety in order to reunite with father after his release from prison. A few days later, Matthew was found abandoned at a Starbucks. His physical condition was very poor, he was not properly dressed, his diaper was soiled and his clothes were soaking wet. In addition, he was extremely hungry and finished 3 6-oz. bottles of formula when offered. He also had diaper rash, a lesion in a fold on his upper leg, a scalding burn on both is legs which appeared non-accidental, and an adult human bit mark on his lower left leg. The appellate court followed the reasoning in *In re T.M*. (2016) 4 Cal.App.5th 1214 which found a juvenile court may suspend or deny visitation per section 361.2, subd. (a), if such

visitation would be inconsistent with the physical or emotional well-being of the child. The Court of Appeal declined to follow contrary case law. (See *In re C.C.* (2009) 172 Cal.App.4th 1481.) Holding the standards for denial of visitation at detention are similar to those for suspension of visits during the reunification period, the appellate court affirmed the trial court's orders denying visits at the detention hearing as well as the subsequent disposition hearing. Further, the court acknowledged mother was given visits 3 months after disposition showing she was progressing in residential treatment.

In re T.M. (2016) 4 Cal.App.5th 1214 (3d Dist.) [Sacramento]
Where an 11-year-old son had experienced prolonged and violent physical abuse by his father, the child was extremely fearful such that his body shook and his voice trembled when he thought his father would find out he had disclosed the abuse, and he pleaded with the social worker not to make him see his father, the trial court properly held visits with father were detrimental and denied visitation. When the child was 7 years old his mother died and he began to live with his father. When he was 11 years old, T.M. disclosed that father beat him often for small errors or for no reason at all. At school, he said he could not take the whooping and hitting anymore and he refused to return to father. At the contested jurisdiction hearing, father testified T.M. was lying and he was not willing to participate in reunification services such as counseling. Father repeatedly interrupted the court and used foul and offensive language and was ordered to appeared on a charge of contempt of court. Father appealed the denial of visitation. Relying on the plain language of section 362.1, subd. (a) visitation is required as frequently as the well-being of the child allows. Visits which are emotionally detrimental are hardly consistent with the well-being of the child. Further, father had not yet addressed his serious anger management problem and failed to recognize the harm his behavior was causing T.M. The court did not abuse its discretion in denying visitation.

In re Korbin Z. (2016) 3 Cal.App.5th 511 (2d Dist., Div. 4) [L.A.]
When father's whereabouts were unknown for 20 months after the case began, he was not entitled to visitation but, since the court ordered visits, the court cannot delegate whether visits occur to teenage Korbin. The case began when Korbin was 13 years old because of domestic violence between mother and her boyfriend, mother and maternal grandmother, and mother's mental and emotional problems and her abuse of marijuana and alcohol. Father's whereabouts were unknown until shortly before the section 366.26 hearing. Father appeared and filed a 388 petition requesting the court vacate its finding the agency used due diligence in searching for father and to place Korbin with him. Father confirmed he had not seen Korbin for 9 years. The juvenile court denied father's 388 petition finding the agency used due diligence and declined to place with father because Korbin preferred to stay with his maternal aunt and uncle, father had no relationship with Korbin, Korbin's age, and changing the prior order would be too disruptive for Korbin. Father appealed and argued the juvenile court erred in giving

Korbin sole discretion over father's visits when it ordered the agency to facilitate monitored visits with Korbin and father in a therapeutic setting at Korbin's discretion. The appellate court reversed the visitation portion of the order and remanded for further proceedings. [J. Tavano]

Reasonable Reunification Services

In re T.W., et al. (2017) 9 Cal.App.5th 339 (1st Dist., Div. 5) [Mendocino]
The Court of Appeal found that agency's effort at reunification services was inadequate and reversed the trial court's finding of reasonable services at the 6-month review hearing when the agency was only able to provide the phone numbers for 2 service providers with no other details more than 3 months after court ordered a case plan and father was granted one phone visit. Case began because of mother's substance abuse and mental illness. Father's location was unknown but 4 months later he was found in Florida living with his parents. He requested counsel and reunification services. A month later, and prior to the disposition hearing, the agency had no case plan but, after father's attorney objected, the juvenile court ordered the agency to create a case plan with specific information about services in Florida. At the disposition hearing, father again objected to the case plan as being insufficient. The juvenile court agreed and continued the hearing for the agency to provide a more specific case plan for father. At the continued hearing, the trial court set out several specifics the agency was to provide including parenting, whether anger management was appropriate, substance abuse treatment, drug testing, domestic violence education, a housing component and classes to address the special needs of one of the children. In its 3d case plan, filed in advance of the 6-month review hearing, the agency provided the name of 2 service providers and phone numbers but no details on what services were involved or any other specifics. The 6-month review hearing was held 3 months later but father had not participated in any services. The appellate court found services were not reasonable when it took more than half the review period to develop a case plan, it did not address sobriety or substance abuse treatment, father was not drug tested once, father was living with this parents but no assessment was made about whether it was an appropriate placement for the children, it did not include any housing assistance, and finally, father was given only 1 phone call with his children for the entire review period.

N.M. v. Superior Court (2016) 5 Cal.App.5th 796 (1st Dist., Div. 4) [Contra Costa]
Mother argued she was entitled to reunification services up to 24 months because she was denied reasonable reunification services but the appellate court held that because the trial court did not find by clear and convincing evidence that it was in the children's best interests to continue reunification, the juvenile court was required to terminate reunification services and set a section 366.26 hearing. The case began because of a physical altercation between mother and her then 12-year-old son, P.W. Mother caused serious physical harm including biting and scratching during the

fight and she had untreated mental illness including anxiety and depression. P.W. reported this was the worst incident with his mother and he and his 11-year-old sister, M.W., were detained. After the initial social worker interview, mother was placed on a psychiatric hold per section 5150. This was not the 1st dependency. Mother had lost 2 older children who had been adopted and P.W. and M.W. had been in a dependency between 2004 and 2006 when mother reunified with them. Mother was offered reunification services and she completed much but not all of her services. The children were referred to therapy and at the beginning, the therapist recommended against visits with mother. Eventually M.W. was willing to visit occasionally but P.W. refused visits for the duration of the case - more than 20 months. Prior to the 18-month review hearing, M.W. agreed to conjoint therapy with mother and 2 sessions happened. These were both very emotionally harmful for M.W. because mother focused on denying responsibility for the children's removal, emphasized P.W.'s role in the altercation, and pressured M.W. to reunite with her. At the 18-month review hearing, the court declined to continue reunification services because both children still feared mother and opposed visitation. Mother filed an extraordinary writ and argued the trial court could not set a section 366.26 hearing because evidence did not support the finding mother received reasonable reunification. The appellate court held the setting of the section 366.26 hearing at the 18-month review hearing is not conditioned on whether reasonable services were provided. Further, given the finding that more reunification was not in the children's best interests, the trial court was bound to set a section 366.26 hearing.

In re J.E. (2016) 3 Cal.App.5th 557 (1st Dist., Div. 3) [Alameda]
Where agency failed to follow the mandates of the case plan and did not fashion reunification services to address the "core issue" preventing reunification, the trial court properly found reasonable reunification services had not been provided and continued reunification services to 24 months. The agency appealed. Then 14-year-old J.E. was detained after she ran away and mother refused to allow her to return home. Mother was overwhelmed with J.E.'s behaviors including fire-setting, chronically running away, self-cutting, suicidal ideation, sexual molestation by J.E. of her younger sister and abuse of alcohol and marijuana. Mother had 2 other children in the home including an 18-year-old older sister and an 8-year-old younger sister. Mother was granted reunification services and J.E. also had a plan including individual therapy and a psychological evaluation. Mother participated in individual and family therapy as required. At the 12-month review hearing, mother was not able or willing to have J.E. returned because J.E. was a "trigger" for her younger sister because of the sex abuse and the sister had been on a 5150 hold 8 times. Visits between J.E. and her sister were temporarily suspended. At the 18-month review hearing, the juvenile court rejected the agency's recommendation to end reunification services. The court expressed significant concerns about the agency's failure to provide services targeted at resolving the impediment to minor's reunification - specifically the sex abuse of her younger sister. The

psychological evaluation ordered at disposition had never been completed and the juvenile court was concerned there was never an assessment as to whether J.E. needed a specific type of therapy including sexual offender treatment. Further, the trial court found a substantial probability that J.E. could be returned home within the extended period of services. The Court of Appeal found continued reunification was within the court's discretion based on section 352 upon a showing of good cause. Further, substantial evidence supported the court's finding that reasonable reunification services were not provided. The case plan expressly required a psychological evaluation which was never conducted. J.E. was offered only general individual and family therapy and these were not tailored to meet the family's specific needs. Finally, the court was not required to find a substantial probability of return within the extended time period. Given J.E.'s expressed desire to return home and mother's commitment to participate in services, the court reasonably concluded there was a strong likelihood J.E. would reunify with proper treatment. [V. Lankford, minor]

Early Termination of Reunification

M.C. v. Superior Court (2016) 3 Cal.App.5th 838 (1st Dist., Div. 1) [Del Norte]

Mother sought writ relief and the appellate court granted her petition challenging the early termination of reunification services since the agency failed to file a petition per 388, subd. (c) and the trial court erred in terminating reunification services at the 6-month review hearing based on mother's lack of participation and her new prison sentence. Case began after mother's home was searched and mushrooms, methamphetamine pipes, drug paraphernalia, concentrated cannabis, and marijuana over 28.5 grams were found and she was arrested. Mother also tested positive for methamphetamine, benzodiazepines and marijuana. The children were aged 5 and 11 years old. During the 1st 6 months, mother's participation with services was minimal and she was sentenced to 16 months in prison. The agency recommended to end reunification at the 6-month review hearing. It was apparent none of the participants knew exactly how long mother would be incarcerated or what programs would be available to her. The juvenile court found mother had not engaged in services, there was an extremely low likelihood of reunification prior to the 12-month review hearing and the services available to mother in prison would be inadequate and terminated reunification services. In finding the trial court erred, the appellate court reviewed the case law relied on by the agency to support early termination. The Court of Appeal found the Legislature amended the statutory language in 2008 in response to prior case law. The new statutes set the minimum time for reunification for children under 3 years old at 6 months and for children over 3 years old at 12 months. In addition, in order to end reunification early the agency must file a 388, subd. (c) petition, which was not done. The Court of Appeal found the error was not harmless because the juvenile court was laboring under a misapprehension as to the proper legal standard and it did not make the necessary

findings. The court issued a writ of mandate directing the juvenile court to vacate its orders terminating reunification services and setting the case for a 366.26 hearing.

Exit Orders

Heidi S. v. David H. (2016) 1 Cal.App.5th 1150 (2d Dist., Div. 1) [L.A.]

In a case of 1st impression, the appellate court determined the scope of the family court's authority to modify exit orders issued by a juvenile court after a dependency proceeding finding the changes to visitation were reasonable including drug testing indefinitely and a reduction in visits with a positive drug test result. Soon after the child was born, mother brought an action against father in family court to establish parental relations with father. Family court issued paternity, child custody and visitation orders. Subsequently, a dependency action was started after mother was arrested with her 1-year-old son in her arms when she was found in a park under the influence of alcohol and controlled substances. The record does not specify what happened in the dependency case but, 16 months later, the juvenile court awarded the father sole legal and physical custody and granted mother limited visitation under the supervision of a monitor and terminated jurisdiction. Less than 3 months later, mother filed a family court request to modify the exit order. Mother requested joint legal custody, sole physical custody and unmonitored visits. Mother presented extensive evidence of changed circumstances, a prerequisite to a modification of the exit orders. Father filed his own declaration calling into question the veracity of mother's claims including a 730 evaluation that found mother was a very disturbed person, with psychopathic tendencies and with a potential for homicide of the child, evidence which showing mother was doctor shopping and received treatment from 6 different physicians and was taking up to 9 different medications, and her childhood friend said he observed mother purchase synthetic urine in order to pass the drug tests. The family court held a number of hearings which spanned more than year after the exit orders were issued. After considering the evidence, the family court did not change the custody orders but modified the visitation schedule creating 3 tiers leading to unmonitored and overnight visits if mother continued to test negative on drug and alcohol tests. Mother appealed challenging several parts of the family court's orders. The moving party has a burden to show there has been a significant change of circumstances and that the modification is in the best interest of the child. (§ 302, subd. (d).) Once an exit order is in place, the paramount need for continuity and stability in custody arrangements weigh heavily in favor of maintaining that custody arrangement. As a result, even though the family court found mother had shown changed circumstances, the court did not abuse its discretion in not changing the custody arrangement and only modifying visitation.

In providing a tiered approach for mother's increased visitation, the family court had 3 major concerns - mother's lack of credibility, the child's safety in the face of mother's unexplained seizure, and mother's possible relapse. Given these, the court's order struck an appropriate balance in acknowledging that changed circumstances warranted

modification of visits but changes did not justify the full remedy requested by mother. Mother further argued the family court failed to make any judicial determination that mother exhibited the habitual, frequent or continued illegal use of controlled substances as required by Fam. Code section 3041.5. Mother claimed the family court was only allowed to consider the evidence after the motion for modification was filed but the appellate court disagreed and found common sense dictates the family court look to the totality of the circumstances. Finally, the Court of Appeal found, contrary to mother's contentions, the family court has the authority to order drug tests indefinitely as a condition of visitation and a positive drug test can immediately trigger a reduced visitation schedule as was ordered in this case.

In re Armando L. (2016) 1 Cal.App.5th 606 (5th Dist.) [Merced]
Due process requires the court to provide an evidentiary hearing at a section 364 hearing when the issues to be challenged are placement and visitation. Prior to the dependency, mother has custody of 9-year-old Armando but left him with his father because she could not control his behavior. Armando is diagnosed with ADHD. The case began because of physical abuse by father. The parents complied with services and Armando was returned to his mother. However, he became uncontrollable again and a section 387 petition was filed. The family then received 18 months of services but Armando was eventually placed in a group home. The agency then recommended placement with father and a section 364 hearing was set. At the hearing, mother requested to present evidence that placement with father was incorrect and to challenge the proposed visitation orders. The agency and minor's counsel argued mother did not have standing at a section 364 hearing to present evidence. The appellate court held mother had a right to present evidence relevant to the court's exit orders and the denial of a hearing deprived mother of her due process rights. The court's orders were reversed and the case was remanded.

PRELIMINARY/CONTINUING CONSIDERATIONS

Indian Child Welfare Act (ICWA)

In re Abbigail A., et al. (2016) 1 Cal.5th 83 (Supreme Court) [Sacramento]
The Supreme Court reversed in part and affirmed in part the Court of Appeal decision finding rules 5.482(c) and 5.484(c)(2) invalid finding only 5.482(c) is invalid as it conflicts with state law. Abbigail and Justin, now aged 10 and 9 years old, were detained in 2012. Father was found presumed and told the court he might have Indian ancestry in the Cherokee tribe. In January 2013, the Cherokee Nation informed the agency the children were eligible for enrollment through direct lineage from an enrolled member - father's great-grandmother but they were not Indian children because neither of their biological parents was a member. Father informed the court he intended to apply for membership. Based on this disclosure, and rule 5.482(c), the trial court proceeded as if the children were Indian children to whom the ICWA applied. At the

jurisdiction/disposition hearing, the trial court complied with the ICWA and the agency appealed. The agency argued, and the Court of Appeal agreed, rules 5.482(c) and 5.484(c)(2) were invalid because they conflict with state law and the appellate court reversed. The Supreme Court granted father's petition for review. Rule 5.482(c) requires the court to proceed as if the child is an Indian child. The Supreme Court found this rule was inconsistent with statutes and with the Legislative intent and is invalid because it broadens the definition of an Indian child to include children who are merely eligible for membership even if they did not fall within the definition of an Indian child. The Supreme Court further found rules 5.482(c) and 5.484(c)(2) are not identical. Rule 5.484(c)(2) merely directs the juvenile court to pursue tribal membership for a child who is already an Indian child as defined in the ICWA. The Supreme Court concluded this rule remains valid.

In re Isaiah W. (2016) 1 Cal.5th 1 (Supreme Court) [L.A.]
California Supreme Court reversed and remanded the Court of Appeal decision finding that even though mother did not appeal the disposition orders finding the ICWA did not apply, the trial court's decision terminating parental rights included a new finding the ICWA did not apply and the appeal was proper. Isaiah was born positive for marijuana in Nov 2011. Mother received reunification services and before the jurisdiction hearing she informed the court she may have Indian heritage. At the disposition hearing in Jan 2012, the court held the ICWA did not apply and mother did not appeal. In Apr 2013, the juvenile court terminated mother's parental rights and again found it had no reason to know Isaiah was an Indian child. Mother appealed. Relying on *In re Pedro N*. (1995) 35 Cal.App.4th 183, the Court of Appeal found mother was foreclosed from raising the ICWA issue because she failed to appeal the disposition order in 2012, an approach contrary to another line of cases. The Supreme Court granted review to resolve this conflict, declined to follow *Pedro N*., and reversed finding the trial court had a continuing and affirmative duty to inquire and investigate for Indian heritage. Consequently, the Apr 2013 order terminating mother's parental rights was necessarily premised on a current finding by the juvenile court that it had no reason to know Isaiah was an Indian child. [P. Dikes, mother]

In re Breanna S., et al. (2017) 8 Cal.App.5th 636 (2d Dist., Div. 7) [L.A.]
Mother and father appeal from the termination of parental rights where the agency omitted from the ICWA notices information about Indian ancestors known by the agency and the appellate court found the error prejudicial and remanded for new notices. The agency interviewed the maternal grandmother and she confirmed possible Yaqui heritage and provided the names of maternal great-grandmother and great-grandfather, the dates of birth, states of birth, and dates and locations of death. The omitted information included former addresses, current addresses and dates of birth and death and places of birth and death. The agency conceded the error but argued the error

was harmless. The Court of Appeal acknowledge that vigilance in ensuring strict compliance with federal ICWA notice requirements is necessary because a violation renders the dependency proceedings vulnerable to collateral attack if the dependent child is, in fact, an Indian child. The appellate court rejected the agency's contention that according to the Yaqui's Constitution, Breanna could not possibly have enough blood quantum to qualify as a tribal member. The Court of Appeal declined to speculate finding the Indian tribe, and not the juvenile court or the Court of Appeal, is the sole entity authorized to determine whether a child is an Indian child. The court remanded the matter for the juvenile court to conduct a further investigation into mother's claim of Indian ancestry. [J. Moran, mother; P. Saucier, father] [See under c-1-B-i exception]

In re Charlotte V. (2016) 6 Cal.App.5th 51 (2d Dist., Div 8) [L.A.]
Where the evidence showed the agency complied with the ICWA notice requirements, including citation to mother's tribal membership card, the trial court's finding that the ICWA did not apply was proper. The case began because of domestic violence including mother repeatedly rammed her car into father's while Charlotte was in the car, mother brandished a loaded handgun at father and where the handgun was in Charlotte's reach, and mother and father were arrested and had a long history of violent confrontations. Parents were granted 18 months of reunification services but were irregular in complying and in visiting Charlotte. At the section 366.26 hearing, parental rights were terminated and this appeal followed. Mother's only contention on appeal was a failure to comply with the ICWA. Mother provided a copy of her tribe identification card indicating she has membership in the Blackfoot Confederacy through the Ammskapi Pikuni. Notice was sent to the Blackfeet tribe including mother's identifying information, a copy of her tribe identification card, and maternal grandmother's name but no other identifying information. A subsequent notice included maternal grandfather's name and address and maternal uncle's identifying information. The Blackfeet tribe responded and found it was unable to find Charlotte, mother, father, maternal uncle, or maternal grandmother or grandfather in the tribal rolls. On appeal, mother argued the agency was required to include further information about maternal grandmother and information about Charlotte's cousin and great-grandparents. The appellate court held the record revealed substantial evidence of ICWA compliance. Consequently, mother failed to demonstrate prejudicial error. [P. Saucier, mother]

In re O.C., et al. (2016) 5 Cal.App.5th 1173 (1st Dist., Div. 1) [Mendocino]
Where the agency noticed only 2 of 22 potential tribes with ICWA notice, the trial court erred and the case was reversed and remanded to comply with the ICWA. At the detention hearing, father claimed heritage through Wailaki and Pomo tribes. Father later included possible heritage in the Round Valley and Covelo tribes. Mother indicated she had possible heritage through the Mohawk tribe. It is undisputed that only 2 Pomo Indian tribes or bands were notified. California has the 2d largest Indian population in the

country. According to the California Department of Social Services, the state includes 22 bands and Rancherias affiliated with the Pomo tribe. After a review of recent case law interpreting notice provision of the ICWA, the appellate court determined the juvenile court had an affirmative and continuing duty to inquire into a child's Indian status, information in this case provided by the parents was sufficient to trigger a duty of inquiry and notice, and the trial court failed to require notice to the remaining Pomo-affiliated tribes. The case was remanded for compliance with the ICWA. [J. Moran, mother]

In re Michael V. (2016) 3 Cal.App.5th 225 (2d Dist., Div. 7) [L.A.]
Where the agency was notified that maternal grandmother might have Indian heritage and the agency and the trial court failed to fulfill their duty to inquire and investigate possible Indian heritage the Court of Appeal remanded the matter with directions for the juvenile court to conduct a meaningful investigation. The case began because of mother's drug use. Mother was granted reunification services. After 6 months, the court terminated reunification services and set a section 366.26 hearing. Parental rights were terminated and mother appealed. Mother argued error in ICWA inquiry and the Court of Appeal reversed for the trial court to comply with the ICWA. Mother completed an ICWA-020 form and claimed she might have Indian ancestry through the maternal grandmother. Mother had been a dependent as a child, she was placed in a foster home, received services, and was eventually emancipated from the system. During her case, a social worker told mother the maternal grandmother was "full-blood Indian" and she was from 2 tribes. The agency questioned paternal grandfather and paternal great-grandmother who both denied Indian heritage and reviewed mother's dependency case filed which had no indication of Indian ancestry. After these efforts, the trial court found the ICWA did not apply. Initially, the appellate court found the order terminating parental rights includes an implied finding the ICWA does not apply so even though mother did not appeal the earlier ICWA order, the appeal from the termination hearing was valid. The Court of Appeal remanded the matter with instructions for the juvenile court to direct the agency to conduct a meaningful investigation into mother's claims including making a genuine effort to locate other family members including the maternal grandmother and mother's siblings.

In re Andrew S., et al. (2016) 2 Cal.App.5th 536 (2d Dist., Div. 7) [L.A.]
Where father claimed possible Indian heritage but did not name a specific tribe, father was not asked to complete an ICWA-020 form and, even though is parents were deceased, the agency failed to question any of his 7 siblings about possible heritage, the case was remanded for compliance with the ICWA. The agency argued father’s reference to possible Indian heritage was insufficient to require any form of notice under the ICWA. In response to respondent’s brief, father's appellate counsel wrote to the Court of Appeal that in light of the parties' agreement as to the jurisdiction errors [the agency conceded] and to expedite return of the matter to the juvenile court, father

would not pursue his ICWA claim. The appellate court accepted the withdrawal but held the record appeared to show the agency and the juvenile court failed to satisfy their affirmative and continued duty to inquire re: possible Indian heritage. On remand the trial court was to consider custody with father per section 361.2 and to revisit its determination that the ICWA did not apply. [M.Keiter, father] [See under the Removal]

In re Alexandria P. (2016) 1 Cal.App.5th 331 (2d Dist., Div. 5) [L.A.]
In their 3d appeal, the Court of Appeal held Alexandria's de facto parents did not show good cause to depart from the ICWA placement preferences because the child's bond with them cannot be the sole reason to deviate. Alexandria is an Indian child who was removed from her parents at 17-months-old. She was placed with her de facto parents in order to allow father to reunify. However, the de facto parents were informed from the start of the case that an extended family member located in Utah would be the adoptive home for Alexandria if reunification failed. Alexandria thrived in the home of the de facto parents for 2 ½ years. When reunification failed, the father, the tribe, and the agency recommended Alexandria be placed in Utah with a non-Indian couple who are extended family of the father and where Alexandria would have contact with her 2 siblings. In 2014, at the initial hearing the de facto parents argued good cause existed to depart from the ICWA adoptive placement preferences but minor's counsel argued good cause did not exist. The trial court ordered Alexandria placed with the extended family member in Utah finding the de facto parents had not proven by clear and convincing evidence that is was a certainty she would suffer emotional harm by the transfer. The de facto parents appeal. The Court of Appeal issued a writ of supersedeas staying the court's orders pending resolution of the appeal. The appellate court reversed and remanded for the lower court to determine under the appropriate standard whether de facto parents could show good cause to depart from the ICWA. On remand, the trial court held a hearing on whether good cause existed spanning 5 days. The juvenile court issued its decision in Nov 2015 finding the de facto parents had not proven good cause by clear and convincing evidence. The de facto parents sought a supersedeas writ to stay the latest trial court's orders. The Court of Appeal treated the writ of supersedeas as a petition for writ of mandate directing the trial court to apply the correct burden of proof and emphasized time was of the essence and instructed the lower court to resolve the issue of placement within 30 days. In the 3d good cause decision, the trial court concluded the de facto parents had not shown good cause to depart from the ICWA's placement preferences. The court ordered Alexandria removed from the custody of the de facto parents and placed with the extended family members. The appellate court rejected the de facto parents' arguments that the trial court's decision exceeded the scope of remand, disregarded the law of the case or abused its discretion with its evidentiary rulings. The Court of Appeal further rejected the de facto parents' argument that good cause existed as a matter of law because Alexandria would suffer trauma if their bond with her was broken. The longevity of the child's foster placement may be relevant but it cannot be the

sole deciding factor. Further, making longevity the determinative factor would ignore not just the overall policy behind the ICWA but the more general policy favoring preservation of extended family and sibling relationships in the dependency context. The Court of Appeal found substantial evidence supported the court's conclusion that the de facto parents had not shown good cause. The extended family members offer Alexandria a better opportunity to maintain a relationship with 2 of her siblings and her family will be more effective with giving Alexandria access to her cultural identity. Finding no good cause to depart from the ICWA's placement preferences, the orders directing Alexandria be placed with her extended family were affirmed.

Parentage

In re M.R., et al. (2017) 7 Cal.App.5th 886 (4th Dist., Div. 2) [San Bernardino]
Where a man (S.H.) other than father (R.R.) acted as a parent to the oldest child, the trial court properly found both men are presumed parents and awarded sole legal and physical custody to S.H. Case began when mother left her 5 children with the maternal grandmother and disappeared. Father appealed the jurisdiction findings against him along with the court's finding that the oldest child (Ro.R.) had more than one presumed father. Both father and S.H. believe they are the biological father to Ro.R. and no DNA test was completed. The Court of Appeal affirmed the finding that father and S.H. are presumed fathers for Ro.R. Relying on S.H.'s relationship with Ro.R. from birth, to his increasing contact with Ro.R. including summer visits and numerous weekend visits, and his acknowledgment of paternity as evidence that S.H. acts as a presumed father, the court affirmed the juvenile court's conclusion that to recognize only mother and father as Ro.R.'s parents would be detrimental to Ro.R. The appellate court also affirmed the orders involving visitation and the ICWA both challenged by father. [M. Thue, mother; S. Rollo, father; M. Goode, Ro.R.] [See under Jurisdiction.]

In re M.Z., et al. (2016) 5 Cal.App.5th 53 (4th Dist., Div. 1) [San Diego]
Where mother's boyfriend and biological father to the 2 youngest of 4 children does not qualify as a presumed father for the older children, the trial court properly held he could not be a 3d parent for the oldest children per Fam. Code section 7612, subd. (c). Mother was married to Miguel Z. and they had 2 children together. The parents filed for divorce but it was never finalized. Mother began a relationship with Anthony R., the appellant in this case. Anthony R. requested the juvenile court find him a presumed father of the older 2 children and to apply section Fam. Code section 7612, subd. (c) to find him a 3d parent to these children. Both Miguel and Anthony were involved in drug use and spent considerable time in jail after the children were born. The children at issue, referred to as Minor 1 and 2 (children), were then aged 6 and 5 years old. Statements by the minors indicated they knew their father was named Miguel and they did not have a strong bond with Anthony. According to mother's testimony, Anthony helped the children with homework and took them to school but the children's teacher reported the children

did not turn in homework and were constantly tardy to school. The trial found Anthony was a father in theory and in name only and held that not one bit of evidence supported that any detriment would eventuate should the relationship between these children and Anthony be disrupted. The appellate court decided to use its discretion in regard to the agency's contention that the order denying a presumed parent status was not appealable because it was made before the disposition order. The court assumed, without deciding, to treat the notice of appeal as timely from the subsequent disposition order. To find a presumed parent, the Court of Appeal held that a caretaking role and/or romantic involvement with a child's parent is not enough to qualify. A presumed parent finding is not based on the living situation but on whether a parent-child relationship has been established. Anthony claimed he lived with the children on and off from 2014 but the court found Anthony was incarcerated for months and he admitted he would disappear for days at time when he was using drugs. In affirming the juvenile court's decision, the appellate court found residing with a child out of personal convenience and self-interest is not sufficient to establish presumed parent status. [S. Davidson]

In re Alexander P. (2016) 4 Cal.App.5th 475 (1st Dist., Div. 1) [San Francisco] Multiple appeals involved the presumed father findings of the juvenile court for 3 separate men including the mother's former boyfriend (Michael), the child's biological father (Joel), and mother's husband/Alexander's step-father (Donald). **Where the child has 3 presumed fathers, the Court of Appeal affirmed one family court order for presumed father, reversed another finding made after the dependency petition was filed, and affirmed mother's husband was a psychological parent and is also presumed**. Michael met mother and Alexander was conceived during an intermittent 3-year relationship. Neither mother or Michael believed Michael was Alexander's biological father. Michael lived with Alexander for one year and during this time the relationship was characterized by "oppressive domestic violence." Around this time, Joel took a DNA test to confirm he is Alexander's biological father. He had weekly visits with Alexander and he later filed an action to establish his paternity in family court. Michael also filed a petition for custody of Alexander in family court. The relative paternity status of Michael and Joel were determined in family court in 2 separate hearings - one held before the filing of the dependency petition and the other after. Prior to these hearings, Donald began living with mother and they married. Donald assumed the daily physical and emotional responsibilities of Alexander and became his "psychological parent." The dependency began after Donald committed domestic violence against mother and attacked her in front on Alexander. Alexander was 3 years old and, in tears, attempted to intervene to protect his mother. This resulted in a restraining order against Donald and a dependency petition.

Two weeks after the dependency petition was filed, the family court ruled both Michael and Joel qualified as presumed parents and designated both per Fam. Code section 7612,

subd. (c). At the juvenile court hearing, all 3 men requested to be declared the minor's presumed parent. The juvenile court found both Michael and Joel presumed parents based on the family court's orders and that Donald also satisfied the requirements for presumed parent and designated him as well – giving Alexander 3 presumed fathers. Michael and the child appealed designation of Donald as a presumed father. The court affirmed the designation of Donald as a presumed father. Several parties challenged Michael's designation. The Court of Appeal found the juvenile court erred in finding Michael to be a presumed parent. The court remanded the issue of Michael's status and the order denying him visitation to the trial court. As to Michael, the trial court relied on the family court's orders but the appellate court found it was error because those orders were made after the dependency petition was filed and, once the petition was filed, the family court was divested of subject matter jurisdiction to determine paternity issues. As for Joel, he was designed a presumed father in the earlier family court order that was made prior to the filing of the dependency petition making the family court's orders valid and final before the dependency court hearing. As for Donald, the appellate court found ample evidence that he qualified as a presumed father while living with mother and taking care of Alexander. Further, the domestic violence perpetrated by Donald was not sufficient to preclude his designation as a presumed parent as a matter of law. Finally, the evidence was sufficient to support the finding that Alexander would suffer a detriment if his stepfather was not designated as a presumed father. [L. Rehm, father Joel; K. Lee, father Donald]

388 PETITION

In re Alayah J., et al. (2017) 9 Cal.App.5th 469 (2d Dist., Div. 2) [L.A.]

The trial court erred when it conditioned a hearing on mother's section 388 petition on whether mother's parental rights were not terminated at the section 366.26 hearing scheduled for the same time but the error was harmless. Mother had 3 children, now aged 7, 5, 3 years old, who were removed in 2014. The case began because of drug abuse and domestic violence. The children were placed with a paternal great-aunt and despite reunification services, the family was unable to reunify. Shortly before the section 366.26 hearing, mother filed a 388 petition requesting unmonitored visits, an assessment of her home for overnight visits and placement of the children. The trial court set the hearing for the 388 petition on the same day as the section 366.26 hearing and conditioned a 388 hearing only if mother's parental rights were not terminated. At the section 366.26 hearing, the trial court terminated parental rights and did not consider mother's 388 petition. The trial court's decision to condition the grant of a 388 petition hearing on whether mother kept her parental rights at the section 366.26 hearing was not one of the 4 options available to the court when a section 388 petition is filed. Such action was outside the scope of its statutory authority and was error. In further analysis, the juvenile court found the error did not require reversal. Finding mother was only in partial compliance with her case plan, tested positive for marijuana 6 days before the filing of the

section 388 petition, and never progressed to unmonitored visits, the appellate court found it was not reasonably probable that mother's parental rights would not have been terminated if a hearing had been held on her 388 petition.

In re K.L., et al. (2016) 248 Cal.App.4th 52 (1st Dist., Div. 4) [Marin]
Where mother made conclusory statements in her section 388 petition, provided no declarations for support, and alleged no information to justify a modification, the appellate court found no prima facie showing which required an evidentiary hearing. Mother appealed from the denial of her section 388 petition in which she asked for placement of her 3 children with their maternal grandmother and a subsequent order for the termination of her parental rights to her 2 youngest children. Mother's 3 children, now aged 14, 11 and 9 years old, were detained in 2011 because mother often left the children unsupervised at home and, the last time, the youngest child started a fire. After 6 months of reunification services, the children were placed with their maternal aunt in a guardianship. Two years later, the children were removed from the aunt because of physical abuse. The grandmother was living with the aunt and children when this abuse happened. Dependency jurisdiction was reinstated and the children were placed together with their godparents. A few months later, the youngest brother was removed because of his aggressive behavior. A few months after that, the older brother was removed from the godparents because of sexualized behavior. The children remained in separate foster homes at the time of the section 366.26 report. The agency recommended adoption for the younger brother and sister. Mother filed a section 388 petition asking for the children to be placed together with their maternal grandmother's home. The children's CASA, minors' attorney and the agency all opposed mother's 388 petition. The trial court found the petition did not present sufficient information to warrant an evidentiary hearing and denied the petition. A month later, the juvenile court terminated parental rights to the younger brother and sister and selected adoption as a permanent plan. Mother appealed both decision and these appeals were consolidated. In mother's 388 petition she alleged the changed circumstances were that grandmother had moved into a larger home with space for all 3 children. The Court of Appeal held this alone was insufficient for a prima facie showing. The record further established that both boys needed significant individualized attention and support and nothing in the petition alleged grandmother was able to provide this care better than the foster families. Finally, mother's generalized statement that the children were comfortable with grandmother was not supported by the record which showed she lived with the aunt when the children were physically abused and were removed for that reason. [J. Moran, mother]

SECTION 366.26

Beneficial-Relationship Exception

In re Breanna S., et al. (2017) 8 Cal.App.5th 636 (2d Dist., Div. 7) [L.A.]
Where parents failed to spend the holidays with their children, did not attend any medical appointments, father averaged only 2 visits per month, and the older child wanted to be adopted, the parents failed to show the beneficial-relationship applied. Mother and father appealed from the termination of parental rights over 9-year-old Breanna and her 4-year-old brother David arguing that, despite the trial court's finding that the parents' visits were not consistent, the c-1-B-i exception applied. The appellate court held mother failed to show she occupied a parental role in her children's life and where the trial court was appropriately concerned about the continuing violence that characterized the parents' relationship, the evidence fell far short of demonstrating a substantial emotional attachment that would cause the children to suffer great harm if severed. [J. Moran, mother; P. Saucier, father] [See under the ICWA]

In re Grace P., et al. (2017) 8 Cal.App.5th 605 (2d Dist., Div. 3) [L.A.]
Juvenile court erred in denying father's request for a contested section 366.26 hearing when father showed he had consistent visits with the child and offered his own and his daughter's testimony to show the nature of the parent-child relationship. The 2 oldest children were detained in 2013 and the youngest child was detained shortly after birth because of ongoing domestic violence and marijuana abuse. Father completed some of his reunification services and consistently visited the children. At the section 366.26 hearing, father requested a contested hearing to determine the applicability of the c-1-B-i exception. The trial court requested an offer of proof and then indicated the offer was insufficient for a contested hearing and denied father's request. The court then found no exceptions to adoption and terminated parental rights. Both parents appealed but mother joined in father's arguments and raised no independent issues. The appellate court found a parent has a right to due process at a section 366.26 hearing. However, due process does not require a court to hold a contested hearing if it is not convinced the parents will present relevant evidence. Here, the agency concluded and the trial court agreed father maintained regular visits --the 1st prong of the beneficial-relationship exception. The issue considered by the Court of Appeal is whether father's offer of proof was sufficient to warrant a contested hearing. The appellate court found it was. As to the offer of proof on the 2d prong of the exception, father offered his own testimony about the positive quality of his visits and his now 6-year-old daughter's testimony regarding how she enjoyed visits with father, saw father as a parent, and would be sad if visits with father ended. Because the exception is an individualized inquiry, the juvenile court must take caution before denying a contested hearing when a parent has clearly maintained regular contact with the child. Since the agency's contrary argument were based solely on its own evidence, and father's evidence was not admitted, the

appellate court could not conclude that father was incapable of proving the exception. [J. Love, father; L. Serobian, mother]

In re Logan B. (2016) 3 Cal.App.5th 1000 (2d Dist., Div. 1) [L.A.]
Mother contended the trial court erred in requiring mother to show a compelling reason why termination of parental rights would be detrimental to Logan in addition to the 2 elements of the statutory exception including regular visits and a beneficial relationship which outweighs the benefits of adoption but the Court of Appeal rejected her argument. Finding the plain language of the statute required a finding of a compelling reason to avoid termination of parental rights and not just the showing of the 2 elements of the statute, the Court of Appeal affirmed. Logan was 8 years old at the time of the dependency petition for domestic violence and drug use. This is Logan's 2d dependency. He was reunited with his mother who was granted sole physical and legal custody in the prior case. Initially, mother complied with the case plan but then she became homeless when Logan was hospitalized for mental health issues, allowed unsupervised contact with father, and dropped off Logan with Logan's maternal cousin, Andre. Logan was detained and placed with Andre. Mother did not comply with reunification services and violated the visitation plan. Logan struggled emotionally when mother missed visits. A section 366.26 hearing was set in early 2015. In 2014, Logan wanted to be placed in a guardianship with Andre, however, by July 2015, he changed his mind and wanted to be adopted. He liked visits with mother but he wanted to be adopted so he could live with Andre and be in a stable home. The juvenile court found mother was not fulfilling a parental role and terminated parental rights. Finding the express statement that the court must find a compelling reason to find that termination of parental rights would be detrimental is in subdivision (c)(1)(B), the appellate court found no error in the trial court's ruling. Using statutory interpretation, the court found this language makes it plan that a parent may not claim entitlement to the beneficial-relationship exception simply by demonstrating some benefit to the child from the continued relationship with the parent or some detriment from termination of parental rights. [D. Kaiser, mother]

In re Noah G., et al. (2016) 247 Cal.App.4th 1292 (2d Dist., Div. 5) [L.A.]
Mother argued the trial court erred in failing to apply the beneficial-relationship exception but the appellate court found that mother's failure to start drug treatment, her positive drug tests, and then her failure to continue to do any drug testing were sufficient for the court to determine she continued to have problems with drugs. The case began in October 2013 when Noah was 4 years old and his brother Jose was a newborn because the parents were abusing drugs including marijuana and methamphetamine. Initially, the children were released to mother with family maintenance services but 5 months later the children were detained on a section 387 petition. The children were placed with maternal grandmother and the parents were granted reunification services. After 6 months, the court terminated reunification services

and set a section 366.26 hearing. At the hearing, the court found the children were likely to be adopted and the beneficial-relationship exception did not apply. It was undisputed that mother had regularly daily contact with the children, but she tested positive twice in 2014. The juvenile court properly focused on the mother's unresolved substance addiction. Mother failed to comply with court orders to attend drug treatment, she stopped drug testing after 2 positive tests, and the agency was unable to determine if mother was drug free. The juvenile court's order denying application of the c-1-B-i exception was affirmed. [J. Tavano, mother]

Relative Exception

In re D.R. (2016) 6 Cal.App.5th 885 (2d Dist., Div. 8) [L.A.]

The trial court ordered guardianship based on the relative exception (c-1-A) but the Court of Appeal found error and reversed because there was no evidence to support this exception. D.R. is now 13 years old and has lived with her maternal grandmother since she was an infant. The case began when D.R. was 9 years old. The petition alleged mother and the father of D.R.'s younger half-siblings engaged in violent altercations with family members and abused drugs. Mother was given reunification services but did not reunify. Father was not located until more than a year after the case began. He immediately asked for custody and was granted reunification services. Father visited D.R. for a period of 4 months. For the duration of the case, D.R. was adamant she did not want to live with father even though she desired to visit him. Grandmother reported she was willing to adopt D.R., she participated in a home study, and her home study was approved the same month as the section 366.26 hearing. At the section 366.26 hearing, father argued for application of the beneficial-relationship exception. In response, the trial court ordered guardianship as D.R.'s permanent plan and stated the child was living with a relative who was unable or unwilling to adopt the child. The Court of Appeal held under the circumstances the trial court was required to order adoption as D.R.'s permanent plan because no evidence supported an exception. Grandmother was willing and able to adopt and had an approved home study. Finally, as to mother's and father's argument that father was presumed parent and the trial court's order should be affirmed because the trial court never made a detriment finding against him, the appellate court found father was not a presumed father. The record showed he was an alleged father and no detriment finding was required. The juvenile court's order of guardianship was reversed and the trial court was directed to enter a new order of adoption as D.R.'s permanent plan. [A. Aslanian, respondent father; K. Chandler, mother]

Relative & Sibling Exceptions

In re Isaiah S. (2016) 5 Cal.App.5th 428 (4th Dist., Div. 1) [San Diego]

Mother lacked standing to assert error for failing to place with a relative at the section 366.26 hearing because it did not support any challenge to preserve mother's parental rights and the sibling exception does not apply because the sibling

relationship was not sufficient to outweigh the benefits of adoption and it was unlikely adoption would interfere with the sibling relationship because the relative and foster parents were both committed to continued sibling contact. Isaiah had 2 prior dependency cases and he reunified with mother each time. In 2014, however, he was detained because of violent confrontations between mother and her husband, the father of Isaiah's 3 younger half-siblings. He was placed in a foster home and the oldest half-sibling, Juan, Jr., was eventually placed with him. The boys thrived in the foster home. Mother was granted reunification services, had a short-lived extended visit which was ended because she had contact with her husband, and eventually lost contact with the agency and did no reunification. Maternal aunt and uncle came forward prior to the 6-month review hearing and requested placement. They were being evaluated and visited Isaiah several times. Isaiah's foster mother expressed a willingness to adopt him. Prior to the 6-month review hearing, the agency filed a section 388 petition to end mother's reunification early. The trial court granted the agency's 388 petition, terminated mother's reunification and suspended her visits. Mother requested a contested section 366.26 hearing. She had not visited Isaiah for approximately 8 months. Mother contended the trial court failed to ensure the agency fulfilled its duty under section 361.3 to properly conduct a relative placement assessment. Finding that mother's argument did not advance mother's challenge to termination of parental rights, the court found mother had no standing. The appellate court found the relatives planned to adopt and mother failed to show that placement with the maternal uncle would prevent the termination of parental rights.

As for the sibling exception, the Court of Appeal found evidence the foster parents and relatives of the siblings planned to continue sibling contact after adoption. Further, mother failed to show how preserving her parental rights would facilitate Isaiah's sibling relationship with his half-brother. Finally, since the 2 boys were aggressive with each other beyond just typical sibling bickering, the court found, even though they shared a strong bond, the nature of the relationship was somewhat detrimental to Isaiah's health. The trial court's orders were affirmed. [D. Kaiser, mother]

FAMILY CODE TERMINATION

In re A.B. (2016) 2 Cal.App.5th 912 (4th Dist., Div. 1) [San Diego]

The one year period of abandonment referred to in Fam. Code section 7822 does not refer only to the year immediately preceding the filing of the petition to terminate parental rights. Father of now 5-year-old A.B. contended that only the year before the filing of the petition should be considered when trying to determine whether father intended to abandon A.B. Father's history with A.B. showed he was not at her birth but visited a few hours later. He was not named on A.B.'s birth certificate. In the following 5 years, he visited A.B. only a few times and paid some child support. He testified he sent several letters between 2010 and 2014 but A.B's mother testified she never received them.

The court found mother's testimony more credible and there was substantial evidence to support the finding that father made only token efforts to communicate with A.B. for well over a one-year period.

NON-MINOR DEPENDENTS

N.S. v. Superior Court (2016) 7 Cal.App.5th 713 (1st Dist., Div. 4) [Alameda]
When a nonminor dependent testified she believed she qualified under a statutory criterion for continued foster care under a specific eligibility in section 114.03, subd. (b)(5), she was not tendering her mental state and she therefore had not waived her psychotherapist-privilege. N.S. was placed in foster care when she was 11 years old and turned 18 in 2014. She remained under the juvenile court's jurisdiction as a nonminor dependent. In 2015, the agency believed N.S. qualified for extended foster care because she had a medical condition - mental health diagnoses - that prevented her from attending an educational program, an employment program or working at least half-time. (§ 11403, subd. (b).) Her prior diagnoses included PTSD, depression and other disorders. In Feb 2016, the agency changed its recommendation and asked that N.S.'s dependency be dismissed because it could not determine N.S.'s exact whereabouts and she was not participating in any services. The month before, N.S. admitted she was using methamphetamine and she met with her therapist sporadically. At the hearing to dismiss N.S.'s dependency, she testified she saw her therapist weekly and also she was using methamphetamine. Her therapist testified that N.S. had a diagnosis that prevented her from participating in services but she refused to testify as to what the diagnosis was asserting the psychotherapist-patient privilege. The juvenile court ruled the privilege did not apply because N.S. herself had put her mental state at issue. N.S. filed a writ petition seeking review of the court's order. The appellate court disagreed with the juvenile court and held N.S. did not put her mental state at issue but provided written notification she could not meet the educational and work requirements required by statute.

MISCELLANEOUS

Post-Permanency Termination of Guardianship

B.B. v. Superior Court (2016) 6 Cal.App.5th 563 (4th Dist., Div. 1) [San Diego]
Father argued he was entitled to reunification services because the agency filed a section 300 petition instead of 388 petition to end the guardianship but the appellate court found that based on the facts that father had failed to reunify with H.B. after 18 months of reunification services, his conduct in 2015 and 2016 again brought H.B. to the agency's attention, and he made no attempt to visit H.B. after his removal from the guardian, and consequently any error was harmless. In 2013, the juvenile court terminated reunification services for father and appointed H.B.'s maternal aunt as legal guardian. During the guardianship, in 2015 and 2016, the guardian allowed unsupervised contact between H.B. and the parents and during such a visit father tried to use H.B. to smuggle heroin to mother in jail and he drove H.B. to the jail while under the

influence of heroin and methamphetamine. In 2016, the guardian allowed H.B. to spend a few weeks with his parents and during a parole search of father's hotel room authorities found 14 syringes, methamphetamine, and a glass pipe, all accessible to H.B. After each of these incidents, the guardian claimed she did not know visits with the parents were to be only supervised. In Jun 2016, the agency filed a section 300 petition to end the guardianship. Parental rights had not been terminated and the petition named the parents and the guardian. At the jurisdiction hearing, the court made a true finding on the allegations and found H.B. was described by section 300, subd. (b). For disposition, both parents argued they were entitled to reunification services because the agency filed a 300 petition instead of a section 388 petition. The trial court disagreed. The court found good cause to terminate the guardianship due to the guardian's inability to protect H.B. The court set a section 366.26 hearing and father filed a petition for extraordinary writ per rule 8.452 asserting the agency erred and this error was prejudicial. The Court of Appeal agreed the procedure used by the agency was improper. However, the court determined it was not reasonably probable the juvenile court would have awarded reunification services to father if proper procedures had been followed and affirmed.

In re Z.F. (2016) 248 Cal.App.4th 68 (3d Dist.) [Sacramento]
Where the burden of proof is not specified by statute, the default standard of preponderance of the evidence applies as it did in this case where the trial court terminated a probate guardianship. Z.F. was placed in a probate guardianship with her grandmother during her 1st year. The agency filed a dependency petition for Z.F. when she was about year old. The parents did not visit Z.F. after the establishment of the guardianship. The petition alleged appellant-guardian neglected Z.F. on several occasions in a manner which put Z.F. at risk of serious harm. The court declared Z.F. a dependent, placed her in foster care and ordered reunification services. Appellant failed to reunify and the court terminated reunification services and set a section 366.26 hearing. The agency filed a motion to terminate the guardianship per section 728 and the juvenile court granted the motion finding termination of the probate guardianship was in Z.F.'s best interest. The Court of Appeal reached the merits of the case without deciding whether the case was moot after the juvenile court terminated parental rights after the hearing appealed from. Appellant argued the party filing the section 728 motion is required to prove by clear and convincing evidence that termination of the guardianship is in the minor's best interest. The trial court had not articulated a specific burden of proof. Finding the relevant statutes are silent on a standard or proof, the appellate court found the default standard of preponderance of the evidence applied and the trial court did not err in failing to articulate the standard of proof. [M. Vogelmann, grandmother]

Writ Notice

In re Hannah D. (Mar 10, 2017, F074143) ___ Cal.App.5th ____ [2017 WL 944222] (5th Dist.) [Tulare]

Failure to provide oral advisement to father of the need to file petition for extraordinary writ at referral hearing when father received written notice did not allow appellate court to reach merits of father's appeal. Father was physically present at referral hearing but the court did not orally give him writ advisement. Rather, father was personally served with an information sheet and forms JV-820 and JV-825 which notified him in writing of the necessity to seek writ review. The Court of Appeal held that the fact the rule requiring oral advisement was not followed did not mean that the Legislature and Judicial Council intended such violation to excuse compliance with writ petition requirements of section 366.26 (l)(1) - (l)(2). Father was represented by counsel at the referral hearing and was personally served with written notice. The fact he did not received an oral notice was regrettable but the ultimate purpose of actual notice was achieved.