APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

September 2019 through February 2020

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JURISDICTION

In re D.P. (Jan 8, 2020) [2020 WL 582789, B295780] (2d Dist., Div. 3) [Los Angeles]
Where the trial court failed to state the facts used as the basis for its decision to remove D.P. from his mother, the removal was not harmless and the Court of Appeal reversed. When the case began, D.P. was nine years old and the referral alleged mother was driving D.P. in the car while under the influence of alcohol. According to father, mother struggled with bipolar disorder and was not taking her medications. Father filed a restraining order in family court and was awarded sole custody of D.P. At the combined jurisdiction and disposition hearing held more than two months later, the trial court removed the child from mother's custody relying on Dependency Court Order 415. Mother appealed and the appellate court held reliance on this court order failed to state the facts on which to remove the minor as required by §361, subd. (e). The agency conceded the juvenile court erred, and the Court of Appeal held the failure to state the facts was not harmless error. If the juvenile court had made mandatory factual findings regarding reasonable alternatives, the appellate court determined it is reasonably probable the result would have been more favorable and the court would not have removed D.P. from mother's custody. As to the other dispositional orders, the appellate court held the juvenile court reasonably exercised its discretion in ordering monitored visitation and requiring mother to attend drug therapy and domestic violence treatment.

In re J.A. (2019) 43 Cal.App.5th 49 (4th Dist., Div. 2) [San Bernardino]
The trial court's failure to inform mother of her right to appeal at the jurisdiction and disposition hearing did not constitute good cause to consider jurisdiction issues on appeal when mother filed her notice of appeal 16 months late. At the jurisdiction hearing in Nov 2017, the juvenile court sustained the allegations, removed the then nine-year-old twin son and daughter, placed them with their father and granted father sole legal and physical custody. The trial court did not advise mother of her right to appeal and jurisdiction was terminated. Father was in the Air Force and then lived in Las Vegas with his wife (step-mother). The case began when mother attempted to abandon the twin son at the hospital explaining he was "too much trouble" and had behavior problems. After the dependency case closed, mother hired an attorney to regain custody in family court but she agreed to a stipulated dismissal of her request. Nine months after the dependency closed, mother filed a §388 petition in juvenile court asking the court to modify its disposition order from 2017. The juvenile court denied her petition but mother did not appeal this decision. Six months later, mother filed a notice of appeal challenging the 2017 order. The notice of appeal was dismissed for lateness, but upon mother's request to vacate the dismissal, the Court of Appeal reinstated the appeal based on a lack of advisement of mother's right to appeal. The Court of Appeal made clear that if an appeal is not taking within the 60-day period, the time to appeal is jurisdictional and the appellate court has no power to entertain the appeal. In distinguishing existing case authority which allowed a later consideration of disposition issues, the Court of Appeal

held that in those cases the dependencies were still open. In the instant case, the dependency had been closed for a year and a half. Further, mother failed to show any diligence by filing such a late notice of appeal. The appellate court held there is simply no authority for the proposition that a parent may reopen a long-closed dependency to relitigate issues of disposition based on the failure to advise a parent of appellate rights.

In re I.I. (2019) 42 Cal.App.5th 971 (2d Dist., Div. 1) [Los Angeles]
Where a prior dependency found the parents physically abused the children's siblings leading to the death of a sibling, the trial court was required to assert jurisdiction based on the uncontroverted evidence the parents caused a sibling's death. Father appealed arguing that since the children were not facing a current risk of harm, jurisdiction was improper. In the prior dependency in 2010, mother took her four-month-old twins to the hospital and medical personal determined the children suffered from injuries consistent with Shaken Baby Syndrome. The twins suffered severe brain injury and one of the twins died. The surviving twin was removed from the parents and adopted. Now, eight years later, mother has three children in her custody and took her two-year-old child to the hospital with a vaginal rash. Concerned it might be the result of sex abuse, the agency investigated. The social workers found no safety issues but filed a petition requesting removal based on §300, subd. (f) [death of a sibling]. The allegations cited only the facts of the 2010 case. At the jurisdiction hearing, the trial court found no evidence the children were at current risk of neglect or abuse but, even so, it was required to sustain the petition based on the prior allegations that were found true. The Court of Appeal held the juvenile court correctly understood the extent of its legal authority and properly exercised it in taking jurisdiction. Where there is uncontroverted evidence to support the allegation of the death of a sibling, the court's decision to find the allegation true and to establish jurisdiction is not discretionary and the court is required to assert jurisdiction. [M. Turkat-Schirn, father; N. Gold, children]

In re J.M. (2019) 40 Cal.App.5th 913 (2d Dist., Div. 5) [Los Angeles]
After mother absconded with her children for nine months, the Court of Appeal held there was no substantial evidence to support the trial court's decision to decline to assume jurisdiction even though the evidence was now old. In a response to a removal order, mother fled and the agency filed a petition. The petition for three- and two-year-old siblings alleged the parents abused drugs and participated in domestic violence. Children's whereabouts were unknown for about nine months. Mother eventually surrendered the children to a maternal relative. Since mother did not cooperate with the agency, the jurisdiction report contained mostly information from before mother left with the children. Prior to taking the children, a restraining order existed that prohibited contact between mother and father and mother testified positive for methamphetamine, marijuana, and cocaine. Based on the stale evidence, the juvenile court dismissed the petition because of a lack of current risk finding mother's lack of

cooperation did not create any kind of presumption of risk. The agency filed a writ of supersedeas to stay the case and the children appealed. The appellate court found no substantial evidence to support the juvenile court's decision to decline to assume jurisdiction. Evidence of risk included mother's prior positive drug tests, mother's missed drug tests, her failure to ensure one child received medical care for a heart murmur, and two missed meetings with the agency. Finding the parents' argument disingenuous, the court rejected the idea that the delay in holding the jurisdiction hearing meant the evidence of risk of harm was stale. The rule requiring a current risk should not apply to frustrate jurisdiction when a parent's wrongful conduct is the cause of the delay. In addition, the evidence provided an unrebutted basis to infer mother was continuing to use drugs which inhibited her judgement and interfered with her ability to care for her children. The order dismissing the petition was reversed and the matter remanded with directions for the trial court to make new and different orders assuming jurisdiction. [J. Shargel, mother; J. Love, father]

DISCOVERY

In re William M.W. (2019) 43 Cal.App.5th 573 (1st Dist., Div. 1) [Alameda]

Without finding a right to have discovery disclosed to parents in a specific form, the Court of Appeal held the juvenile court failed to exercise its discretion in making discovery orders and reversed and remanded. The parents, who were indigent, moved to compel discovery at no cost. The agency in Alameda County makes discovery available by setting an appointment for trial counsel to visit their office to review redacted discovery materials. Documents identified by the attorney will be duplicated for $.10 per page. The motion was denied and the parents appealed. The parents argued, based on constitutional principles of due process and equal protection, that the agency was required to provide discovery at no cost to the parents including delivering the discovery electronically. The Court of Appeal granted the application of the California Juvenile Court Advocates (CJCA) to file an amicus curiae brief in support of the parents' position. The appellate court held that making the discovery available for review and copying at a minimal cost, as provided by the agency here, complied with statutory requirements. In the present case, the parents' counsel declined to go to the agency's office and inspect the discovery when it was made available. Relying on California Rules of Court, rule 5.546 and statutory construction, the appellate court held affording a defendant an opportunity to examine, inspect, or copy the discovery items complies with the disclosure requirement. The rule requires only an opportunity to inspect the material and affords the agency the flexibility in the means by which the records are made available. As for due process, the court found parents in a dependency are not generally entitled to the same protections as criminal defendants. The Fourteenth Amendment does not guarantee any particular form or method of procedure for making discovery available. As for the equal protection claim, the constitutional right of indigent parents in dependency proceedings to equal access has been adequately protected through their right to appointed counsel. The

appellants may rely on the services of their appointed counsel who could be expected to do whatever was necessary to obtain the information needed. The Court of Appeal found no violation but did not opine on the wisdom of the agency's chosen procedure. The appellate court held instead that the juvenile court has discretion to manage discovery and, since the trial court here was unaware of its discretion, the case was remanded for the court to have an opportunity to exercise its discretion. [V. Lankford, parents]

DISPOSITION

In re Adam H. (2019) 43 Cal.App.5th 27 (2d Dist., Div. 5) [Los Angeles]

The Court of Appeal reversed finding the error not harmless where the trial court removed the child from father pursuant to §361 even though he was a non-custodial parent. Fourteen-year-old Adam was living with his mother who exposed him to narcotics and prostitution in the family home. Adam said mother physically and emotionally abused him and sold drugs at their house and he was depressed and suicidal. Adam had not seen father for eight years and he did not know him. According to father, he was incarcerated but after his release mother was aggressive towards him and refused to cooperate with his efforts to enforce a family court visitation order. Father requested custody but Adam was concerned about living with him since he did not know him well. Father's home was assessed and found to have no hazards and he began unmonitored visits with Adam. At the jurisdiction and disposition hearing, the trial court found it was premature to place Adam with father. The juvenile court removed Adam from the custody of both parents under §361, subd. (c). Father appealed and argued, and the agency conceded, that §361.2 governed father's request for custody. The Court of Appeal held the trial court did not apply the correct law to father's request. Further, the trial court failed to make express findings and the Court of Appeal was unwilling to imply findings because the evidence was not clear. Further, the lack of a relationship between father and son is not, by itself, sufficient to support a finding of detriment under §361.2. Since the court did not expressly consider placement with father under §361.2 and there was conflicting evidence as to whether such placement would be detrimental, the case was remanded for the juvenile court to consider the facts within the appropriate statutory provision. [J. Shargel, father]

BYPASS

In re I.A. (2019) 40 Cal.App.5th 19 (4th Dist., Div. 2) [San Bernardino]

Children appeal from orders granting mother reunification services arguing the bypass provision applied to mother and she was not entitled to reunification services and the Court of Appeal agreed. The appeal involves only the six-year-old and eight-year-old children involved in their 3d dependency. The children were removed from mother in 2015 and reunited with their father. In 2017, the children were removed from father and reunited with mother. In this, the 3d dependency, the children were removed from mother along with their younger sibling in 2018 for the same problems – domestic

violence and neglect. The trial court found the bypass provisions in §361.5, subd. (b)(10), applied only to the youngest child and granted reunification for mother for the older children. These children appealed. The Court of Appeal reviewed two cases which came to contrary conclusions about whether a parents' failure to reunify with a child's sibling can apply in subsequent cases involving the same children. Finding the language of the statute ambiguous, the appellate court followed *In re Gabriel K*. (2012) 203 Cal.App.4th 188, concluding the intent of bypass provision is to allow the juvenile court to deny reunification services if a parent has already failed at attempted reunification and providing additional services may be fruitless. The intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment. Consequently, the trial court's finding that the bypass provision did not apply was reversed and the case remanded for the juvenile court to enter an order denying reunification services. [M. Chaitin, children; J. Love, father]

SECTION 387

In re K.T. (2019) 42 Cal.App.5th 15 (4th Dist., Div. 2) [San Bernardino]

The Court of Appeal determined that relatives have standing to challenge removal pursuant to a §387 petition. K.T. was removed at nine months old and placed with his relatives, the B.'s, who were already caring for an older half-brother. The agency filed a 387 petition because the B.'s began to refuse to communicate with social workers and K.T. needed to be placed in a special health care needs foster home. In response to the 387 petition, the B.'s filed a 388 petition requesting the trial court return K.T. to their custody. The trial court granted the 387 petition and denied the relatives' 388 petition. The relatives appealed. In general, a person from whom a child is removed under §387 lacks standing to challenge the removal. In the published part of the opinion, the appellate court found that when a child is removed from a relative under §387, the relatives have standing to challenge the removal. Relying on statutory construction of §387, the Court of Appeal held the B.'s have standing because their appeal is, in effect, a challenge to the denial of their request for placement under §361.3. Section 387 specifically mentions §361.3 and the appellate court held it could not honestly distinguish a decision not to place a child with a relative from a decision to remove a child from a relative. Consequently, when a child is removed from a relative, that relative has standing to appeal. In addition, the relatives have standing under §388 to appeal the denial of their request for modification. [W. Caldwell, relatives]

SECTION 366.26

NOTICE

In re J.R. (2019) 42 Cal.App.5th 513 (3d Dist.) [Sacramento]

When writ notice is sent to mother's designated mailing address, notice is proper and mother's challenge to the visitation orders affirmed at the referral hearing was forfeited. The case began after it was reported that mother had relapsed in her alcohol use and had driven her 12-year-old son in the car while intoxicated. J.R. confirmed the report of mother's relapse and he had been living with his maternal grandparents at his mother's request. Mother was granted 12 months of reunification services but was unable to reunite. In Aug 2017, in response to J.R.'s refusal to visit with his mother, the trial court made a visitation order allowing the agency to consider J.R.'s wishes about visitation but J.R. shall not be given the option to consent to, or refuse, future visits. At the contested permanent planning hearing held in Feb 2018, the court terminated reunification services, set the §366.26 hearing, and confirmed the prior visitation order. The §366.26 hearing was continued several times as J.R. vacillated between wanting to be adopted by his grandparents or a legal guardianship with them. Mother attended the §366.26 hearing held in Sept 2018 where the court made the maternal grandparents the legal guardians and ordered a guardianship for J.R. Mother appealed the guardianship and the visitation orders. Mother argued she did not file a writ from the referral hearing but her challenge to the visitation order was not time barred because the juvenile court failed to provide her with timely and valid notice of her writ rights. In the published section of the opinion, the Court of Appeal found that notice of mother's writ rights had been sent to her designated mailing address. When a parent fails to inform the court of her new mailing address, the parent's failure to receive advisement of her writ rights that were timely mailed does not constitute good cause to excuse the parent's failure to file a petition for extraordinary writ. Consequently, mother was properly served with writ notice and her challenge to the visitation order was forfeited. [S. Gorman, mother]

In re M.S. (2019) 41 Cal.App.5th 568 (4th Dist., Div. 1) [Imperial]

When the agency had known mother's address since the start of the case, it was error for the trial court to find that mother's whereabouts were unknown, to deny reunification services to mother based such a finding, and to terminate parental rights at the subsequent §366.26 hearing. Mother gave birth to M.S. and mother and child tested positive for methamphetamine. Mother told the agency in her first interview that she was separated from father, was unemployed, and lived with her parents and her three other children in Mexicali, Mexico and she provided a mailing address. Mother was noticed and appeared at the detention hearing and the initial jurisdiction hearing. The court continued the hearing for six months to notice father who was in Mexico and would have to be served with letters rogatory. Mother was served notice for the continued hearings at the Mexicali address, however, the agency reported mother's and father's

whereabouts continued to be unknown. Days prior to the continued jurisdiction hearing, the social worker called some phone numbers on a statewide database along with calls to the Imperial County jail, a Mexico jail, and three Mexicali hospitals. Mother was not located. At the jurisdiction hearing, the juvenile court found the agency had exercised due diligence. The court declared M.S. a dependent, removed her from her parents, and denied mother reunification services under §361.5, subd. (b), because her whereabouts were unknown. Based on the denial of reunification services, the court set a §366.26 hearing. Mother was not unknown to the agency because she had sporadic visits supervised by the agency. Further, notice of the hearing was sent to mother's Mexicali address. Mother was absent from the §366.26 hearing and the trial court terminated parental rights. Mother appealed challenging the disposition orders. The Court of Appeal found insufficient evidence to support the court's findings because it was unreasonable for the agency to not avail itself of the resources most likely to ascertain mother's whereabouts for the 10-month period leading up to the jurisdiction hearing. Since the evidence was insufficient to support a finding that the agency used diligent efforts to locate mother and because such evidence did not support a finding mother's whereabouts were unknown, the trial court erred in denying reunification services. In addition, since the trial court found mother's whereabouts were unknown, it was error to set the §366.26 hearing because §361.5, subd. (f), does not permit the court to set a §366.26 hearing under these circumstances. Thereafter, terminating mother's parental rights was further error because mother had not been offered or provided reasonable reunification services. The Court of Appeal found the harmless error analysis did not apply and the juvenile court's error was reversed. [E. Min, mother]

In re D.R. (2019) 39 Cal.App.5th 583 (2d Dist., Div. 8) [Los Angeles]
Where the agency only noticed father by publication and failed to comply the Hague Service Convention (HSC) even though father was a resident of Mexico, the lack of reasonable due diligence warranted reversal of the judgment and remand. Father's location was unknown for most of the case but, after the initial hearing for the §366.26 hearing, father filed a §388 petition requesting to vacate the jurisdictional and dispositional orders based on a lack of notice. The trial court denied father's petition finding it was unreasonable to ask the agency to attempt to locate father in Mexico and because father had no contact with the children for two years before the hearing. This appeal by father followed. The case began when the children were four and six years old based o physical abuse by mother including burning one child with a hot spoon and striking a child in the face with a belt. The family had a prior dependency and since then father had been deported to Mexico. The jurisdiction hearing was held in Jan 2016. The agency was aware father was in contact with his adult son on Facebook and he was not in California. The agency was unable to locate father on Facebook and the trial court denied father reunification services. Mother was granted reunification services for 12 months. The court continued the 12-month review hearing for notice to father in March 2017. The

agency noticed father by publication in the Los Angeles Bulletin. Then, in Sept 2017, father spoke to one of the children by phone during a visit. The child's half-sibling told the agency she and her brother had contact with the father through Facebook. The agency asked for a phone number and address for father but could not reach him. The agency also conducted a search which recovered only addresses in California. Father reached out to the agency in June 2018, requested custody, and for appointed counsel. Father filed a 388 which was denied and led to this appeal. The Court of Appeal found the agency did not provide notice reasonably calculated to apprise father of the case. The agency failed to ask father's adult children for information about father through Facebook. They agency also searched through two dozen U.S. government databases but was aware father had been deported. The appellate court found it was not unreasonable to ask the agency to locate father in Mexico. The agency could have used social media and other efforts likely to lead to an address for father in Mexico. Service by publication under these circumstances was invalid. Further, the appellate court found the agency failed to comply with the requirements of the HSC as obligated. Failure to complete with the HSC would invalidate all proceedings with respect to father. Contrary to the agency's assertion, father's counsel's appearance did not constitute a general appearance and father in no way acquiesced to the court's personal jurisdiction. All the orders as to father were reversed and the case remanded with instructions to commence de novo with jurisdiction. [J. McGowan, father]

PLACEMENT

In re J.M. (2020) 44 Cal.App.5th 707 (6th Dist.) [Santa Clara]

Even when a guardian does not plan to have the child in her home, the trial court properly entered a permanent plan of legal guardianship with continued dependency jurisdiction and appointed grandmother as legal guardian. J.M was born in 2010 but he suffered an accident at 10 months old and he is permanently disabled. He has anoxic brain injury, epilepsy, developmental delays, and bone disorders. He needs assistance to eat and breath, he is immobile and will never walk, and he is non-verbal. He remained in the hospital until 2017 when he was ready to be discharged. Neither parent completed the necessary training to be caregivers. The parents were provided with reunification services but were unable to care for J.M. The agency determined J.M. was not adoptable due to his complex specialized needs. The trial court made grandmother J.M.'s legal guardian even though she did not reside in accessible housing, had no plans to obtain accessible housing, she completed some but not all the training to care for J.M., and she was not seeking placement of J.M. in her home. Based on these facts, the minor appealed and argued appointment of the grandmother as legal guardian was not authorized by the governing statute and was not in J.M.'s best interest. Relying on statutory construction, the Court of Appeal held that §366.26, subparagraph (c)(4)(A), applied even when adoption is unlikely. The appellate court found the record showed grandmother cannot be characterized as a mere friendly visitor, she has long been a

positive presence in J.M.'s life, the two share an emotional bond, she regularly visited J.M., and has been the educational rights holder who has advocated on J.M.'s behalf. Based on this, the trial court's determination that J.M.'s best interest would be best served through legal guardianship with his grandmother was not an abuse of discretion. [L. Barry, minor]

In re L.M. (2019) 39 Cal.App.5th 898 (4th Dist., Div. 1) [San Diego]
Where two possible placements are both appropriate, the trial court did not err by focusing on the child's best interest and placing the child with the foster family who had previously adopted the child's sibling. In 2013, L.M.'s sister was born testing positive for methamphetamine and was eventually adopted by the E.'s in 2015. L.M. and her sister are African-American and the E.'s are Caucasian. After adopting L.M.'s sister, the E.'s learned more about transracial adoption and in response moved from San Diego to Tampa, Florida, which is 26 percent African-American, reside in a multiracial neighborhood and have their child attend a racially-diverse school. L.M. was born positive for methamphetamine in 2018 and was removed from her parents. She was placed with Kate K. and Jamie S. [de facto parents]. The E.'s said they wanted to adopt L.M. two days after she was born. Once the E.'s became licensed foster parents in Florida, so the agency could place L.M. with them, the E.'s began traveling to California to visit L.M. including overnight visits. L.M. and her sister immediately made a connection according to both the E.'s and the social worker. The trial included expert witnesses from the E.'s and the de facto parents. The trial court found it was in L.M.'s best interest as she grows older to live with an older sister of her same race. The appeal by the de facto parents was filed after the trial court ordered the removal of L.M. from their custody and placed her with the E.'s. The de facto parents argued they qualified as L.M.'s prospective adoptive parents under §366.26, subd. (n), and the trial court erred in considering removal from their custody and placement with the E.'s at the same time. The Court of Appeal found it was unnecessary to decide the merits of whether the de facto parents qualified as prospective adoptive parents because the trial court did not designate them as prospective adoptive parents. Further, the trial court may consider future placement under §366.26, subd. (n)(3). The E.'s ability to provide L.M. a sibling relationship in a loving home directly affects whether L.M.'s best interests are furthered by removal. Finally, the appellate court found the trial court's best interest finding is supported by substantial evidence. The evidence included the testimony of the E.'s expert which the trial court found more credible and which indicated L.M. would not suffer trauma at being placed with the E.'s because she was familiar with them. The appellate court affirmed the trial court's orders.
Father also appealed but he did not challenge the termination of parental rights from the §366.26 hearing. Since he lacked standing to challenge the placement order, father's counsel requested the appellate court consider father's brief akin to an amicus curiae on behalf of the de facto parents. Since no party objected, the court considered his

comments. [W. Hook, father; A. Tobin, children]

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