

APPELLATE DEFENDERS, INC.



RECENT TRENDS IN DEPENDENCY CASE LAW

March 2014 through August 2014

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JURISDICTION

Petition/Findings

In re A.R. (July 18, 2014, No. B251957) ___ Cal.App.4th ___ [2014 WL 3919748] (2d Dist., Div. 8) [Los Angeles]

The appellate court held that because jurisdiction was proper based on father's conduct alone the court need not consider whether it was also proper based on mother's conduct, but, in the alternative, substantial evidence supported jurisdiction based on mother's lack of action. The children, aged 7 & 5 years old, were removed from father after he was found driving with the children under the influence of methamphetamine & alcohol. By April 2010, father had taken the children from mother & then disappeared. Mother was aware father had a substance abuse problem, had beat her previously, was not providing food or clothing, & she was frightened of him. She claimed she did not request custody because she did not know about family court. While in father's custody, the girls suffered sex abuse, severe neglect of their teeth, & both were angry with their mother for abandoning them to father & they refused to see her. Mother argued no evidence showed father failed to provide the children with adequate food, shelter, clothing, or medical care & therefore her abandonment did not cause them to suffer such harm. Mother knew father did not care for the children properly as evidenced when she began buying food & clothing before father disappeared. Based on this, along with evidence of mother's inaction contributing to the girls' neglect, the court found mother waived her argument that insufficient evidence supported jurisdiction. Further, jurisdiction was proper based on mother's failure to protect because she knew father abused drugs, was violent, & had previously neglected the girls.

In re Christopher M. (July 16, 2014, No. B251097) ___ Cal.App.4th ___ [2014 WL 4050171] (2d Dist., Div 8) [Los Angeles]

At the 2d jurisdiction/disposition hearing, held after father was released from prison, the trial court found jurisdiction based on father's inability to support Christopher but the appellate court reversed finding jurisdiction was not supported by substantial evidence. Christopher was detained at 4 years old after mother physical abused his older half sibling. Father was incarcerated & jurisdiction was found based on mother's conduct & father's failure to provide the necessities of life. Father was released from prison in October 2012. After his release, he began visiting Christopher regularly &, in March 2013, the court granted father's section 388¹ petition requesting to be found a presumed father & to have the previous jurisdictional/dispositional orders vacated

¹All future statutory references are to the Welfare & Institutions Code unless otherwise indicated.

because father was not given proper notice. The court granted father's 388 petition &, at the new jurisdiction hearing, the court found jurisdiction again based on father failing to provide the necessities of life. Father appealed & the appellate court reversed finding no substantial evidence supported jurisdiction because father was out of prison, employed, living with the paternal grandmother, visiting consistently, was in anger management, counseling & was willing to pay for conjoint therapy. Based on these facts, no evidence was presented father was unwilling to provide Christopher with the necessities of life and did not support the finding of jurisdiction.

In re Rebecca C. (2014) 228 Cal.App.4th 720 (2d Dist., Div. 8) [Los Angeles]

Where no evidence showed causation or harm from mother's drug use, the appellate court reversed & held jurisdiction was not supported by sufficient evidence. The case began after mother tested positive for methamphetamine & marijuana & 13-year-old Rebecca was removed from her care. Mother argued the trial court was required to have a medical diagnosis or its equivalent to show substance abuse. The Court of Appeal disagreed. Mother also asserted, & the appellate court agreed, the evidence of her drug use did not support the juvenile court's finding it caused or was causing a substantial risk of harm to Rebecca. Finding the agency's arguments that mother's failure to ensure Rebecca did her homework or that evidence of drug use presumes harm to the child were insufficient, the Court of Appeal reversed the jurisdictional orders. [D. Rooney]

In re J.F. (2014) 228 Cal.App.4th 202 (2d Dist., Div. 5) [Los Angeles]

Despite more than 2 years of family maintenance services, & the repeated recommendation by the agency to end jurisdiction, the juvenile court continued jurisdiction & mother appealed. At the start of the case in March 2011, mother was 16 years old, had been subjected to sexual abuse & had suicidal & homicidal ideations. J.F. remained with his mother & she began to meet her therapy & medications requirements & to care appropriately for her son. By November 2013, the agency had repeatedly recommended ending jurisdiction but the juvenile court declined to terminate jurisdiction. After the juvenile court subsequently ended jurisdiction, mother attempted to dismiss the appeal but the Court of Appeal denied mother's request. In affirming, the appellate court held the juvenile court retained the discretion to maintain jurisdiction even if the agency recommended otherwise. Finally, the appellate court held substantial evidence supported the court's order because mother continued to need help in caring for her child & no evidence was presented about mother's capacity to live independently. [M. Coffey; R. Keller for J.F.] (Dissent would have granted mother's request to dismiss.)

In re J.L. (2014) 226 Cal.App.4th 1429 (2d Dist., Div. 8) [Los Angeles]

The Court of Appeal reversed the dismissal of a dependency petition finding mother's plan to leave her daughter with relatives while she was incarcerated was

inappropriate because the family members had serious criminal histories, allegedly only wanted the child for food stamps & money, were gang associated & currently used drugs. Mother was released from prison in November 2012 after her latest felony incarceration in a criminal career dating back to 1991. She had left J.L. in the care of family member Anthony, who was a "second striker" & his sibling, Darnell, whose father is a registered sex offender. Mother had no housing after she left prison so J.L. remained with Anthony. Six months later, 7-year-old J.L. revealed to mother she had been repeatedly sexually abused by Darnell. J.L. gave detailed accounts of repeated rapes by Darnell & how she was forced to orally copulate a 13-year-old boy family friend while Darnell watched. J.L. was afraid to tell Anthony about the sexual abuse because she believed he would spank her as he did when she told him about the incident with the 13-year-old boy & on many other occasions. The juvenile court dismissed the petition because the court believed mother's testimony that she had not anticipated the abuse when she left J.L. with Anthony; Darnell was now in prison so he was not an ongoing threat; & J.L. would be better off with her mother than in foster care. In reversing, the appellate court found no reasonable basis for the trial court's dismissal because mother's testimony did not overcome the presumption that the sexual and physical abuse inflicted on J.L. was prima facie evidence J.L. was a person described by section 300, subd. (b). At most, mother's testimony proved she did not know & had no reason to know J.L. would be raped, beaten & neglected in Anthony's home when she made plans to leave J.L. in his care. Whatever mother knew or should have known, the evidence was overwhelming & undisputed that in 2011, mother made an inappropriate plan to place J.L. in the care of Anthony. Importantly, mother admitted knowing many facts that manifestly demonstrated J.L. would be at risk of harm. The appellate court reversed the trial court's order and remanded with instructions to issue a new order finding J.L. is a person described in section 300, subd. (b). [E. Handy for child; C. Booth for mother]

In re Isabella F. (2014) 226 Cal.App.4th 128 (1st Dist., Div. 4) [Sonoma]

Mother challenged the juvenile court's order finding jurisdiction based on serious physical harm & risk of future harm &, the appellate court agreed & reversed finding the record lacked substantial evidence to support jurisdiction. The case began after a physical altercation between mother & Isabella, who was not quite 10 years old, after Isabella argued with her older brother & resisted getting ready for school. Though the record contained different accounts of the incident, it is apparent mother became physical with Isabella. Once at school, Isabella cried, reported mother hit her in the face, grabbed her by the neck, locked her in the bathroom & she was afraid of mother. School personnel familiar with Isabella, who was chronically truant & complained of almost daily about headaches & stomach aches, believed Isabella's problems were related to her troubled home. Photos of Isabella's injuries show fingernail marks on the side of her face & a gouge mark on her left ear lobe. The agency filed a petition alleging Isabella was

described by section 300, subd. (a), based on mother's conduct but also subd. (b) based on father's mental health issues even though father was completely absent from Isabella's life. Based on a team meeting, including mother, Isabella's two older siblings, the principal of Isabella's school, representatives from an Indian tribe to which mother belongs, & two social workers, the agency concluded Isabella would be at greater risk of harm if she was removed from mother's custody & changed its position to recommend Isabella remain with her mother. The juvenile court declined to detain Isabella & ordered out-of-custody detention returning Isabella to mother under court supervision. Three months later, at the contested jurisdiction/disposition hearing, mother's attorney argued the agency had failed to prove the subd. (a) allegation but stopped short of asking for the petition to be dismissed in order to obtain more services for mother. The juvenile court sustained the petition, focusing on the benefits of reunification services, as opposed to any harm Isabella had suffered. The appellate court held mother's attorney had not forfeited a challenge to the subd. (a) allegation. The appellate court found it was essentially undisputed mother failed to interact appropriately with Isabella & mother would benefit from anger management services, but the evidence did not support a finding Isabella's injuries amounted to "serious physical harm" under subd. (a). Although the statute does not define what constitutes such harm, it has withstood a void-for-vagueness challenge because the term has a sufficiently well-established meaning & is no less specific than the phrase "great bodily injury." The Court of Appeal went on to find even less evidence to support a finding of jurisdiction based on the subd. (b) allegation re: father's mental illness. Because the appellate court concluded the jurisdictional findings must be reversed, the dispositional order was also reversed. [R. Keller]

In re A.B. (2014) 225 Cal.App.4th 1358 (2d Dist., Div. 1) [Los Angeles]

Where mother cannot be granted relief on an initial petition because substantial evidence supported the findings of a subsequent petition, & where mother's attorney never asked for a continuance to prepare a defense to agency evidence, the appellate court found mother's initial argument moot & the 2d issue forfeited. The agency filed a petition for 2-year-old A.B. in October 2012, alleging mother's unsafe and cluttered apartment & father's failure to protect A.B. from the apartment's hazards endangered A.B. Prior to the petition, mother claimed the maternal grandmother had kidnapped A.B. The juvenile court ordered mediation but the agency mailed notice of the mediation to mother at the wrong address. Neither mother nor father attended but the juvenile court adjudicated the petition over mother's counsel's objection, finding the allegations under subd. (b) true & declared A.B. a dependent. Nine days later, University of Kentucky police officers found A.B. with maternal grandmother, who was wandering around outside on the university's Lexington campus. The temperature was below freezing & windy, but A.B. had no pants, shirt, shoes, sweater, jacket or gloves. A.B. was examined

by a doctor in Kentucky, who diagnosed failure to thrive based on her low weight [below 5th percentile for her age] & delayed physical development. Kentucky police discovered mother had wired money to maternal grandmother multiple times while A.B. was purportedly missing. The agency filed a subsequent petition under section 342, alleging mother placed A.B. in danger by allowing maternal grandmother to care for her & placed A.B. at risk of severe physical and emotional harm by failing to properly feed and care for her. The contested adjudication hearing on the subsequent petition was held 4 months later & mother was absent because she was out of the country. The juvenile court denied mother's motion for reconsideration of the original petition & her motion to continue. The court found the evidence established A.B. was underfed while under mother's care but dismissed the count re: mother allowing the maternal grandmother to care for A.B. The trial court ordered A.B. remain a dependent, removed her from mother, placed her with father, and awarded mother monitored visits. Mother appealed challenging jurisdiction under the 1st petition because she did not receive proper notice. The court found this issue moot because jurisdiction was established independently on the 2d petition & no effective relief could be granted. Mother also challenged the denial of her request for a continuance to address the information in the multi-disciplinary assessment team report (MAT) filed on the day of the hearing. Mother argued her due process rights were violated because she was denied the opportunity to prepare a defense to the MAT report & subpoena the persons responsible for the information. However, mother's attorney objected to admission of the MAT report based on hearsay & did not request a continuance to prepare a defense to the MAT. Because mother's counsel never requested a continuance to address the MAT assessment, the appellate court considered the argument forfeited. [M. Coffey]

In re Christopher R. (2014) 225 Cal.App.4th 1210 (2d Dist., Div. 7)

The Court of Appeal affirmed jurisdiction & disposition based on mother's continued cocaine use based on a positive drug test, father's admitted, persistent marijuana use, & Christopher's tender age. The case began after baby Brianna tested positive for cocaine & methamphetamine at birth - she & her 3 siblings, aged 7, 6 & 3 years old, were detained. Mother admitted starting cocaine use 7 years before. Father admitted daily marijuana use, former gang ties, & being on probation. Mother often left the children with a relative & could be gone until the next day. One of the siblings was living with a maternal aunt in Las Vegas. The petition alleged mother's current use of cocaine & father's use of marijuana as the basis for jurisdiction & the juvenile court found the children were described by section 300, subd. (b), & removed them from their parents. Father is a parent to only the youngest child, Brianna. Mother all but conceded that jurisdiction was proper as to Brianna who tested positive for drugs at birth but argued that, as to the other children, her sporadic drug use was insufficient to support jurisdiction. Father argued his past marijuana use & criminal history was insufficient to

support jurisdiction. Given her initial false denial of any cocaine use in the days before Brianna was born, the juvenile court could reasonably disbelieve Crystal's portrayal of limited, sporadic drug use combined with her lack of involvement in drug treatment & her "cavalier attitude about childcare," fully supported the juvenile court's finding that mother's drug use endangered all 4 children. The Court of Appeal relied on mother's decision to use cocaine during her pregnancy to find she met at least 1 criteria in the DSM-IV for substance abuse. Despite finding jurisdiction was proper based on mother's conduct, the appellate court addressed father's contentions as well because it could adversely affect a future dependency or family law proceeding. Father argued his use of marijuana, without more, was insufficient to find jurisdiction. Relying on Brianna's tender years at only 3 months old & father's persistent & illegal use of drugs, the Court of Appeal found jurisdiction was proper. For removal from father, the trial court cited, & the appellate court agreed, Frank was not in compliance with the terms of his parole; Brianna had never lived with him; the paternal grandfather, with whom Frank was living, had not agreed to have the child placed in his home; & there was no cooperation with the agency to have home evaluated. Under these circumstances the decision not to place Brianna with Frank was proper. [C. Gabrielidis for mother; J. Cochran for father]

In re D.P. (2014) 225 Cal.App.4th 898 (2d Dist., Div. 3) [Los Angeles]

Where mother could not explain the serious injuries to her daughter & the petition included the relevant language from section 355.1, the Court of Appeal held substantial evidence supported jurisdiction. When detained, D.P. was a year old & her parents shared custody. Mother returned D.P. to father after a 2-week stay & father and great-grandmother noticed D.P. had bruises on her face, bruising and scab wounds that looked like bite marks on her shoulders and chest area, & a swollen eye. D.P. was taken to the hospital & diagnosed as having a "scalp hematoma" that was "most likely caused by [non-accidental] trauma." D.P. was detained & released to her father. The juvenile court found jurisdiction & mother appealed. Mother challenged the section 300, subd. (a), finding but not jurisdiction based on subd. (b). The appellate court found it may exercise its discretion to review the issue even if jurisdiction is proper on other allegations, such as here, if the finding that mother intentionally hurt her daughter has the potential to impact future dependency proceedings. Based on mother's inability to offer a plausible explanation for how D.P. suffered a head trauma or had adult bite marks on her body, the undisputed evidence of non-accidental trauma constituted substantial evidence mother was responsible for inflicting these injuries. Mother further argued she was not notified the presumption found in section 355.1 would be applied. The appellate court found the language from section 355.1 was borrowed from the statute & placed in the petition. As for the precedent that section 355.1 must be specifically cited in the petition, the Court of Appeal declined to follow its reasoning. (See *In re A.S.* (2011) 202 Cal.App.4th 237.) Given that mother had an attorney representing her at all times, the opinion held she was

given adequate notice the agency intended to rely on section 355.1. As for mother's challenge that some evidence successfully rebutted the presumption, the appellate court held the juvenile court could properly choose to ignore the inferences raised by the evidence from mother's relatives that mother did not hurt D.P. [D. Kaiser]

K.F. v. Superior Court (2014) 224 Cal.App.4th 1369 (4th Dist., Div. 1) [San Diego]
The Court of Appeal sustained dependency jurisdiction based on the fact the parents were the primary caretakers, the other family members who cared for the child were unlikely to abuse the child, & the parents acted as if they had guilty knowledge when they delayed seeking medical care. After taking jurisdiction based on section 300, subs. (b) & (e) [severe physical abuse], the juvenile court denied reunification services based on section 361.5, subs. (b)(5) & (b)(6). The parents filed a writ of mandate & the appellate court granted the petition in part [reunification services] & denied in part [jurisdiction]. The 3-month-old child was detained after he was brought to the emergency room with 2 subdural hematomas, numerous rib fractures, an elbow fracture & bruising which were caused non-accidentally. Father contended insufficient evidence existed to sustain the court's section 300, subd. (e), abuse finding as to him. The appellate court found the trial court could reasonably have inferred that the frequency of father's contact with the child & mother & his hands-on participation gave him a substantial opportunity to either commit the abuse or become aware the abuse was occurring. The appellate court also relied on the fact that the child's symptoms were quite alarming but the parents decided to wait to take the child to the hospital. If the parents had a clear conscience, the child's symptoms would have compelled them to seek immediate medical care. [J. Braden] [See also under Bypass Of Reunification Services.]

Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)

In re Cristian I. (2014) 224 Cal.App.4th 1088 (2d Dist., Div. 7) [Los Angeles]
Where juvenile court did not make jurisdiction finding until the Arizona court conceded jurisdiction but made custody orders placing the child with his father in Arizona, the Court of Appeal held that any errors were harmless because it was not reasonably probable that the delay & indirect method of communication between the state courts had any impact on the outcome. The California court took emergency temporary jurisdiction after evidence was presented that then 6-year-old Cristian has been the victim of 3 days of beatings & physical abuse at the hands of his step-father while mother was present before she called the police. Mother argued the trial court erred in making custody orders before holding an evidentiary hearing as required by the UCCJEA, allowing her to present evidence about the proper forum & contacting the Arizona court. Although the appellate court found some merit to mother's arguments, it found the detention hearing was an evidentiary hearing sufficient to meet the requirements of the

UCCJEA & to justify emergency jurisdiction. However, the record was devoid of any court-to-court communication with Arizona which had made custody orders finding mother had taken Cristian out of state without notice to father in violation of Arizona law & ordered mother to return him to Arizona just days before mother called the police in September 2012. Arizona did not concede jurisdiction until a family court hearing in December 2012. Ultimately, any error would not have changed the outcome of the case thus making any error harmless. [E. Handy]

In re Gino C. (2014) 224 Cal.App.4th 959 (4th Dist., Div. 1) [San Diego]

The Court of Appeal reversed finding the trial court erroneously converted temporary emergency jurisdiction over children with a home state in Mexico into permanent jurisdiction even though the home state had not declined to take jurisdiction. Mother & her children were traveling by bus from Mexico to Nevada when mother was arrested for being under the influence of methamphetamine. Mother & the children confirmed they had been living with father in Mexico for the last 4 years. Mother & her children are all United States citizens. At the detention hearing, & the 3 following jurisdiction hearings, the juvenile court determine the children's home state was Mexico but the court could detain the children under temporary emergency jurisdiction. At the 3d jurisdiction hearing, the court held the temporary jurisdiction had become continued jurisdiction because the parents hadn't filed custody orders in Mexico & there was no evidence any custody orders had previously been made in any Mexican court. The Court of Appeal reversed & remanded finding temporary emergency jurisdiction can only ripen into continuing jurisdiction if no other state with grounds for continuing jurisdiction can be found or, if one is found, that state declines to take jurisdiction. The trial court here made no attempts to contact the relevant court in Mexico, which was error. [R. Bishop; E. Alexander]

In re A.M. (2014) 224 Cal.App.4th 593 (4th Dist., Div. 1) [San Diego]

The juvenile court properly assumed temporary emergency jurisdiction over the children but erred in failing to notify the Mexican authorities to determine if Mexico wished to assert jurisdiction and commence proceedings. The children, aged 5 & 3 years old, were in the car with mother as she tried to smuggle 3 lbs. of heroin from Mexico to the U.S. The parents said they had lived in Tijuana for at least 6 months & the citizenship of the family members is not provided. The children were detained & not returned to father who was living in Mexico & would not return to the U.S. because he thought he would be arrested. At the detention hearing, the court found the children's home state was Mexico but found it had emergency jurisdiction. The appellate court found it was error for the trial court not to contact Mexico to determine if Mexico wanted to assume jurisdiction but this error was harmless. Mother further contended the court erred in taking temporary emergency jurisdiction because the children were not at

immediate risk if returned to her care & father joined. The Court of Appeal held the parents' attempt to use the children in their scheme to smuggle heroin across the international border presented a substantial risk of danger to the children. Consequently, substantial evidence supported the court's finding that returning the children to either parent without the parent's participation in services would place the children at substantial risk of harm & the risk was continuing. The appellate court affirmed the jurisdiction & disposition orders but remanded the case for the limited purpose of notifying Mexico about assuming jurisdiction. If a Mexican court did not take action after contact & notice, the jurisdiction & disposition orders would remain in effect. [C. Gabrielidis; S. Riopelle; K. Mallinger for children]

DISPOSITION

Ending Jurisdiction

In re I.G. (2014) 226 Cal.App.4th 380 (3d Dist.) [Shasta]

The trial court acted outside its statutory authority & abrogated its duty to protect this 14-year-old child when it found the child was a dependent, held the parents had made no progress in alleviating the causes necessitating placement, & then placed the child with mother & terminated jurisdiction. The child appealed & the Court of Appeal reversed. The trial court found I.G. was a frequent runaway, used illegal substances, had her own dependency case as a parent, was oppositional, defiant & assaultive such that foster care was unavailable & she refused a group home placement. The appellate court found the agency's arguments "stunning" & rejected them out of hand when the agency argued I.G. is not simply an obstinate minor but a street-wise, minor-mother who has show her ability to survive on her own & with her family. The Court of Appeal held that although caring for an obstreperous child is difficult, it was clear I.G. remained in need of continued supervision as her parents were unwilling or unable to do so. Given that, I.G.'s misbehavior & lack of cooperation did not justify termination of her dependency status which essentially abandoned her to attempt to manage her own well-being sensibly. The case was reversed & remanded for further proceedings.

Removal

In re J.S. (August 19, 2014, No. E058963) ___ Cal.App.4th ___ [2014 WL 4079508] (4th Dist., Div. 2) [San Bernardino]

The appellate court held substantial evidence supported removal of the children from the parents based on on-going domestic violence from 2008 to 2012 while the children were present which constituted a substantial danger to the children's emotional well-being, if not their physical well-being. The children, then aged 5 & 2 years old, were detained after they were found in father's custody & he confirmed mother

did not take her medications for her mental health issues, mother used methamphetamine & marijuana, the parents shared custody, he had been convicted of a sexual offense in Kentucky in 1997 & he was required to register in California as a sex offender. In a wide-ranging opinion which is largely unpublished, the court held that the admitted domestic violence was sufficient for the court to remove the children from the parents even though they did not live together anymore. [H. Gorguinpour for mother; M. Keiter for father; N. Williams for children] [See also in Bypass of Reunification Services.]

In re A.E. (July 9, 2014, No. B252573) ___ Cal.App.4th ___ [2014 WL 3812265] (2d Dist., Div. 8) [Los Angeles]

Where father expressed remorse, mother affirmed she would not allow father to strike their daughter again, & where other means were available to protect A.E. from harm other than removal, the appellate court found the juvenile court's order removing A.E. from her father was not supported by substantial evidence & reversed disposition. The appellate court reversed to the extent the orders required father to remain outside the home. The case began after father disciplined his 3-year-old daughter with a belt leaving 2 long, red welts on her legs & buttock. After agency intervention, father expressed remorse & was committed to learning better child-rearing techniques. As proof, he purchased a book on parenting & said he understood why his daughter was acting out that afternoon & hitting her was not an appropriate discipline. The appellate court also relied on the fact that the parents do not have drug abuse issues, domestic violence, mental health conditions, developmental delays or other social issues often at the root of dependency cases. [M. Levine]

In re Ashly F. (2014) 225 Cal.App.4th 803 (2d Dist., Div. 1) [Los Angeles]

Where the agency failed to provide any facts showing what reasonable means were considered to protect the children from harm other than removal or what reasonable efforts had been made to eliminate the need for removal & the trial court failed to state the facts relied on to justify removal of children, the Court of Appeal held both the agency & the trial court committed prejudicial errors & reversed. In 2 reports, the agency failed to cite any facts to show what reasonable alternatives to removal had been considered or tried by the agency. Jurisdiction was based on mother's excessive use of discipline with belts & other objects leaving marks on 4 children [only 1 child's age is mentioned - 5-year-old Cristina]. Mother appealed the disposition order only. The appellate court agreed with mother that removal was not proper based on the lack of any facts showing any other options were considered other than removal. The opinion suggested the agency & court should have considered unannounced visits by the agency, public health nursing services, in-home counseling, and/or removal of mother from the home as alternatives to protect the children. Mother actually voluntarily left the home so the children could be placed with their father. The Court of Appeal found that on

this record there was a reasonable probability that had the juvenile court inquired into the basis for the claims by the agency re: no alternatives to removal, the court would have found the claim was not supported by clear & convincing evidence. [K. Lee]

Bypass of Reunification Services

In re J.S. (August 19, 2014, No. E058963) ___ Cal.App.4th ___ [2014 WL 4079508] (4th Dist., Div. 2) [San Bernardino]

The appellate court found father's conviction for second degree sexual abuse under Kentucky law qualifies as a violent felony within the meaning of section 361.5, subd. (b)(12), regardless of the length of his sentence. The children, then aged 5 & 2 years old, were detained after they were found in father's custody & he confirmed mother did not take her medications for her mental health issues, mother used methamphetamine & marijuana, the parents shared custody, he had been convicted of a sexual offense in Kentucky in 1997 & he was required to register in California as a sex offender. Father argued his Kentucky conviction did not qualify as a violent felony because he only served 28 days in jail. In a wide-ranging opinion which is largely unpublished, the court found the purposes of the denial of reunification services is based on the underlying criminal conduct & the punishment imposed is irrelevant. Because of this, father's foreign conviction provided sufficient evidence to support denial of reunification services based on subd. (b)(12) [conviction of a violent felony]. [H. Gorguinpour for mother; M. Keiter for father; N. Williams for children] [See also in Disposition, Removal.]

K.F. v. Superior Court (2014) 224 Cal.App.4th 1369 (4th Dist., Div. 1) [San Diego]

The appellate court found the application of bypass provisions to deny reunification services was improper where the burden of proof of clear & convincing evidence was not found for either bypass provision. After finding jurisdiction based on section 300, subds. (b) & (e), the juvenile court denied reunification services to the parents based on section 361.5, subds. (b)(5) & (b)(6). The parents filed a writ of mandate & the appellate court granted the petition in part as to reunification. The 3-month-old child was detained after he was brought to the emergency room with 2 subdural hematomas, numerous rib fractures, an elbow fracture & bruising which were caused non-accidentally. As to the bypass provisions, the trial court affirmatively stated it could not make its section 300, subd. (e), abuse finding by clear & convincing evidence but only by a preponderance of evidence. Based on this, the lesser burden of proof of a preponderance of the evidence could not support a finding the bypass provisions applied because each required a finding by clear & convincing evidence. [J. Braden] [See also in Jurisdiction.]

PRELIMINARY/CONTINUING CONSIDERATIONS

Indian Child Welfare Act (ICWA)

In re Alexandria P. (August 15, 2014, No. B252999) ___ Cal.App.4th ___ [2014 WL 4053054] (2d Dist., Div. 5) [Los Angeles]

Finding the juvenile court applied an improper analysis to whether good cause existed to deviate from the ICWA's adoptive placement preference, the Court of Appeal reversed the trial court's order to follow the placement preference & move Alexandria from her de facto parent's home to extended relatives in Utah.

Alexandria was removed from her mother at 17 months old because of substance abuse. Alexandria is considered an Indian child based on Indian heritage from her father. In an effort to promote reunification with father, Alexandria was placed with a nearby, non-Indian family with the tribe's agreement. The foster family understood when Alexandria was placed with them in December 2011 that she was subject to the ICWA &, if reunification failed, the tribe recommended placement with her extended family in Utah. At the time of placement, Alexandria exhibited signs of reactive attachment disorder but eventually formed a primary bond & attachment to her foster family. Father was not successful at reunification & during a conference call to discuss a transition plan, the parties agreed to a relatively short transition plan to move Alexandria to her relative's home. After a lengthy hearing, the trial court issued its decision finding the de facto parents had failed to demonstrate good cause to deviate from the placement preference & ordered Alexandria to be moved to her relative's home. The Court of Appeal granted a writ of supersedeas allowing Alexandria to stay in her current placement until this court decided the appeal. The de facto parents appealed & raised 3 constitutional issues but the appellate court found de facto parents do not have standing to challenge the constitutionality of the ICWA. Even so, the opinion discussed these issues at some length. Next, the Court of Appeal rejected the foster family's assertion the tribe agreed to an adoptive placement with a non-Indian family when it consented to the foster care placement.

However, the appellate court reversed and remanded the matter after it concluded the juvenile court's application of the good cause exception was legally erroneous & prejudicial. The appellate court held the trial court properly applied a clear & convincing standard of proof but that its requirement the moving party could only show good cause with expert testimony & evidence the child has current extreme physical & emotions problems or would definitively have them in the future was improper & not based on California law. Instead, the Court of Appeal held a trial court may find good cause when a party shows by clear & convincing evidence there is a significant risk the child will suffer serious harm as a result of a change in placement. Further, the juvenile court was directed to consider the bond between the child & her current caregivers & also what was in

Alexandria's best interest. Aware a full year has since passed since the court began its good cause hearing in July 2013, the case was remanded & the trial court was instructed to consider facts & circumstances that have arisen since the filing of the appeal. [J. Willis Newton; C. Blake for minor]

In re Isaiah W. (August 8, 2014, No. B250231) ___ Cal.App.4th ___ [2014 WL 3889076] (2d Dist., Div. 3) [Los Angeles]

Where the trial court found ICWA notice was not required at the disposition hearing & mother failed to appeal this order until after her parental rights were terminated more than a year later, the appellate court held mother forfeited her right to raise an ICWA error. Isaiah was removed soon after birth based on a positive toxicology test for marijuana & withdrawal symptoms. Mother claimed Indian heritage in the Blackfoot tribe through her maternal grandfather & Cherokee heritage through her great-great grandmother. At disposition, the trial court found no reason to know Isaiah was an Indian child & did not order the agency to provide notice. The appellate court found that since the orders from the disposition hearing became final 60 days later, mother is now foreclosed from raising the ICWA finding on appeal. The court rejected the prior reasoning that "'parental inaction' cannot 'excuse the failure of the juvenile court to ensure that notice under the Act was provided to the Indian tribe named in the proceeding.'" Instead, relying on the fact that the tribe can intervene at any time, & the ICWA does not authorize a parent to delay in challenging a trial court's determination on the applicability of the ICWA until after the disputed decision is final, the court held mother had forfeited her right to raise this issue on appeal. [P. Dikes]

In re I.P. (2014) 226 Cal.App.4th 1516 (4th Dist., Div. 2) [San Bernardino]

The agency is not required to make an assessment of a tribal customary adoption (TCA) where the tribe made no effort to offer a TCA as a permanent plan & any omission was harmless. The case began when 4-year-old I.P. & his 7-year-old half-sister were found walking alone down a busy street in Barstow. The children led police officers to their home where the officers found the front door wide open, mother & several other people asleep inside, & the home was dirty, cluttered, with very little edible food but with pipes & bags of marijuana & methamphetamine throughout. Mother admitted daily marijuana & methamphetamine use. I.P. met the growth weight standard for failure to thrive & mother was arrested on child endangerment charges. The children were detained & placed with the maternal aunt who has 4/4 Navajo blood and is a member of the Navajo Nation. After taking jurisdiction & placing the children with their aunt, the Navajo Nation (the Tribe) indicated I.P. & A.G. were eligible for membership & the Tribe was intervening. The trial court found the ICWA applied. At the 18-month review hearing, the children were returned to mother. Less than a month later, she relapsed & used drugs & 3 months after she was arrested. On the subsequent petition filed under

sections 342 & 387, the court took jurisdiction & denied mother reunification services. I.P. was returned to his maternal aunt, who wanted to adopt him. At the section 366.26 hearing the ICWA social worker appeared telephonically but was disconnected after a bad connection. The trial court terminated mother's parental rights. Mother appealed & argued the juvenile court committed reversible error when it failed to order a TCA report as required by the ICWA. The appellate court held mother forfeited her argument by failing to raise it in juvenile court. After considering the issue, however, the Court of Appeal held any error was harmless. The appellate court found the agency did not discuss TCA with the tribe & the tribe made no effort to present TCA as a permanent plan. The appellate court concluded any error was harmless since the Tribe never identified TCA as an option and the court had no reason to speculate the Tribe was unaware of TCA as an alternative permanent plan. [P. Tripp]

In re Abigail A. (2014) 226 Cal.App.4th 1450 (3d Dist.) [Sacramento]

Because father was not an enrolled member of an Indian tribe, & the children were only eligible to enroll but were not members yet, 2 California Rules of Court² were held to be inconsistent with state law & the ICWA because the children were not Indian children as defined by statute. After the initial hearing, father appeared & claimed Indian heritage & the Cherokee Nation acknowledged father & children were eligible to enroll. At the following status conference, the juvenile court concluded it was required to treat the eligible minors as Indian children under rules 5.482(c) and 5.484(c)(2) & therefore directed the agency to take active efforts to enroll the minors in the tribe. The agency appealed challenging the validity of two rules on various grounds including the rules are inconsistent with the definition of Indian children entitled to ICWA protections under state law & the appellate court agreed. These two rules are inconsistent with the legislative definition of the class of protected Indian children, and therefore the Judicial Council lacked authority to expand the definition. After a discussion of statutory interpretation & legislative intent, an extensive analysis of the ICWA & its definitions, & the limited case law available, the appellate court concluded rules 5.482(c) and 5.484(c)(2) are inconsistent with state law & consequently could not authorize the application of the ICWA to minors who are not Indian children within the meaning of the ICWA because father is not an enrolled member. As a side note, the court wrote there is a surprising dearth of authority on this issue, since according to the agency's brief, the 2010 census data showed California has the largest Indian population in the U.S. [K. Lee]

12-MONTH REVIEW HEARING

²All further references to rules are to the California Rules of Court unless otherwise specified.

San Joaquin Human Services Agency v. Superior Court (2014) 227 Cal.App.4th 215 (3d Dist.) [San Joaquin]

Where the trial court did not make the necessary findings to continue reunification services & none of the facts supported a finding that the child would be returned to mother in the next 6 months, the trial court erred in continuing reunification services.

Mother was granted further reunification services at the 12-month review hearing & the agency filed a petition for writ of mandamus challenging the juvenile court's orders. In July 2012, then 3-year-old D.F. (minor) was in mother's custody & she is developmentally delayed & receives life skills supportive services from a Regional Center. Mother's assessment showed her cognitive functioning was impaired, she was unable to care for D.F. on her own, & she relied on her biological father, P.F., to meet D.F.'s basic needs. Mother was in a long-term incestuous relationship with P.F. who encouraged her to engage in prostitution, which resulted in D.F.'s conception. P.F. was arrested & mother became increasingly agitated, made suicidal statements & repeatedly asked the social worker to take D.F. Mother was hospitalized & D.F. was detained. Mother was offered a variety of reunification services & was ordered to complete a psychological evaluation to help tailor her services. D.F. was assessed to be on the autism spectrum. At the 6-month review hearing, mother was ordered to a 2d psychological evaluation which concluded mother's cognitive deficits, limited support system, & mental health issues (including PTSD & history of depression) significantly impaired her functioning so she could not safely parent &, although she completed some services, she had not benefitted. The Agency recommended terminating mother's services citing her "lack of capability" to parent. At the hearing, the doctor who performed mother's psych evaluation testified it would take mother years of treatment to reunify with D.F. The juvenile court noted it was bothered by the delay between the order for the 2d psychological evaluation & its receipt & held reasonable reunification services had not been provided & ordered an additional six months of services. The appellate court noted at the time of the 12-month review hearing, D.F. had actually been detained for over 19 months & the juvenile court could only continue reunification from 18 to 24 months if it found a substantial probability the child would be returned to the custody of their parent within the extended period. Finding the juvenile court's decision was not supported by substantial evidence, the trial court also failed to make required findings, & none of the facts necessary to make any of these required findings was in evidence, the trial court abused its discretion when it continued mother's reunification services. The appellate court issued a peremptory writ of mandate directing the respondent superior court to (1) reverse its orders granting additional reunification services to mother, & (2) enter new orders terminating reunification services & either returning the minor to mother's custody or setting a section 366.26 hearing.

388 PETITION

In re G.B. (2014) 227 Cal.App.4th 1147 (1st Dist., Div. 4) [San Francisco]

Where child suffered severe physical abuse under section 300, subd. (e), the trial court did not err in denying mother's two section 388 petitions requesting reunification services. Two children were detained & the younger child, at 7 months old, suffered 13 fractures in her left femur, shins, left thumb & ribs. Both parents were denied reunification services because of the subd. (e) finding. Mother argued the court erred in denying her 1st 388 petition because the court checked the box indicating a hearing would be held. The appellate court found that even if checking the box meant the court had found a prima facie showing on the petition, the trial court retained discretion to change its determination upon further consideration, which it did. As for the substantive error, in light of mother's continued denial of any parental fault in her child's injuries, mother's efforts would not rebut the presumption against reunification services for her after a subd. (e) finding. The denial of the 2d 388 petition relied on the fact mother was able to testify during the section 366.26 hearing which followed the denial of the 388 petition. Essentially, the trial court was able to consider all the testimony so mother's due process was not violated simply because she was denied an evidentiary hearing on her 388 petition. This seems a little dubious since the court had already denied the 388 petition. How would mother's attorney re-raise the already denied 388 petition after testimony taken for the issues at the permanency planning hearing? [See also in § 366.26 Issues.]

In re Jonathan P. (2014) 226 Cal.App.4th 1240 (2d Dist., Div. 7) [Los Angeles]

Where the trial court's analysis would be affected by the child's voluntary absence from his placement, the trial court did not err in failing to apply section 361.2 for placement with a non-custodial, non-offending parents but it did err by failing to consider whether father was entitled to reunification services because the location of the child does not affect such an evaluation. Jonathan became a dependent at 15 years old after he & his toddler sister witnessed his mother & her boyfriend engage in domestic violence. Father was not offered reunification services because he was previously deported & his whereabouts were unknown. Jonathan subsequently left a foster care placement, then a group home & then a hospital after he had been in a serious car accident requiring surgery. When contacted, father confirmed he had been deported but he had returned to the U.S. & was living in Chicago. Father appeared at the 6-month review hearing & was found to be a presumed father. The court told father he had to file a 388 petition to obtain reunification services &, 10 days later, father filed a 388 petition requesting custody & reunification services. Father appealed the denial of his 388 petition & the Court of Appeal agreed & reversed. Father argued the juvenile court erred in failing to assess his request for custody pursuant to section 361.2 because he is a non-offending, non-custodial parent entitled to custody unless the agency proved placement with Father

would be detrimental. Further, he asserted he was entitled to reunification services. The appellate court held any harm resulting from the failure to apply section 361.2 to father's request for custody was not prejudicial because Jonathan had left his placement & his whereabouts were unknown so the court could not make any accurate determination of detriment because Jonathan's condition was unknown. As for reunification, the trial court erred in denying father reunification services because the whereabouts of Jonathan did not determine father's legal entitlement to reunification services & the court's failure required reversal.

The appellate court noted the agency trial attorney's repeated references to father's immigration status as troubling. Further, it was unclear the degree to which the juvenile court was influenced by the agency's argument on this issue or whether father's legal status played any role in the court's decision-making process. The law is clear, however, that father's citizenship status is not a legally relevant consideration in these matters. (See § 361.2, subd. (e)(1).) It is also apparent the agency's improper comments infected the proceedings, distracting the court & parties from the relevant matters at hand, namely, father's request for custody and/or reunification services. [L. Fields]

In re J.C. (2014) 226 Cal.App.3d 503 (4th Dist., Div. 3) [Orange]

By finding mother's evidence did not establish J.C.'s need for permanency and stability would be advanced by an order returning J.C. to her mother, the appellate court found the juvenile court did not abuse its discretion in denying mother's section 388 petition filed on the eve of the section 366.26 hearing. The Court of Appeal made clear the 12-month review hearing had been continued for more than a year & was held a few weeks before J.C.'s 2d birthday. J.C. had been removed at birth based on the existing dependency case involving her 3 older siblings. By the time of the section 366.26 hearing, J.C. had been detained for 29 months. The court's willingness to continue the case many times was because of mother's apparent success at treating her drug abuse problem. In its analysis, the Court of Appeal emphasized the proper analysis for determining J.C.'s best interest is found in the Supreme Court case *In re Stephanie M.* (1994) 7 Cal.4th 295 and not a review of the factors often cited in *In re Kimberly F.* (1997) 56 Cal.App.4th 519. The appellate court held mother was required to "establish how such a change will advance the child's need for permanence and stability." The opinion went on to admonish the trial court for ignoring the statutory deadlines in the dependency scheme because the court failed to focus on J.C.'s best interest in finding permanence within a reasonable time. The appellate court held the trial court did not abuse its discretion in finding mother showed changed circumstances but she did not establish that an order giving her custody of J.C. would be in the child's best interest. [R. McLaughlin] [See also in § 366.26 Issues.]

REASONABLE REUNIFICATION SERVICES

In re Taylor J. (2014) 223 Cal.App.4th 1446 (2d Dist., Div. 1) [Los Angeles]

When the agency's efforts at providing reunification services amounted to providing 2 lists of service providers, 1 of which was 7 years old & outdated, the trial court's finding the agency provided reasonable reunification services was in error & the Court of Appeal reversed. At the start of the case, 13-year-old Taylor was adjudicated a dependent based on being exposed to violent altercations between Taylor's mother & stepfather along with one incident when Taylor was struck in the face by her stepfather. The juvenile court ordered reunification services for mother including domestic violence & conjoint counseling with Taylor if recommended by her therapist. After 12-months of reunification services, mother was not complying with the case plan but the trial court nonetheless found mother had made significant progress in resolving her issues & continued reunification. After the hearing, mother moved to San Bernardino County & mother argued, & the agency conceded, the agency never gave mother any San Bernardino County referrals during the last 6 months of the case. Relying on the fact that the agency did not determine if the on-line service mother completed was approved by the agency until nearly a year later & the fact the agency never helped mother find an alternative program that would comply with the case plan, the appellate court found the agency did not provide reasonable reunification services. The Court of Appeal rejected the agency's argument the doctrine of invited error applied because mother said she had completed the required counseling program by the time of the 12-month review hearing. The court's order terminating reunification services was reversed & remanded. The remedy for failure to provide reasonable reunification services is an order for continued provision of services. [L. Vogel]

SECTION 366.26 ISSUES

In re Jayden M. (August 1, 2014, No. C075336) ___ Cal.App.4th ___ [2014 WL 4086825] (3d Dist.) [Sacramento]

Parents lack standing to challenge the removal of Jayden from his prospective adoptive parents without complying with statutory procedures prior to the termination of parental rights. Jayden was removed because of his parents' substance abuse, a history of domestic violence & mother's prostitution. Father did no reunification & mother only partially engaged in services. Jayden was placed with his paternal aunt & uncle. Just prior to the section 366.26 hearing, the agency concluded the placement with the aunt was longer in Jayden's best interest. The court continued the permanency placement hearing to allow the investigation of other potential relative placements. The Court of Appeal found the notice provisions of section 366.26, subd. (n), do not apply when a child is removed from a potential prospective adoptive parents prior to termination of parental rights, as in this case. Further, the parents did not have standing to

appeal relative placement preference issues after reunification services have been terminated, as in the instant case. Also, parents may appeal only if the placement order's reversal advances the parent's argument against terminating parental rights which did not apply in this case. [L. Serobian]

In re G.P. (2014) 227 Cal.App.4th 1180 (4th Dist., Div. 1) [San Diego]

Where father was not found until late in the case, his attorney argued no detriment finding was necessary when he appeared, & he did not request custody, the Court of Appeal found father's due process rights were not violated because father invited the error complained of per the doctrine of invited error. The children aged 5 & 2 years old were detained from their mother for excessive use of methamphetamine. Mother told the agency father was in federal prison in Indiana in less than a month after detention. More than a year & a half later, the agency located father in prison in Indiana with an expected release date in 2019 & the possibility he would be deported after his sentence. On appeal, father argued his due process rights were violated because no detriment finding was ever made against him. At the special hearing, father's attorney argued a detriment finding was not required because the child had not been removed from father. The agency disagreed & argued against father's position but the juvenile court sided with father. Based on this, the appellate court found father invited the error & cannot now complain on appeal. Further, even without the invited error, the Court of Appeal found the detriment finding may be implied because the older child had been previously removed from father in a prior dependency in 2008 & he had not seen either child since then & had no relationship with them. [V. Lankford]

In re G.B. (2014) 227 Cal.App.4th 1147 (1st Dist., Div. 4) [San Francisco]

Where mother's visits were always supervised, she had only begun to acknowledge the damaging effects of domestic violence in her life, & there was still instability & dysfunction surrounding her relationship with father [the likely abuser], the evidence fell short of establishing mother's relationship outweighed the benefits of adoption for her children. Siblings, aged 3 years old & 7 months old, were detained when the baby suffered 13 fractures in her left femur, shins, left thumb & ribs. Both parents were denied reunification services because of the subd. (e) finding. By the time of the section 366.26 hearing, mother had separated from her husband, she admitted she was the victim of domestic violence, she failed to protect her children, she had undergone a psychological evaluation, & she had completed other reunification services. Further, the appellate court found no real question that mother maintained regular visits & contact with her children. Despite this, the court relied on her continued supervised visits & instability in her relationship with father to find she had not met her burden for application of the beneficial-relationship exception. [See also in 388 Petition.]

In re J.C. (2014) 226 Cal.App.3d 503 (4th Dist., Div. 3) [Orange]

After finding mother had only pleasant contacts with J.C. for whom she never provided primary care & mother failed to demonstrate harm would have ensued from termination of parental rights, the appellate court found the trial court did not abuse its discretion by ruling the parental benefit exception did not apply. First, the opinion adopted the combined standard of review identified in *In re Bailey J.* (2010) 189 Cal.App.4th 1308 thus allowing for an abuse of discretion standard to be applied. Next, the opinion distinguishing *In re S.B.* (2008) 164 Cal.App.4th 289 & again emphasized that opinion is limited to its facts. Finally, the court held nothing in the record suggested the benefit J.C. might gain by continuing her relationship with mother was outweighed by the benefits of adoption & little evidence was provided to show J.C. had a bond with her mother. The court relied on how J.C. easily separated from her mother, the absence of a bonding study, & the only evidence of a bond was mother's self-serving declaration to find the exception did not apply. [R. McLaughlin] [See also in 388 Petition.]

In re I.R. (2014) 226 Cal.App.4th 201 (3d Dist.) [El Dorado]

Where the minors appealed & the juvenile court failed to choose one of the mandated options for permanency at the section 366.26 hearing, the appellate court reversed the orders finding no facts were presented to support the finding of the sibling exception applied. The minors appealed from the orders placing them in long-term foster care after the court held the sibling exception applied but continued the section 366.26 hearing for another 6 months. The Court of Appeal reserved and, based on the statutory limitations & the relevant evidence in the record, directed the juvenile court to terminate parental rights. In 2011, the family was placed under a disposition of family maintenance for then six-month-old I.R. & 19-month-old K.R.. The petitions alleged the parents failed to participate in voluntary family maintenance, both parents suffered from serious mental health issues & were not in treatment, father had a history of drug abuse, & mother's medical and physical issues limited her ability to care for the children. Despite services, 6 months later the agency filed 387 petitions because the parents had left the minors in the bathtub unsupervised several times, & in one instance, the older half sibling tried to drown I.R. Eight months after removal, the court ended reunification services & set a section 366.26 hearing. The children were placed in the same foster home in November 2012 &, when a new baby was born in April 2013, she was placed in the same home. At the same time, the parents each filed a 388 petition requesting additional reunification services. The parents were given 2 visits a month but largely missed these. The juvenile court found the children were likely to be adopted & the siblings had developed a close, caring relationship with the baby, the bond was significant, & severing the bond would be detrimental. The juvenile court twice emphasized the parents' ongoing efforts to reunify with the baby were "most critical to the analysis" &, in response. the trial court ordered a plan of long-term foster care "for the present time" & set a "renewed"

section 366.26 hearing in 6 months. At the time of the section 366.26 hearing, the trial court must choose among several options but, instead chose a combination of alternatives not available. The appellate court held the trial court may not hold the permanence & stability for the minors hostage to the speculative outcome of a third child's case. As for the beneficial-relationship exception, the appellate court held the trial court correctly found this exception did not apply because the parents did not visit regularly despite some conflict in the precise number of visits. Further, no evidence was presented that the positive contact outweighed the benefits of adoption or that the minors would be greatly harmed. However, based on the trial court's written opinion, the appellate court held the trial court viewed the "critical issue" to be the parents' reunification efforts with the infant sibling. The appellate court held this issue was completely irrelevant to not only the existence of a current sibling bond but also the minors' interests in the permanence of adoption. While both siblings knew the infant was their baby sister, the baby had no reciprocal awareness of the sibling relationship & 3 social workers opined there was not a significant sibling relationship due to the ages and intellectual development of the minors. The record did not disclose compelling evidence that termination would be detrimental to the minors based on either of the proffered exceptions. Since the juvenile court found the minors were likely to be adopted and no facts supported any option for a permanent plan other than adoption, reversal was required.

MISCELLANEOUS

Minor's Counsel for Non-Appealing Minor

In re Felicity S. (2014) 171 Cal.Rptr.3d 487 (1st Dist., Div. 2) [Contra Costa]
Although the Court of Appeal declined to publicly admonish minor's counsel in its opinion, the court found fault with minor's counsel for failing to assess the child's best interest independent of the child's wishes & for failing to consult with the child's guardian ad litem (GAL), who was the child's trial counsel, before changing the minor's position on appeal. Mother appealed the jurisdiction/disposition orders in a prior now de-published opinion. Minor's counsel was appointed at the request of the First District Appellate Project (FDAP) & filed an oversized brief joining with mother's position on appeal. In response, the appellate court issued an Order to Show Cause (OSC) why minor's counsel on appeal should not be publicly admonished for the manner in which she represented minor. Prior to the OSC, the court directed minor's appellate counsel to file a declaration to address 4 specific concerns about the nature of the position taken in minor's brief on appeal. Minor's appellate counsel filed a 25-pp. declaration. After modifying the opinion in the prior appeal to delete the portions relating to the admonition of minor's appellate counsel, the Court of Appeal issues its OSC. The appellate court held there was ample evidence that when minor's appellate counsel spoke

to Felicity &, regardless of Felicity’s wishes, she was not mentally capable of making such a “momentous, potentially life-threatening decision” regarding whether she should be returned to her mother’s care. Further, whether minor’s appellate counsel should be admonished for disregarding the GAL’s position at trial about Felicity’s best interest is a closer question. The court found that on balance a public admonition was not necessary. The OSC was discharged.

Family Code Termination of Parental Rights

In re E.M. (August 5, 2014, No. D064955) ___ Cal.App.4th ___ [2014 WL 3843942] (4th Dist., Div. 1) [San Diego]

Finding mother & step-father filed a petition to free the children from father's custody solely to delay resolution of father's post-dissolution petition to modify custody, visitation, & support orders following mother's remarriage, the appellate court held the trial court did not exceed its jurisdiction when it issued temporary visitation orders for father and the trial court properly exercised its discretion in ordering petitioners to pay father's legal fees. Mother & step-father appeal the denial of their petition to declare the children free from the custody & control of their father, challenge the trial court's jurisdiction to issue temporary visitation order allowing father supervised visits, & the order directing them to pay father's attorney's fees. The parents were married in 2006 & separated 5 years later in part due to father's drug use. Mother filed for divorce in January 2012 & remarried step-father in September 2012. In spring of 2012, mother refused to communicate with father & denied him any visits until he proved he had been sober for 30 days. After completing 90 days of sobriety, mother would allow father to have one hour of supervised visitation once a month. In November 2012, father filed a petition to modify the custody & visitation orders. In response, in January 2013, mother filed a petition to free the children from father's custody alleging father had abandoned his children. The appellate court found ample evidence supported the finding father did not intend to abandon based on his repeated attempts to visit them & his efforts to show his continuing sobriety. As for the visitation order, the Court of Appeal found that, although there was no specific authority for the court to issue visitation orders, that the trial court acted within its inherent authority to take any action which is in the best interests of the children. Finding the appellant's numerous substantive & procedural arguments against the imposition to pay father's legal fees without merit, the appellate court found the trial court properly ordered payment of attorney's fees in response to concluding the petition to free the children from father's custody was filed solely to delay resolving father's rights in family court under this modification request. [M. Vogelmann for minors]

Removal From De Facto Parent

In re A.F. (2014) 227 Cal.App.4th 692 (4th Dist., Div. 2) [San Bernardino]
Case reversed & remanded because the juvenile court did not apparently consider whether removal of the children from their de facto parents was in their best interest. On this record, the appellate court held they could not find the juvenile court did not abuse its discretion in refusing to order the twins returned to their de facto parents. The twins, a boy & a girl, were born premature at 25 weeks of gestation & were removed from their mother at 9 months old when the male twin suffered a non-accidental femur fracture. The children were placed with their de facto parents & remained for the next 14 months. In November 2012, the agency reported the children had made tremendous progress developmentally & had a strong & health bond with the de facto family. A month later, the de facto parents expressed a concern they could not adopt because they were having marital problems after 20 years of marriage. Less than a month later, & before the twins were removed, the de facto parents recommitted to adoption because it would be “cruel & devastating” to remove the twins from “the only home & family they have known.” The agency removed the twins in February 2013. At the section 366.26 hearing held March 5, 2013, the de facto parents appeared, requested court-appointed counsel & asked that the twins be returned. The trial court admonished the de facto parents for treating the children like possessions & said the twins would not be removed from their prospective adoptive home. On April 25, 2013, the de facto parents filed a 388 petition requesting return of the children. The court summarily denied the petition without a hearing & the de facto parents appealed. In making its decision, the Court of Appeal returned to the trial court’s comments at the March 5 hearing & held the trial court did not consider the best interest of the children about whether removal was proper. Based on this, the case was reversed & remanded. [P. Tripp]

Dependency vs. Delinquency Jurisdiction for Dual Status Minors

In re M.V. (2014) 225 Cal.App.4th 1495 (1st Dist., Div. 4) [Alameda]
After the juvenile court considered the adequacy of the section 241.1 assessment report, the appellate court held that although M.V. was eligible for diversion services & the juvenile court was not required to review her entire dependency file, the trial court did not abuse its discretion in declaring 15-year-old M.V. a ward of the court in light of the court's justifiable concerns for her safety & her failed dependency placements. M.V. was arrested for prostitution and pled to a lesser charge. At the time of her arrest, she was already a dependent of the court. She had run away from a number of dependency placements including a group home & was placing herself in dangerous situations by associating with a pimp, being involved in prostitution, & was apparently a victim of sexual exploitation. The Court of Appeal found the record had

sufficient evidence for a factual finding on the 602 petition that M.V. admitted to loitering with the intent to commit prostitution. Further, M.V.'s 602 counsel did not provide ineffective assistance of counsel.

Press Coverage

In re A.L. (2014) 224 Cal.App.4th 354 (2d Dist., Div. 8) [Los Angeles]

Finding the blanket order to allow press access by the Los Angeles Times to dependency hearings conflicted with section 346 & the court's discretion to determine who may be admitted to a hearing based on a direct interest in the case, the appellate court found the blanket order by the juvenile court allowing that all members of the press "shall be allowed access" to dependency hearings unless there is a reasonable likelihood that access will be harmful to the child's best interests was invalid. Section 346 hold that the public shall not be admitted to a juvenile court hearing. Under the new blanket order, in order to keep the press out, the objecting party had to show harm or detriment was reasonably likely to occur. A.L.'s case involved her, a 15-year-old girl, & her 4 siblings. At a pretrial conference, the L.A. Times & an attorney for The Times were present. A.L.'s counsel objected & A.L. filed a sealed objection which was not served on The Times. A.L.'s separate objection stated the facts underlying this case are particularly brutal, & the oldest child [A.L.] in particular was the victim of a brutal assault by her father. This child is at an age (15) where children are extremely sensitive to the possibility of their private information being disseminated to others. Child will be personally present at the hearing in question, & has a right to personally participate in the hearing, without the threat that intimate details & other confidential information about her personal life may become known to strangers. The juvenile court held the objectors had not shown access would be harmful to the child or the children's best interest in this case. On April 16, 2012, A.L. filed a writ petition seeking review & a stay of the juvenile court's order, but this court denied the petition (B240474). A.L. appealed & the appellate court reversed. Preliminarily, the appellate court held the access of the press is an appealable order & The Times was designated a real party in interest. The Court of Appeal went on to find the blanket order reversed the presumption in section 346. Private hearings were mandated by statute for good reasons based on the conclusion that there can be little doubt that the embarrassment, emotional trauma & additional stress placed on the minor by public proceedings & the publicity engendered by public proceedings may well interfere with the rehabilitation and reunification of the family. Based on these considerations, the Court of Appeal reversed the order. [Dissent would dismiss as non-appealable.]