APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

September 2014 through April 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

JURISDICTION

Petition/ Findings

In re Jesus M., Jr. et al. (Mar 13, 2015, No. B256537) ____ Cal.App.4th ___ [2015 WL 1208624] (2d Dist., Div. 4) [Los Angeles]

Jurisdiction per § 300, subd. (b), reversed where evidence only supported a finding of risk of emotional harm & not physical harm. Father challenged jurisdiction over his 2wo children because substantial evidence did not support it. The appellate court held the trial court's findings that father's conduct—harassing the children's mother in violation of a family law restraining order and denigrating the mother to the children—placed the children at risk of emotional, but not physical injury, could not support assertion of jurisdiction under subd. (b), which requires proof of physical harm or substantial risk of such harm. The Court of Appeal reversed the court's jurisdictional order & the dispositional and custody orders that derived from it.

Mother & father were married in 2000 & separated in 2009 or 2010. Per family court orders mother, had legal & physical custody & father had visitation 3 weekends per month. In 2010, a restraining order was issued prohibiting father from harassing mother or contacting her except to facilitate visitation with the children. In 2013, mother had the restraining order renewed declaring father continued to contact & harass her daily & to denigrate her to the children. The dependency case began when the children were 10 & 12 years old & mother was alleged to have left the children unsupervised at home. In the investigation, it was learned father continued to harass mother, there had been prior domestic violence in the relationship, father encouraged the child to spy on mother & report to him, & he was able to convince one child to call mother names.

At the jurisdiction hearing, the trial court expressly found “this is not a case of domestic violence ... [t]his is a case where there has been domestic violence in the past,” resulting in the issuance of a permanent restraining order. The court found that as a result of father's violations of the restraining order, “these children ... have been injured emotionally, not physically, but emotionally.” The court detained the children from father, terminated jurisdiction, issued a family law order granting sole legal and physical custody to mother, & permitted monitored visitation for father.

As the trial court recognized, the evidence supported “emotional[ ], not

physical[ ]" injury. Since subd. (b) does not provide for jurisdiction based on "emotional harm" the court could not properly assert jurisdiction over Jesus and Gissel A juvenile court may not intervene absent substantial evidence of at least a risk of physical injury or serious emotional harm to a child. Neither was established by the evidence presented at trial. Accordingly, the appellate court reversed the court's jurisdictional order & held that, in the absence of jurisdiction, the juvenile court had no authority to issue a dispositional order or the family law custody orders.

In re Jonathan B. et al. (Feb 19, 2015, No. B258513) ___ Cal.App.4th ___ [2015 WL 1137812] (2d Dist., Div. 3) [Los Angeles]
Where mother could not have anticipated father's unprecedented attack, jurisdiction was not proper for mother's actions. Mother immediately took action to obtain a restraining order after father punched & hit her, & the only other similar incident had taken place 5 years before, substantial evidence did not support jurisdiction based on mother's conduct. The Court exercised its discretion to reach the merits of mother's appeal since the allegations against father were sufficient to maintain jurisdiction. Three children were involved & witnessed the incident. The parents had been separated for 10 months, continued to communicate with each other peaceable to exchange the children, & mother could not have anticipated father's conduct. On these grounds, there was no substantial evidence that the children were at "substantial risk" of "suffer[ing] serious physical harm" inflicted nonaccidentally by mother or through her failure to protect them. The judgment was reversed with respect to the findings against mother. [D. Rooney]

In re Emily D., et al. (2015) 234 Cal.App.4th 438 (2d Dist., Div. 7) [Los Angeles]
The trial court can seek additional evidence from the agency before making its jurisdiction findings & does not act as an advocate & fulfills an important duty of the court by requesting the relevant facts. Mother challenged the jurisdiction & disposition orders arguing the trial court acted as an advocate by requesting the agency provide missing drug test results. The appellate court held the juvenile court had good cause to continue the hearing for 3 days, & the court could delay ruling on mother's § 350, subd. (c), motion until after the drug tests results were received. The children, aged 10, 8 & 6 years old were removed from mother due to substance abuse after mother tested positive for methamphetamine & marijuana & the home was in a filthy & unsanitary condition. The jurisdiction hearing was

continued several times between Feb & May 2014. The orders at issue were made May 12, 2014. The agency moved its reports into evidence & rested. Mother moved to dismiss the petition per § 350, subd. (c), & then the trial court continued the hearing to allow the agency to provide the drug tests the trial court had previously requested. The hearing resumed 3 days later. After the drug test were considered, the juvenile court denied mother's request to dismiss, sustained the allegation against mother based on her drug use & detrimental home environment, declared the children dependents, removed them from mother, & placed the children with their respective presumed fathers [the 2 oldest with 1 father & the youngest with another father].

The appellate court found none of the trial court's efforts to obtain the missing drug test violated mother's due process. In fact, the trial court is authorized to question witnesses & to call witnesses on its own motion. Given this latitude, the court acted properly given it is not only the right but the duty of a trial judge to bring out the facts so the important functions of her/his office may be fairly & justly performed. As for order to continue the hearing, the Court of Appeal held the trial court has the power to "control all proceedings during the hearings with a view to the expeditious & effective ascertainment of the jurisdictional facts." Mother did not, & according to the appellate court, could not argue the continuance was contrary to the children's best interest & she failed to show she was prejudiced. Consequently, any error was harmless. Mother's objection to the dismissal of the § 350, subd. (c), motion was based on the timing – after the trial court received additional evidence from the agency. The appellate court held the trial court acted well within its discretion & the record showed no abuse of discretion.

In re J.C. (2014) 233 Cal.App.4th 1 (2d Dist., Div. 8)[Los Angeles]
When father had a short time at sobriety & appeared to encourage mother to use drugs, jurisdiction was proper & placement order was supported by substantial evidence. Father challenged jurisdiction & disposition orders after the court granted reunification services to father but denied placement. The dependency began when J.C. tested positive for methamphetamine at birth. The petition alleged the positive drug test of J.C., mother's long history of drug abuse & father's failure to protect J.C. from mother's drug use. Father asserted on appeal the trial court erred because there was insufficient evidence he knew of mother's drug use, he could not have done anything to stop her & there was no evidence he posed a risk of harm to J.C. Relying on inferences from father's statements that he

believed mother used drugs last when he used last in August 2013, the trial court concluded father was still doing drugs with mother when she was more than 5 months pregnant, with a child he believed was likely his own. The trial court concluded &, the appellate court agreed, this inference gave rise to another conclusion – instead of taking steps to stop mother's drug use during the pregnancy, father abetted & encouraged it. The Court of Appeal was not convinced by father's challenges to these inferences.

As for disposition, the appellate court held that father's 7 months of sobriety, given his years-long struggles with drug abuse was insufficient to show father was immune from relapse, which had happened in an earlier case involving his 2 older children. Further, the parents had a history of domestic violence as recently as 2012 & father had never received any mental health evaluation. Given these factors, the Court of Appeal held there was substantial evidence that J.C. would be at risk if he were returned to father. [R. Keller]

In re Quentin H., et al. (2014) 230 Cal.App.4th 608 (2d Dist., Div.7) [Los Angeles]

Even with a prior sex conviction, father successfully rebutted the evidence & was not a current risk to his children. Father of 8-year-old Quentin H. & 6-year-old Linda H., appealed from the jurisdiction findings & disposition order declaring his children dependents of the juvenile court. Father, who was convicted in 1987 of sexual abuse of a child under 14 years old, contended the court erred in basing its jurisdiction findings on the § 355.1 presumption of risk. The Court of Appeal agreed father adequately rebutted the presumption of current dangerousness by identifying contrary evidence in the agency's own reports. Because the juvenile court improperly relied solely on the presumption to sustain the allegations in the dependency petition relating to father, rather than evaluating the totality of the evidence in the record, the appellate court reversed & remanded with directions to consider the evidence without regard to the § 355.1 presumption.

The dependency case began because of mother's drug use. Father's children lived with mother along with 2 older minors. The petition contained counts under § 300, subds. (b) & (d) alleging in identical language solely that father's conviction in 1987 (when he was 18 years old) for forcible oral copulation with a minor under 14 years old & his status as a registered sex offender endangered his children

Father denied he was a danger to his children & moved to dismiss the petition for lack of evidence. Father argued the evidence in the agency's own reports, including the staleness of his sexual abuse conviction & statements from mother and his children, showed he was not a danger to his children. Quentin & Linda's counsel agreed the evidence was too insubstantial to support jurisdiction. The court sustained the allegations in the petition as to both parents & found Quentin and Linda to be persons described by § 300, subds. (b) & (d). As to father, the court stated the prior sex abuse conviction was prima facie evidence he was a danger to his children & the passage of time since his conviction was, by itself, insufficient to rebut that presumption found in § 355.1.

The appellate court held Richard adequately rebutted the presumption contained in § 355.1 & remand was necessary for the juvenile court to properly consider the question of jurisdiction. [A. Aslanian]

In re Francisco D. (2014) 230 Cal.App.4th 73 (2d Dist., Div. 3) [Los Angeles]
Despite finding mother was not medically negligent in the death of a sibling, the trial court properly took jurisdiction & removed the 11-year-old child because of a long history of abuse of other foster children. Mother adopted siblings 14-year-old Fabiola & 8-year-old Francisco in April 2010. Three years later, Fabiola suddenly developed diabetes, & then contracted influenza B & pulmonary mucormycosis, a rare fungal infection, & she died shortly thereafter in March 2013 from multiple organ failure. The agency filed a petition for Francisco alleging mother's medical neglect of Fabiola, mother's refusal to disclose Francisco's whereabouts, & his vulnerability due to autism put him at risk of harm. During its investigation, the agency found a long history of mother's abuse of foster & adoptive children including a pattern of emotional, verbal & physical abuse. In particular, Fabiola disclosed consistent use of derogatory names, beatings, & the requirement that she perform all the housework & cooking for the household causing Fabiola to run away several times. These findings were confirmed by neighbors, family members, a former foster child removed from mother along with a pattern of 28 referrals. The juvenile court held mother did not medically neglect Fabiola but sustained the allegations of abuse of Francisco under § 300, subds. (b) & (j). Finding substantial danger existed to the physical health of Francisco, that Francisco

suffered severe emotional damage, & no reasonable means existed to protect Francisco he was removed from mother's custody.

The appellate court held that because Fabiola was subjected to acts of cruelty by Mother, she was thus abused as described under subd. (i) satisfying the 1st prong of subd. (j)'s analysis. As evidenced by mother's 15-year-long history of referrals & the removals of 5 children from her custody, Mother's abuse is pervasive in her parenting. These facts were combined with the increased risk from Francisco's vulnerability due to his autism, which, as noted by the juvenile court, made him less likely to identify abuse to others. Based on these findings, the appellate court affirmed the jurisdiction & disposition orders.

As for the ICWA, mother claimed she was a member of an Indian tribe. However, the evidence showed Francisco is not a member of an Indian tribe, nor is he the biological child of a member of a tribe. Consequently, Francisco cannot satisfy the definition of an Indian child & the ICWA did not apply. [R. Keller]

DISPOSITION

Removal

In re D'Anthony, D, et al. (2014) 230 Cal.App.4th 292 (2d Dist., Div.3) [Los Angeles]

Where trial court used the proper burden of proof despite ignoring the correct statute, the denial to place the children with father was proper. Children aged 7 & 5 years old were removed from mother's based on her drug abuse & inadequate supervision. Father lived in Mexico with his wife & newborn son. Father appeared in court prior to jurisdiction & requested custody of the children. During the investigation re: placement with father, the agency found father used a belt & his hands to physically discipline his 7-year-old son when D'Anthony was visiting in Mexico. D'Anthony testified to the same during the disposition hearing. Despite a positive report from Desarrollo Integral de la Familia (DIF) in Mexico, the trial court refused to place the children with him. The court made no analysis re: placement with a noncustodial parent per § 361.2. The appellate court found this failure to analyze placement under this statute was error but held it was harmless. Since the juvenile court held placement with father posed a substantial danger per § 361, subd. (c), this finding based on clear &

convincing evidence was sufficient to comply with the requirements of the correct statute. The opinion reviewed 2 other cases with differing holdings about whether § 361.2 requires a non-custodial parent to also be non-offending. This Court declined to include the requirement that a parent also be non-offending for placement.

Placement with Non-Custodial Parent

In re C.M. (2014) 232 Cal.App.4th 1394 (2d Dist., Div. 8) [Los Angeles] **The Court of Appeal reversed finding insufficient evidence of detriment in placing the child with father even though the child wanted to remain at her grandmother's home**. Father, the noncustodial and nonoffending parent, appealed from the dispositional order granting physical custody of now 14-year-old child to the maternal grandparents. Both the child & the agency filed respondents' briefs in support of the order. The Court of Appeal agree with father that there was insufficient evidence that placement with father would be detrimental to the child per § 361.2, subd. (a). Accordingly, the appellate court reversed & remanded. A petition was filed after mother was arrested on January 9, 2014 following an incident in which she pushed maternal grandmother to the ground causing her to lose consciousness & mother threw a vase at a maternal aunt causing injuries which required surgery to repair severed tendons. At detention, father requested the child be placed with him. The child's counsel filed a motion requesting the child not be released to father without a hearing & a full report stating C.M. "is terrified of being released to her father." At the disposition hearing, the juvenile court found it would be detrimental to place C.M. with father, in a home in which she had never lived. The court explained: "I don't think [C.M.] is comfortable with her father because he's not been in her life for whatever reason. According to father, he was kept from C.M. by the mother & maternal grandmother.

Father argued the trial court failed to find clear & convincing evidence of detriment as required by § 361.2, subd. (a). While the child's wishes, sibling bonds & the child's relationship with the noncustodial parent may be considered by the juvenile court in determining whether placement of a dependent child with a noncustodial, nonoffending parent would be detrimental to the child's physical or emotional well-being, none of these factors is determinative. The trial court relied on the fact that C.M. wanted to remain with her grandmother, had never lived with father, did not want to be separated from her half-sibling, & father worked long hours which

meant C.M. would be in her step-mother's custody. The Court of Appeal reversed the detriment finding & remanded the matter with directions to hold a new dispositional hearing on the issue of placement of C.M. with father under § 361.2, subd. (a).

In re A.B. et al. (2014) 230 Cal.App.4th 1420 (1st Dis., Div.1) [Marin] **Mother was not entitled to an evidentiary hearing to request reunification services even when the court requested a home visit of the previously noncustodial parent after placement**. The appellate court held mother did not have an absolute due process right to contested evidentiary hearings before the court could (1) deny her family reunification services in first child's case, or (2) dismiss the proceeding and make exit orders in second child's case.

Minor A.B., now 13 years old, has autism & his half sibling, Z.B., is now 9 years old. In December 2012, Z.B. was found alone outside crying & fearful of mother. The children were detained after police described mother's home as containing drug paraphernalia, was in filthy condition, & mother was arrested for possible child endangerment. Each child's presumed father requested custody of their child & the children were placed with their fathers.

Children were removed from their mother & placed with their fathers pursuant to § 361.2. After a contested disposition hearing, the dependency court upheld the removals, ordered the fathers to assume custody of the minors, declined mother's request for reunification services, & ordered the agency to conduct home visits & provide reports within three months pursuant to § 361.2, subd. (b)(2). These rulings were upheld in an earlier appeal.

The appellate court found due process did not require the court to hold an evidentiary hearing to allow mother to request reunification services even if the court ordered a home visit with a previously noncustodial parent. The issue of whether mother should receive family reunification services had recently been litigated in a contested hearing, & neither the agency nor the minors' counsel had changed their views. The Court of Appeal rejected mother's position she had an absolute due process right to contested evidentiary hearings before the court could deny her reunification services under subd. (b)(3) in Z.B.'s case or dismiss the proceeding and make exit orders under subd. (b)(1) in A.B.'s case. Trial court's orders were affirmed.

In re Jaden E. (2014) 229 Cal.App.4th 1277 (1st Dist., Div. 4) [San Mateo]
The trial court was not required to make a reasonable services finding since the child was placed with a non-custodial parent & mother was offered reunification at the discretion of the court & the facts supported the finding mother would not reunify in next 6 months. The facts of the underlying case were not published other than the child was removed from mother & placed with the non-custodial father. At the disposition hearing, mother was granted reunification services. The sole issue on appeal is whether, when reunification is granted under § 361.2, subd. (b)(3), the trial court is required to make a reasonable services finding at a subsequent hearing. The opinion reviewed the background & case law involved. The Court of Appeal held that the rules entitling a parent to reasonable reunification services "are inapplicable when a child is removed from the custody of one parent and placed with another under section 361.2." In addition, the failure to provide adequate reunification services to the other parent does not prevent the court from terminating jurisdiction under section 361.2. Finally, reunification offered to a previously custodial parent under § 361.2 are wholly discretionary and analytically distinct from the mandatory reunification efforts required by § 361.5. The appellate court held the juvenile court's order ending mother's services was otherwise supported by substantial evidence. The Court of Appeal concluded that at the time of the 6-month review, in May 2013, mother did not have the potential to provide a safe, stable, or permanent home for Jaden. Moreover, it was evident it was in Jaden's best interests to focus on father as the parent most likely to retain later custody without juvenile court supervision. Mother had made no progress in solving the problems that led to Jaden's initial removal; continued to obstinately & belligerently maintain she did not require any services; & she remained completely oblivious to the significantly detrimental impact her actions were having on her son.[L. Barry]

Reunification Orders

In re D.H. et al. (2014) 230 Cal.App.4th 807 (3d Dist.) [Butte]
Trial court's orders to bypass of reunification to father was upheld as to 1 of 2 basis, which was sufficient. Father appealed determination to deny him reunification services with the minors, now 16–year–old D.H. & 7-year-old T.H. The trial court found two reunification bypass provisions applied, that (1) father had previously had reunification services & his parental rights terminated to the minors' half siblings & father had not made

reasonable efforts to treat the problems that led to the removal of the half siblings [§ 361.5, subds. (b)(10) & (11)] & (2) father was incarcerated & the provision of services would be detrimental to the children (§ 361.5, subd. (e)). Father contended these bypass provisions did not apply. The Court of Appeal agreed as to failure to reunify with sibling. The Court held there was not sufficient evidence to support the finding father had not made reasonable efforts to treat the problems that led to the removal of the half siblings, because the record showed the problems that led to the removal of the half siblings (unsafe & unhealthy conditions) were different from those presented in this case (alcohol abuse, anger management problems & domestic violence); nor did the record establish any connection between the two sets of problems or even that father received services in the prior case for the problems manifest in the present case.

However, the appellate court found sufficient evidence to support the finding that father was incarcerated and it would be detrimental to the minors to provide services. Accordingly, the Court affirmed the orders of the juvenile court. [J. Love]

Exit Orders

In re Cole Y. (2015) 233 Cal.App.4th 1444 (2d Dist., Div.1) [Los Angeles] **Exit orders may not limit the family court's ability to modify custody & visits on whether father completed specific services**. After removing 5-year-old child from father based on drug abuse, the trial court declared Cole a dependent, terminated the dependency with family law exit orders which granted physical custody to mother & monitored visitation to mother, & required father to complete various counseling programs as conditions to modifying the custody order. Father appealed & asserted the juvenile court did not have authority to condition modification of exit order on proof of father's completion of certain programs & counseling & the Court of Appeal agreed. The appellate court affirmed the jurisdiction order but held the disposition must be reversed to the extent it conditioned the family court's modification of the juvenile court's custody & visitation exit order upon proof of Father's completion of drug & parenting programs & counseling.

Although the juvenile court has authority to issue collateral orders in crafting an exit order &, consequently, the juvenile courts may require participation in counseling & other programs in an exit order. The issue in

this appeal is whether the juvenile court had authority to condition the family court's modification of an exit order upon the completion of counseling & other programs The decision to modify an exit order was, & is, within the province of the family court, & then only upon a finding of "significant change of circumstances" & that the modification is in "the best interests of the child." Consequently, the juvenile court did not have authority to condition the family court's modification of the exit order upon father's completion of drug & parenting programs & counseling.

In re Maya L. (2014) 232 Cal.App.4th 81 (2d Dis., Div. 7) [Los Angeles] **The trail court made the proper findings despite relying on the incorrect statute & substantive evidence supported the order placing the child with father & ending jurisdiction**. The dependency began after 4-year-old Maya fell from the trunk of a moving car during an altercation between mother & aunt following a Thanksgiving celebration during which mother drank excessive alcohol. Mother was arrested for assaulting the aunt, child endangerment & public intoxication. Maya was removed from mother & placed with father. At the 6-month review hearing, the trial court terminated jurisdiction & entered a family law orders giving father physical & legal custody of Maya. Mother appealed.

Father was not named in the petition &, at the detention hearing, Maya was removed from mother & placed her father. According to father, who was not in a relationship with mother & had a wife, mother had unresolved alcohol & mental health issues. At jurisdiction, the juvenile court sustained a single allegation that mother had an unresolved history of alcohol abuse. The trial court found the Thanksgiving incident was an isolated event that did not place Maya at substantial risk of future harm. The court ordered reunification services to mother & ordered father to participate in family maintenance services. During the case, mother filed 3 separate 388 petitions, each requesting custody of Maya or liberalized visitation. Each was denied including the final 388 petition which was heard at the 6-month review hearing. Mother's behavior throughout the case was erratic & agency reports described mother trying to intimidate the social workers, blaming the agency, the aunt & father for the dependency case, & refusing to discuss her fault in any way.

At the 6-month review hearing, the trial court applied the standards in § 364. Mother argued the standards set forth in § 366.21, subd. (e), applied & required Maya be returned to mother unless doing so was detrimental to

Maya. The appellate court found neither standard was correct. Section 364 governs when "a child under the supervision of the juvenile court ... is not removed from the physical custody of his or her parent or guardian." Next the Court of Appeal found that although § 366.21, subd. (e), governs when a child has been removed from the custody of a parent, the trial court is not required to return to the custodial parent absent detriment as argued by mother. The statute includes a separate paragraph describing the procedures used at a 6-month review hearing for a child who was removed from a custodial parent & placed with a non-custodial parent pursuant to § 361.2. In such a situation, the juvenile court must "determine whether continued supervision is necessary."

In holding the trial court did not abuse its discretion in awarding custody to father the appellate court found the record contained overwhelming evidence father provided excellent care & father & daughter shared a strong, loving bond. The same record showed that even after completing a parenting course & participating in months of anger management therapy, mother continued to display erratic, aggressive behavior toward the agency while in the presence of Maya. The trial court heard testimony from mother & concluded she was not credible & continued to deflect responsibility. [K. Dodd]

In re Daniel B., et al. (2014) 231 Cal.App.4th 663 (2d Dis., Div. 7) [Los Angeles]

The trial court may order a custodial parent to complete services but may not leave the decision for when a parent has completed these services to the program providers. After the agency filed a petition, the trial court declared two children dependents of the court, removed them from the custody of their father, & released them to mother with family maintenance services. Mother appealed & asserted the juvenile court erred in ordering her to participate in a domestic violence support group for an open-ended period & in delegating to the program's counselors the authority to decide how long she would be required to attend the program. The appellate court agreed & reversed this portion of the disposition order & remanded with instructions.

The dependency began when father stabbed mother in the shoulder while she was pregnant & holding their 1-year-old child. At disposition, the juvenile court ordered both Daniel & Damian be removed from father & placed with mother under the supervision of the agency. The trial court

made it clear mother needed help with her decision to stay with father after the domestic violence. The court ordered mother to attend a support group for victims of domestic violence, a parenting class, & individual counseling but purposely declined to specify the duration of these services. Given that mother & father expressed a desire to reconcile their marriage by the time of the disposition hearing, the juvenile court acted reasonably in concluding mother's participation in a group program for victims of domestic violence was necessary to ensure the safety of the children. The appellate court held the trial court did not err in failing to set a time limit for mother's treatment. However, the court erred in appearing to leave the determination of an end date for mother's participation, as well as the basis for that determination, entirely in the hands of the program's counselors. In granting the program's counselors unfettered discretion to decide, based on their own criteria, when as to when mother had satisfied her court-ordered case plan the juvenile court erred. In light of these statements, the appellate court concluded the proper remedy was reversal of this portion of the disposition order & remand to issue a new order for a domestic violence program under terms consistent with the Court's opinion.

PRELIMINARY/CONTINUING CONSIDERATIONS

The Indian Child Welfare Act (ICWA)

In re H.G., et al. (2015) 234 Cal.App.4th 906 (2d Dist., Div.6) [Ventura]
Eskimo families are included in the ICWA & the trial court orders were reversed to comply with the ICWA & its heightened standards. The juvenile court & the agency believed the Indian Child Welfare Act (ICWA) did not apply. Evidence submitted for the first time on appeal, however, establishes the children, who are of Eskimo descent, are Indian children under the ICWA. Three years before, father submitted an ICWA–020 form claiming possible Eskimo heritage. The agency informed the juvenile court the ICWA did not apply to Eskimo families & the juvenile court agreed & found the ICWA inapplicable. The agency conceded this was error since the federal definition of "Indian" includes "Eskimos and other aboriginal peoples of Alaska." To avoid remand, the agency sent notice to 4 tribes & the tribes confirmed the children were eligible to enroll & father then enrolled as a member of the tribe. After finding the ICWA did not apply, the juvenile court failed to comply with the heightened requirements of the ICWA in terminating parental rights & the tribe was not afforded an opportunity to intervene. Accordingly, & as the agency conceded, the order terminating parental rights must be reversed &

the matter remanded for a new section 366.26 hearing in compliance with the ICWA. Recognizing its decision further delays permanency for these children, the Court of Appeal found it "cannot conclude that the prospect of such a delay excuses non-compliance at the expense of those that ICWA is intended to protect." The appellate court urged the juvenile court & the parties to expedite resolution of these proceedings on remand.

C.F. v. Superior Court (2014) 230 Cal.App.4th 227(1st Dist., Div. 4) [Mendocino]

Where social worker took steps to assist mother by meeting & encouraging her & pursuing drug treatment for mother, the appellate court held active efforts were made as required by the ICWA. Mother & her 3 children are registered members of a tribe. The children, then aged 8, 7 & 3 years old, were detained because of mother's drug abuse & a home without the necessities including no refrigerator, no running water, nor adequate food. At jurisdiction, the trial court found the allegations true. The children were detained & placed with relatives with the approval of the tribe. Mother was granted 12 months of reunification services & she repeatedly attempted to enter residential drug treatment. Mother visited sporadically throughout. At the 12-month review hearing, the court ended reunification services & set a section 366.26 hearing. Mother filed a statutory writ & challenged the finding she had been given reasonable reunification services. The appellate court found under California law, there is no significant difference between "active efforts" required by ICWA and "reasonable services" required in both ICWA and non-ICWA cases. Finding the reasonableness of reunification services is reviewed under the substantial evidence standard of review & finding no reason to depart from this rule, the Court of Appeal held the proper standard for whether active efforts were provided is reviewed under substantial evidence. The phrase "active efforts," construed with common sense & syntax, seems only to require that timely & affirmative steps be taken to accomplish the goal of the ICWA: to avoid the breakup of Indian families. Distinguishing between passive & active efforts, the Court of Appeal held active efforts is where the social worker takes the client through the steps of the plan rather than requiring the plan be performed on its own. Reviewing the actions of the social worker, the Court found active efforts. The social worker encouraged mother to participate in her case plan, made repeated attempts to meet with mother, reviewed the case plan with mother at least twice, was in contact with possible residential treatment programs, & assisted mother in trying to find housing. The petition was denied on the merits.

Paternity

Adoption of Baby Boy W. (2014) 232 Cal.App.4th 438 (4th Dist., Div. 1) [San Diego]

When father took immediate & sustained action to assume custody of his child during the pregnancy & refused to agree to adoption he is a *Kelsey S.* father. Young father found to be a presumed father by qualifying as a *Kelsey S.* father. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816.) Mother & father are unwed biological parents of Baby Boy who met in college & unintentionally became pregnant. During the pregnancy, father filed petition to establish his paternity. Mother filed, & the adoptive parents eventually joined, a petition to terminate father's parental rights. The trial court found father established his paternity rights under *Kelsey S.*, denied appellants' petition, & entered judgment in father's favor, thereby halting the Hs' adoption of Baby Boy. The mother & adoptive parents appealed asserting the trial court misunderstood *Kelsey S.* & there was insufficient evidence to support the *Kelsey S.* findings.

During the 1st 4 months of the pregnancy, mother & father communicated about how to proceed & father consistently rejected adoption. Much of this communication was through text messages reviewed by the trial court. By the 6th months of pregnancy, the couple was no longer communicating because of the disagreement over adoption. Around this time, mother interviewed the H.'s & she informed them father objected to the adoption.

Father filed a paternity action in San Diego. Mother filed a petition to terminate father's parental rights. A DNA test confirmed father was the biological parent of Baby Boy. The trial court consolidated the actions & stayed further proceedings on father's petition pending a final determination on mother's petition. Disappointed with the trial court's stay, father created an online petition urging "California law makers" to "[a]llow unmarried fathers to be able to have rights in determining the futures of their biological children," & "specifically in halting an unwanted adoption." He a also created a related page on Facebook asking readers to "Help me Keep my Child From Being put up for Adoption." These actions were not viewed favorably by the trial court.

Baby Boy was born at the end of December 2013. Mother relinquished custody of the baby the day after this birth & the adoptive parents left town. Within a week after learning of the birth, father relocated to San Diego,

found employment, continued college classes & expected to graduate in July 2014.

The trial court heard appellants' petition to terminate father's parental rights & the court found father is a presumed father under *Kelsey S*., that he is not an unfit father, & he had not abandoned Baby Boy. The trial court considered each of 7 factors identified in *Kelsey S*. & found father met these requirements. Father promptly attempted to assume parental responsibilities & was willing to assume full custody & not merely block the adoption. Father planned to rely on his family but it is clear he intended to raise Baby Boy with or without mother's involvement. He publicly acknowledged paternity & took immediate legal action & these facts were not in dispute. Father paid pregnancy & birth-related expenses to the best of his abilities as a college student. The trial court struggled the most with whether father provided emotional, physical & financial support to mother. The juvenile court held father attempted to be emotionally supportive in his own way, but lacked the maturity to do so effectively. In addition, the relationship eventually was strained because father would not agree to adoption & this could be construed as not being supportive. Despite this, the trial court held father did what he could. In finding father is a *Kelsey S*. father, the appellate court held under California law, an unwed mother does not have an unqualified, unilateral right to decide her baby will be adopted & to deny the biological father his right to parent his child. The judgement was affirmed. [J. Tavano]

In re D.S. (2014) 230 Cal.App.4th 1238 (6th Dist.) [Santa Clara]
A biological father did not do all he could to be a parent & could not overcome the step-father's presumed father status. The juvenile court initially found stepfather to be presumed father, found biological father to be natural father, but then set aside stepfather's presumed father status. Stepfather, mother, & child appealed. The Court of Appeal held evidence established that biological father had not done all that he could have to support child & he was not entitled to presumed father status. The trial court's orders reversed & remanded.

This appeal involves competing claims for presumed father status of 4-year-old D.S. by the boy's biological father, A.V., and his stepfather, B.E. The juvenile court ruled the biological father qualified as a presumed father under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 4 Cal.Rptr.2d 615 & his step-father was a statutorily presumed father under Fam. Code § 7611,

subd. (d). As required by § 7612, the juvenile court weighed competing paternity presumptions in view of the relevant facts & ruled the biological father's presumption was founded on weightier considerations of policy & logic &, thus, controlled.

Mother & A.V. met in 2009, when mother was 19 years old and A.V. was 45 years old. Mother had just been released from jail and needed a place to stay, so she moved in with A.V., who had an extensive criminal history. Mother began prostituting at A.V.'s request, as she had done in the past. Mother became pregnant in early 2010. Mother told A.V., who was then incarcerated, that she believed he was the father. Shortly afterwards, mother moved in with her boyfriend, B.E. Four months later, D.S. was born & 2 months after that, B.E. & mother married. Three months after D.S. was born, mother filed a confidential parentage action naming A.V. as the alleged father. Days later, A.V. was released from custody & attempted to file a paternity action. He was informed a parentage action already was pending but mother had never served him. Apparently nothing happened in the case until A.V. filed a response over a year later, in January 2012.

Meanwhile, A.V. saw D.S. on three occasions before he was incarcerated once again in the spring of 2011. During one of the visits, A.V. gave mother $20 for diapers. According to mother, during the 3dvisit A.V. tried to kiss her against her will & made threats against B.E. The dependency began after mother "lost" the children & B.E.'s mother located the children & then filed for guardianship in probate court. The probate court referred the case to the dependency court. At the initial detention hearing, the trial court held B.E. was D.S.'s presumed father & kept his placement with his step-paternal grandmother. A.V. requested a DNA test which confirmed he was D.S.'s biological father. A.V. filed a motion to set aside the finding that B.E. was D.S.'s presumed father. The trial court held A.V. was a presumed father per *Kelsey S.* & set aside the presumed father status of B.E. The trial court then ordered the child placed with mother with visits for A.V.

On appeal, B.E., D.S., & mother contend the juvenile court erred in finding that A.V. qualifies as a presumed father under *Kelsey S.* The agency submitted a letter brief but took no position.

The appellate court held a father whose own bad decisions preclude him from carrying out his parental responsibilities did not satisfy the high bar set by *Kelsey S.* but the Court declined to decide whether a father's

incarceration was among the relevant *Kelsey S*. "circumstances." The dependency court itself found that A.V. "ha[d] not done all that ... he could have done" to support D.S. That finding was supported by substantial evidence, including evidence that A.V. provided only minimal financial support to D.S., threatened one of D.S.'s caregivers (B.E.), and did not vigorously assert his legal rights until the agency was required to step in to safeguard D.S.'s well being. The trial court's finding that, in fact, A.V. did not do all that he could have done precluded a finding that A.V. is a presumed father of D.S. The court erred in ruling otherwise. [N. Gold (mother); J. Braden (father)]

UCCJEA

Ocegueda v. Perreira (2015) 232 Cal.App.4th 1079 (3d Dist.) [Yolo]
If a child is less than 6 months old, a child's home state is the state where he/she was born regardless of short travel to another state.
Father filed parentage action for a child born in Hawai'i. After mother notified court she would be filing a parentage action in Hawai'i, the trial court found California was child's home state & California had jurisdiction to make initial custody determination. Mother appealed. The Court of Appeal held California could not be considered the home state of child; as a matter of first impression, a child must have been physically present in a state to confer home state jurisdiction; mother's alleged subjective intent to move back to California after giving birth to child was irrelevant to determination of where child lived; & child's appearance in California prior to commencement of parentage proceedings did not affect determination that child lived in Hawai'i and Hawai'i had home state jurisdiction.

Mother lived & was employed in California before the birth & planned to return to California, the child lived 6 weeks in Hawa'ii. The day after mother returned to California father filed a parentage action. Shortly afterwards the parties stipulated to joint custody, set a shared parenting plan, & agreed not to travel out of California without the consent of both parties or a court order. In less than 10 days, mother notified California she would be filing a parentage action in Hawa'ii. The California court contacted the Hawa'ii court for purposes of the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) & issued an order that the two court agreed California had jurisdiction over the child.

The Court of Appeal found California cannot be the home state because the child was born in Hawaii. The statute is clear: "In the case of a child less than six months of age, the term [home state] means the state in which the child lived from birth with a parent. The next issue is whether the child's fleeting appearance in California affected home state jurisdiction. The appellate court concluded the child's appearance in California 24 hours prior to commencement of these proceedings did not affect home state status. Finally, the appellate court held Hawa'ii had not declined to exercise home state jurisdiction. Jurisdiction was reversed & all custody orders previously issued in Yolo County were void.

388 PETITION

In re Priscilla D. et al. (2015) 184 Cal.Rptr.3d 468 (5th Dist.) [Fresno] **The trial court had authority under § 388 to end the guardianship with relatives & return the children to mother**. Mother contended, & the appellate court concurred, the juvenile court erred in ruling her § 388 petition was not the proper vehicle to change its order placing the children in guardianship. The children, then aged 14, 9, & 2 years old, were placed in a guardianship with their maternal uncle & aunt in 2010 based on mother's abuse of phencyclidine (PCP). In August 2013, mother filed a § 388. She had completed substance abuse treatment & parenting classes, maintained her sobriety for three years & attended AA/NA meetings, she had liberal visitation with the children including every weekend & all school breaks, including summer vacation. She asserted she had established a permanent & safe home & the children wanted to return to her care & be reunited as a family. The uncle & aunt disagreed. The juvenile court denied mother's § 388 petition finding it was not the proper vehicle to end the guardianship. Finding "[a] decision that rests on an error of law constitutes an abuse of discretion," the Court of Appeal found the juvenile court erred in deciding it lacked authority under § 388 to terminate the relative's guardianship & return the children to mother with family maintenance.

In re L.S., Jr., et al. (2014) 230 Cal.App.4th 1183 (3d Dist.) [El Dorado] **Trial court erred in applying a higher burden of proof to modify bypass orders & the ICWA was not complied with & reversal was required**. Following contested dispositional hearing, parents filed a motion to modify the bypass order & sought reunification services. The trial court denied the motion & terminated parental rights. The parents appealed. The Court of Appeal held preponderance of the evidence applied to parents'

petitions for modification & it was error to apply the heightened clear and convincing evidence standard& the error was not harmless. Further, the appellate court held errors in the ICWA notice required reversal.

The family including 6 & 8 year old children came to the attention of the agency because the family was homeless. Initially, the children were not detained. Two weeks after the parents agreed to a voluntary plan, the mother called & asked for the children to be placed in foster care because the family remained homeless. The agency filed a 387 petition & detained the children. Mother admitted she & father had relapsed into methamphetamine use. At the contested disposition hearing, the court bypassed reunification services based on failure to reunify with a sibling & on the parents' resistance to court-ordered drug treatment. The court set a § 366.26 hearing.

Two days before the scheduled § 366.26 hearing, the parents filed petitions to modify the court's bypass order seeking an order for reunification services. The parents alleged, as changed circumstances, they were actively participating in services on their own & father was employed. At the hearing October 2013, the parties discussed the proper burden of proof for the petitions for modification of the prior bypass order. The trial court concluded the appropriate burden for the hearing was clear & convincing evidence. The court denied the petitions for modification.

The appellate court held a petition per § 388 has a burden of proof of preponderance of the evidence even though some specific parts of § 388, not relevant to the appeal, have a higher burden. Because § 388 did not permit application of the clear and convincing burden of proof to the parents' petitions for modification, the juvenile court abused its discretion in requiring them to meet the higher burden of proof. The appellate court held the error was not harmless given the extensive evidence received & the stated reliance on the incorrect burden. Remand was necessary to permit the court to determine the issues applying the correct burden of proof.

At the jurisdiction hearing on the § 387 and § 342 petitions, the parents provided the ICWA–020 forms in which mother claimed Blackfoot heritage & father claimed Cherokee heritage. According to the disposition report, the parents denied Sioux heritage, but claimed Cherokee heritage. The agency sent notices to the Cherokee tribes which included information on father's ancestry, but did not send notice to any other tribe or provide any ancestral

information for mother. Because the facts of mother's claim & the notice required were unclear, the Court of Appeal declined to imply the court found the ICWA did not apply. Neither the agency nor the court performed the duties required under the ICWA. [P. Saucier]

In re Ernesto R. (2014) 230 Cal.App.4th 219 (2d Dist., Div. 6) [Santa Barbara]
A trial attorney is not required to file futile motion even when some evidence made support the motion. The 1-year-old Ernesto was removed from mother based on her chronic drug abuse. Mother was offered reunification services from 2009 to 2011 for an older child but she was non-compliant. Mother had lost 2 older siblings because of her drug use & she used drugs during her pregnancy with Ernesto. Reunification services were bypassed based on § 361.5, subds. (b)(10), (11) & (13) & a § 366.26 hearing was set. Prior to the hearing mother filed an "Offer of Proof" alleging numerous changes in her life – 13 listed items in all. On appeal, mother claimed ineffective assistance of counsel for failure to file a § 388 petition. The Court of Appeal distinguished the case cited by mother, *In re Eileen A*. (2000) 84 Cal.App.4th 1248, & found mother's petition was a "clear loser" instead of a "clear winner" as was found in *Eileen A*. Finding mother's chronic drug abuse presented a life-long challenge, the absence of a § 388 petition was not evidence the trial counsel conduct fell below an objective standard of reasonableness. The appellate court held "defense counsel is not required to make futile motions or to indulge in idle acts to appear competent." The judgement terminating mother's parental rights was affirmed.

In re J.P. (2014) 229 Cal.App.4th 108 (4TH Dist., Div. 1) [San Diego]
Where court erred in refusing to hold a 388 hearing before the 6-month review hearing, the error was not reversible because the child did not challenge the findings made at the 6-month review hearing. J.P. was severely abused by mother's boyfriend & spent a month in the hospital while she recovered from a pancreatic injury, malnourishment, & at least 38 fractures, including a fractured hip, which were deliberately inflicted. J.P. is now 6 years old & she was the result of a brief romance between mother & father while father was separated from his wife. Prior to the case, father last saw J.P. a year before. Mother was denied reunification services but father was granted reunification & began to visit J.P. Initially, J.P. saw him as a stranger & did not feel safe with him. Given the distance to attend visits & his need to work to support his wife & 3 children, father struggled to

comply with reunification. After cancelling several visits & filing for bankruptcy, J.P. filed a 388 petition requesting visits be suspended & reunification ended early. J.P. told everyone in her life she did not want to visit father. The juvenile court found it was required to hold the 6-month review hearing before it could grant a hearing on the child's 388 petition. Once the 6-month review hearing ended, J.P. renewed her motion for a hearing on her 388 petition. The trial court then found the petition did not make a prima facie showing & denied it.

The appellate court held the trial court erred in requiring the 6-month review hearing be held before the 388 petition. Reviewing the issue under a de novo standard of review, the Court of Appeal held it is not premature to consider terminating reunification services to a parent prior to the 6-month review hearing because § 388, subd, (c) requires the juvenile court to make a reasonable services finding before it may terminate reunification services to a parent. Further, a hearing on the merits of a petition to terminate a parent's reunification services prior to the 6-month review hearing does not violate due process.

The Court next considered whether the child's 388 petition made a prima facie finding. Afer reviewing father's actions, the Court of Appeal found father had not shown much interest in, or progress towards, developing a safe and supportive home for J.P., & it was therefore in her best interest to shift the focus of her case from reunification to permanency and stability. As a result, the juvenile court erred in denying a hearing on J.P.'s petition. However, despite this, the Court found the error did not require reversal because J.P. did not challenging the findings made at 6-month review hearing. The juvenile court found visits were not detrimental & father was making substantive progress with reunification. The lack of any challenge on appeal to those findings required the Court of Appeal to conclude a result more favorable to J.P. would not have been reached in the absence of error. [P. Saucier (appellant-child); N. Gold (resp.-father); E. Alexander (resp.-mother)]

MISCELLANEOUS

Family Code Adoption

Adoption of I.M. (2014) 232 Cal.App.4th 40 (2d Dist., Div.8) [Los Angeles]

Appellate court affirmed finding father's consent was not necessary for the child's adoption by the step-father because he had been absent but the trial court was not required to find an intent to abandon. Mother & father were in a relationship between 2002 & 2005. I.M. was born in 2003. Mother met step-father in 2006 & the 2 were married in 2008. In 2010, I.M.'s last name was legally changed to step-father's last name. In a proceeding under Fam. Code § 8604, the trial court determined father's consent was not necessary for the stepfather's adoption of I.M. The presumed father appealed. The minor filed a respondent's brief in which the step-father joined.

In January 2013, step-father filed a request to adopt I.M., then 9 years old. The agency contacted father, who was incarcerated, & he refused to consent. In July 2013, step-father filed a petition requesting an order freeing I.M. from father's custody & control based on Fam. Code § 8604. The petition alleged father had not had any contact with I.M. since 2006.

In his appeal, father challenged his absence at the hearing based on Pen. Code § 2625 & asserted ineffective assistance of counsel for failing to object to father's absence. The appellate court found Pen. Code § 2625 did not apply because the proceedings were under Fam. Code § 8604 & not Fam. Code § 7822. Section 8604 deals with whether the consent of a birth parent is needed for adoption. A hearing based on this section does not terminate parental rights. Section 7822 makes abandonment an independent ground for termination of one or both parents' rights when the evidence shows the parent abandoned the child. Based on this distinction, Pen. Code § 2625 did not apply & since father's presence was only discretionary, any objection by trial counsel to proceeding without father would have been futile. As a result, father's attorney did not provide ineffective assistance of counsel.

Father challenged the court's findings base on § 8604. The juvenile court held father was a parent within §8604, subd. (b), because he had left I.M. with mother for a period greater than one year, he had failed to communicate with I.M. & pay for her care during that time. In addition, father's failures to communicate & pay support were willful & without lawful excuse. Consequently, the court ordered the consent of father was not necessary for the adoption to proceed & no further notice of the proceedings needed to be given to father. Finding this was not the equivalent of terminating father's parental rights, the court held the juvenile

court was not required to make a finding of intent to abandon under Fam. Code § 7822 or of parental unfitness under *Kelsey S.* (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816.) [V. Lankford (father); J. Chocran (child)]

Commissioner v. Referee

In re Angelina E. (2015) 233 Cal.App.4th 583 (2d Dist., Div.1) [Los Angeles]
Where superior court orders cross-assignments between commissioners & referees, the Commissioner had authority to make orders denying mother's § 388 & terminating parental rights. Mother contended Commissioner Castro was not authorized to act as a referee conducting juvenile court proceedings &, consequently, her orders denying mother's 388 petition & termination parental rights were void. After reviewing the Government Code & several orders from Los Angeles Superior Court re: commissioner & referees, the appellate court concluded Commissioner Castro had authority to make the rulings she did. The parties agree only judges, referees, & temporary judges may preside in juvenile dependency proceedings. As a result of prior orders, Commission Castro was cross-assigned as a referee, subject to her being qualified. The appellate court presumed the Commissioner was found qualified as part of the court's official duties. [J. Shargel]

De Facto Parent

In re M.M. (Feb 9, 2015, No. C075687) ___ Cal.App.4th ___ [2015 WL 1182924] (3d Dist.) [Sacramento]
When a de facto parent qualifies as a prospective adoptive parent, notice & a chance to object are required before removal. Appellant, de facto parent of minor M.M., appealed from the juvenile court's order removing the minor from her home at the § 366.26 hearing. She contended, & the Court of Appeal agreed, she was entitled to notice & a hearing prior to the minor's removal, & the juvenile court abused its discretion in summarily ordering removal. In addition, removal was an abuse of discretion as it was unsupported by the evidence in the then-existing record. The appellate court vacated the orders and remanded with instructions.

Child was placed with the de facto parent a month after her birth. The parents were granted reunification but after 6 months, the agency recommended termination of services. When appellant expressed

reservations as to whether she wanted to adopt, the agency asked the aunt is she wanted placement & the aunt was interested in adoption. A month later, appellant told the agency she wanted to adopt. Reunification services were ended at the same time. Notice of the § 366.26 hearing was mailed to appellant but the notice did not indicate removal was proposed or requested. At the initial § 366.26 hearing, the trial court rejected a change in placement. At the continued hearing, the juvenile court moved the child to the aunt's house without prior notice to appellant.

The Court of Appeal found that because appellant qualified as a prospective adoptive parent, she was entitled to notice in a change in placement despite the fact she was not yet designated the prospective adoptive parent. Since appellant had no notice of the agency's intention to remove the child, & she was not represented by counsel, she had no meaningful opportunity to object to the court's actions at the § 366.26 hearing & therefore forfeiture did not apply. In addition, the error was not harmless. Finding the relative placement preference did, the Court of Appeal held the juvenile court abused its discretion. The change of placement order was vacated & the matter was remanded to the juvenile court where the agency was ordered to provide appellant with notice & the opportunity to object & to seek designation as a prospective adoptive parent.

Relinquishment to a Designated Relative

In re R.T. (2015) 232 Cal.App.4th 1284 (1st Dist., Div. 3) [Alameda] **Parents may relinquish a child & designate a relative & the agency may not ignore the relative placement preference & the trial court erred in refusing to determine if the agency abused its discretion in refusing to accept the relinquishment**. After minor child was born drug exposed, the agency filed a dependency petition & requested to set a § 366.26 hearing. The trial court denied the parents' motion to direct agency to accept their relinquishment of child for adoption by paternal relatives. Instead the juvenile court entered an order terminating parental rights & placing the child for adoption, & denied the paternal relatives' motion to modify child's placement. Parents and paternal relatives appealed denial of motion to direct agency to accept parents' rights to relinquishment & the paternal relatives appealed denial of their modification motion. Appeals were consolidated.

The Court of Appeal held the paternal relatives were entitled to preferential consideration for placement; the agency's oral advisements to paternal relatives regarding placement process did not constitute sufficient notice; the error in failing to give paternal relatives preferential consideration for placement was not harmless; & the juvenile court had authority to review for abuse of discretion agency's refusal of parents' relinquishment of their dependent child for adoption.
Although removal of the child & the parents' attempt to place him with a relative began shortly after the child's birth, the proceedings continued to where the child is now almost 2 ½ years old. The errors reflected in this record compelled the Court of Appeal to remand for further proceedings conducted under proper standards, although effective redress may or may not be possible given the passage of time spent with other caretakers and the child's current best interest.

After being born exposed to methamphetamine, marijuana, opiates, & benzodiazepines, R.T. was placed with his then 16-year-old sibling in the home of father's ex-girlfriend. Less than 2 weeks later, 2 paternal aunts requested placement of R.T. The agency later acknowledged they never considered the aunts for placement. When R.T. was 3 months old, the aunts' homes were approved for placement. When R.T. was 4 months old, in November 2012, the aunt & uncle filed a motion for placement changed based on the relative placement preference. The trial court did not rule on this motion until R.T. was 14 months old in September 2013, when it denied the motion.

During this time, on February 23, 2013, mother and father executed relinquishment & to designated the aunt & uncle as adoptive parents. On March 4, the parents submitted the forms to the agency but the agency refused to sign acknowledgment of receipt & told the parents it would accept relinquishment only if they designated the current placement as the adoptive parents. On March 22, 2013, the parents filed a motion asking the court to review the agency's "failure to comply with the law and the parents' rights to relinquishment." The trial court did not take action on this motion for 7 months until October 2013, when the court found a relinquishment of parental rights is not effective unless an adoption agency accepts it. The § 366.26 hearing was held over several days over 3 months & on January 9, 2014, the juvenile court terminated parental rights & ordered R.T. placed for adoption.

The Court of Appeal held the agency & the trial court erred in failing to apply the statutory preference for placing a dependent child with a relative. Further, the agency's oral advisement to the relatives was insufficient given the statute's mandate for written notice. Next the juvenile court erred in denying the aunt & uncle's modification motion by failing to apply the correct standards of the § 388 petition & such error was not harmless. In addition, the juvenile court erred in failing to determine if the agency abused its discretion in refusing to accept parental relinquishment of the dependent child for adoption by designated relatives. The trial court denied the motion, finding it had no jurisdiction but the appellate court did not agree the exercise of an adoption agency's discretion to refuse a parent's relinquishment of a child to a designated individual as contrary to the child's best interest was immune from judicial review.

Because the juvenile court erred in failing to apply the statutory preference for relative placement, & in failing to determine if the agency abused its discretion in rejecting the parents' relinquishment, none of the orders on appeal may stand & remand is necessary. Since the agency itself failed to consider the proper standards, the agency should be directed to submit new reports & recommendations which update the relevant facts and apply the correct standards. [K. Lee (father); S. Gorman (aunt & uncle)]

Filing of Dependency Petition

In re Michael H., Jr. (2014) 229 Cal.App.4th 1366 (2d Dist., Div. 7) [Los Angeles]

The trial court's order affirming the agency's decision to not file a dependency petition is not appealable. Dependency statutes permit private individuals, including a parent, to petition the social worker to file a dependency petition. If, after conducting an investigation, the social worker declines to do so, the concerned individual can seek review of that decision in the juvenile court. If the juvenile court affirms the social worker's decision, no dependency petition is filed. The issue in this appeal is whether the decision of the juvenile court is an appealable order. The Court of Appeal concluded it is not, & therefore dismissed father's appeals from 2 orders affirming the decisions of social workers not to commence dependency proceedings on behalf of his sons.

In 2010, following a referral that mother was physically abusing the children, the agency investigated & found both parents disciplined Michael

with corporal punishment. On August 27, 2010 the agency filed a petition on behalf of Michael & Quincy, who then were 7 & 6 years old, respectively, but did not detain the children. The juvenile court deferred to the family court & on September 10, 2010 the family law court granted mother primary custody of the children, granted father visitation & ordered him to pay child support.

In December 2012, father submitted applications pursuant to § 329 asking the agency to commence dependency proceedings. It is unclear how this was resolved. However, in February 2013 father filed another application & provided a supporting declaration in which he described his concerns about mother's parenting style, including her use of corporal punishment and lack of continuous supervision. On June 26, 2013 the agency decided not to commence dependency proceedings because "[t]here were no indications of abuse or neglect found for the children in the home" & there were "[n]o marks, injuries or any other signs to show children at risk with Mother." On July 5, 2013 the juvenile court received father's § 331 application to review the agency's decision not to commence proceedings. On July 30, 2013 the juvenile court affirmed the agency's decision & father appealed.

After of review of the appealable orders provided by statute, the appellate court concluded that if the Legislature intended an order by the juvenile court affirming a social worker's decision not to commence dependency proceedings to be appealable, the Legislature would have so stated, as it has in other circumstances. Because the Legislature has not expressly made appealable a juvenile court's order affirming a social worker's decision not to institute dependency proceedings, such an order is not appealable. Therefore father's appeals were dismissed.