APPELLATE DEFENDERS ISSUES

The Quarterly Newsletter of Appellate Defenders, Inc.

NUMBER 34 **MAY 1998**

NOTES FROM THE EXECUTIVE DIRECTOR
by Elaine A. Alexander
Executive Director

I would like to address a number of topics and recent developments, both large and small, in this edition of the column.

Usual June claims crunch

As most attorneys are aware, it is necessary claims be received by the AOC by the end of the fiscal year, June 30, in order for them to be paid from this year's budget. If they arrive later, they will be paid from the next fiscal year budget, and that will have to await resolution of any impasse that might arise between the Governor and Legislature (which in some years has gone on for weeks).

Claims must arrive at ADI by MONDAY, JUNE 22, to ensure we can ship them to the AOC by the end of the fiscal year. Claims have to go through a number of steps, and we often have about 50% more claims in June than in any other month. Although we give claims high priority, especially in June, we do need that cushion.

Evaluations to panel attorneys

We have sent a mailing to the panel describing ADI's pilot project for sending systematic evaluations to panel attorneys. To summarize the main points in the mailing:

Evaluations will be sent automatically if the case is one of the attorney's first eight on the panel or if the grade is less than satisfactory. They will be sent on request if the case is one of the attorney's first eight independent appointments, if the case is officially assisted, or if the attorney has formally been notified s/he is on probation with ADI.

(This was not mentioned in the mailing, but if an attorney for some reason does not want to receive evaluations in the two "automatic" situations, s/he should notify us in writing. Such a waiver of course leaves the attorney in no position to complain of any alleged discourtesy because of failure to warn before removal, denial of independent cases, or other action.)

The overall grade will be summarized as (a) "good or better," or (b) meeting minimum ADI standards but not "good or better," or (c) less than satisfactory under ADI standards. Comments, including strong and weak points, will follow.

The panel attorney may comment on the evaluation by writing to the executive director.

In order to put evaluations in context, the mailing also discussed the advisory paragraph. The paragraph says, in essence: Each evaluation covers the panel attorney's work to date on the particular case. It may be revised because of later information or after review

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by the executive director. Panel membership requires, on average, at least good or better work overall. It also depends on the individual's performance relative to others.

The pilot project will apply to briefs filed on or after May 1, 1998. It will be evaluated after 6 months and again after 12 months.

(With respect to the starting date -- at the time this is being written, near the end of April, our computer programmer is still working to create a feedback form from the internal evaluation. We hope it is ready by May 1. If it is not, there will be some delay in sending out the forms, but we still will do feedback evaluations retroactively to May 1.)

Claims allowance for requesting extensions of time

In the past ADI has limited payment for routine extensions of time to 0.3 hours and have included first extensions in that category because usually the courts grant them without especially elaborate explanation.

After being questioned about this matter and discussing it with the other projects, we have decided in the future to allow up to the full guidelines time of 0.5 hours for first extensions, if that time seems reasonable for the extension request that was filed. Although extensive justification is usually not required for first extensions, it does take time to assemble the relevant information and create the form the first time.

Subsequent extension routine requests, which merely update the first, will be limited to 0.3 hours, as before; this is a statewide practice. Non-routine requests will be judged by the guidelines and the overall criterion of reasonableness.

Electronic transmission of claims between ADI and AOC

Plans are being drawn for the appellate projects to submit claims to the AOC by computer, rather than paper. Testing will begin in July. The system will require use of a new claims form. The form will be mandatory once the new system goes into effect. Once the new form is drafted, the AOC will alert providers of computer claims programs, so that they can distribute the revised version.

It is hoped the new system will speed up payment of claims by eliminating mailing, handling of paper, and manual entry of data at the AOC.

Reasons for rejecting case offers

Our paralegals will probably be asking you for an explanation for rejecting a case offer. This is not being nosy or trying to put you on the spot. The Appellate Indigent Defense Oversight Advisory Committee is studying, among other things, the effect of the increased rates in capital cases on availability of counsel for Court of Appeal cases. They have asked the projects to collect data on the frequency of rejections and reasons therefor. The information will be helpful to us, too, in our effort to make the most efficient use of panel resources. Thanks very much for cooperating when we ask.

Pro per briefs offered by your client

All appellate attorneys at one time or another must deal with a client who wishes to file a pro per brief, or at least to preserve the option of filing one. ADI through its appointment function also regularly faces clients who wish to represent themselves in the entire appeal.

The right to self-representation on appeal is not established. Although a defendant has the right to self-representation at trial (Faretta v. California (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]), the case of In re Walker (1976) 56 Cal.App.3d 225, held there is no such right on appeal. Hines v. Enomoto (9th Cir., 1981) 658 F.2d 667, 677, and People v. Ashley (1963) 59 Cal.2d 338, 358, indicate that, whatever the right to self-representation on appeal might be, it is preserved if the appellant is permitted to file a pro per brief in addition to the brief filed by counsel.

We feel as a policy matter it usually makes sense to support a request by the client to file a pro per brief, even though the client has an appellate attorney. The great majority of defendants who at first say they want to represent themselves change their minds if they are told they can probably file their own brief if dissatisfied with counsel's. The large majority of those who accept counsel never do file their own brief once they see how well counsel has argued. When they do file, courts often find the pro per issues can be dealt with

summarily; on the other hand, if the court thinks some issues have possible merit, it can ask counsel for briefing, thus forestalling later habeas corpus based on ineffective assistance of appellate counsel. Thus the policy deters a great deal of pro per activity and obviates some post-appeal proceedings. It also leaves the client more likely to feel a "day in court" was provided.

Court policies vary; the court may not automatically accept a pro per brief submitted by a client already represented by an attorney. In some divisions, it may be helpful for you to support the request to file the brief and give reasons why doing so would be in the interests of justice and/or efficiency. Please check with ADI if the matter comes up.

Sometimes, of course, a pro per brief can be harmful, as when it attacks the arguments you have made or reveals facts detrimental to the client. In such a situation, after trying to dissuade the client from filing the brief, you may have to make the hard decision whether to support it and thus honor your client's wishes, or not support it and thereby promote what you judge to be your client's best interests.

Wende-Anders briefs

The Attorney General's petition for rehearing and rehearing en banc in the Ninth Circuit case of Robbins v. Smith (1997) 125 F.3d 831, has been pending since October 8. That case held no-merit briefs (Wende briefs) must include a statement of legal issues and discussion of authority, as required by Anders v. California (1967) 386 U.S. 738 [18 L.Ed.2d 493, 87 S.Ct. 1396]. This district's position has been and continues to be that no-merit briefs require compliance with Anders.

Paul Bell Memorial Award -- Lynda Romero, First Award Winner

Lynda Romero was on the Appellate Defenders, Inc. staff for about nine years, rising from a fairly new attorney to one of ADI's office leaders. She left to go on the panel in 1988 and has been one of ADI's highest ranked attorneys on the panel since.

Ms. Romero is an exceptionally fine attorney. Her work is consistently ranked excellent. She has handled every kind of appeal, including the most sensitive and complex. Her writing, analysis, and research are outstanding; she is impeccably thorough and responsible; she cares for her clients and always puts their interests first. The various divisions of the Court of Appeal regard her with the highest respect.

Ms. Romero is also a leader. She is incredibly well organized, gets along with people extremely well, and has creative ideas. While she was a staff attorney at ADI, everyone looked to her for advice and good sense, and she initiated ADI's training program, team system, and newsletter. She has chaired the State Bar Committee on the Appellate Courts and organized the first-ever (and highly successful) conference for the Committee on Women in the Law. She has been instrumental in developing the San Diego Appellate Lawyers group and in encouraging the continually excellent educational programs they sponsor. She has been active in the La Raza lawyers organization, the Criminal Defense Bar Association, Criminal Defense Lawyers Club, and the Appellate Court Committee of the San Diego County Bar Association.

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Most importantly for purposes of this award, she is truly committed to the cause of indigent defense, which has been almost her entire career. Her dedication is shown in her care for her clients and her energetic leadership in bar activities focusing on indigent appellate representation. Paul especially appreciated the invaluable support she has always given ADI. A prime example is her decision to stay with ADI during the 1983 transition from the State Public Defender to the current system. Although ADI's future was quite dubious at the time (the entire staff had pink slips from the State Public Defender and was running into incessant roadblocks in dealing with the Administrative Office of the Courts), she turned down a chance for employment with the Attorney General to stay with ADI.

Lynda was a great personal friend to Paul, as well. During his illness she regularly took time off from her practice to drive him to the hospital for treatments. He regarded her with the highest respect and admiration. Lynda is a great credit to our memory of Paul and the professional excellence for which he stood.

Update On "CPC Developments" By Anna M. Jauregui, Staff Attorney

In our January, 1998 Newsletter, we featured an article entitled "Recent `CPC' Developments in the Fourth District." On February 3, 1998, the California Supreme court granted review in the case highlighted in our article, People v. Mendez, S066175, formerly (1997) 58 Cal.App.4th 773. The question presented for review is, "Did a defendant's failure to file a timely request for a certificate of probable cause preclude consideration of issues going to the validity of his guilty plea?"

Until the issue is resolved by the high court, appellate counsel should persist in seeking and obtaining CPCs when necessary in order to protect the client's interests on appeal. As noted in the January article, Division One's and Division Three's practice in responding to late CPCs is consistent with the principles announced in People v. Clark (1996) 51 Cal.App.4th 575, a Division One case with which Mendez expressly disagreed.

Presumably, Division Two will continue to adhere to its pronouncement in Mendez. However, Mendez suggested that a defendant can seek relief for failure to obtain a CPC by filing a petition for writ of habeas corpus based on ineffective assistance of trial counsel. (People v. Mendez, supra, 58 Cal.App.4th at p. 783.) Further, Mendez mentioned that the defendant in that case never asked the Court of Appeal to relieve him from his failure to comply with rule 31(d) by way of a motion for relief from default. (People v. Mendez, supra, at p. 785, fn. 5, citing Cal. Rules of Court, rules 45(c) and 45(e) and other authorities.)

Court of Appeal Notices:

Motions Filed in Divisions One, Two and Three:

All three divisions have recently informed ADI that motions should not be filed with any colored covers or colored back page. They should also not have binding. The divisions would like all motions filed in normal pleading fashion, with a single staple at the top.

Augmentations in Division Two

For some time, it has been the policy of the Court Appeal, Fourth Appellate District, Division Two, to desire augmentation motions to the Court of Appeal rather than a Rule 35(e) letter request to San Bernardino Superior Court when the latter would normally be the method specified in the California Rules of Court. The reason for the policy has been to permit the Court of Appeal better policing of due dates and management of the appeals. (In other words, a routine Rule 35(e) letter to the superior court with notice to the Court of Appeal would not serve to toll any due date. Both the court and counsel are dependent upon swift compliance by the superior court.)

Division Two has now extended its policy to Riverside County. All counsel should utilize augmentation motions to the Court of Appeal in lieu of Rule 35(e) requests to the superior court. In the augmentation motion, counsel should also indicate that the motion is being made in lieu of a Rule 35(e) request to comply with the policy of Division Two.

Video Conferencing/Oral Argument In Division Three

In Division Three cases, if both counsel are from San Diego, oral argument by televised video conferencing is available. The video conferencing connects Division One with Division Three's courtroom for oral arguments which are specially set for that purpose. In lieu of traveling to Division Three, counsel can arrange ***in advance*** that counsel's appearance may be made at the video conferencing center in Division One. Necessary details will be provided by calling the Clerk of the Court, Stephen Kelly, at (619) 645-2762. Upon making any arrangement with Mr. Kelly in order to utilize the video conferencing center for oral argument, counsel ***must also*** contact Division Three's deputy clerk, Jannes McElroy, at (714) 480-3265 to confirm the arrangements. ***Also***, counsel is required to forward a confirming letter to Division Three, including the case name and appellate court number of the case to be argued via video conference. Division Three encourages participation in this program.

ERRATA re In re BENOIT

Usually, an untimely notice of appeal is detected by the appeals clerk in the superior court, and the appeal does not go forward unless and until the Court of Appeal grants relief from the late filing pursuant to In re Benoit (1973) 10 Cal.3d 72. Under such circumstances, Benoit relief is typically sought by a staff attorney at Appellate Defenders, Inc. While pre-appeal Benoit relief is an ADI staff function, for the panel's education, the procedures differ in the three divisions. These differences are noted in the San Diego County Bar Association, Appellate Court Committee's Appellate Practice Manual at 2.39-2.41 at pages 31-32:

> Each of the three divisions in the Fourth District handle Benoit requests differently. Division One, regardless how the request is denominated (as either a "petition" or a "motion") will handle the request as a motion. The motion will be ruled upon solely by the presiding justice. Division Three, in contrast, requires the request to be submitted in the form of a petition for writ of habeas corpus, and the petition is assigned to the current writ panel for a three justice decision. Division Two does not concern itself with the form of the request. Most Benoit requests in Division Two are generated by a superior court's "stop notice" with which the superior court stamps a late notice of appeal "received, but not filed." When Division Two receives a stop notice, the court assigns a regular appellate case number (e.g., Exxxxxx) for tracking purposes. A Benoit request which follows this course is handled as a motion. However, if no notice of appeal is ever attempted to be filed and a petition for writ of habeas corpus is originally presented to the court, Division Two will handle it as a petition.

However, different responsibilities and policies are effective when, for whatever reason, an otherwise untimely notice of appeal slips past the superior court appeals clerk and the appellate process begins. In this circumstance, the responsibility for seeking relief rests with the attorney of record, i.e., the panel attorney. The policies of the three divisions are uniform under this scenario; that is, the panel attorney should seek Benoit relief by means of a motion. Please note that the information contained in 5.16, p. 157, of the Appellate Practice Manual is incorrect in this regard. Readers who possess a copy of the Manual are requested to correct 5.16 to conform with the correct policy. That is, for pre-appeal Benoit relief a reference to 2.39-2.41 is

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apropos. For appeals in which a late notice of appeal was processed, all three divisions want a motion, not a petition.

Division Three Clerk Assignments

Division Three has promulgated the following information which ADI passes on to panel attorneys. For faster and more effective communications with the clerks, please note the new assigned terminal digit numbers and respective telephone numbers (area code 714):

0 and 1		Kathy Roy
2 and 3	Kathy Rossi	480-3266
4 and 5		Mary Urena
6 and 7		Diane Hernandez
8 and 9		Rachel Hahn

Transcript Photocopying

Some panel attorneys have noticed that a few reporters are now placing notations in the Reporter's Transcripts which indicate that copying of the transcripts cannot be done without a court order. The notations appear on the bottom of each page of a transcript. There is usually a specific reference to Government Code section 69954, subdivision (d). Under any interpretation of the statute, the message is inaccurate. Likely questions are discussed below.

1) May I make a copy of the transcript for my client?

Yes. The statute specifically allows reproduction of the transcript "for internal use." This is contrasted with providing copies or selling copies to "any other party or person." Since the copy of the transcript is really the client's copy, it seems appropriate to make copies of parts of the transcript for one's own use or for the client's use. This copying is actually sanctioned by the rule.

2) Can a copy of the transcript be made for another party?

Maybe. Although the statute would seem to prohibit this, the entire statute may not be applicable to our cases anyway. First, Government Code section 69954 appears to be applicable only to "Transcripts prepared with computer assistance . . . ." Subdivision (a) refers to "transcripts prepared . . . using computer assistance and delivered on a medium other than paper..." Since subdivision (d) may only address making copies from a computer disk or copying to another computer disk, the entire section may be inapplicable.

Second, the statute applies only to a party who has "purchased" a transcript. Since we have not "purchased" transcripts, under any definition, subdivision (d) may not be applicable to us.

480-3270
480-3269
480-3268
480-3267

Briefbanking: Boon Or Curse?

Word-processing is both a time-saving benefit while at the same time a potential drawback. Too often counsel (both panel attorneys and deputy attorneys general) and sometimes the courts "word-process" material from one case to another without adapting the material to the present case. Most often, the lack of adaptation is subtle, for example, forgetting to delete an inapposite portion, but sometimes it is blatant with the incorporation of incorrect names, dates, et cetera.

The inherent problems in adopting recycled materials also applies to the use of sample arguments. For the savings of time and expense, panel attorneys are, indeed, strongly encouraged to utilize briefbanking and sample argument resources. ***However***, the use of sample arguments is ***ONLY*** a starting point. The panel attorney remains responsible for editing, updating, citation checking, and every other function required to produce a quality brief. While ADI strives to keep its briefbank timely, it is not possible to edit every sample argument to be applicable to every case. A sample argument is merely a research tool, a springboard for further thought and analysis, and should be used accordingly.

Claims: "Free" $$$$$ And Other Considerations

Mileage. There is no such thing as a "free lunch." However, there is something which is almost free: additional mileage expense. The state employee mileage reimbursement rate has gone up to 31 cents a mile. Panel attorneys or ADI employees can claim this for any trips made after October 1, 1997. In reviewing claims, ADI continues to see travel expenses for trips made after October 1, 1997, at the old rate of 27.5 cents per mile (and even some at the old, old rate of 24 cents per mile!). Panel attorneys are not required to bill at the new, higher rate and may, of course, subsidize the state budget by claiming less. However, for panel attorneys who do not desire to subsidize the state (and, hence, be paid more on claims), the rate is ***31 cents*** per mile. If a claim has already been paid, however, a supplemental claim would not be worthwhile and should not be filed just for the extra mileage.

Travel and time to review superior court files. As counsel of record, appointed counsel bears the ultimate responsibility for a case which includes the decision as to whether to review the superior court file. If there is a particular question or concern (which could not be easily answered by review by an ADI staff attorney on an "ambassador" trip), then counsel should review the superior court file. On the other hand, review of the file in each and every case akin to a fishing expedition should not be undertaken. Rather, the time and expense spent on travel should be reasonable and proportional to the need to see the file. If the trip is long or expensive, it needs strong justification, and it would be a good idea for counsel to call ADI for unofficial advice on whether the travel is appropriate. (We cannot give formal "preapproval" for substantial expenditures in the same way the court can.) Counsel should try to combine several cases in one trip, or ask an ADI "ambassador" to go.

Unbriefed issues (or, really, the lack thereof). There is *NO* requirement or perceived need to include an unbriefed issues page where there is no claimed time for any unbriefed issue. Panel attorneys are strongly encouraged ***not*** to attach an unnecessary page claiming 0.0 hours.

$75/hour tier cases. For whatever reason, there is some confusion as to what cases qualify for the $75/hour tier, and ADI has not infrequently received claims with the incorrect hourly rate. The criteria are:

(a) independent, **and**
(b) a jury trial, **and**
(c) in one of these classes:

(1) murder *conviction*, with appointment on or after 7/1/95, **or**

(2) LWOP, with appointment on or after 10/1/95, **or**

(3) a specified sex crime (PC 208d, 220, 261-269, 281-294), with appointment on or after 8/1/96, **or**

(4) record of 3000 pages or more (including augments), with appointment on or after 8/1/96.

Busy, Busy, Busy!

The golden rule . . . telephone etiquette . . . common courtesy . . . Panel attorneys, *PLEASE* take into consideration your clients, court personnel, and others (such as ADI staff) in your telephone arrangements. With technology being what it is today, many panel attorneys still use a single telephone line which serves not only for telephone communications but for faxing as well as Internet use. *PLEASE* consider another arrangement and have another business phone line installed (or answering service, message center) for times when you may be "on line" for extended periods or sending or receiving a lengthy fax. Few things are more frustrating than trying to get an important message through to a panel attorney (or at least a voice mail message) and obtaining a constant busy signal.

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Amongst other criteria in evaluating attorney performance are: "Is reliable and cooperative in working with ADI," "Keeps client informed," and "Difficulties in contacting." Positive evaluations (or avoiding negative evaluations) are enhanced when ADI staff can reach an attorney easily.

The Briefbank Corner

A sample Request for Order to Decertify the Record on Appeal and to Refile a Corrected Record in Compliance with Code of Civil Procedure Section 237 is now available. You can contact our office for a copy.

Alert For Cases Involving Criminalist Patricia A. Lawson

ADI, among others, has received the following correspondence from the Office of the District Attorney, County of San Diego:

Patricia Aiko Lawson has been charged by the District Attorney's Office in case CD134169 (DA PA482301) with crimes which occurred during her employment as a criminalist for the San Diego Police Department.

The District Attorney's Office has previously notified counsel in cases where Ms. Lawson was a witness, and has sent letters and discovery material to various attorney groups and bar associations, informing them of Ms. Lawson's situation. We are currently in the process of advising specific counsel, as well as the same attorney groups and bar associations, of the availability of discovery from her criminal case. It is our intention to continue to provide ***Brady*** discovery as information comes to our attention.

Any questions about, or a request for, the discovery from Ms. Lawson's criminal case may be made to me at (619) 515-8610.

Sincerely,
James E. Atkins
Deputy District Attorney
Appellate and Training Division

Peggy O'Neill Joins ADI

Attorney Peggy O'Neill joined the ADI staff in March 1998. A Florida native, Peggy attended the University of West Florida and earned her Bachelor of Science degree in Systems Engineering in 1987 and her Master of Arts degree in Mathematics in 1989. She worked as a systems engineer for a Department of Defense contractor in Florida and California until 1992 when she decided to pursue a law degree.

Peggy attended California Western School of Law where she quickly abandoned her initial interest in patent law and yielded to the cause of representing indigent criminal defendants. At California Western, she received an American Jurisprudence Award for Legal Research and Writing, was awarded a Faculty Scholarship and Service Award, and served as a Legal Skills Honors Instructor. Additionally, Peggy externed at the University of San Diego School of Law Patient Advocacy Legal Clinic which advocates the rights of mental health patients.

Upon graduation from law school and admission to the bar in 1995, Peggy entered private practice and worked with several local criminal attorneys on state and federal matters as well as criminal appeals. She joined the ADI Panel in November 1996 and the CAP panel in November 1997.

ADI Surfs The Internet

Appellate Defenders, Inc. now has a homepage on the Internet. (Http://homepage.usr.com/a/appeals) Please come pay our site a visit. Although our web site is still under construction, it currently contains information regarding filing requirements, useful addresses and phone numbers, our mission

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Supplement to the Quarterly Newsletter of Appellate Defenders, Inc.
NUMBER 18 May 1998

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

by Carmela F. Simoncini, Staff Attorney

FIRST OFF...

I hope this issue makes up for the absence of Civil Tongues in the last issue of the newsletter. There were so many new developments and I had so little time, that trying to meet the last deadline would have meant a sacrifice in quality and substance. Because we are now seeing the impact of some of the statutory amendments which went into effect in January, 1997, where appropriate, I will try to offer some tips on how to handle some of the new problems.

DEPENDENCY CASES

A. Jurisdictional Issues

The California Supreme Court recently held that a finding that an allegedly sexually abused child is incompetent to testify does not preclude admission of the child's hearsay testimony. (In re Cindy L. (1997) 17 Cal.4th 15.) In doing so, the court found the court's creation in In re Carmen O. (1994) 28 Cal.App.4th 908, of a child dependency hearsay exception in sexual abuse cases, was well founded, but that the exception should be more fully developed to provide specific due process protections for parents at child dependency hearings. Specifically, the court held such statements were admissible so long as the juvenile court finds sufficient indicia of reliability, the child is available for cross-examination, or there is corroborating evidence, and other interested parties have adequate notice of the hearsay statement.

The Court further held that a finding a child is not competent to differentiate between truth and falsehood or to understand the duty to tell the truth at the time he or she is prepared to testify should not be an absolute bar to the admission of the child's hearsay testimony, but only one circumstance to be considered in determining whether the child's statement is reliable. The court found that the various circumstances surrounding the statement that are relevant are not only the statements' spontaneity, but also the precociousness of the child's knowledge of sexual matters, and the lack of motive to lie.

B. Dispositional Issues

In In re Damonte A. (1997) 57 Cal.App.4th 894, the Third Appellate District found that an order removing a child from parental custody, but that allowed the minor to remain in the parental home, is invalid. The court held that nowhere in the statutes or rules is there authorization for the court to declare a dependency, order the dependent child removed from the physical custody of its parents, order the care, custody, control and conduct of the minor to be under the supervision of the probation officer and then direct the probation officer to temporarily place the minor back into the home from which it was removed. The statutes contemplate that removal of the child from the physical custody of the parents will result in some other person or entity having physical custody of the child and that the child will be placed in an appropriate home other than that of the parent who had custody at the time the petition was filed. As it lacks a statutory basis, the juvenile court's removal order was held invalid, since the order permitted the department to circumvent the requirement of section 361, subdivision (b) that removal from the parent's physical custody can be made only on a showing by clear and convincing evidence that removal is necessary to avert a substantial danger to the physical health or well-being of the minor.

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The recent revisions to Welfare and Institutions Code, section 361.5, which enlarge the number of situations in which a juvenile court may deny reunification services, has been the subject of a few recent decisions. In In re Baby Boy H. (1998) Cal.App.4th ___ [98 Daily Journal D.A.R. 4179], the court denied services to mom at the dispositional hearing, on the ground the minor's twin half-siblings, Cody and Anna, had been freed for adoption in 1995, and two other children, Wyatt, a full-sibling, and Shawn, a half-sibling, had been declared dependents in 1996. At the same hearing, services were terminated as to Shawn and Wyatt, despite the social worker's recommendation to extend them due to mother's "moderate progress."

On appeal, mother challenged the orders as an abuse of discretion and on grounds the statute is unconstitutional, because it (a) creates an irrebuttable presumption of inability to parent based on prior court orders, (b) dramatically increases the risk of erroneous deprivation of parental rights, (c) is overbroad, and (d) the harm it addresses is not related to the ability to parent.

The reviewing court affirmed the order on all bases. First, it noted there is constitutional entitlement to services. As to the issue addressing the Santosky v. Kramer criteria (due process requires a standard of proof of clear and convincing evidence of unfitness in order to terminate parental rights), the court relied on the holding of Cynthia D. v. Superior Court (1993) 5 Cal.4th 242, which held that the preponderance of evidence standard was sufficient "at this late stage in the proceedings." The court observed that because the removal order is grounded upon a determination of detriment by clear and convincing evidence, the Santosky standard was met.

The court then went on to say, without explanation, that section 361.5, subdivision (b)(10) does not create an irrebuttable presumption of inability to parent, because "it is the parent's current parenting skills, examined in light of a heightened standard of proof, which determine whether the child will be adjudged a dependent." (98 Daily Journal D.A.R. at p. 4181.) Unfortunately, section 361.5, subdivision (b)(10) is a dispositional criterion, not a jurisdictional basis.

The court also concluded the statute was not overbroad and arbitrary because it emphasized past conduct and disregards current circumstances. However, to reach this conclusion, the court again failed to address the language of the statute and referred to the fact the parent's present circumstances determine whether a minor is adjudged a dependent child of the juvenile court. The court did not address the fact that, although the court may still order reunification services to a parent who has another child who is declared a dependent, it is the parent who bears the burden of proof, by clear and convincing evidence, that services would be in the child's best interest.

But then, that would muddy the waters with more of that Santosky stuff, where the United States Supreme Court held that **until** parental rights are terminated, the interests of child and parent coincide, and they share an interest in avoiding erroneous termination of parent-child relationship, such that when the state moves to destroy weakened familial bonds, it is required to provide the parents with fundamentally fair procedures.

C. Review Hearing Issues

In Constance K. v. Superior Court (1998) 61 Cal.App.4th 689, the Second District Court of Appeal denied the mother's petition for writ of mandate, holding there was substantial evidence to support the trial court's findings at the 18-month review hearing. In that case, mother had completed all the requirements of the reunification plan, and the social worker had recommended return of the minors to her custody based upon evidence of bonding between the mother and the two older children.

However, in an opinion noteworthy for containing possibly the longest paragraph in the appellate reports to date (see 61 Cal.App. 4th at pp. 705-707, the court makes a startlingly contradictory holding. On page 708, the court "agree[s] with the mother that there is evidence there would be no risk of substantial detriment if the children were returned to her. ... ." However, in the very next paragraph, the court states, "However, we agree with the department that the countervailing revelations in the various reports constituted substantial evidence of the risk of requisite detriment if the three children were returned to the mother. ... ."

Basically, the "various reports" referred to by the court relates to two reports concerning the minors. The

June 30, 1997, report recommended adoption, although adverting to the many positive factors concerning the mother. The social worker in this report opined the mother is barely able to be responsible for herself and questioned whether she could parent the three dependent children as well as her newborn child. The social worker concluded the mother had not learned the lessons taught in the parenting classes, because the children, when asked why they enjoyed being with her, explained she let them watch television and eat what they want when they want.

The next report, prepared for the August, 1997, hearing, discussed the unsuccessful nature of the weekend visits which had begun in March, 1997. The mother experienced difficulty controlling all the minors, and it was learned the fathers were present at the visits. The home was observed to be dirty and in disarray, with exposed stereo wires presenting a hazard. During this visit, one child had a few ant bites and scraped her leg on a bolt.

On the bases of these two reports, the court concluded the mother was incapable of acting as a proper parent when the minors were in her custody. However, the court also felt return of the minors to the mother would be detrimental to the children, "because it would end the loving and stable relationship which had developed over a two-year period in the foster home and place the minors in the problematical environment with their mother." (61 Cal.App.4th at p. 709.) (Recommended reading: Matter of Guardianship of J.C. (1992) 129 N.J. 1, 21 [608 A.2d 1312], Matter of Guardianship of K.L.F.(1992) 129 N.J. 32 [608 A.2D 1327]; Matter of Michael B. (1992) 80 N.Y.2d 299 [604 N.E.2d 122].)

In Daria D. v. Superior Court (1998) 61 Cal.App.4th 606, Division One of the Fourth District Court of Appeal denied the parents' petition and concluded the recent statutory amendments allowing termination of services at the 6-month review hearing, where the child is under the age of 3 years, was constitutional. The reviewing court noted it is critical to secure stable placement for a dependent child as soon as possible and observed the purpose of the new statutory provisions is to give juvenile courts greater flexibility in meeting the needs of young children, "in cases with a poor prognosis for family reunification." (Daria D. v. Superior Court, supra, 60 Cal.App.4th at p. 611, quoting Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1524 (1995-1996 Reg. Sess.)

The court also held that parents' rights were protected, because, in addition to other statutory safeguards (e.g., representation by counsel, clear and convincing evidence standard for removal, reunification services), the parents must be warned that their failure to participate regularly in any court-ordered treatment programs may result in termination of efforts to reunify the family after 6 months.

In response to the parents' challenge the new law was being applied retroactively, the court concluded the critical date is not the date of the acts giving rise to the petition, but the date the child was initially removed from parents' custody. (Id. at p. 614.) I wonder how many filings have been delayed to take advantage of the new law, considering it was sponsored by the California Department of Social Services. (See 61 Cal.App.4th at p. 612.)

In Anthony D. v. Superior Court/In re Christopher D./ In re Anthony D. on Habeas Corpus (1998) Cal.App.4th ___ [98 Daily Journal D.A.R. 3781], Division Three of the (Continued on page 12)

Fourth Appellate District recently denied multiple claims for relief to an incarcerated father. The father filed a writ petition, an appeal, and a petition for writ of habeas corpus challenging two orders (the 12 month review hearing as to daughter Danielle, where the matter was referred for permanency planning and the jurisdictional/dispositional order relating to Christopher). Father filed a pro se petition pursuant to Rule 39.1B, California Rules of Court. His trial counsel filed a notice of appeal as to both hearing dates but only filed a Rule 39.1B writ petition as to Danielle, declining to file one as to Christopher; nevertheless, trial counsel's writ petition was deemed to have superseded father's petition. [But see Guillermo G. v. Superior Court (1995) 33 Cal.App.4th 1168, 1173-1174, holding that a writ petition filed by an attorney without personal consent by the client is unauthorized.] Appellate counsel filed a petition for writ of habeas corpus, addressing trial counsel's failure to file a writ petition seeking relief from the referral orders regarding Christopher. The court summarily denied the father's pro per writ petition in Christopher's case and consolidated all the proceedings.

In the unpublished portion of the opinion (which concluded that father's unavailability for cross-examination due to the trial court's refusal to enforce its transportation order rendered the evidence of his letters to the social worker concerning the inadequacy of services inadmissible, and which concluded that services - limited to providing paper and envelopes to father and communicating with him by letter or telephone on a monthly basis - were reasonable, and also concluded that visits could be denied with impunity, despite lack of court order, if the social worker deems them "unworkable), the Court of Appeal addressed the writ petitions, finding no reversible error.

In the published portion of the opinion, the court dismissed the appeal from the dispositional order relating to Christopher, because the court denied services to father. The Court did not explain how a statutory provision, which by its terms is limited to the actual referral order only, could be extended to include review of the jurisdictional and dispositional orders, aside and apart from the denial of services and referral. It notes that subdivision (l) of section 366.26 has unequivocally expressed the legislative intent that "referral orders be challenged by writ" before the 366.26 hearing. The court also relied on In re Rebekah R. (1994) 27 Cal.App.4th 1638, where the reviewing court concluded the mother's attack on an order denying services was not appealable, based upon the precedent in In re Rebecca H. (1991) 227 Cal.App.3d 825.

However, apparently without regard for the language of Sue E. v. Superior Court (1997) 54 Cal.App.4th 399, which held the language of section 366.26, subdivision (l) is limited to the orders denying services and referring a matter for a hearing pursuant to section 366.26, the reviewing court followed the holding of Rebekah R., in which that court found, "Nothing in Rebecca H. warrants limiting its application to only those appellate issues which involved the propriety of the portion of the disposition order that denies a parent reunification services. ... ." However, Rebecca H. notwithstanding, the express language of the statute limits its application to only those issues which involve the propriety of the portion of the disposition order that denies a parent reunification services.

On the other hand, in Mark N. v. Superior Court (1998) 60 Cal.App.4th 996, the Second District Court of Appeal issued a writ of mandate directing the juvenile court to vacate its order terminating services and setting a hearing pursuant to section 366.26. In Mark N., the court held that there was insufficient evidence that reasonable reunification services were offered to the incarcerated father as required by Welfare and Institutions Code section 361.5, subdivision (e)(1). It further held the father was not required to complain about the lack of services as a prerequisite to the social services department fulfilling its statutory obligations, and the department was not relieved of that responsibility simply because the father did not request services.

The father in Mark N. also had a lengthy history of incarceration, dating back to 1985. In April, 1996, the father had fled with the minor, Sabrina, to Mexico, in order to avoid the dependency court's jurisdiction. It was also reported he had threatened the maternal grandmother if she were considered for placement of Sabrina. (Sabrina's mother had been adopted by her foster mother, who had also adopted Sabrina's siblings.)

The reunification plan required the incarcerated

father to attend drug/alcohol counseling, random drug testing, Alcoholics Anonymous/Narcotics Anonymous, parenting classes, and domestic violence classes. There was evidence of several attempts at correspondence from the father to the Department which the latter acknowledged receiving, in which father complained about the lack of response by the department, but only one letter from the department to the father, and no evidence of other regular contact. There was also evidence that because father was not put on "main line," he could not participate in prison programs. (Mark N., supra, 60 Cal.App.4th at p. 1005-1008.)

On appeal, the reviewing court noted the applicable standards of review relevant to questions regarding reasonableness of services. It noted an effort must be made to provide reasonable services in spite of difficulties in doing so or the prospects of success. (Id., at p. 1011.) With respect to an incarcerated parent, it reviewed the services described in section 361.5, subdivision (e)(1), which require maintaining contact between parent and child, transportation services, where appropriate, visitation services, and services to extended family members providing care for the child if the services are not detrimental to the child.

Section 361.5, subdivision (e)(1) also provides an incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs if these programs are available. However, the department must preliminarily identify the services available to an incarcerated parent and cannot delegate the incarcerated parent the responsibility for identifying such services. The court concluded the department's employees may not simply conclude that reunification efforts are not feasible on the sole ground the parent is incarcerated. (Mark N. v. Superior Court, supra, 60 Cal.App.4th at p. 1012.) The court concluded the lack of contact between the department and the father was not excused. It further held the "department does not meet its obligations when, as here, it simply concludes: The father is in prison; he knows what the requirements of his case plan are; he was imprisoned before any referrals were made; he says no services are available to him; and being unaware of any resources to assist the incarcerated parent with reunification, the department need not take any action to facilitate the reunification process." (Id., at p. 1013.)

The Third Appellate District has held that amendments to Rule 39.1B of the California Rules of Court, which purport to compel appellate courts to decide such petitions "on the merits by written opinion" after the "issu[ance] of an Order to Show Cause or an Alternative Writ," are unconstitutional. In Maribel M. v. Superior Court (1998) ___ Cal.App.4th ___ [98 Daily Journal D.A.R. 2425], the court noted the amended provisions of the Rule conflict with provisions of Welfare and Institutions Code, section 366.26, subdivision (l)(1)(C). That section requires the filing of a petition following a referral order, in order to obtain review on appeal from the order setting a section 366.26 hearing, and provides the petition "must have been 'summarily denied or otherwise not decided on the merits.'"

The reviewing court noted the amendments purport to mandate that in all procedurally regular writ matters creation of a cause and disposition on the merits by written opinion, which conflicts with section 366.26, and hence are unconstitutional, "since the Judicial Council may only make rules which are not inconsistent with statute." (Maribel M. v. Superior Court, supra, [98 Daily Journal D.A.R. at p. 2427], citing Cal. Const., art. BI, 6; People v. Superior Court (Williams) (1992) 8 Cal.App.4th 688, 701, and

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other cases.) The court went on to hold the invalid provisions were severable from the rest of the rule, so it was not required to invalidate the entire rule.

Thereafter, it denied relief to the petitioner on the merits. Mom had been incarcerated during part of the reunification period, and, upon release from custody, she did not avail herself of services but, instead, returned to Mexico, not appearing for the 12-month review hearing. The court, noting extension of the reunification period are justified only by unusual circumstances, concluded that extending the reunification period now would be futile.

In the recent case of In re Ashley P. (1998) 62 Cal.App.4th 23, Division Five of the Second District Court of Appeal grappled with an order denying de facto parent status to a grandmother who had been appointed as guardian for her two grandchildren. The children had been placed with her for an extended period of time after a petition based upon the mother's drunk-driving arrest (with children in car) was sustained. Mother had had brain surgery, and dad had been unable to care for the children, so the children were placed with the grandmother. At a hearing pursuant to Welfare and Institutions Code section 366.22, guardianship was identified as the permanent plan, and grandma was subsequently appointed as guardian.

Several months later, dad filed a 388 petition, seeking custody, and claiming grandmother was thwarting his parental rights. Appellant-grandmother sought de facto parent status, for some unknown reason. (She was already a guardian, which, by definition, is an interested party in the custody proceedings.) Even more inexplicably, that status was denied, and grandma appealed.

The Court of Appeal correctly ruled the grandmother, who had assumed day-to-day care of the children, was a de facto parent entitled to standing. Moreover, the court held the record did not support dad's claims that grandma tried to influence the children against him or undermine their feelings for him.

Department of Social Services v. Superior Court (1997) 58 Cal.App.4th 721, involved a termination of parental rights proceedings in which two of five minor children were referred to the Department of Social Services for adoption. The juvenile court made a ruling directing the department to place the two children in a home pending adoption other than the residence chosen by the department. The two children had been placed in the home of the Bringles, while the three older siblings were placed with the Stocktons. At a review hearing, the CASA urged the court to order the department to place the two younger children in the home of the Stocktons, with their siblings, pending adoptive placement, based upon problems in the Bringles' home. The department acknowledged it was not considering the Bringles for adoption of the minors but intended to continue this placement pending identification of an appropriate adoptive family. The juvenile court ruled that the minors should remain within the Bringles until the next ruling.

Subsequently, the department brought a 388 proceeding to move the children from the Bringle home, because the family was having difficulty coping with the children's escalating behavior problems. The CASA agreed, and requested again that the children be placed with the Stocktons. The CASA's view was that the court had authority to supervise and regulate the department's decisions on preadoptive placements; the department disagreed, and, while it was not opposed to the Stocktons, it was pointed out that family had not initiated action to be considered as an adoptive placement. The department wished to assert its exclusive authority to make preadoptive placements.

As we all suspected and as the Court of Appeal concluded, the department has exclusive custody, control, and supervision of children referred for adoptive placement. The clear grant of exclusive authority and discretion over adoptive placement and temporary care pending such placement evidences a legislative intent to defer to the department's expertise once parental rights have been terminated. The court thus held that the juvenile court committed reversible error in exercising its independent judgment to determine the appropriate interim placement of the two minor pending their adoption, as there was no evidence that the department acted arbitrarily or capriciously in choosing one home rather than another residence for interim foster case placement and since substantial evidence supported the department's decision. Under the statutory scheme, the agency's discretion regarding adoptive and interim foster care placement is not

unfettered. The juvenile court retains jurisdiction over the minor to ensure the adoption is completed as expeditiously as possible and to determine the "appropriateness of the placement." However, the juvenile court may not substitute its independent judgment for that of the agency.

D. Permanent Plan Issues

In In re Cynthia C. (1997) 58 Cal.App.4th 1479, the Fourth Appellate District, Division Three, found that when there has been no "ordered placement" with a specific caretaker, Welfare and Institutions Code section 387 does not require the department, before removing the child, to file a supplemental petition, give notice of a hearing, and prove the existence of conditions which constitute a substantial risk of harm to the minor.

In Cynthia C., the minor had been placed with her paternal aunt and uncle at 10 months old. At the 12 month hearing the court terminated reunification services and the department concluded adoption by the aunt and uncle was probable. However, a series events over the next several months, indicating family dysfunction in the relatives' home, caused the department to express second thoughts. Nevertheless, because of the acknowledged close bond between the minor and the couple, long term foster care was maintained as the permanent plan, to provide time for the couple to receive counseling.

Ultimately, the breakup of the relative family led to a decision it would not be in the minor's best interests to remain with them. The minor was then removed from the home and placed with another aunt and uncle and then with a foster family. Sharon, the aunt, as a de facto parent, then petitioned the appellate court for a writ, challenging the department's removal of the child without a supplemental petition under section 387. This writ was denied as untimely. The couple then petitioned the juvenile court under section 388 for modification of its prior orders authorizing the department to determine Cynthia's placement. Before this hearing could be held, however, the couple separated and announced their intention to divorce. The couple withdrew their 388 motion.

A few months later the minor returned home to her foster parents after a visitation with Sharon and her cousins and complained that the cousins had "touched her privates". The department then recommended restricting visitation to one monitored hour per week. Sharon then filed a new section 388 petition, seeking immediate custody, or in the alternative, a bonding study. The petition alleged the minor had been removed from the home solely because of the uncle's physical abuse of their son, and now that the couple were permanently separated, the reason for the removal no longer existed. The court denied the 388 petition, finding that Sharon failed to carry her burden of proving modification would be in the minor's best interests.

The court held the original placement in the relatives' home was pursuant to a general placement, whereby custody was vested with the department, which had discretion to reassess the continuing appropriateness of the home of the aunt and uncle, with whom Cynthia resided until they separated. The Court found that when a general placement order vests the department with the minor's custody and the discretion to select suitable placement, the agency may, without further court order, react to changed circumstances (in this case the separation and

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impending divorce of the de facto parents with whom the minor was living) by removing the child from an environment it no longer deems suitable and selecting another placement.

In another Department appeal challenging a permanency plan for long term foster care, the Second District appellate court found that a dependency court cannot refuse to consider adoption of minors because of the County's repeated failure to give notice to the fathers. (In re Christiano S. (1997) 58 Cal.App.4th 1424.) In Christiano S., the Department failed to notify the fathers of the impending .26 hearing by publication three times, causing the .26 hearing to be continued from March, 1996, to the end of November, 1996. An exasperated dependency court denied the County's fourth request for a continuance and foreclosed the Department from presenting any evidence at all on the issue of adoption. The court then ordered the children into long-term foster care over the objection of the County.

The appellate court found the trial court's denial of the County's request for a continuance prejudiced the minors and remanded to the trial court for a new 366.26 hearing. The Court of Appeal acknowledged that the County would again have to be ordered to notify the fathers, and if the County failed to comply, the dependency court has the option of setting an order to show cause hearing and impose appropriate sanctions until the department is in compliance. However, it concluded the dependency court did not have the option of refusing to consider adoption, and its finding that terminating parental rights was not in the minor's best interests was premature until there is a finding that adoption is a likelihood.

In In re Joshua M. (1997) 56 Cal.App.4th 801, the Sixth District Court of Appeal found that mother cannot raise a claim based on the argument that father's separate counsel was ineffective in a termination of parental rights action, where the father did not appeal the termination himself. Mother argued that she was directly affected by the ineffective assistance of father's counsel because of their unity of interest. The appellate court found that mother could not raise this argument where father himself did not appeal the termination. The court then continued to find that even if mother were able to bring such a claim, father's counsel was not ineffective in securing reunification services for father and that this claim should have been raised in a writ petition.

In In re Daniel K. (1998) 61 Cal.App.4th 661, Division Three of the First District Court of Appeal affirmed a juvenile court's ruling denying a petition to modify a guardianship order, which guardianship was the permanent plan adopted by the court. The minor had been placed in Alaska with the Sheltons, who had taken care of him for extended periods of time.

In July, 1996, the mother had sought continuing discovery regarding the minor's placement, including his therapist's observations and evaluations, because the mother had learned Daniel had been placed in a mental health care facility. That motion was denied on July 31, 1996. (61 Cal.App.4th at p. 664.) In October, 1996, mother filed a section 388 petition to modify the appointment of the Sheltons as Daniel's guardians, on the ground his behavior had deteriorated while in their custody. These allegations were denied by the department, and the petition itself was denied without an evidentiary hearing.

Regarding the motion/petition to modify the guardianship, the court held the juvenile court was not required to order an evidentiary hearing. Regarding the timeliness of the appeal from the denial of the motion for continuing discovery, the appeal was dismissed. The Notice of Appeal was not filed until November 18, 1996, more than 3 months after the denial of the discovery motion. The mother had argued that not all post-judgment orders in dependency proceedings are separately appealable, only those which affect the judgment or relate to it by enforcing or staying its execution, citing Lakin v. Watkins Associated Industries (1993) 6 Cal.4th 644, 651.

The Court of Appeal disagreed, noting that no court had applied such a limitation to appeals in dependency proceedings; to the contrary, courts have held that juvenile dependency law does not abide by the normal prohibition against interlocutory appeals. This is an understatement, since, as the reviewing court acknowledged, the limitation apparently applies in the juvenile delinquency context. (See 61 Cal.App.4th at p. 669.) It is fair to say that dependency law knows no normal prohibitions.

PATERNITY CASES

On November 12, 1997, review was granted in the case of Steve H. v. Wendy S. (1997) [formerly at 57 Cal.App.4th 379], S064838. That was the case where a man sought to recover damages for emotion distress he suffered in response to his former wife's effort to terminate his parental relationship with the daughter of the marriage, by offering blood test evidence in dissolution proceedings showing he was not the biological father. The decision discussed public policy concerns surrounding interspousal tort actions.

INDIAN CHILD WELFARE CASES

In In re Brandon M. (1997) 54 Cal.App.4th 1387, the mother appealed from a court order granting de facto parent status to Rodger H., with whom mother cohabited and eventually married. The couple's marriage was dissolved in 1989, with Rodger obtaining visitation rights respecting all the children, including Brandon. Although there was little contact between the time of the divorce until 1992, in that year Brandon contacted Rodger H. in Arkansas and asked for financial assistance. Thereafter all the children spent time with Rodger H. in Arkansas every year. In 1995, Brandon again called Roger H. to request money to pay outstanding bills, which eventually led to the filing of the petition, when Brandon was 13 years old. The order granting de facto status was made when Brandon was 15, in connection with the 6 month review hearing.

The mother challenged the validity of the de facto parent ruling on the ground that California's de facto parent doctrine is preempted by the I.C.W.A. The Court of Appeal concluded it was not. In the first place, federal law contains no express preemption provision. In the second place, the I.C.W.A. does not "occupy the field" of child custody or adoption, even as to Indian children. In the third place, there is no conflict between the California de facto parent principle and one or more provisions of the I.C.W.A. Nor would any "major damage" be done to either federal law or Indian tribal law, custom, status or rights from application of the de facto parent doctrine. Thus, the order was affirmed.

GUARDIANSHIPS AND CONSERVATORSHIPS

In In re Marriage of Lloyd (1997) 55 Cal.App.4th 216, the First District Court of Appeal concluded a trial judge had no authority to appoint, on a regular basis, a guardian ad litem to represent minors in custody matters and "make orders" relating to child custody. There is some good discussion about the proper function of a guardian ad litem in the decision. The bottom line is that a guardian ad litem normally represents a party in an action, and children are not parties to family law proceedings.

In In re Tamneisha S. (1997) 58 Cal.App.4th 798, an order establishing legal guardianship as the permanent plan was upheld as within the trial court's discretion, in the absence of a showing that adoption was likely. In this case, the County Department of Children and Family Services appealed an order granting legal guardianship to her foster parents, arguing that adoption is the preferred plan for a child who cannot be returned to his or her family. The Court of Appeal agreed in theory with this position but concluded the department had failed to show by clear and convincing evidence that Tamneisha was adoptable.

In this case, the minor was brought into the dependency system due to a positive toxicology screen showing prenatal exposure to cocaine. The minor was declared a dependent under section 300, subdivision (b) of the Welfare and

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Institutions Code, and placed in foster care. The mother failed to get her act together during the next several months, while Tamneisha continued to be medically fragile, suffering from asthma, developmental delays, and other abnormal behaviors. By the time of the 366.26 hearing, no adoptive home had been identified for Tamneisha, although the foster parents were willing to become legal guardians.

At the 366.26 hearing, the court requested a report detailing why the exception under section 366.26, subdivision (c)(1)(D), did not apply. The department's report stated Tamneisha had been matched to a potential adoptive family and requested an additional 90 days to investigate this match or find another. The trial court found the department had failed to show Tamneisha was adoptable and, at the foster parents' request, appointed them as her legal guardians.

On appeal, the Second District Court of Appeal affirmed the order. It noted section 366.26 provides if a court does not find clear and convincing evidence the minor will be adopted, it may choose the best option from the remaining procedures, among which is the appointment of a guardian. It also noted the juvenile court's decision was well grounded insofar as the time limit for finding an adoptive family is 90 days past the 366.26 hearing, and, in this case, no such family was identified. While it is true, recognized the court, an adoptive family need not be waiting in the wings, in this case, the department had over 10 months to find an adoptive home and failed to place her.

The court also commented on the fact the juvenile court had requested a comprehensive report on the exception to terminating parental rights state in section 366.26 subdivision (c)(1)(D) from the department and the department was now contending the juvenile court had misinterpreted the section. The Court of Appeal concluded that exception was not relevant, since the exception would only apply in the event the child was found adoptable, which, in this case, the court found the contrary.

This next case is more in the nature of a permanency planning case, but the guardianship category was looking pretty empty, so I will put it here: In In re Jamika W. (1997) 54 Cal.App.4th 1288, the Second District Court of Appeal affirmed an order appointing the adult half-brother of the dependent child as guardian. The dependency jurisdiction arose of allegations the mother had struck the child, was a frequent user of cocaine and alcohol, and had failed to send the minor to school on a regular basis. Jamika was promptly detained in the home of her adult half-brother, Jimmy W., and, at the dispositional hearing, she was placed there.

During the 12 months of reunification, appellant-mom failed to appear at the hearings, and her visitation with Jamika was limited to a single visit for which Jimmy W. transported her. Aside from that, she did not participate in any of the service plan requirements or visit the child on her own. Thus, services were terminated at the 12 month review hearing, and Jimmy W. was appointed as guardian. Shortly after hearing, appellant appeared in court and subsequently filed a 388 petition. The petition alleged mom was participating in a drug recovery program and receiving Regional Center Services for her developmental delays. She claimed she had missed the prior hearing due to transportation problems and requested that the court reinstate family reunification services. The trial court declined to hear the petition with respect to the request to modify the guardianship order but did hear the portion addressed to visitation.

Appellant challenged the court's refusal to hear her request for a new guardianship hearing in the 388 proceedings. However, the Court of Appeal affirmed, since the trial court's denial as to the guardianship order was based on its observation it would not be in the child's best interests. Procedurally, mom had also questioned whether the trial court had authority to deny an evidentiary hearing on a portion of her 388 petition after an initial ruling granting an evidentiary hearing had been made previously. Mother likened her petition to a motion for reconsideration based upon new facts or law, pursuant to Code of Civil Procedure section 1008. The Court of Appeal disagreed; it concluded the trial court was not acting on a reconsideration motion but was correcting an erroneous ruling, as to which C.C.P. 1008 does not preclude the action by the court in this case.

NEW LAWS--NEW ISSUES DEPARTMENT

A. Federal Legislation

Congress recently passed, and President Clinton

signed, new legislation to speed up the adoption process. The new law, which is aimed at doubling the number of adoptions each year, provides the states $20 million in bonuses, for each of the next five years, to encourage speedier adoption processes. For each child adopted over the current level, the state will receive $4,000, with an additional $2,000 for each adoption of a child with special medical needs. Most significantly, to qualify for the bonuses under the new program, permanency planning hearings must be held no later than 12 months after a child enters foster care.

The new legislation will impact California, which depends in very large measure on federal funds already and will no doubt seek access to the bonus money, which already has spawned one of the most lucrative adoption mills in the world. However, its legality is open to question. Several potential issues are presented.

First, regarding the question of providing reasonable services, is the potential problem that the state (through the aegis of the Department of Social Services and its county delegates) will have a direct financial incentive to frustrate reunification efforts (which still remain a primary goal of foster care under the new provisions) in order to insure a termination of parental rights at the 12 month stage. As a matter of fundamental substantive due process, the state, as parens patriae, should not be encouraged to dissolve a biological family unit in favor of an adoptive family for financial profit.

The president's efforts, calling upon many more families (read: affluent families) to "open their homes and their hearts to children who need a loving home," could be the call for a new level of social engineering, if the implementation follows the trend under the current law.

A second potential issue relates to the federal program's adoption of criteria for situations in which reunification services are not required. These situations include cases in which a parent has been convicted of murdering another child or when a child has been abandoned, tortured or abused. We will need to look closely at the exceptions contained in the federal law and compare them with the new provisions of Welfare & Institutions Code 361.5. If California permits nonreunification in a broader class of situations than provided under federal law, a strong argument can be made that the California exceptions (to the extent they are applied in a given case) violate due process of law.

Recall that federal law sets minimum levels of protection. States may adopt greater protections, but not less than that guaranteed under federal constitutional law. Notwithstanding the newly adopted statutory amendments, under federal constitutional law, a parent and a child have a fundamental interest in their familial relationship. This relationship may not be breached except when the parental home is proven to be unfit.

Under federal law, in order to terminate parental rights (whether at the 12 month stage or the 18 month stage), unfitness must be found to continue to exist **at the time of the termination hearing**, by clear and convincing evidence. If the unfitness, which is to form the basis for a denial of reunification services, relates to a condition set forth in section 361.5, which is not included in the federal version, compliance with which is a condition precedent to federal funding, a constitutional violation should be raised.

B. State Legislation

(i) Amendments to Welfare and Institutions Code 361.5

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Having already alluded to newly amended State Legislation, let me launch into a review of some new problem areas detected in the amendments to Welfare and Institution Code sections 361.5 and 366.21 which are causing quite a bit of fur to fly.

Section 361.5 adds several new criteria which can give rise to a denial of reunification services in the first instance. As you may have guessed by hints in the discussion of the new federal legislation, the new additions do not exactly track the federal criteria. Under the provisions which existed prior to the effective date in January 1997, services could be denied where (1) the whereabouts of the parent/guardian is unknown, (2) the parent/guardian is suffering from a mental disability, as described in Family Code section 7820, which renders him or her incapable of using services, (3) the minor had previously been adjudicated a dependent as a result of physical or sexual abuse, had been returned to parental custody and re-removed due to additional physical or sexual abuse, (4) the parent/guardian had been convicted of causing the death of another child through abuse or neglect, (5) the minor was declared a dependent under Section 300, subdivision (e) [severe physical abuse], (6) the minor has been declared a dependent under any subdivision of Section 300 as a result of severe sexual abuse or infliction of severe physical harm and the court finds reunification would not benefit the child.

Under the revised statute, additional situations can result in nonreunification. Note that the provision which previously related to a minor whose parent/guardian was convicted of causing the death of another child through abuse or neglect has been broadened to cover any situation in which the parent/guardian has caused the death of another minor through abuse or neglect. This was intended to cover the O.J. Simpson type of cases where the parent is acquitted in the criminal proceeding but found liable in civil proceedings. However, that is not what the statute says. As written it means a parent acquitted of the homicide can still permanently lose custody of the child, even if the acquittal was based on evidence that someone other than the parent committed the act and the parent was uninvolved. This presents most serious problems where a parent is adjudicated at fault in the dependency system because of failure to protect (abuse by babysitters, day car, burglars, etc.), notwithstanding the fact the death of the other child was actually caused by another person.

In addition to those summarized above, services may also be denied where [I have paraphrased and summarized] (7) the parent is not receiving reunification services for a sibling or half-sibling of the minor under numbers 3, 5, or 6, (8) the minor was conceived by means of a violation of Penal Code section 288 or 288.5, (9) the minor was "willfully abandoned," (10) the court has previously ordered a permanent plan of adoption, guardianship or long-term foster care for any siblings of the minor due to the parent's failure to reunify and the court finds the parent has not subsequently made a reasonable effort to treat the problems that led to the removal of the sibling, (11) the parent has been convicted of a violent felony as defined in Penal Code section 667.5, subdivision (c), and (12) the parent/guardian has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior treatment for this problem during a three-year period prior to the filing of the petition.

Readers should immediately be struck by the fact the some of these sections openly refer to non-current circumstances. A prior dependency involving a sibling has minimal relevance to a current case, particularly in light of the fact there is no time frame provided, and some of the situations which may have caused a termination of a sibling (such as emotional trauma prognosticated at the prospect of return to parents when a minor has a bond with a non-parent) are as easily attributable to the sibling's uniquity of emotional or physical health as they are to the parent's situation.

How many times have we seen a parent fully comply with reunification plan requirements, only to have adoption ordered because the minor is emotionally fragile and should not be removed from the foster family to which he/she has bonded? The loosely worded amendment may engender re-litigation of the causes which led to the termination of rights as to the sibling, and well it should. However, in so doing, trial counsel may wish to demur to the allegation in the petition insofar as it violates state and federal due process principles insofar as it purports to presume parental unfitness on circumstances occurring before the filing of the petition, not to mention before the hearing.

Note that the conviction of a violent felony under the newly added subparagraph (11) presents a "strict

liability" problem. Given the ease with which people who are not even present at a crime may be convicted, and given that there is no time restriction as to the age or recency of such a conviction which result in nonreunification,
there is little in the way of a nexus between parental conduct (here, the status of having been, at some time in his or her life, convicted of a violent felony) and some perceived risk of serious physical or emotional injury.

In addition to these changes in section 361.5, subdivision (b), an important change to subdivision (a) must be acknowledged. Changes to this subdivision provide that services to a parent/guardian of a child aged 3 or older, shall not exceed a period of 12 months, and services to a parent/guardian of a child under 3 years of age shall not exceed a period of 6 months, unless it is shown the objectives of the service plan can be achieved within the next 6 months.

Here is one problem: findings made under section 366, subdivision (a) must also be made, and a parent may be ordered to participate in court-ordered counseling or treatment programs unless the parent's participation in those services is deemed to be inappropriate or "**potentially** detrimental to the minor." [Emphasis added.]

(ii) Amendments to Welfare and Institutions Code sections 366.21, 366.22

In conjunction with the changes to section 361.5, the Legislature added some language to the provisions governing the conduct of period review hearings. Noteworthy is the addition of language requiring the court to state a factual basis for **either** a decision to return a minor to the parent's custody or not to return the minor. Considering that section 366.21, subdivisions (e) and (f), mandate return unless the department proves detriment by a preponderance of evidence, the new requirement that a court state a factual basis for finding that detriment does not exist smacks of shifting the burden of proof.

Another problem with the amendments is the inclusion of certain language in subdivision (g), subparagraph (c) of section 366.21 (which is already in effect), as well as the provisions of subdivision (a) of section 366.22 (which will go into effect in 1999) which conflicts with other statutes. Those subdivisions provide that "[e]vidence that the minor has been placed with a foster family that is eligible to adopt a minor, **or has been placed in a preadoptive home,** in and of itself, shall not be deemed a failure to provide or offer reasonable services."

I would strongly urge counsel, at the earliest stages of the proceeding, to request discovery of information about any foster care placement, including information about any and all licenses, home evaluations, and whether the family has either been approved as an adoptive home, or has requested consideration as such. The provisions of this subparagraph seem to conflict with the language of Welfare and Institutions Code, 361.2, subdivision (d), and here is how: Section 361.2, subdivision (d) incorporates the provisions of Family Code section 7950, regarding Foster Care Placement Considerations. Subdivision (a) of section 7950 provides that the placement preferences listed therein are to be used "[w]ith full consideration for the proximity of the natural parents to the placement **so as to facilitate visitation and family reunification**." [Emphasis added.]

This policy (promoting reunification) is

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echoed in subdivision (f)(1) of section 361.2, which provides, "If the minor is taken from the physical custody of the minor's parent or guardian and unless the minor is placed with relatives, the minor shall be placed in foster care in the county of residence of the minor's parent or guardian **in order to facilitate reunification of the family**. This comports with the Legislative intent stated in Section 16000 of the Welfare and Institutions Code, which provides that when a child is removed from his or her own family, family reunification services shall be provided for expeditious reunification of the child with his or her family.

Trial counsel might want to keep a couple of things in mind from the inception of any out-of-dependency case. First, was the child placed in a home which is the equivalent of the parental home, as mandated under section 16000? If the low-income family lives in a low-income neighborhood, the minor should be placed in a foster home which is equivalent. There is no legal reason by a poor family cannot qualify for foster care licenses. In fact, in at least one other state, single parents receiving welfare are encouraged to apply for foster care licenses. The reasoning is that these parents, who are prevented from maintaining full time employment due to the need to stay home with children, are experienced with child care and would provide quality care equivalent to the family's own means. The system adds income to people who need it most, while providing a safe home for children.

With financial aid being increased to out-of-home placements, attorneys would be wise to make a record early in the case that the minor has been placed in a non-equivalent home, contrary to the mandates of section 16000, and that this will prevent reunification. Placement in a foster home of people of higher means, in a different neighborhood, who have applied for approval as an adoptive home, is not calculated to reunify a child with his natural family.

The statute is thus flawed, to the extent it lessens the department's obligation to make a good faith effort to develop a plan aimed at reunification. In addition, the conflict between section 366.21, subdivision (g)(3), and the Legislative intent presents a due process problem, insofar as fundamental custody rights may be lost under an internally contradictory statutory scheme.

This is not an exhaustive list of potential issues, but, rather, is a starting place. If trial counsels find themselves facing a petition alleging one of the new grounds, intended to give rise to a denial of services, you are encouraged to call ADI to speak with the Dependency Hotline. We are always happy to brainstorm with you about possible approaches. We are especially happy when our beforehand brainstorming results in the preservation of some of these important issues for appellate review. Statistics relating to opinions filed between July 1, 1997, through November 19, 1997, show that in the Fourth Appellate District, out of a total of 370 appeals, a total of 14 cases (nearly 4%) resulted in a complete reversal, and another 13 (3.5%) resulted in a partial reversal.

This means that in approximately 7 1/2% of all the dependency appeals, favorable results were obtained. It is more than double the rate of reversal for all other appeals. It tells me there are problems with the interpretation of the dependency statutes which can be redressed if preserved for review.

C. Sade C. Procedural Update for the Fourth District.

By now, most attorneys have faced the problem of the case with elusive appellate issues and wondered what they should do. These attorneys have learned the answer to this question is directly dependent on which appellate district, and which individual divisional court within such district, the case arises. For practitioners in the Fourth Appellate District, there is something for everyone. However, as you will see, because dismissal of the appeal is highly probable, counsel are reminded to seek a Wende-type review by an ADI staff attorney prior to filing the no-issue brief. This is especially important in independent cases.

In Division One, with the filing of a brief in the wake of the decision in In re Sade C. (1996) 13 Cal.4th 952, requesting that the reviewing court exercise its discretion to conduct an independent review of the record, dismissal of the appeal will follow a motion by County Counsel. Until very recently, County Counsel has filed a formal motion to dismiss the appeal, against which parents' counsel have frequently filed opposition in writing.

However, the Court of Appeal has recently informed me that, soon, the County will file an informal

letter, acknowledging service of the Sade C. brief and requesting dismissal of the appeal. When the Court of Appeal receives this letter, it will hold off acting on it for **one week**, to give appointed counsel an opportunity to inform the court of his/her intent either to file a formal opposition to the request for dismissal or to file a brief on the merits of an issue which may have been found in the meantime. Counsel will need to act quickly if any further filings are contemplated.

In Division Two, the reviewing court will, as an exercise of its discretion, conduct an independent review of the record to determine if there are any arguable issues.

In Division Three, the Court of Appeal will not exercise its discretion to review the record for issues independently, but it will issue a notice to the appellant, that unless a supplemental brief is filed within 30 days, the appeal will be dismissed. This provides the indigent client an opportunity to write to the court and explain the issues he or she wanted raised.

D. REVISED PROCEDURES FOR RULE 39.1B WRITS IN DIVISION ONE

Trial Counsel Alert: You are already aware that Court Rules and case law require that a parent personally sign the Notice of Intent to file a petition for extraordinary relief. (See Janice J. v. Superior Court (1997) 55 Cal.App.4th 690, 691-692; Suzanne J. v. Superior Court (1996) 46 Cal.App.4th 785, 788; and Guillermo G. v. Superior Court (1995) 33 Cal.App.4th 1168, 1174.) You have also noticed there is a problem meeting the 10-day time limit for filing the notice of intent where your client is either incarcerated or resides out of state. Division One of the Fourth Appellate District recognizes the problem and has adopted a new policy.

Out-of-State Parents: If the parent resides out of state, trial counsel may sign and file the notice of intent to file a petition pursuant to Rule 39.1B of the California Rules of Court, BUT counsel must submit another notice, personally signed by the petitioning parent, within the next 15 days. This allows a two week grace period to obtain the personally signed notice of intent, for a maximum of 25 days from the date of the hearing, to facilitate contact with the client and allow for regular mail to and from the out-of-state client.

Incarcerated Parents: Division One understands that mail to and from the various prisons is problematic and may be further complicated by lockdowns. Thus, where the parent is incarcerated, the Court of Appeal for Division One of the Fourth Appellate District will accept a notice of intent to file a Rule 39.1B signed by counsel, under certain limited circumstances.

NOTE: Counsel must submit a declaration along with the notice of intent, signed under penalty of perjury, explaining that the client is incarcerated, and that communication and timely delivery of a personally signed notice of intent is prevented by a specific aspect of the incarceration, in order to justify filing the notice of intent on behalf of the client. For instance, if the client is in a facility experiencing a lockdown, counsel needs to mention that fact as the reason for signing the notice of intent on behalf of the client. If the client is in the middle of a transfer between institutions such that his or her mail has not caught up with him/her, state that fact.

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KUDOS AND ANECDOTES

Raise a glass to Marcia Faith Levine for her perserverence: In a recent published case decided by Division Three of the Fourth Appellate District, the court reversed an order denying a mother's Welfare and Institutions Code section 388 motion and directed return of the minor to parental custody. (In re Kimberly E. (1997) 56 Cal.App.4th 519.) In part, the reversal was based on the strength of the parent-child relationship which survived the reunification period. However, to allow a safety valve, in the event current circumstances would justify a detriment finding, the Court of Appeal directed a hearing take place in the trial court.

Upon remand, Orange County social workers immediately requested a new bonding study, in order to show how the bond between the child and the current caretakers now exceeded the parent-child bond in strength. Over mother's objections, the court ordered such a bonding study.

Marcia Levine, the appellate attorney for mother, took action, even though the appeal was completed. On her own initiative, she filed a petition seeking extraordinary relief from the juvenile court order directing the bonding study. A peremptory writ was issued commanding the juvenile court to vacate its order directing the bonding study forthwith, and, to prevent frustration of the relief granted, the Court of Appeal directed the opinion would be final in 5 days.

The Court of Appeal was greatly offended by the machinations of the department, which threatened to "undermine the whole edifice of appellate review in our juvenile dependency statutes. If evidence of bonding during a fast-track appellate process ([citation omitted]) could serve to show detriment sufficient to derail the appellate reversal of the denial of a section 388 motion brought by a parent, then appellate review may be effectively nullified." (Typed opn., p. 4.)

The court went on to say, "We are not window dressing for a system which is stacked against parents so that they can never win. The rule of law cannot be that strengthened bonds between a dependent child and a caretaker which developed after a speeding appeal and reversal of an order erroneously denying a section 388 motion can be sufficient to show detriment preventing a return otherwise required." (Typed opn., p. 4.)

Way to go, Marcia!

Warning: A recent article, appearing in the November 5, 1997, edition of the Los Angeles Daily Journal, recounts the tragic tale of a dependent child who was severely scalded by the relative of an unlicensed foster parent in whose home the child had been placed. Although the injury was brought to the attention of the juvenile court judge, the minor's attorney did not file a governmental tort claim against Los Angeles County. Apparently, the licensing violations went unnoticed until about 1994, when the case was assigned to a new dependency judge.

At around the same time, a new attorney was appointed to investigate the problems, to represent the minor (who is permanently disfigured and disabled as a result of the scalding), and file appropriate governmental claims. However, the deadline for filing such claims had passed and the new attorney's petition for leave to file a late claim was denied. A malpractice suit was thereafter instituted, and the judgment against the minor's attorney was affirmed on appeal in an unpublished opinion by the Second District Court of Appeal.

The moral of the story is that processing juvenile court cases is only part of the job of minor's counsel. Welfare and Institutions Code section 317, subdivision (e) mandates that counsel investigate and report to the juvenile court judge; the section, which charges minor's counsel "in general with the representation of the minor's interests," extends beyond the scope of the juvenile proceedings. Thus, it is the obligation of minor's counsel to investigate and file appropriate governmental claims.

HOT RESOURCES

Check out a recent article by Lori Klein, entitled "Doing What's Right: Providing Culturally Competent Reunification Services" (1997) 12 Berkeley Women's Law Journal 20. Lori, an appellate practitioner in the area of dependency law, shares lessons learned in representing a parent from a culturally different background and explains the need for a service plan culturally tailored to the family's individual needs. The

article contains entire sections devoted to "Trial Strategies" and "Appellate Strategies," which should be required reading. After you have finished reading this newsletter, of course.

ADI on the Internet (continued from page 8)
statement and a page of links to other Internet sites for researching criminal law. Additionally, from the ADI web site you can send E-mail directly to our office! Panel attorneys may submit short questions or special requests via E-mail. All legal questions will be referred to the assigned assisting attorney or to the attorney of the day if no attorney has been assigned to your case. Questions will be answered in one to two business days. Please include your case name and case number on all questions. Currently, draft opening briefs will not be accepted via E-mail.

Please keep checking our homepage for changes. In August we expect to make major changes to our homepage to incorporate some suggestions from our panel. Planned improvements consist of including our current and recent past newsletters, recent informational mailings, and our expanding criminal law research link page. Please E-mail us your suggestions and comments.

KUDOS

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

Gary Nelson, Special kudo for his cameo appearances in the award-winning Titanic.

Romero Wins: Janice Lagerlof, **Shawn O'Laughlin**, **Richard Power**, and **Kyle Marie Wesendorf**

Cheryl Anderson, P. v. Glover, #D028052, One count of possessing a completed check with intent to defraud reversed where defendant possessed multiple checks on a single occasion. (A)

Joan Anyon, P. v. Allen, #E019556, Consecutive term of two years plus ten year firearm enhancement stayed per PC 654 where defendant convicted on felony murder theory based on robbery; remand for restitution hearing where court imposed $5,000 restitution fine in minutes but imposed no fine at hearing. (I)

Neil Auwarter, P. v. Adargas, #D026396, Conviction of possessing methamphetamine for sale reversed, because trial court erred in denying suppression motion; home entry by police violated knock-notice requirement where officer announced purpose as he passed through threshold. (ADI)

Douglas Benedon, P. v. Peetom, #E019764, Remanded for resentencing where court imposed upper term, relying on an improper aggravating factor (vulnerability) and other aggravating factors were of questionable validity, and two mitigating factors were present. (A)

Janyce Blair, P. v. Hernandez, #E020326, Sentence miscalculation corrected to reduce sentence by one year. (I)

Randall Bookout/Amanda Doerrer, P. v. Crystal R., #D028483, Where methamphetamine was found in back seat of patrol car following transportation of three juvenile defendants to station, evidence was insufficient to show appellant either possessed the drug or aided and abetted another in possessing it. (ADI)

J. Thomas Bowden, P. v. Armijo, #D026393,

Conviction of attempted murder stayed pursuant to PC 654 where defendant was also convicted of conspiracy to commit murder. (I)

Julie Braden (for mother) **Michael Randall** (for father), In re Tyler F., #D029367, Reversal for abuse of discretion of judgment that denied presumed father status to husband of the mother
of the child, where the child was conceived before the marriage, but born during the marriage, and no biological father had come forward to offer support. (I)

Alison Braun/Deborah Hawkins, P. v. Sok, #G020207, Sentence for attempted robbery stayed pursuant to PC 654. (A)

Philip Brooks, P. v. Brown, #E017853, Trial court erred in allowing DA to amend information to allege a 1992 Washington prior conviction for robbery after the jury was discharged, because defendant was deprived of the 20 peremptory challenges he would have received had the Washington prior been charged at the time the substantive offenses were tried. (I)

Gordon Brownell, P. v. Humphreys, #E019774, Remanded to stay six-year term for felony child endangerment conviction pursuant to PC 654 (term had been imposed concurrently, and AG conceded error); second-degree murder conviction otherwise affirmed. (I)

Martin Nebrida Buchanan, 1) P. v. Johnson, #D026942, One strike prior reversed, because Illinois robbery conviction required no intent to permanently deprive the victim of the property. (I) 2) P. v. Barton, #D026470, Court of Appeal modifies sentence because trial court erred in imposing a greater sentence than that imposed after appellant's first trial from which a first appeal was taken. Trial court also erred in its award of custody credits. (I)

Dennis Cava, P. v. Miranda, #E020334, On People's appeal, trial court did not abuse discretion in dismissing strike; case remanded for trial court to reissue its ruling on the motion and its statement of reasons and to direct clerk to enter reasons in minute order where trial court had failed to do so. (I)

Melissa Chaitin, In re Amanda T., #E020377, Though the jurisdiction/disposition findings under W&I 300, subd. (a) were affirmed concerning one child, the judgment under 300, subd. (j) as to the sibling was reversed for lack of substantial evidence where the parents' emotional unavailability and meanness neither extended to the sibling nor were argued at the hearing. (A)

Marianne Harguindeguy Cox, P. v. Parilla, #D028419, Trial court grants 267 days extra presentence credits as requested by counsel's motion arguing that San Diego Rescue Mission placement sufficiently custodial to warrant additional time. (A)

Michael Dashjian, P. v. Gonzalez, #E018143, Court order revoking driver's license reversed. (I)

John Dodd, P. v. Sanchez, #E018663, People's appeal of Romero resentencing where the trial court struck two strikes. Affirmed, despite failure to put reasons in the minutes, provided the trial court amended the minutes to "precisely and completely" state its reasons for dismissing the strike priors. (I)

William Drake, In re Daniel K, #E020639, Removal of two children at a review hearing where no supplemental petition was filed violated the mother's due process rights and several statutes. Also, the termination of reunification services for the daughter at the six-month hearing was based on no statutory authority and was an abuse of discretion. (A)

Suzanne Evans 1) (for mother), In re Larissa G., #D028630, Remand to allow full provision of services to the parents, and to reconsider the visitation issue which the trial court failed to do on the first remand. (A) 2) P. v. Sechrist, #E016786, Affirmance on People's appeal. People had appealed trial court order in a habeas corpus proceeding granting defendant a new trial based on prosecutor's misconduct where police "ambushed" defense counsel at trial with key inculpatory evidence omitted from police report. (I)

Linda Fabian, In re Juan M., #D028928, Ruling on a supplemental petition pursuant to W&I 387 reversed, because there was no substantial evidence to support the lower court's findings that the previous disposition had not been effective in protecting the children; the children had been placed with father and resided in paternal grandparents' home where they were well cared for. (I)

Patrick Ford, P. v. Bell, #D027299, Published

remand for trial court to exercise discretion in deciding whether to sentence strikes crimes committed on same occasion consecutively or concurrently. (I)

Jeffrey Garland, P. v. Ratcliffe, #E017650, Romero remand in pre-Romero case. Also remanded with directions for trial court to award presentence conduct credits when trial court left calculation to Dept. of Corrections and trial counsel "waived" the calculation. (A)

Stephen Gilbert, 1) P. v. Hamilton, #G020258, Denial of motion to suppress reversed. CHP officer had no duty to drive stranded female pedestrian 1/4 mile to off ramp. Failure to give pedestrian the option of walking and requiring submission to search as prerequisite for ride was unconstitutional. (I) 2) P. v. Bermudez, #G020141, Murder verdict modified to second degree because of insufficient evidence of premeditation and deliberation. (I)

Laura Gordon, In re John P., #D027871, Reversed. Insufficient evidence that minor possessed a gun, discharged a gun in a grossly negligent manner, committed malicious mischief and possessed live ammunition. (I)

Robison Harley, P. v. August D., #D028893, Minor's true findings of malicious mischief reversed on insufficient evidence grounds. (I)

Donna Harris/Stephen Cohan, In re Leon Parker, #D029756, Habeas corpus granted; probable cause hearing under Sexually Violent Predator's Act requires more than a mere "paper review," i.e., a hearing in which the defendant may cross-examine experts and call witnesses. (San Diego P.D., Non-ADI)

Carl Hancock, 1) In re Viante F., #D027067, Juvenile case remanded for court to determine whether matter is misdemeanor or felony. (A) 2) P. v. Rodriguez, #E018960, With no notice, no hearing, and no evidence regarding appellant's ability to pay for cost for defense services, order for appellant to pay defense costs stricken. (A)

Mark Hart, P. v. Ansaldo, #E018467, Prior prison term enhancement stricken as erroneously entered on abstract of judgment. (I)

David Hendricks, 1) P. v. Molina, #D026688, Narcotics convictions resulting in 9-year prison term reversed based on erroneous admission of drug courier profile evidence to prove defendant's guilt. (A) 2) P. v. Bell, #D026699, Appellant's sole conviction for possession with strike prior reversed, because trial court erred in allowing inadmissible unqualified expert opinion which was compounded by erroneous instruction on evidence of other crimes. (A)

Marvin Hendrix, In re Larry V., #D027430, Remand for juvenile court to designate whether automobile burglary is a felony or misdemeanor. (A)

Patrick Hennessey, 1) P. v. Whitaker, #D026939, Stayed conviction for receiving stolen property (car) stricken where appellant also convicted of unlawful driving/taking of same car. (I) 2) P. v. Martinez, #E019490, Three year gang enhancement (PC 186.22) stricken because crime punishable by life in prison. (I)

Mary Hibbs, P. v. Campbell, #E019335, Sentence for possession of controlled substance for sale was erroneously imposed concurrently to a sentence for possession of the same controlled substance with a firearm; Court of Appeal (Continued on page 28)

ordered the former stayed pursuant to PC 654. (A)

Donal Hill, 1) P. v. Perales, et al., #E019170, Appellant's punishment for simple assault stayed pursuant to PC 654 because committed with same intent as voluntary manslaughter. (I) 2) P. v. Walker, #E019317, Negotiated disposition took five years off 13-year sentence, in exchange for dismissal of habeas petition on IAC grounds filed in superior court. (I)

Handy Horiye, 1) P. v. Salceda, #D029086, Abstract of judgment modified to included 531 days of actual credit for the period appellant was imprisoned between his initial sentence and resentencing upon a remand pursuant to Romero. (I) 2) P. v. Sandigo, #E018375, Restitution fine of $10,000 stricken as unauthorized; clerical error in abstract of judgment corrected. (I) 3) P. v. Haines, #D027203, Remand to determine whether court wishes to sentence concurrently as opposed to consecutively on two felony counts with multiple strikes where these counts arguably arose out of same transaction or occurrence and court believed it was required to sentence consecutively. (I) 4) P. v. Miles, #D026984, Restitution fine under PC 1202.45 could not be imposed for a 1991 offense, since the statute was passed in 1995. (I)

Anna Jauregui, P. v. Hawkins, #D026821, Trial court erred in ordering a PC 1202.45 restitution fine in violation of the prohibition against ex post facto laws. (ADI)

Sharon Jones, P. v. Travers, #G019098, Trial court erred by treating appellant's Marsden motion, made after trial but before sentencing, as a motion for new trial based on IAC, pursuant to People v. Fosselman. A Marsden motion may be made after trial, and in this case, where appellant's letter initiating the Marsden request indicated the request was based not only on counsel's performance at trial but also on additional facts which appellant stated he wanted to tell the court, the trial court's failure to give appellant the opportunity to be heard constitutes error. Case remanded for Marsden hearing and resentencing pursuant to Romero. (I)

Greg Kane, P. v. Young, #E019535, The trial court improperly imposed a concurrent 25 years to life sentence for a petty theft with a prior, where the appellant also received a 25 years to life term for the burglary which involved the petty theft. The petty theft sentence was stayed under PC 654. (I)

Judy Keim, P. v. Vallo, #D028183, Convictions of possessing heroin and cocaine stricken, when appellant was also convicted of possession for sale of both substances. (A)

Susan Keiser, In re Chad D., #D027576, Trial court erred in failing to exercise its independent discretion in setting a minor's maximum term of confinement. Record did not reveal court independently set this term as opposed to acquiescing to clerk's statement as to what term was. (I)

Roni Keller, 1) In re Paris S., #E020415, Reversal of order placing child in father's custody at the disposition hearing, discharging her as a dependent, and dismissing the dependency, where no investigation of the out-of-state father took place. Father had not communicated with or seen the child for over a year since he had gotten out of jail for spousal abuse and he had a history of drug abuse. In addition, the Court found the mother's parental rights were effectively terminated, because the trial court did not outline a visitation schedule or specify who would bear the expense of travel for visitation. (I) 2) In re Pedro M., #G021911, 366.26 termination of parental rights reversed because trial court abused its discretion by refusing a requested 30 day continuance so a 388 motion could be filed. (I)

Nancy King, P. v. Korogy, #D026218, Judgment vacated and case remanded for new suppression hearing. Court held that PC 1538.5, subdivisions (j) and (p) require that where a case is dismissed following a successful 1538.5 motion, upon refiling the renewed 1538.5 motion must be heard by the same judge, because statute is designed to prevent prosecutorial forum shopping. (A)

Jill Lansing, P. v. High, #G019862, The trial court improperly made a victim restitution order for an unspecified amount, without a hearing. (I)

David Macher, P. v. Clark, #E019647, Case remanded for resentencing, because trial court erred in imposing separate terms for murder and burglary since those crimes were part of a single course of conduct. (I)

Linda Casey Mackey, P. v. Rafferty,

#D026950, A violation of PC 502, subd. (c)(2) [taking of information from a computer system without permission] as alleged against appellant was a necessarily included lesser offense of PC 502, subd. (c)(1) [use of a computer system without permission to wrongfully obtain money or property], such that appellant's convictions on both violations could not stand. Former conviction reversed. (I)

Pearl Gondrella Mann, P. v. Zamora, #G019866, One count of assault reversed for failure to read verdict and obtain jury's oral affirmation of verdict. (I)

Martha McGill, P. v. Vasquez, #D027076, Assault with intent to commit rape reversed for insufficient evidence where defendant was in complainant's home already when complainant saw him downstairs. Evidence consisted of complainant's statement she felt defendant had an erection and made a pelvic thrust towards her while attempting to stop her from calling 911. When arrested, defendant had a flashlight, mace, screwdriver and pliers in his front pocket. (I)

David McKinney, P. v. Valdovinos, #D028209, One of two five-year priors stricken because priors were not brought and tried separately. Case remanded for resentencing because trial court erroneously believed consecutive sentences were mandatory under PC 667, subd. (c)(6). (I)

Michael McPartland, P. v. Flores, #D028696, Court reversed the conviction for simple possession of heroin because it is a LIO of the conviction of possession of heroin for sale. (I)

Paula Mendell, P. v. Rubio, Jr., #D026147, Attempted murder, assault with a firearm, and shooting at an inhabited dwelling convictions based on aiding and abetting reversed for insufficiency of the evidence. (A)

David Morse, P. v. Guy, #E020464, The trial court failed to instruct on reasonable doubt. (I)

Gary Nelson, P. v. Sherman, #D027394, Receiving stolen property conviction reversed where appellant also convicted of burglary. (I)

Laurel Nelson, 1) P. v. Williams, #D028690, PC 1297 does not authorize bail money to be used for court-appointed attorney's fees. Judgment modified to delete that payment from the cash bail owed to appellant. (I) 2) P. v. Williams, #D028272, Payment of court-appointed attorney's fees not authorized by PC 1297; judgment modified to delete. (I)

Diane Nichols, 1) P. v. Ward, #E019418, Published. Infliction of corporal injury conviction (PC 273.5) reversed, because statute does not apply to prospective parents of unborn children.
2) P. v. Johnson, #E020487, In People's appeal from dismissal of strike, case remanded for trial court to set forth reasons for striking in minutes per PC 1385, subd. (a); judgment affirmed in all other respects. 3) P. v. Hodges, #E020642, In People's appeal from dismissal of strike; judgment affirmed; trial court ordered to reissue ruling and reasons and enter in minute order per PC 1385, subd. (a) 4) P. v. Lopez, #D022170, In People's appeal, judgment dismissing strike affirmed with directions to trial court to prepare written statement of reasons to comply with PC 1385, following remand from Supreme Court with directions to reconsider earlier opinion in light of Romero and P. v. Bailey (1996) 45 Cal.App.4th 926 (Div. Three case holding People have no right of appeal from probation grant). (ADI)

Kenneth Nordin, P. v. Farha, #D027395, PC 1202.45 restitution fine [suspended unless parole revoked] stricken because imposition of fine where offenses pre-dated enactment of PC

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1202.45 [Aug. 3, 1995] is ex post facto. Issue not waived by failure to object at sentencing because imposition is an unauthorized sentence, correctable at any time. (A)

Shawn O'Laughlin, P. v. Avila, #D026393, Accessory to murder conviction stayed pursuant to PC 654 where defendant was also convicted of conspiracy to commit murder. (I)

Benjamin Pavone, P. v. Medina, #D027241, Appellant awarded one additional day of presentence custody credit. (A)

David Rankin, 1) People v. Velasquez, #D021930, On habeas following appeal, Superior Court applied law of the case to newly discovered evidence that a detainer was filed against appellant in Yuma County jail, and dismissed convictions with prejudice, because prosecutor violated the Interstate Agreement on Detainers by refusing to bring petitioner from Arizona to California for trial within statutory time limit. 2) P. v. Valles, #D027037, Vehicular burglary reversed for failure to give instruction on LIO of vehicle tampering. (ADI)

Peggy Reali, In re Vhijay G., #D028002, Insufficient evidence of true findings that minor either discharged or possessed the gun or assisted/encouraged another to do so. Also, insufficient evidence to support vandalism true findings. (A)

Sharon Rhodes, 1) In re Jason B., #D028727, True finding of commercial burglary reversed for insufficient evidence. Mere presence does not constitute aiding and abetting. (I) 2) P. v. Castro, #D027177, Where court unaware of its discretion to strike H&S 11370.2, subd.(a) enhancements, trial counsel ineffective in failing to inform court of its discretion to strike, and there were three potential mitigating and no aggravating factors; case remanded for resentencing. (A)

Andrew Rubin, P. v. Laird, #E016786, Affirmance on People's appeal. People had appealed trial court order in a habeas corpus proceeding granting defendant a new trial based on prosecutor's misconduct where police "ambushed" defense counsel at trial with key inculpatory evidence omitted from police report. (I)

Stefanie Sada, P. v. Wade, #E018145, Two year enhancement pursuant to 667.9(b) [commission of offenses against one 65+ years of age] stayed where trial court imposed sentence on attempted murder to which enhancement did not apply and stayed residential burglary to which it did apply. (ADI)

George Schraer, P. v. Johnson, #E026826, Five counts of simple kidnapping reversed, because they were LIOs of the five counts of kidnapping for robbery. Court's failure to impose a sentence orally for the PC 12022.3, subd. (a) enhancement viewed as intent not to impose enhancement and an act of leniency. (I)

Steven Schorr, P. v. Goodson, #E019189, Consecutive 25-years-to-life term ordered stayed pursuant to PC 654 on 70 years to life sentence. (I)

Patricia Scott, 1) P. v. Gonzales, #E019051, Abstract of judgment modified to reflect a 3 year reduction in the determinate term because PC 186.22 does not permit enhancement on life sentences. (A) 2) P. v. Ngo, #G018710, Concurrent term for false imprisonment stayed pursuant to PC 654 where defendant was separately sentenced for rape facilitated by the false imprisonment. (ADI)

Terrence Scott, P. v. King, #E018747, Sentencing court erroneously 1) imposed separate punishment for kidnapping and attempted sodomy in violation of PC 654, 2) imposed two PC 667(a) priors based on single prior serious felony conviction, and 3) miscalculated presentence credits. (I)

Maureen Shanahan, P. v. Creutz, #E020364, Guilty plea set aside and convictions reversed, because prosecution filed case after two prior dismissals in violation of PC 1387. (I)

Alisa Shorago, P. v. Fear, #D027619, Two of defendant's four strikes set aside, because Florida sex offense conviction does not require penetration for genital-genital contact; court remanded for the trial court to exercise its discretion under Romero because court could not conclude trial court would not have stricken a strike if it had known defendant had only two strikes, not four. (ADI)

Alice Shotton (Father), **Carmela Simoncini** (Mother), In re Gerald M., #D028107, Detriment finding at W&I 366.21/366.22 hearing reversed for

insufficient evidence. The department acknowledged parents had complied with their reunification, but relied on referrals going back several years in recommending non-return. Court of Appeal agreed past conduct was relevant but was limited to the assessment of a present risk of detriment. It concluded the department's beliefs parents failed to recognize the nature and severity of their children's problems was subjective and did not constitute substantial risk of detriment in light of the professional opinions
to the contrary. (I) (ADI)

David Stanley, 1) P. v. Richards, #D027585, 25 years to life sentence for commercial vehicular burglary reversed for resentencing as non strike case where, because court failed to make any finding as to prior strike allegations on the record due to oversight, priors were determined to be not true. Any later attempted redetermination is barred, and thus court could not correct at resentencing following remand from first appeal. Monge, which deals with findings set aside on appeal, is inapplicable to failure to make a finding at trial court level. (I) 2) P. v. Kocak, #D026252, Restitution fine modified from $10,000 to $7,728 where statute applicable at time of offense provided for offset in calculation of fine against victim restitution. (I)

Howard Stechel, P. v. Sosa, #E017493, First degree murder conviction reversed, because prosecutor improperly cross-examined appellant about her understanding of what would happen to her if she were found sane or insane. This
questioning effectively and improperly allowed the jury to consider appellant's punishment in reaching its verdict. Even though no objection was made to the prosecutor's argument regarding appellant's motive to lie, it would have been futile, since court's overruling of general objection when evidence came in sanctioned the prosecutor's argument. (I)

Ava Stralla, P. v. Mosely, #D027836, Restitution fine pursuant to PC 1202.45 stricken where crime committed one month before statute's effective date. (I)

Jeffrey Stuetz, P. v. Williams, #E020074, Judgment against "one-strike" defendant with multiple sex offenses and robberies reversed in part. Two counts of attempted genital penetration by a foreign object reversed because of insufficient evidence to show attempted penetration by foreign object rather than by sexual organ; sentences on two counts should have been stayed under PC 654. The court also struck four gun use enhancements, when defendant received an enhancement for firearm use under PC 667.61, subd. (e), because the prosecution did not plead and prove any additional circumstances justifying the gun use enhancements. The court rejected the AG's argument that PC 667.61(e)(5) (multiple victims) functioned as an additional circumstance because the prosecution did not specifically plead the circumstance under the statute, even though the information set forth the qualifying counts and multiple victims. (I)

Michael Totaro, P. v. York, #G019557, People's appeal affirmed and published. In a number of cases the People charged defendants with felony attempted possession of contraband when the suspects responded to undercover police overtures to sell the contraband in a "reverse sting." The Court of Appeal held that if all the defendant did was to solicit--without any other act--the sale, defendant would be guilty of only misdemeanor PC 653f, subd. (d). **Note:** In a companion published case, the Court of Appeal reversed, holding that where the suspect does more, such as tender money, then attempted

possession is appropriate. (I)

Patricia Ulibarri, 1) P. v. Walker, #D026989,
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GBI enhancement stricken, because GBI is an element of battery causing great bodily injury. (I) 2) P. v. Kristine P., #D029432, Burglary and attempted burglary true findings reversed on sufficiency grounds. (I)

Christopher Wagner, P. v. Mora, E020540, 15% good conduct limitation pursuant to PC 2933.1 does not apply to limit 4019 credits when defendant serves jail time as a condition of probation. (Riverside P.D., Non-ADI)

Kristine Watkins, 1) P. v. Valson, #E018752, Abstract corrected where second degree burglary conviction was incorrectly recorded as first degree burglary; three 5-year prior serious felony enhancements stricken, because current offense was not a serious felony; two of four prior felony strikes stricken based on insufficient evidence; two days of presentence custody credit added. (I) 2) P. v. Calac, #D027285, Petty theft with a prior stricken as lesser included offense of robbery. (I)

Mary Woodward Wells, P. v. Phipps,

#D027231, Judgment as to grand theft auto and accompanying enhancements reversed wheredefendant also convicted of robbery of same cars. (A)

Kyle Marie Wesendorf, 1) P. v. Austin, #D026758, Rather than remanding for new sentencing hearing, court reduces two consecutively imposed armed enhancements from one year each to four months each, thereby reducing sentence on a negotiated guilty plea. (I)
2) P. v. Webster, #D027384, Trial court ordered to modify abstract of judgment to delete conviction of petty theft with a prior because this crime was LIO of robbery conviction. (I)

Sharon Wrubel, 1) P. v. Johnson, #E020546, Abstract of judgment amended to reflect robbery term in one case to run concurrently with term imposed in another case. (I) 2) P. v. Mitchel, #E019243, Sentence reduced, because trial count erroneously found defendant acted in concert with two or more people under PC 213, subd. (1)(a). (I)

APPELLATE DEFENDERS, INC.
233 "A" Street, Suite 1200
San Diego, CA 92101-4010