APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

September 2015 through May 2016

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JURISDICTION

In re Mia Z. (2016) 246 Cal.App.4th 883 (2nd Dist., Div. 8) [Los Angeles]
Appellate court found mother's lack of supervision which allowed her 3-year-old daughter to wander into an busy alley was a substantial factor in the child's death & affirmed the trial court's finding that jurisdiction under section 300, subd. (f), is proper. Mother's 3-year-old child, Destiny, was playing with 2 other children in a busy alley near her family's apartment when she was crushed by a heavy metal gate that had fallen off its track. Mother had a younger child who was immediately removed & a child born during the case who was also detained. At the disposition hearing for the surviving child & the jurisdiction hearing for newborn, the court took jurisdiction under § 300, subds. (f) & (j). The children's attorney argued for placement with father & the trial court removed the children from mother & placed with father. Mother appealed. Mother asserted she could not have foreseen the gate would fall &, even if she had been with Destiny, mother could have been injured by the falling gate as well. The Court of Appeal held that mother incorrectly focused on the specific mechanism of Destiny's death, the metal gate, however, the but-for causation was mother's neglect in allowing a 3-year-old child to walk away unattended from the family home thus exposing her to dangers of all kinds. [J. Tavano]

In re K.S. (2016) 244 Cal.App.4th 327 (6th Dist.) [San Benito]
Where mother was unwilling to have K.S. in her custody & planned to leave her with an aunt while searching for appropriate mental health services for K.S., the trial court properly found jurisdiction under section 300, subd. (c) [emotional abuse], & the disposition order removing K.S. from mother was affirmed. K.S. was removed from an abusive home at 4 years old & was adopted by mother at 5 years old. K.S. is a special needs child diagnosed with reactive attachment disorder, ADHD, PTSD, & a learning disorder. K.S. exhibited a number of troubling behaviors &, after she ran away at 14 years old, spent the night with a boy in an abandoned house, & returned home the next day with 3 large knives, mother wanted her committed to a psychiatric hospital as a danger to herself. Mental health providers determined K.S. was not a danger to herself but mother refused to take custody because she could not ensure K.S.' safety. This lead to a dependency petition. The juvenile court found the allegations under subd. (c) true & took jurisdiction in Jan 2015. In Mar 2015, the trial court removed K.S. from mother & she appealed. The court rejected mother's dismissal requests at both hearings. The record supported a finding mother was impeding K.S.' therapy, her lack of insight was obstructing K.S.' ability to receive appropriate care & the record contained substantial evidence mother was not capable of providing such care. As for disposition, the Court of Appeal held that mother's failure to secure specialized therapy for K.S.' reactive attachment disorder, her failure to follow advice from K.S.' mental health team, & her rejection of the dangerousness assessment which lead to mother's refusal to take

custody of K.S., all support a finding that continued supervision is necessary to ensure K.S.' access to & engagement in appropriate mental health services. The orders were affirmed.

In re Natalie A. (2015) 243 Cal.App.4th 178 (2nd Dist., Div. 3) [Los Angeles]
Substantial evidence supported the jurisdiction finding based on father's abuse of marijuana because he failed to ensure his young children were supervised by an adult, he did not drug test as he agreed to do, he failed to enroll in a drug treatment program & he failed to fulfill major role obligations at home including not being employed or having appropriate housing. This evidence was sufficient to draw a reasonable inference that father's marijuana use was more frequent than the one admitted instance in Las Vegas. Since the appellate court upheld the jurisdiction finding, the court held the juvenile court was well within its discretion to order services to address father's drug abuse & the harm it posed his children. [G. Clark]

In re D.M. (2015) 242 Cal.App.4th 643 (2nd Dist., Div. 2) [Los Angeles]
Where mother spanked the child occasionally with her hand or a sandal, but never left a mark, the trial court erred in finding that corporal punishment is automatically serious physical abuse under section 300, subd. (a). The case began because father assaulted & raped mother while the children, now 9 & 6 years old, were present. The petition made allegations against father for the assault but also against mother because she sometimes used corporal punishment. The appellate court exercised its discretion to reach the merit of mother's challenge even though the allegations against father were not challenged. Subdivision (a) expressly excludes reasonable & age-appropriate spanking to the buttock where there is no evidence of serious physical injury. Nice review of the type of cases which qualify under subd. (a). The Court of Appeal reversed jurisdiction as to mother only & remanded to allow the juvenile court to apply the correct legal standard.

In re Dakota J. (2015) 242 Cal.App.4th 619 (2nd Dist., Div. 3) [Los Angeles]
The court reversed in a matter of 1st impression finding the trial court erred in removing 2 of mother's children when they had not been in her physical custody for a number of years finding the removal order was prejudicial. Mother had a prior dependency in 2008 &, although she reunited with her 2 older children, for the last 6 to 7 years these children had been living with the father's step-father. This case began because mother had apparent serious mental illness & was not providing adequate care for her youngest child, now 10 years old. Mother was not allowing the child to attend school & did not provide medical or dental care. The appellate court held the trial court erred in removing the children living with their grandfather because they were not residing with mother. Further, such orders prejudiced mother because of the gravity of a removal order. The disposition order as to the 2 older children was reversed. [V. Lankford]

In re Emma B. (2015) 240 Cal.App.4th 998 (4th Dist., Div. 1) [San Diego]
Where father was named a presumed father based on his marital status & his receipt of the child into his home, the issue of whether he is biologically related to the child is not relevant & a presumed father under such circumstances is not

entitled to paternity testing. Mother became pregnant while father was on military deployment. After his return, he signed the birth certificate, supported the child, & listed her as a military dependent. After acting as Emma's father, mother tested positive for opiates & father was no longer interested in being in Emma's life because she was not his biological child. Father requested a DNA test to rebut his presumed father status under Fam. Code §§ 7611 & 7540. The trial court declined to order testing. The appellate court found that a presumed father, where his status was determined based on martial status & conduct after the child was born, cannot rebut the presumption with proof of lack of biological connection since presumed fathers do not need to be related to their children. Court limited findings to the factual situation presented here. [M. Cella; T. Chucas (minor)]

In re M.M. (2015) 240 Cal.App.4th 703 (4th Dist., Div 1) [San Diego]
Juvenile court properly took permanent jurisdiction over the case even though the child's home state was Japan after Japanese courts refused to discuss the case in any way with a California court. As for jurisdiction under section 300, subd. (a), the trial court found subd. (a) was proper where the child was at the feet of the parents during a prolonged and heated physical fight and, during some of the incident, he was being held by his father & where other evidence supported conclusion this was not the only incident of domestic violence. Parents involved in a serious domestic violence incident involving choking, hitting, grabbing, throwing objects & pushing where the child was witness. The court found the not-quite-2-year-old child was present & witnessed the incident & was even involved by being held by the parent. Given this, there was sufficient evidence to support the court's finding. Further, given other evidence from the parents, the trial court had sufficient evidence that this was not an isolated incident. [R. Knight] [See under UCCJEA]

UCCJEA

In re M.M. (2015) 240 Cal.App.4th 703 (4th Dist., Div 1) [San Diego]
Juvenile court properly took permanent jurisdiction over the case even though the child's home state was Japan after Japanese court refused to discuss the case in any way with a California court. As for jurisdiction under section 300, subd. (a), the trial court found subd. (a) was proper where the child was at the feet of the parents during a prolonged and heated physical fight &, during some of the incident, he was being held by his father & where other evidence supported conclusion this was not the only incident of domestic violence. Parents involved in a serious domestic violence incident involving choking, hitting, grabbing, throwing objects & pushing where the child was witness. The trial court repeatedly called & sent emails and a certified letter requesting the Japanese court discuss jurisdiction. Japanese court repeatedly indicated it was improper for any court in Japan to discuss any specific case with a court in California including about jurisdiction. The Court of Appeal held that given the Japanese's court's refusal to discuss jurisdiction it was appropriate that the trial court found this refusal equivalent to an express order declining juris. [R. Knight][See also under Jurisdiction]

Doctrine of Disentitlement

In re A.K. (2016) 246 Cal.App.4th 281 (4th Dist., Div. 2) [San Bernardino]
Father challenged the disposition orders but the Court of Appeal dismissed the appeal finding father's conduct frustrated, if not paralyzed, the ability of the agency, the court, & his own attorney to obtain information necessary to determine if he was an offending parent and applied the doctrine of disentitlement. Father appealed the orders removing A.K. from her parents & declaring her a dependent asserting the agency failed to establish he suffered from drug abuse. The child tested positive for methamphetamine at birth. At the hospital, father became very angry, threatened the social worker, had to be asked to leave &, in later contact, he indicated he would not do anything the social worker asked, did not want any communication from the agency, refused to drug test despite a court order & failed to appear at the disposition hearing. Given his attitude, the appellate court found father was uncooperative, possessed an attitude of contempt to legal orders & he demonstrated an extraordinary & unmitigated pattern of obstruction. His hostile behavior toward the social worker showed a pervasive indifference to his child's safety & his conduct was sufficiently egregious to warrant application of the doctrine of disentitlement & dismissal of the appeal. [M. Conroy]

DISPOSITION

Reunification Services

Patricia W. v. Superior Court (2016) 244 Cal.App.4th 397 (1st Dist., Div. 2) [Del Norte]
Where agency did little to determine what mother's mental health diagnosis was or to provide appropriate help with medication or how to manage her medications nor did the agency assist father in understanding mother's mental illness or help him explore being a single parent if mother's symptoms could not be controlled, the appellate court vacated the reasonable services finding & remanded the case. Toddler was removed a 2d time after mother suffered relapse of schizophrenia where she hears command auditory hallucinations ordering her to injure others including her son. Mother immediately sought help when she began to hear voices again after her medications ran out. The agency requested 2 psychological evaluation for the purpose of requesting a bypass of reunification. At the 6-month review hearing the trial court held the parents had been offered reasonable services & set the section 366.26 hearing. The parents filed writs & asserted they had not been offered services designed to overcome their problems. The appellate court agreed finding the agency did little to assist mother in finding a diagnosis & provided no services to assist her in obtaining medication or help to consistently take medications. The Court of Appeal concluded no substantial evidence supported the trial court's findings that adequate reunification services were provided to either parent & granted both petitions. The Agency was required, first, to identify mother's mental health issues and provide services designed to enable her to obtain appropriate medication and treatment that would allow her to safely parent S.L. and also, 2nd , to provide services designed to help her stay on her medication. It did not meet its burden to show that it took either step. Assistance to father was equally lacking & the court granted both parents' writs.

In re Albert A. (2016) 243 Cal.App.4th 1220 (4th Dist., Div. 2) [San Bernardino]
Trial court was not required to notify mother of her appellate rights at the disposition hearing because mother was absent but when the court failed to notify mother of her writ rights at the referral hearing, the appellate court found good cause to consider mother's claim of error in the termination of reunification services. Appeal was reversed for errors not detailed in the published part of the opinion. Older children removed after mother admitted daily methamphetamine use when she was acting strange at school, the police were called & she was arrested. Mother also confirmed auditory & visual hallucinations & mother was appointed a guardian ad litem (GAL). Parents mostly not in contact & missed visits. The children placed with paternal grandmother who wanted to adopt. For the advisement at the disposition hearing, the appellate court held if mother had been present she would have been entitled to notification but, since she was absent, notice was not required according to the language of the statute. [R. Bishop] [See under Writ Advisement]

In re D.C. (2015) 243 Cal.App.4th 41 (4th Dist., Div. 1) [San Diego]
Where teenaged daughter's disclosures about sex abuse to different people was consistent, & the sibling provided some corroboration based on her observations, & where mother minimized the abuse, jurisdiction based on § 300, subd. (d), is proper and removal of the children from the parents was supported by substantial evidence. Parents are unmarried, adoptive parents of children aged 13, 10 & 9 years old. Father was alleged to have sexually abused his oldest daughter. The Court of Appeal held the child's statements of sexual abuse, even with minor inconsistencies, did not make disclosures unreliable. In addition, abuse of oldest child was sufficient to find 2 other children were within § 300, subd. (j), & supported removal from the parents. Father argued sex abuse treatment violated his right against self-incrimination but the appellate court held that the existing use immunity prevented court-ordered therapy from being a violation of father's 5th Amendment rights. As for mother, she argued removal of the 2 youngest children was not supported by substantial evidence. The Court of Appeal held mother's failure to protect 1 child from sexual abuse, her minimization of the abuse, violation of voluntary safety plan & her delay in starting services all supported removal & that her positive steps could not be used by the appellate court to reweigh the evidence. [J. Braden (mother); R. Bishop (father)] [See under the ICWA]

D.F. v. Superior Court (2015) 242 Cal.App.4th 664 (1st Dist., Div. 1) [Humboldt]
The bypass provision based on the termination of parental rights to a sibling are not limited to California orders and, consequently, the termination of parental rights to a sibling in Texas was a sufficient basis to deny mother reunification services based on § 361.5, subd. (b)(11). The infant was born 3 months premature, was medically fragile, spent months in pediatric intensive care & was positive for marijuana. Although mother was housed a block away from the hospital she rarely visited. Mother lost parental rights to a sibling in Texas after dropping the child off with her wife's mother who eventually turned the children over to the agency because she could not care for them. After that, mother did not contact the agency or participate in any reunification efforts. Mother argued that based on *Melissa R. V. Superior Court* (2012) 207 Cal.App.4th 816, which found the bypass provision in subd. (b)(10) only applied to California cases, that

subd. (b)(11) should only be applied to terminations from California courts. The Court of Appeal disagreed finding the limiting language in subd. (b)(10) is not in subd. (b)(11). Further, based on U.S. Supreme Court authority, the burden of proof to sever parental rights is clear & convincing evidence in all states. (*Santosky v. Kramer* (1982) 455 U.S. 745.) Further, as to the 2d requirement that mother has not subsequently made a reasonable effort to treat the problems leading to the dependency, the appellate court found mother presented no evidence of any effort to address the same problems that were presented in Texas. As a result, the extraordinary writ is denied.

In re A.O. (2015) 242 Cal.App.4th 145 (4th Dist., Div. 2) [Riverside]
Where the trial court failed to advise mother of her right to appeal after the disposition hearing, the Court of Appeal granted mother a right to appeal the disposition order along with the orders from the six- & 12-month review hearings & reversed the trial court's orders finding the agency provided mother with reasonable reunification services. The published opinion is limited to 2 issues. Finding the authority in *In re Cathina W*. (1998) 68 Cal.App.4th 716 persuasive, the court held the trial court's failure to provide the appeal advisement at disposition, which is contained in the same rule of court as the writ advisement, is a special circumstance constituting an excuse for failure to timely appeal the disposition orders. The court considered & rejected mother's claim of error at the disposition hearing. However, the court reversed the orders issued at the 6- & 12-month review hearings with regard to the finding that the agency provided mother with reasonable services. On remand, at a minimum the juvenile court shall order the agency to provide services designed to give mother an opportunity to commence a psychotropic medication program. [L. Puertas]

In re Kadence P. (2015) 241 Cal.App.4th 1376 (2d Dist., Div. 7) [Los Angeles]
The Court of Appeal affirmed the disposition order declaring the child a dependent & removing him from his parents finding ample evidence of mother's continued drug use. Mother had another dependency case involving 3 children in Nevada for drug use & mother's behavior was ample evidence of current drug use including avoided or refused drug tests & diluted samples. [J. McGowan (father)] [See under ICWA.]

D.T. v. Superior Court (2015) 241 Cal.App.4th 1017 (1st Dist., Div. 4) [San Francisco]
After receiving 31 months of family maintenance services for her 3 older children beginning in 2012, the trial court erred when it denied bypass of reunification based on § 361.5, subd. (b)(10), but should have ended reunification based on § 366.3. Extensive analysis of how to determine when the clock is running for reunification services but held that after a child is removed from the parent's home pursuant to § 387 the trial court must set the § 366.26 hearing, which was done in this case. Once a permanent plan is selected & the case moves into post-permanency stage, then § 361.5 has no further operation. Since the case at issue entered the post-permanency stage years ago, then § 366.3 comes into play. The trial court's analysis was unduly favorable to mother since mother should have had the burden to prove further efforts at reunification were the best alternative for the child. It is the rare case in which further reunification is justified after a § 387 petition & this case did not qualify with the children being dependents for nearly ten of the last 11 years while they only lived with mother for a total

of 4 years & each placement ended with the children suffering due to mother's mental illness, recurrent drug use & lack of follow through.

Bypass Provisions

In re B.H. (2016) 243 Cal.App.4th 729 (4th Dist., Div. 2) [San Bernardino]
Regardless of whether a parents has physical custody of a sibling or half-sibling when the sibling was removed in a prior dependency, the bypass provision in § 361.5, subd. (b)(10), still applies. Father was jailed at the time the child was removed due to mother drug use, criminal activity, & an uninhabitable home. Father had a half-sibling removed in a prior dependency in 2011 for domestic violence & father did not reunify. In this appeal, father challenges application of the bypass provisions solely on the basis that he was not the custodial parent at the time the sibling was removed. The Court of Appeal reviewed the issue de novo as an issue of statutory interpretation. The appellate court held that in order to avoid inconsistent application of the bypass provision, the subdivision applies regardless of whether the parent had physical custody of the half-sibling when the child was removed in a prior dependency. [S. Gorman]

In re T.G. (2015) 242 Cal.App.4th 976 (1st Dist., Div. 4) [Alameda]
Finding that mother forfeited her right to assert error in applying the bypass provisions 2 times, the appellate court nonetheless held the bypass order was proper under at least 1 of the subdivisions. Mother appealed the termination of her parental rights to her youngest daughter & asserted that the bypass of reunification services violated her due process rights at the dispositional hearing. The case involved an earlier dependency with 2 older children in 2012 & began because of mother's numerous emotional, mental health & substance abuse problems. T.G. was detained at 11 months old. Mother had received reunification services for the older children but she did not reunify. Mother argued the application of the bypass provision was improper because the appeal for the 2 older children was pending at the time of the disposition hearing for this youngest child. The Court of Appeal held by the time of its opinion the appeal for the older children had been affirmed. Further, mother "doubly forfeited" this issue because she did not raise it in the trial court & then she failed to seek appellate review through extraordinary writ. However, the appellate court did not decide whether to relax the forfeiture rule concluding the order denying mother's reunification was proper. As to the bypass provision in § 361.5, subd. (b)(10), the trial court need only find reunification services for any sibling had been terminated. Since mother's reunification to the older children had been terminated, the order bypassing reunification complied with the plain language of the statute.

Placement with Non-Custodial Parent

In re Liam L. (2015) 240 Cal.App.4th 1068 (4th Dist., Div. 1) [San Diego]
Although concerns raised by mother included the children were bonded to current caregiver maternal grandmother & older sibling, children did not have a strong bond with father after not seeing him for 5 years & 2 of the children did not want to move to Kansas, these factors are not determinative &, given the other facts

considered by the juvenile court, substantial evidence supported the finding of no detriment in placing with the presumed father. Father had been absent for 5 years but immediately requested custody & worked on creating a bond with his children aged 9, 8, & 6 year old at detention. At the 12-month review hearing, the court found no detriment in placing the children with their father with family maintenance services. The appellate court held father should have filed a § 388 petition since he requested custody after the disposition hearing but it was harmless error since the parties agreed to determine placement at the hearing & no one objected. The factors in favor of placement included father had a stable job, lived with his wife & child, he cooperated with the agency & developed a positive relationship with his children including 2 trips to California & a visit to Kansas for the children, he had an approved ICPC evaluation, he had no recent criminal history, & the social worker found no detriment. In addition, the court considered the children's serious attendance problems at school an issue while living with the grandmother in California. The Court of Appeal found mother invited the court to reweigh the evidence, which was inconsistent with the standard of review. [J. Turner-Bond (mother); P. Tripp (father); N. Trop (minors)]

Placement with Relatives

In re Isabella G. (2016) 246 Cal.App.4th 708 (4th Dist., Div. 1) [San Diego]
Where grandparents repeatedly requested placement starting prior to the detention hearing, the grandparents maintained weekly contact with the child, & when the agency did not timely complete a relative home assessment, the Court of Appeal held a relative is entitled to a hearing under § 361.3 without the need to file a § 388 petition. Child now 4 years old was removed from her parents for drug use & criminal activity. The child lived in the paternal grandparents home with her parents prior to the case & the grandparents were protective including asking their son to move out when he was misbehaving. The grandparents asked for placement repeatedly & to each new social worker. Without explanation, the agency did not conduct any relative assessment until the grandparents hired an attorney & filed a § 388 petition shortly before the § 366.26 hearing. The agency told the grandparents they would assess their home on several occasions but finally approved the placement only after the grandparent's filed the § 388 petition. The trial court ruled the relative placement preference did not apply because reunification services had been terminated. Instead, at the § 366.26 hearing, the juvenile court applied the caregiver adoption preference under § 366.26, subd. (k). The agency conceded this was error & the appellate court accepted the agency's concession. Turning to the denial of a hearing on the relative placement preference under § 361.3, the Court of Appeal held the grandparents were entitled to hearing & the error was not harmless. The court reversed the order denying the grandparents' § 388 petition, the orders terminating parental rights & designating the caregivers as the prospective adoptive parents, & the finding that removal from the caregivers would be seriously detrimental to the child. The matter was remanded for a hearing on the grandparents' request for placement under § 361.3. [W. Caldwell (father); L. Serobian (grandparents); J. Moran (child)]

Exit Orders

In re Aurora P. (2015) 241 Cal.App.4th 1142 (1st Dist., Div. 5) [Alameda]
At a review hearing pursuant to section 364, the party who opposes termination of jurisdiction bears the burden of proof & where the agency recommends the end of jurisdiction but the 5 children who oppose failed to provide evidence that conditions still existed to justify initial assumption of jurisdiction, substantial evidence supported the court's orders. Minor's appeal in which 5 children were removed in 2012 but were returned to mother with family maintenance services after mother participated diligently for 2 years in such services & the agency recommended jurisdiction be terminated. Long discussion explaining why children bear the burden of proof & appropriate standard of review relying on the standard in *In re I.W*. (2010) 180 Cal.App.4th 1517 – whether the evidence compels a finding in favor of the appellants as a matter of law. Finding the minor-appellants make almost no effort to refute the evidence in the agency's briefing, the court concludes the minors simply directed the court to consider evidence that might have supported a different conclusion & the court declined to reweigh the evidence.

PRELIMINARY/CONTINUING CONSIDERATIONS

Indian Child Welfare Act (ICWA)

In re E.R. (2016) 244 Cal.App.4th 866 (1st Dist., Div. 4) [Mendocino]
In consolidated appeals, the appellate court considered numerous arguments of error by the Indian custodian/maternal uncle & found no reversible error & affirmed. Although the agency & trial court erred in failing to further investigate the uncle's status as an Indian custodian, any such error was harmless under the facts. Initially, the court held mother revoked the Indian custodial status 3 months after designating the uncle. Court agreed the uncle was not given proper notice as an Indian custodian but that even if the uncle had participated there was no probability the children would have remained with the uncle because the evidence supporting temporary detention was overwhelming. The children were removed from the same property where both mother & the uncle lived after suffering significant neglect. The appellate court found no reasonable probability the uncle's intervention would have changed the outcome because the trial court otherwise complied with all the ICWA requirements including the denial of placement with the uncle as a preferred placement as requested by the tribe. The decision to not place these special needs children with their uncle was supported by substantial evidence especially in light of the fact that no party except uncle favored placement with him. [S. Gorman]

In re A.L. (2015) 243 Cal.App.4th 628 (4th Dist., Div. 1) [San Diego]
In appeal from termination of parental rights, the trial court erred in failing to consider evidence of active efforts to provide remedial services and rehabilitative programs under the ICWA but such error was harmless & substantial evidence supported finding that continued custody with mother would likely result in serious physical & emotional damage. Mother is an enrolled member of the Iipay Nation & according to the tribe the children are eligible for enrollment. The trial court held the

ICWA applied & followed the heightened requirements under the ICWA. Mother failed to participate in reunification except briefly & did not visit consistently. At the § 366.26 hearing, the trial court excluded part of the Indian expert's declaration after the expert indicated she did not know whether mother had access to remedial services after the termination of reunification services. The appellate court held § 366.26 contemplates consideration of the active efforts requirement at the permanency planning hearing. The juvenile court's decision to preclude evidence on the issue and failure to make a finding was, therefore, error. However, finding that even with consideration of such evidence, it was not reasonable probable the out come would have been favorable to mother, the error was harmless and did not warrant reversal. In affirming the trial court's finding that continued custody with mother would result in physical & emotional damage to the children, the appellate court held mother did not show she could safely parent or provide long-term stability to her children. [N. Williams]

In re D.C. (2015) 243 Cal.App.4th 41 (4th Dist., Div. 1) [San Diego]
Where adoptive father claims Indian heritage through Apache & Cherokee tribes, ICWA notice was required even without a biological connection &, since no notice was provided, the trial court's orders were vacated & remanded to comply with notice provisions. The Court of Appeal found since the ICWA emphasized membership & not biology &, since the tribe decides who can be enrolled, that even though father was an adoptive parent & the children did not have a biological connection to the tribe, ICWA notice was required. [J. Braden (mother); R. Bishop (father)] [See under Disposition]

In re K.P. (2015) 242 Cal.App.4th 1063 (4th Dist., Div. 1) [San Diego]
Where the children had been disenrolled by the tribe, the trial court properly found the ICWA did not apply & terminated parental right without applying ICWA's heightened substantive & procedural protections. Mother is a member of the Pala Band of Mission Indians. She has 10 children & has lost custody to 8 due to drug abuse. The appeal from the termination of parental rights involves only mother's 2 youngest. In an earlier dependency in 2009, the Tribe intervened & the children were placed in a plan of guardianship & jurisdiction was terminated in 2011. In Dec 2013, the guardians requested a § 366.26 hearing in order to adopt the children. The Tribe was contacted & informed the agency that the children were no longer enrolled in the tribe. They had been disenrolled in Feb 2012 because they lacked the necessary blood quantum. The Tribe had adopted new enrollment rules & these were being challenged in court by tribal members who had been disenrolled under the new rules. Mother argued that the disenrollment was being reviewed in court & consequently the trial court was still required to follow the ICWA requirements. The appellate court held that the juvenile court deferred to the tribe in ruling the children were not Indian children within the meaning of the ICWA &, in so doing, adhered to the law. [D. Kaiser]

In re K.M. (2015) 242 Cal.App.4th 450 (4th Dist., Div. 3) [Orange]
Where agency failed to investigate or provide notice per the ICWA during the case but, while the appeal was pending, provided notice to the appropriate tribes & asked the juvenile court to find the ICWA did not apply, the Court of Appeal held the trial court acted in excess of its jurisdiction. The case was reversed & remanded to the trial

court to comply with the ICWA. Mother claimed Indian heritage at her first appearance but no notice was provided. After the parents filed opening briefs alleging failure to comply with the ICWA, the agency reinitiated an ICWA notice & the trial court reappointed counsel for both parents & held the agency had complied with the ICWA six months after the termination of parental rights. In the appeal, the agency filed an RB, a motion to augment & take additional evidence, & a motion to dismiss based on mootness. Finding that the trial court lacked jurisdiction to change its court orders after parental rights are terminated, the appellate court held the juvenile court lacked jurisdiction to rule in the post-appeal hearings. The trial court's ICWA orders were void. [R. Pfeiffer (mother); R. Keller (father)]

In re Kadence P. (2015) 241 Cal.App.4th 1376 (2d Dist., Div. 7) [Los Angeles]
The appellate court found the maternal grandmother's and great-uncle's claims of possible tribal heritage were sufficient to trigger notice under the ICWA & reversed & remanded for further compliance. Father claimed Cherokee heritage & the agency had since provided notice to the appropriate tribes. Finding the maternal relatives' claims of possible heritage in other tribes credible, however, the appellate court remanded with directions to the juvenile court to direct the agency to provide notice to the Blackfeet, Creek & Seminole tribes as well. [J. McGowan, father] [See under Disposition]

In re Sadie S. (2015) 241 Cal.App.4th 1289 (5th Dist.) [Fresno]
The juvenile court's order granting full faith & credit for a tribal customary adoption (TCA) is proper even though the tribe had not transferred the case to the tribe's jurisdiction & TCA is proper where father was given notice & an opportunity to be heard. The case began because of serious domestic violence between the parents & in response to ICWA notice the Tribe filed 2 resolutions - the children were Indian children & the Tribe would intervene. The children were eventually placed with maternal aunt. Over the course of the case, the agency, the Tribe, & the parents had fluctuating views on the best permanent plan. According to the tribe's investigation, all the parties had an opportunity to provide input to the Tribe & by the time of the § 366.26 hearing, the agency & the Tribe agreed a TCA was best. Father appealed but was dissatisfied primarily with the visitation requirements. The court found visitation is not something guaranteed by a TCA. After reviewing the procedures for a TCA, the appellate court held the Tribe had subject matter jurisdiction for a TCA. As for whether father's due process rights had been violated, the court found father was given an opportunity to present evidence during the investigation for the TCA. [S. Gorman]

In re B.H. (2015) 241 Cal.App.4th 603 (4th Dist., Div. 2) [Riverside]
Court reversed & remanded where the agency conceded its efforts at noticing the appropriate tribes failed to follow ICWA requirements. Father claimed Indian heritage when the case began & again after a § 387 petition was filed removing the children from mother. In expressing its fatigue, the opinion stated the court is well past the stage of "growing weary" of these cases & that it was absurd that the agency attempted to notify the BIA & the tribes and failed. Notice was attempted but did not comply with the requirements of the ICWA. [C. Geyerman, M. Pena]

Paternity

In re H.R. (2016) 245 Cal.App.4th 1277 (2nd Dist., Div. 8) [Los Angeles]
Where father had yet to prove his biological connection to the child, the trial court properly found him an alleged father & found jurisdiction proper under § 300, subd. (g), because father failed to provide the necessities of life for H.R. Father was found prior to the jurisdiction hearing in custody in Louisiana & in the process of being deported to El Salvador. At the jurisdiction hearing, father was found to be an alleged father & requested a DNA test but did not supply a sample before he was deported. He provided a mailing address in El Salvador. At disposition, the court sustained the petition including the allegation against father, denied father reunification services, but ordered supervised visits or calls with H.R. Father appealed & asserted the allegations against him should be dismissed because as an alleged father he cannot be required to provide care for the child. The appellate court held substantial evidence supported the court's determination because father vacillated about whether he was the biological father & the trial court did not err in waiting for the results of a genetic test before elevating father to a biological parent. As for father's request to be removed from the petition because he is only an alleged father, the Court of Appeal found father completed the JV-505 & could have denied paternity & indicated he did not wish to participate. Since father did not so it is reasonable to conclude he may want to elevate his paternity status in the future.

In re Donovan L. (2016) 244 Cal.App.4th 1075 (4th Dist., Div. 1) [San Diego]
Trial court erred in finding that recognizing only two parents would be detrimental to Donovan, Jr. (DJ) & applying Fam. Code, § 7612, subd. (c), because Donovan did not have an existing parent-child relationship with his biological father. This is the 3d dependency for DJ involving drug use by his mother. DJ's presumed father is mother's husband, Donovan, Sr. DJ's biological father, David, had an affair with mother during the marriage but mother remained with Donovan, Sr. through most of the case. At the disposition hearing, David requested to be found a presumed father through § 7611, subd. (d). The child's attorney argued David did not qualify as a 3d parent but the trial court held David should be recognized because it would be detrimental to DJ to limit him to 2 parents. The juvenile court's reasoning was based on a cultural heritage & in the likelihood mother & Donovan, Sr. would not inform DJ about his biological dad. The Court of Appeal reviewed the relatively new § 7612, subd. (c), & its purpose. The legislative reports indicate this section seeks to protect children from harm by preserving the bonds between children & their parents – the parents the child has always known. Since the juvenile court held David did not have an existing relationship with the 4-year-old DJ, the appellate court found it was error to apply § 7612, subd. (c), to allow David to create a relationship. In other holdings, the appellate court found David is a mere biological father & is not a parent & is, consequently, not entitled to services or visits. Further, since § 7612, subd. (c), does not apply, Donovan, Sr.'s conclusive marital presumption under § 7540 defeats David's parentage claim under § 7611, subd. (d). [T. Chucas (mother); P. Dikes (presumed father); J. Moran (biological father); A. St. Julian (child)]

Adoption of T.K. (2015) 240 Cal.App.4th 1392 (4th Dist., Div 3) [Orange]
Where father failed to demonstrate a full commitment to financially support the child or a willingness to emotionally support the unwed mother during her pregnancy, father does not qualify as a *Kelsey S.* father. (*Adoption of Kelsey S*. (1992) 1 Cal.4th 816.) The opinion noted that the prospective adoptive parents pulled out all the stops at trial in their effort to show father was not a quasi-presumed father &, consequently, the record is large but the appellate court limited their SOF to the 2 areas relied on in affirming the trial court's orders. The parents dated & 9 months later decided to have a child. The relationship was tempestuous & the parents broke up numerous times before the final end in Aug 2014, five months before the child was born. As for the financial commitment, father was mostly unemployed, had to repeatedly borrow money from mother, was transient for some of the time, withdrew 90 percent of the small account set aside as a baby fund, & falsified financial records to show he paid mother which did not happen. Under emotional support, father ran a campaign the court described as "cyber-stalking" & characterized as the opposite of support. Father hacked into mother cell phone account & tracked her movements, showing up at a medical appointment, emailing her attorney during her meeting, & intimidating the prospective adoptive parents by phone & email. The Court of Appeal held that father failed to show he was prepared to support the child in his own home with his own resources but also that his contact with mother was primarily directed at intimidating her & blocking any adoption rather than a real interest in parenting. Opinion spent some time finding it disagreed with *In re H.R*., (2012) 205 Cal.App.4th 455, describing it as an outlier & inconsistent with *Kelsey S.* & subsequent case law. [M. Levine (father); M. Jarvis (mother)]

In re D.P. (2015) 240 Cal.App.4th 689 (4th Dist., Div. 2) [San Bernardino]
Where other evidence conclusively showed father could not be the biological father & father could not show he was a presumed father, the juvenile court did not err in denying father's request for DNA testing. Father spent the majority of the case in federal custody for illegal entry into the U.S. A month after the detention hearing, father was located in custody & was served notice. Father completed a JV-505 form & requested paternity testing. The trial court satisfied its duty to identify the father & provide notice of the dependency. At the juris/dispo hearing, the court received evidence that father was arrested before the time the child was conceived. In addition, father had not parented the child in any way & could not show he should be considered a presumed father. Consequently, the court did not err in denying father's request for DNA testing. [W. Caldwell]

387 PETITION

In re F.S. (2016) 243 Cal.App.4th 799 (2nd Dist., Div. 5) [Los Angeles]
After mother absconded with the child to Texas & refused to return despite an arrest warrant & protective custody warrant for the child, the trial court did not err in holding a § 387 petition hearing in mother's absence & substantial evidence supported court's finding that child should be removed from mother. Jurisdiction assumed in Mar 2013 because of serious domestic violence & the child was placed with

mother with family maintenance services. The parents did not participate much in reunification &, in Apr 2014, the parents were involved in another incident but mother was arrested as the aggressor. Both parents subsequently lied about whether mother was present. The agency filed a § 387 petition but mother informed the court she had moved to Texas with the child without notifying the agency. The § 387 hearing was continued for more than 4 months while the agency communicated with mother & she made it clear she had no intention of returning to California. The court held the § 387 hearing in mother's absence, found the placement was not effective in protecting the child & ordered removal of the child from mother. Father appealed & argued the court erred in holding the hearing without mother because it deprived him of his right to cross-examine mother & substantial evidence did not support removal of the child from mother because the trial court did not have current information about the child's safety. As for mother's absence, the appellate court held that even if mother testified about the allegations of the Apr 2014 altercation, & even if she denied she had assaulted father, it would not have affected the outcome. Father testified & both parents were represented by counsel. The juvenile court had overwhelming evidence of the domestic violence & it was precipitated because mother went to father's apartment with the child. As for whether substantial evidence existed, the trial court could rely on mother's willingness to lie to the agency, her non-compliance with reunification services & her failure to appear as sufficient to show removal was necessary to protect the child. Further, the trial court could rely on the parents' documented untruthfulness to reject the parents' assurance the child was fine & mother's status as the aggressor in at least one instance establishes that her move to Texas did not ensure additional violence would not occur.

388 PETITION

In re F.A. (2015) 241 Cal.App.4th 107 (4th Dist., Div 3) [Orange]
Where 2 foster families wish to have the same child in their home, the trial court properly assessed competing 388 petitions to determine the foster family with the longer placement and approved home study was entitled to custody. Infant child removed at birth as drug exposed & placed with an initial adoptive foster home for almost 2 months. In a misunderstanding when the child needed medical care for withdrawal symptoms, the agency removed the child from these fosters believing incorrectly that the child was going to be removed from the hospital against medical advice. The child was immediately placed in an adoptive home with an approved adoption assessment where she remains. Through a serious of investigations including how the child was improperly removed from the 1st fosters & a grievance process when the agency attempted to remove the child from the 2nd fosters to return to the 1st fosters, the case was delayed for several months. By then each foster family had filed a § 388 petition. The 1st fosters requested return of the child & the 2d fosters wanted to be designated prospective adoptive parents. The trial court held an evidentiary hearing & denied the 1st foster family's 388 petition while granting the 2nd family's petition. The Court of Appeal found the agency properly followed procedure by leaving the child with the 2nd fosters during the grievance investigation & the trial court did not abuse its discretion by continuing the hearing 4 times. The opinion urged the agency to review its procedures for protection of foster parents when children are removed under perceived exigent circumstances but declined to

issue an advisory opinion as it would violate the doctrine of separation of powers. [R. Pfeiffer (1st fosters); G. Clark (2nd fosters); N. Williams (child)]

SECTION 366.26

Sibling Exception

In re D.O. (2016) 247 Cal.App.4th 166 (4th Dist., Div. 1) [San Diego]
The trial court is not limited to the factors enumerated in the sibling exception under § 366.26, subd. (c)(1)(B)(v), & where the trial court considered the caregivers track record in complying with sibling visits & no evidence was presented that the sibling relationship would be disrupted, the court affirmed the orders finding the sibling exception did not apply. Child, who was 1 year old when detained, was removed because of mother's mental illness & domestic violence. The child's half-siblings, aged 11, 10 & 9 years old, were also detained. The child was placed with her paternal grandmother. The parents did not visit & did not maintain contact with the agency. At the § 366.26 hearing, the agency argued to terminate parental rights & asserted the sibling exception did not apply. The child's attorney & father joined in the agency's arguments. Mother & the siblings argued guardianship was appropriate given the child's sibling relationships. The trial court held the sibling exception did not apply. The appellate court affirmed finding that the trial court did not rely on simple promises of continued sibling visits but on the grandmother's proven track record in facilitating visits & the lack of any evidence the grandmother, the siblings' caregivers or the maternal grandmother would in any way interfere with the sibling relationship. [W. Hook (mother); L. Rehm (father); M. Cella (siblings)]

Writ Advisement

In re Albert A. (2016) 243 Cal.App.4th 1220 (4th Dist., Div. 2) [San Bernardino]
Trial court was not required to notify mother of her appellate rights at the disposition hearing because mother was absent but when the court failed to notify mother of her writ rights at the referral hearing, the appellate court found good cause to consider mother's claim of error in the termination of reunification services. Appeal was reversed for errors not detailed in the published part of the opinion. Older children removed after mother admitted daily methamphetamine use when she was acting strange at school, the police were called & she was arrested. Mother also confirmed auditory & visual hallucinations & mother was appointed a guardian ad litem (GAL). Parents mostly not in contact & missed visits. The children placed with paternal grandmother who wanted to adopt. As for the writ advisement, the rule requires notice whether the parent is present or not. Finding the notice was late & incomplete & mailed to an address the agency knew was no longer correct, the Court of Appeal held it would consider mother's claims of error. Mother had never been informed of the importance of providing a mailing address. Finally, mother's GAL did not have the authority to forgo a writ petition without consultation with mother & her trial attorney & no such contact was indicated in the record. In the unpublished section, the court reversed & remanded for compliance with the ICWA and for the trial court to conduct a new permanency hearing and consider potential legal impediments to adoption by the paternal grandmother. [R. Bishop] [See under Disposition]

NON-MINOR DEPENDENTS

In re A.A. (2016) 243 Cal.App.4th 765 (2d Dist., Div. 3) [Los Angeles]
Juvenile court properly terminated jurisdiction over non-minor dependent when he was not in foster care, did not wish to remain in extended foster care, & was not participating in a transitional independent living case plan since he was in the Dept. of Corrections & Rehabilitation, Div. Of Juvenile Justice (DJJ). A.A. became a dependent in 2007 when he was 11 years old. When he was 13 years old, he disclosed being sexually abused by an older cousin at 9 years old & he sexually abused the daughter of his foster parents and several younger relatives. He was placed in a new foster home under dual supervision of the agency & probation department. In May 2013, he was placed with his paternal grandmother, his 12th placement, but left in Oct 2013. In Apr 2014, he was arrested & located in Arizona living with his girlfriend with their twin sons & awaiting the birth of a 3d child. He was adjudicated to have violated Pen. Code § 288 & was sent to DJJ. Three months later, A.A. turned 18 years old. The agency recommended terminating jurisdiction. The trial court found A.A. was not in foster care because he was in the custody of DJJ, he did not want to be involved in foster care because he signed a form for termination of juvenile court jurisdiction, & he was not participating in a transition plan because he was in a locked detention facility. Further, the juvenile court found, & the appellate court agreed, that the agency substantially complied with the requirements of § 391 & provided A.A. with the required notifications but that any error was harmless. [M. Toole]

In re R.G. (2015) 240 Cal.App.4th 1090 (1st Dist., Div. 2) [Contra Costa]
Where non-minor dependent continued to apply for jobs on-line & in person, followed up with prospective employers, received feedback on his resume & applications from an independent living skills program specialist, & maintained contact with his social worker, the trial court erred in finding he was required to be employed in order to qualify for financial support under § 11403, subd. (b)(3). The trial court held that in order to qualify for extended foster care, R.G. had to be employed, in school or in a program to remove barriers to employment. The appellate court held that R.G.'s mostly self-directed programs was sufficient to qualify for benefits & he was entitled to retroactive financial support for 2 months when he was searching for employment. [V. Lankford]

MISCELLANEOUS

Transfer of Case Between Counties

In re Nia A. (2016) 246 Cal.App.4th 1241 (1st Dist., Div. 3) [Marin]
Mother argued, the agency conceded, & the appellate court agreed that the trial court erred in transferring a case from Marin County to Contra Costa County without considering the best interest of the children. The case involved 5 children aged 8 to 15 years old when the case began. Mother struggled for years with abusive relationships, homelessness & unemployment. In late 2014, mother lost her job & housing & asked Contra Costa County to place 4 of her children in foster care while she pursued employment & stable housing. Mother was eventually having some success in

Marin County & Contra Costa asked to have the case transferred, which was done in Apr 2015. Two months later, Marin County determined the case was "sensitive" because someone at the agency was distantly related to 3 of the children. Based on this, the agency urged the juvenile court to transfer the case back to Contra Costa County to avoid any possible breach of confidentiality. The trial court agreed to the transfer even while acknowledging such action would delay the case & would not be good for the children. The trial court also denied mother's motion for reconsideration finding confidentiality trumps other factors. The agency conceded that it was error to transfer the case without determining the transfer would serve the children's best interest but urged affirmance asserting another transfer would simply delay the case longer. The Court of Appeal noted the agency's briefing contained no plausible suggestion that the error was harmless & agreed with mother that the only meaningful relief can be obtained, if at all, by reversing the erroneous transfer order. The opinion reversed the order transferring the case & remanded to Marin County juvenile court & urged the agency to make every possible effort to ameliorate the effects of any delay already occasioned by the transfer.

Dismissal Because Appeal Moot

In re N.S. (2016) 245 Cal.App.4th 53 (1st Dist., Div. 1) [Alameda]

The Court of Appeal dismissed the appeal challenging jurisdiction after the trial court awarded mother custody of the child & dismissed the dependency proceedings finding the appellate court could not offer any effective relief to mother. While pregnant, mother was arrested with father for illegally growing & possessing marijuana & when the child was 2 months old, the parents were arrested again for living in a marijuana growing house. The court took jurisdiction but placed N.S. with mother based on mother's participation in therapy, her repeated negative drug tests, the lack of contact with father, & her moving out of the house where the 2d arrest occurred. Mother appealed. During the appeal, N.S. was returned to mother & the juvenile court jurisdiction was dismissed. Initially, the appellate court reviewed an appellate attorney's obligation to inform the Court of Appeal any post-appellate rulings by the juvenile court that affect whether the appellate court can or should proceed to the merits. The court held mother's attorney acted properly in informing the court of the dismissal order. Next the court explained why it was declining to exercise its discretion in reviewing the trial court's jurisdictional orders because the appellate court could not provide any effective relief if it found reversible error. Finding the juvenile court's dismissal order was favorable to mother, she was awarded custody, & the jurisdictional orders were not the basis for any current order that is adverse to mother, the appellate court held dismissal was proper. [L. Barry]

Guardian Ad Litem (GAL) for Deceased Child

Imperial County v. S.S. (2015) 242 Cal.App.4th 1329 (4th Dist., Div. 1) [Imperial]

Since the dependency system is designed to protect the safety of living children, the trial court properly terminated jurisdiction and denied the child's motion for a guardian ad litem (GAL) after confirming the child was in fact deceased & no longer needed the court's protection. The almost 2-year-old child was removed from mother in Nov 2014 because she was allowed to play with lit matches, was exposed to heavy marijuana smoke, was surrounded by a variety of drugs & paraphernalia, & mother was

arrested. Father declined to take custody. The child was placed in a foster home &, less than a month later, just prior to the disposition hearing, the child was found unresponsive from a severe brain injury likely caused by inflicted trauma. A week later, she passed away. The agency & the police were investigating the foster home. The case remained open for several months while the court waited for the death certificate to confirm the child's death & the parents could be informed of the cause of death. Four months later, the agency filed a request to terminate jurisdiction & dismiss the petition arguing the child was not a person described by § 300 & attached the death certificate. Child's counsel opposed stating he planned to file a motion for appointment of a GAL to investigate any potential tort claims for the child's estate. When the child's attorney moved for a GAL to investigate potential civil claims, the agency filed a 2nd request to terminate jurisdiction. Finding the child was no longer a person under the court's jurisdiction, the trial court granted the agency motion & terminated jurisdiction. The child & father appealed. Finding the purpose of dependency proceedings is protection of the child but, after a child's death, there could no longer be any risk of a child suffering future harm. Once the juvenile court has performed its statutorily authorized duties & made any necessary incidental orders, continued judicial action exceeded its jurisdiction including appointment of a GAL. [V. Lankford (child); R. Bishop (parents)]

Malpractice

Kemper v. County of San Diego (2015) 242 Cal.App. 4th 1075 (4th Dist., Div. 1) [San Diego]

Client brought a malpractice action against the appointed attorneys who represented her in her dependency case but, because client had previously raised & lost an ineffective assistance of counsel (IAC) claim, the appellate court found she was collaterally estopped from raising legal malpractice. Five years earlier, this court affirmed a judgment terminating mother's parental rights rejecting her contention that IAC caused the termination of parental rights. Mother then brought a legal malpractice action against 2 of her appointed dependency attorneys (T. Kisiel & T. De Soto), their supervising attorney (R. Gulemi), & the County of San Diego asserting the defendents' legal representation breached the applicable standard of care & caused the termination of her parental rights. The defendants moved for summary judgment based on collateral estoppel and the motion was granted. Mother was a minor & a dependent herself during the dependency case. In her appeal, mother argued IAC for failure to challenge the jurisdiction findings, waiving appointment of a guardian ad litem (GAL), & failing to raise these issues in a writ petition. In 2010, the court's opinion rejected mother's contentions including mother's IAC claims finding the record did not affirmatively establish counsel had no rational tactical purpose for the alleged deficiencies and the court could not find the outcome would have been different had counsel provided what mother believed was effective representation. The prior opinion found mother's inability or unwillingness to reunify with her child caused her to lose her parental rights. In the malpractice action, mother argued she was limited to the appellate record in the appeal &, just like a criminal habeas petition, mother should be allowed to now raise a malpractice action. The court rejected this claim finding the reasoning flawed. After review the doctrine of collateral estoppel, the appellate court found mother's malpractice claims are identical to the issues raised & rejected in her appeal. Mother claims both revolve around

whether the attorneys' actions caused the termination of parental rights. Based on collateral estoppel, mother cannot relitigate this issue. This is especially true since mother's counsel on her appeal could have filed a habeas petition if warranted but mother did not challenge the decision not to file a habeas. Finally, the mother's evidence presented in opposition to the summary judgment did not create a factual dispute on the foundational fact.