

MINING RECENT DEPENDENCY CASES FOR ISSUES – SPOTTING THE GOLD

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This article was written after reviewing recent case law to provide insight into what issues are winning, why some issues are losing, and what issues are still evolving and may yield interesting argument on appeal.

I. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA): the Child Must Have Lived with “a Person Acting as a Parent” for California to have Home State Subject Matter Jurisdiction.

The court *must* have subject matter jurisdiction in order to hear a case. (*In re Nelson B.* (2013) 215 Cal.App.4th 1121, 1128.) Often, California is the only state with an interest in the case, and, therefore, subject matter jurisdiction is not an issue. However, when a case involves more than one jurisdiction, subject matter jurisdiction may be an issue.

In dependency proceedings and child custody disputes, the UCCJEA dictates whether California has subject matter jurisdiction. (*In re Nelson B., supra*, 215 Cal.App.4th at p. 1128.) The UCCJEA provides five ways a state can exercise subject matter jurisdiction over a case. (Fam. Code §§ 3421, subd. (a) and 3424.) The first way is by qualifying as the child’s “home state.” (Fam. Code § 3421, subd. (a).) A state has become the child’s “home state” if the child has 1.) lived in the state with a person acting as a parent, 2.) for at least six consecutive months (including any temporary absences), 3.) immediately before the commencement of the proceedings. (*In re Gloria A.* (2013) 213 Cal.App.4th 476, 482-483)

In two recent cases, the appellate court held California did not have “home state” jurisdiction. (Fam. Code § 3402, subd. (g); *In re Nelson B., supra*, 215 Cal.App.4th at p. 1129; *In re Gloria A., supra*, 213 Cal.App.4th at pp. 483-484.) In *In re Nelson B.*, California did not have home state jurisdiction because the sixteen-year-old, Maryland run-away, Nelson, was not living with a person acting as a parent when he was detained. His aunt, who had custody of him in Maryland - not his eighteen-year-old, California girlfriend - was the person acting as his parent under the statute. The appellate court affirmed the juvenile court’s dismissal for lack of subject matter jurisdiction. (*Id.* at 1130-1132.)

In *In re Gloria A.*, the court found all three elements required for home state jurisdiction were lacking. (*In re Gloria A., supra*, 213 Cal.App.4th at pp. 483-484.) There, the child, Gloria, was not living with a person acting as a parent immediately before the commencement of the proceedings; her mother was deported one month before the proceedings were commenced. (*Id.* at p. 483.) Moreover, there was no evidence showing when mother and Gloria began living in California, and, thus, that they had been living in California for the requisite six month period. (*Id.* at pp. 483-484.) The court remanded with instructions that the juvenile court determine whether there was some other basis for the exercise of jurisdiction. (*Id.* at p. 484.)

II. Jurisdiction

A. Other Than in the Third District, the Sufficiency of the Petition Cannot Be Challenged for the First Time on Appeal.

Relying on Civil Code of Procedure section 430.80, subdivision (a) and civil cases holding the sufficiency of the petition may be raised for the first time on appeal, in *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397, the Third District held that the sufficiency of a dependency petition can be challenged for the first time on appeal.

Two years later, in *In re Shelley J.*(1998) 68 Cal.App.4th 322, 328, the Sixth District disagreed, holding a parent forfeits challenging the sufficiency of the petition by failing to raise the issue in the trial court. It reasoned that the rules governing civil proceedings do not apply to dependency proceedings unless expressly made applicable, and there was nothing that supported finding Civil Code of Procedure section 430.80 applied in criminal proceedings. (*Ibid.*)

Since then, *In re Alysha S.* has become an outlier. In most – if not all – the other districts, the sufficiency of the petition cannot be challenged for the first time on appeal. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1638 [First District, Division 5, following *In re Shelley J.*]; *In re Christopher C.* (2010) 182 Cal.App.4th 73, 82-83 [Second District, Division 5, following *In re Shelley J.*]; *In re James C., supra*, 104 Cal.App.4th at p. 481 [Second District, Division 5, following *In re Shelley J.*]; *In re S. O.* (2002) 103 Cal.App.4th 453, 459 [Fourth District, Division 1, following *In re Shelley J.*]; *In re Dakota E.* (May 3, 2006, F048758) [nonpub. opn.,

Fifth District]; *In re Tiffany S.* (Oct. 21, 2005, F047342) [nonpub. opn., Fifth District].

B. Challenging Individual Jurisdictional Findings, or Jurisdictional Findings Against Only One Parent.

When a dependency petition alleges multiple grounds for the exercise of jurisdiction, the court may affirm the assertion of jurisdiction if any one of the bases for jurisdiction is supported by substantial evidence. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762.) As a result, appeals challenging individual jurisdictional allegations are often deemed moot because no effective relief can be granted. (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316.)

However, a parent may be able to challenge individual jurisdictional findings anyway. (*In re Drake M., supra*, 211 Cal.App.4th at p. 762.) The court will “generally” exercise its discretion and reach the merits of a jurisdictional challenge if the finding could prejudice the parents’ interest in the current or future dependency proceedings. (*In re Cameron C.* (Aug. 29, 2013, B245305) [nonpub. opn.]; but see *In re I.A.* (2011) 201 Cal.App.4th 1484, 1493 [declining to reach the merits where an alleged father did “not suggest[] a single specific legal or practical consequence from th[e challenged] finding”].)

Some examples of how a jurisdictional finding can prejudice a parent’s interests are:

- a) *In re Drake M.* (2012) 211 Cal.App.4th 754, 762 [holding the father’s appeal was not moot where the individual jurisdictional finding challenged was the basis for finding father was an “offending” parent].
- b) *In re D.C.* (2011) 195 Cal.App.4th 1010, 1015 [holding the mother’s appeal was not moot because the subdivision (i) finding could be prejudicial if she was involved in a future dependency proceeding].
- c) *In re T.V.* (Aug. 23, 2013, F066305) [nonpub. opn., holding father’s appeal was not moot because the subdivision (d) finding, if erroneous, could prejudice his interest in the current, and any future dependency proceedings].
- d) A jurisdictional finding under section 300, subdivision (e) is prima facie evidence the child cannot be returned to the parent’s care at the dispositional hearing. (Welf. & Inst. Code § 361, subd. (c)(1).)

- e) Some jurisdictional findings authorize the court to bypass parents in subsequent dependency proceedings. (See e.g. Welf. & Inst. Code § 361.5, subds. (b)(3), (5) and (6).)

C. Subdivision (b): One Adequate Parent is Enough.

It is commonly said that a jurisdictional allegation against one parent is good against both because the court can exercise jurisdiction over the child if the actions of either parent bring the child within section 300. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1491-1492.) However, this may be changing.

In *In re A.G.* (2013) 220 Cal.App.4th 675, 683-684, the appellate court reversed the jurisdictional findings against mother because the child's custodial father was living apart from mother and had always adequately protected and provided proper care for the child. Likewise, in *In re A.J.* (2013) 214 Cal.App.4th 525, 536-538, the court terminated its jurisdiction after placing the child with her nonoffending, biological father because he was able to provide proper care.

In both cases, the court focused on the overarching basis for dependency proceedings: to protect the child and reunify families. (See e.g. Welf. & Inst. Code § 202.) If the child can safely remain in a parent's care, that child is not in need of the juvenile court's protection, and the case belongs in the family court, not the dependency court. (*In re A.G.*, *supra*, 220 Cal.App.4th at pp. 683-684, 686.)

D. Subdivision (b): Substance Abuse - Not Just Use - Must be Shown

Under section 300, subdivision (b), the court can assume jurisdiction if it finds there is a substantial risk the child will suffer serious physical harm as a result of the parent's failure or inability to provide regular care. A finding the parent *abuses* substances is prima facie evidence the parent is unable "to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767; Welf. & Inst. Code § 300, subd. (b).)

However, a parent's *use* of controlled substances, without something more, is not itself sufficient. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453.) The Department must show the parent's substance *abuse* poses a "specific, non-speculative and substantial" risk the child will suffer serious physical harm. (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 767; *In re Destiny S.*, *supra*, at p. 1003; *In re David M.* (2005) 134 Cal.App.4th 822, 830.)

Courts have been using the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM) to define substance abuse. (*In re Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346-1347; *In re Drake M.* (2012) 211 Cal.App.4th 754, 766; *In re Jasper C.* (Dec. 20, 2013, B247569) [nonpub. opn.]; *In re E.I.* (Apr. 12, 2013, B242762) [nonpub. opn.]; *In re T.L.* (Aug. 23, 2013, A137160) [nonpub. opn.])

Under the DSM, clinical substance abuse is “[a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period:

1. recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household);]
2. recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use);]
3. recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct); or]
4. continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights).”
5. Recent Examples:
 - a. *In re Jasper C.* (Dec. 20, 2013, B247569) [nonpub. opn.].
 - b. *In re E.I.* (Apr. 12, 2013, B242762) [nonpub. opn.].
 - c. *In re T.L.* (Aug. 23, 2013, A137160) [nonpub. opn.].

E. Subdivision (b): When is Domestic Violence Enough?

Domestic violence only supports the exercise of jurisdiction under section 300, subdivision (b) if there is substantial evidence the domestic violence is ongoing or likely to continue and either directly harmed or placed the child at risk of suffering physical harm. (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717.)

To determine whether domestic violence is ongoing and likely to continue, courts look at a number of factors, including: the proximity of the event to the filing of the

petition, whether the child was present or exposed to the violence, the number and severity of the incidents, and the parents' subsequent actions. (See e.g. *In re Daisy H.*, *supra*, 192 Cal.App.4th at p. 717.) The chart below provides a glimpse into the application of these factors.

Section 300, subdivision (b): When is Domestic Violence Enough?

CASE & HOLDING	Proximity of Event to Petition	Was the Child Present?	Number/Severity of the Incidents	Parents' Subsequent Relationship
<i>In re R.C.</i> (2012) 210 Cal.App.4th 930 [affirmed].	2 incidents in three months preceding petition.	Child was present for most recent incident and feared father.	The abuse was severe and recurring: 3 incidents total, during the last father grabbed mother by her hair, choked her, slapped and pushed her, mother hit her head, father threatened to kill her and called friend for a gun.	Most recent incident occurred <i>after</i> the parents separated. Therefore, "the parents' separation did not diminish the risk to the three children (as well as to the mother)."
<i>In re Alexis E.</i> (2009) 171 Cal.App.4th 438 [affirmed].	Father was incarcerated for DV when petition was filed.	On two occasions the child were present.	Father was domestically violent towards mother and two subsequent girlfriends; he repeatedly threatened to kill mother, and was convicted of being domestically violent towards his girlfriend.	Mother and father had been separated for five years, but father continued to enter into domestically violent relationships with his girlfriends.
<i>In re Daisy H.</i> (2011) 192 Cal.App.4th 713 [reversed].	2 or 7 years before the petition was filed.	The children were not present and did not fear father.	Father made disparaging remarks about mother to the children and, on one occasion, he choked mother and pulled her hair.	Parents divorce was finalized just before the petition was filed.
<i>In re Heather A.</i> (1996) 52 Cal.App.4th 183 [affirmed].	Within 3 months of the petition.	Present on 1 occasion, elsewhere in the home during others.	Numerous incidents of violence, which included choking, pushing, hitting, death threats and threats with a gun.	Father had a long history of domestically violent relationships, and he was prone to anger, hostility and violence.
<i>In re Alysha S.</i> (1996) 51 Cal.App.4th 393 [reversed; insufficient petition]	Within 1 year of the petition.	No evidence "the violence was perceived by or affected the children."	Father was physically abusive and violent to mother and arrested for domestic violence on one occasion. No evidence occurred more than once.	Mother and father continued their relationship.
<i>In re E.B.</i> (2010) 184 Cal.App.4th 568 [affirmed].	Within 1 year of the filing of the petition.	Violence occurred within earshot of the children.	Father was emotionally abusive towards mother and had been physically abusive on at least 4 occasions.	Despite the abuse, mother continued to return to father, even after they divorced.
<i>In re T.V.</i> (2013) 217 Cal.App.4th 126 [affirmed].	Within 1 week of the filing of the petition.	The child was not present but likely would be in the future given the risk of recurrence.	Parents had a long history of domestic violence, and father had several felony convictions for spousal abuse.	Mother got a restraining order against father; father still could not control his anger or appropriately express negative feelings.

F. Subdivisions (b) and (g): If an Incarcerated Parent has Arranged for the Child's Care, the Department Must Show Placement with the Caretaker Poses a Substantial Risk of Serious Physical Harm.

The court can only assume jurisdiction under subdivision (g) if the incarcerated parent is unable to identify a caretaker who is willing to assume custody of the child. (Welf. & Inst. Code § 300, subd. (g); *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 672-673.)

Under subdivision (g), the parent does not need to prove the suitability of the proposed caretaker, and the Department cannot use a subdivision (b) to circumvent this limitation. (*Ibid.*; *In re Noe F.* (2013) 213 Cal.App.4th 358, 365 [reversing subdivision (b) finding; mother's incarceration was not a basis for jurisdiction, mother identified willing care providers, and insufficient evidence established the child would be at substantial risk of harm in the proposed placements].)

If the Department thinks the proposed caretaker is unsuitable, it must establish that placing the child in the caretaker's home would pose a substantial risk that the child would suffer serious physical harm, as is required for the exercise of jurisdiction under subdivision (b). (*Maggie S. v. Superior Court, supra*, at pp. 672-673.) Otherwise, there is no basis for State involvement. (*Ibid.*)

III. Disposition

A. Pick Your Battles?: Getting the Court to Disposition

The Third District is declining to reach dispositional arguments after affirming jurisdictional findings, reasoning that the difference between jurisdictional and dispositional findings in the trial court - the burden of proof - doesn't exist on appeal (because both are reviewed for substantial evidence), and counsel did not provide any "reason [for it] to reconsider" jurisdictional arguments in the dispositional context.

- a. *In re Joseph H.* (Feb. 26, 2013, C070804) [nonpub. opn.].
- b. *In re J.B.* (Mar. 26, 2013, C071191) [nonpub. opn.].
- c. *In re J.G.* (July 11, 2013, F066085) [nonpub. opn., noting the clear and convincing standard "is for the edification and guidance of the juvenile court and not a standard for appellate review"].

Unfortunately, the court did not provide any guidance on what would constitute a reason to reconsider jurisdictional arguments in the dispositional context. Here are a few ideas:

- a. Emphasize the importance of dispositional findings in the protection of parents' due process rights. (See *In re T.G.* (2013) 215 Cal.App.4th

1, 14-15, 18-19 [holding the court may not terminate parental rights without first making a finding of unfitness by clear and convincing evidence].)

- b. Focus on a finding specific to the dispositional hearing.
 - (1) Did the court consider removing an offending parent from the home? (See *In re Silvia R.* (2008) 159 Cal.App.4th 337, 351.)
 - (2) Did the court give a nonoffending parent the opportunity to present an “acceptable plan” for protecting the child from future harm? (See *In re Isayah C.* (2004) 118 Cal.App.4th 684, 696.)
- c) Argue the court erred in its application of the statutes governing disposition. (Welf. & Inst. Code §§ 361, subd. (c)(1), 361.2, subd. (a), and 364, subd. (a); *In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1502-1503.)
- d) Challenge the services identified in the case plan in conjunction with the dispositional findings and orders. (See e.g. *In re Jasmine C.* (2003) 106 Cal.App.4th 177, 181-182; *In re Basillio T.* (1992) 4 Cal.App.4th 155, 172-173.)

B. Male Dependents?: “Prolonged and Egregious” Sexual Abuse

Although the Supreme Court’s decision in *In re I.J.* (2013) 56 Cal.4th 766, 778 clarified when the sexual abuse of a female child is sufficient to adjudge male children dependents, it did not foreclose further argument on the issue.

Looking at the language of section 300, subdivision (j), which allows the court to exercise jurisdiction over the siblings of abused children, the court found that under subdivision (j), the more egregious the abuse, the more appropriate the assumption of jurisdiction is. (*In re I.J., supra*, 56 Cal.4th at p. 778; Welf. & Inst. Code § 300, subd. (j).)

It noted that there may be a substantial risk despite a low probability the harm will occur, where the magnitude of the harm is great, and, conversely, a relatively high probability that a child will suffer a very minor harm is likely not sufficient to establish a substantial risk exists. Accordingly, it directed court to look at both the likelihood that harm will occur and the magnitude of that harm to determine whether a substantial risk exists. (*In re I.J., supra*, 56 Cal.4th at p. 778.)

Based on these considerations, the court held the abuse of the female child in that case was sufficient to evidence a substantial risk to the male children, as well. (*In re I.J., supra*, 56 Cal.4th at p. 778.) “The serious and prolonged nature of father's sexual abuse of his daughter...support[ed] the juvenile court's finding that the risk of abuse was substantial as to all the children.” (*Ibid.*)

C. Presumed Parents: Expanding Statutes, Contracting Case Law

For birth mothers, parentage determinations are simple. For everyone else, parentage determinations are not so simple.

The law affords parents rights based on their relationship with the child. A parent who has not established biological paternity, or achieved presumed status, is an alleged parent. A natural, or biological parent, is one whose biological paternity has been established but who has not yet achieved presumed status. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.)

Presumed parents have the most rights. Although the court may offer a biological parent reunification services or custody, only presumed parents have a *right* to reunification services and custody. (*In re Jerry P., supra*, 95 Cal.App.4th at p. 801.)

Under the Family Code, a person will be presumed to be the child's natural parent if he or she 1.) was married to the child's mother; 2.) "receive[d] the child into his or her home and openly h[eld] the child out as his or her own; or 3.) executed a voluntary declaration of paternity. (Fam. Code § 7611.) However, recognizing that a parent could be prevented from achieving presumed status under the Family Code, the Supreme Court created a fourth way of achieving presumed status in *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 847-848, 849 (*Kelsey S.*). If a parent who is prevented from achieving presumed status under the Family Code promptly comes forward and demonstrates a full commitment to assuming parental responsibility for the child, he or she will be deemed a presumed parent under *Kelsey S.* (a *Kelsey S.* parent). (*Id.* at p. 849.)

Currently, a parent can achieve presumed status in dependency proceedings by showing he or she qualified for presumed status under any one of these four categories. (*In re Jerry P., supra*, 95 Cal.App.4th at p. 801.) However, there is a question as to how courts will apply these Family Code provisions in dependency proceedings in the future. (See *In re Brianna M.* (2013) 220 Cal.App.4th 1025, 1030, review granted on Feb. 11, 2014 and dismissed on Aug. 13, 2014, S214955.)

In *In re Brianna M.*, the court affirmed the grant of presumed status to a nonbiological father over a biological father. The nonbiological father had received the child into his home and held her out as his own for several years, performing all the tasks and assuming all the responsibility of parenting. The biological father had signed a voluntary declaration of paternity and had lived with and held the child out as his own for the first nine months of her life. Focused on the voluntary declaration of paternity, the appellate court held he was not entitled to presumed status.

Affirming the juvenile court's holding, the appellate court reasoned

that, in family law proceedings, the purpose of a parentage finding is to identify the child's "natural" parent and allocate the rights (visitation and custody) and responsibilities (child support) that spring from that biological connection. As a result, the Family Code provisions are designed to identify the person who is presumptively the child's biological parent.

However, in dependency proceedings, it held biology is "irrelevant." The purpose of a parentage finding in dependency proceedings is to determine who has a relationship with the child worth nurturing, preserving, and protecting with the provision of reunification services and an opportunity to assume custody. As a result, it held a presumed father for the purpose of dependency proceedings is one who has promptly come forward and demonstrated a full responsibility to assuming parental responsibility for the child, as is required for presumed status under *Kelsey S.*

The California Supreme Court granted review in *In re Brianna M.* on the following issue: If one man seeking presumptive father status in a dependency action has completed a voluntary declaration of paternity under Family Code section 7573 and another man seeking presumptive father status has satisfied the criteria of Family Code section 7611, subdivision (d), is the voluntary declaration of paternity controlling as a matter of law? On August 13, 2014, the court dismissed review because counsel for the biological father, the petitioner, was unable to contact her client and no opening brief was filed.

In the wake of *In re Brianna M.*, the Supreme Court's interest in the presumptive father status issue, and the amended Family Code, several questions are left unanswered.

The court's opinion in *In re Brianna M.* suggests *Kelsey S.* is the only means of achieving presumed status in dependency proceedings. (*In re Brianna M.*, *supra*, 220 Cal.App.4th at pp. 681-682, review granted Feb. 11, 2014 and dismissed on Aug. 13, 2014, S214955.) However, the court's only express holding in this regard was that a voluntary declaration of paternity does not qualify a father for presumed status in a dependency proceeding. Would a person who was married to the mother be entitled to presumed status? Would a person, like the nonbiological father in *In re Brianna M.*, who received the child into his home and held the child out as his own, be entitled to presumed status? If parents are not able to achieve presumed status under the Family Code in dependency proceedings, doesn't this compromise the foundation for *Kelsey S.*: to protect the interests of parents who were prevented from achieving presumed status under the Family Code? (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at pp. 847-848.)

If parents can no longer achieve presumed status under the Family Code in dependency proceedings, this could lead to some very strange results in light of the recent amendment to the Family Code. As of January 1, 2014,

the court may recognize more than 2 presumed parents, if it would be detrimental to the child to have only two presumed parents. In light of *In re Brianna M.*, this would allow the court to find one person a presumed parent for the purposes of a dependency proceeding, while another parent is liable for support according to the family law court. For example, would a man who was previously adjudicated a presumed parent under the Family Code, be liable for support while another person reaped the benefits of reunification services and custody in a dependency proceeding?

Likewise, if biology is irrelevant in dependency proceedings, does this mean that a nonbiological father and biological father are subject to the same standards for achieving presumed status? In *In re Jerry P.*, the court held a nonbiological father may achieve presumed status under *Kelsey S.* if he or she demonstrates an existing parent-child relationship with the child. (*In re Jerry P.*, *supra*, 95 Cal.App.4th at p. 806 [stating there was “no doubt” the man seeking presumed status had established a father-son relationship with the child].) Although subsequent case law has recognized this heightened standard for nonbiological fathers seeking *Kelsey S.* status, it was neither at issue, nor was it addressed by the court in *In re Brianna M.* (*In re D.M.* (2012) 210 Cal.App.4th 541, 553-554.)

Will other courts agree with the reasoning of *In re Brianna M.* and reject the use of voluntary declarations to establish presumed parentage?

Although *In re Brianna M.* and the Family Code amendment turned what was a relatively static statutory scheme on its head, it has provided a catalyst for re-thinking parentage in dependency proceedings and left many questions with yet to be determined answers.

D. Relative Placement - Exemptible Criminal Histories

A relative requesting placement of the child must be afforded preferential consideration; however, the child cannot be placed with a relative who lives with an adult that has a non-exemptible conviction. (Welf. & Inst. Code §§ 361.3, subd. (a) and 361.4; Health & Safety Code § 1522, subdivision (g)(1)(a)(i) [listing non-exemptible convictions].)

The margin for error in determining whether an offense is non-exemptible is “high” because the statutory scheme is complex and social workers - not lawyers - are charged with making this determination. (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 707 [citing *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 997].) As a result, review of the Department’s determination a prior conviction is non-exemptible may yield a viable issue on appeal: unless there is substantial evidence the past conviction is one of the circumstances described in Health and Safety Code section 1522, subdivision (g)(1)(A)(i), the relative is entitled to be assessed for placement. (*In re Autumn K.*, *supra*, at p. 709 [reversing the termination of

parental rights because the Department wrongly concluded the relative requesting placement had a non-exemptible conviction under section 361.4].)

E. Placement with Noncustodial Parents

1. The Late-Arriving or Late-Elevated, Noncustodial Parent

Consideration under section 361.2 is triggered by a noncustodial parent's request for custody. (Welf. & Inst. Code § 361.2, subd. (a).) However, the noncustodial parent must be adjudged a presumed parent before he or she is entitled to consideration under section 361.2, and section 361.2, by its terms, applies at the time of the dispositional hearing. (*In re E.T.* (2013) 217 Cal.App.4th 426, 436-437 [noting only presumed fathers are entitled to placement under section 361.2]; but see *In re A.J.* (2013) 214 Cal.App.4th 525, 536-538 [affirming placement with a biological father].)

Ideally, a noncustodial parent comes forward at detention, requests custody, is adjudged a presumed parent, and is considered under section 361.2 after the child's removal from parental custody at the disposition hearing. (Welf. & Inst. Code §§ 361.2, subd. (a) and 361, subd. (c)(1).) However, many cases are not ideal. The noncustodial parent does not appear until after the dispositional hearing. Due to delays in paternity testing, competing claims of paternity, or other issues, the noncustodial parent does not achieve presumed status until late in the proceedings. Regardless, the courts have held these late-arriving and late-elevated, noncustodial parents are still entitled to consideration under section 361.2.

In *In re Zacharia D.* (1993) 6 Cal.4th 435, 441, the noncustodial father only came forward to request custody at the eighteen-month status review hearing in an attempt to thwart the impending termination of mother's parental rights. The court held he was not entitled to consideration under section 361.2, holding section 361.2, by its terms, only applies at the dispositional hearing. (*Id.* at 453.)

However, exceptions articulated in subsequent cases have essentially swallowed this rule.

First, in *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1451, the court held the "procedures" articulated in section 361.2 may be invoked at later phases of the proceedings. (*Ibid.* [holding the parties consented to the application of section 361.2 at a review hearing by failing to object].) Then, in *In re Z.K.* (2011) 201 Cal.App.4th 51, 71, the court held a mother whose son had been kidnapped was entitled to consideration under section 361.2 because as soon as she found out about her child's location and dependency, she came forward requesting custody. In *In re Suhey G.* (2013) 221 Cal.App.4th 732, 743-744, the court again allowed a parent's request for custody to be considered under section 361.2 despite his later arrival. However, again, as in *In re Z.K.*, the father's late arrival was not his fault; the Department failed to provide him with adequate notice. (*Ibid.*) Then, most recently, the court in

In re T.G. (2013) 215 Cal.App.4th 1, 18-19 held the court cannot set a hearing to terminate parental rights without first making a finding under section 361.2. A finding of unfitness by clear and convincing evidence must be made before the court can terminate parental rights. (*Ibid.*)

Under these cases, a late-arriving or late-elevated, noncustodial parent's request for custody should be afforded consideration under section 361.2 as long as the parent made that request at his or her first opportunity to do so, and, regardless, the court may not move to permanency planning without making a finding under that section.

2. Nonoffending and Noncustodial?

Although section 361.2 does not distinguish between offending and nonoffending noncustodial parents, some districts do.

Some districts have held a noncustodial parent must also be nonoffending to be eligible for consideration under section 361.2. (See *In re A.A.* (2012) 203 Cal.App.4th 597, 606-609; *In re John M.* (2013) 217 Cal.App.4th 410, 420-424 [following *In re A.A.*].) In these districts, a parent is offending if: 1.) jurisdictional allegations other than under section 300, subdivision (g) were sustained against the parent, or 2.) there was a prior detriment finding against the parent and the parent's right to custody has not been restored. (*In re John M., supra*, at pp. 420-424.)

These districts have not addressed what provision does govern a noncustodial, offending parent's request for custody. (*In re A.A., supra*, 203 Cal.App.4th at pp. 606-609; *In re John M., supra*, 217 Cal.App.4th at pp. 420-424.) Presumably, these courts are not saying that an offending, noncustodial parent's request for custody is not entitled to consideration while an offending and previously custodial parent's request is. However, section 361, by its terms, does not apply to a noncustodial parent, and section 361.2 is the only provision governing placement with a noncustodial parent. (Welf. & Inst. Code §§ 361, subd. (c)(1) and 361.2, subd. (a).) If a noncustodial parent's request for placement is not eligible for consideration under section 361.2, what standard governs that parent's request?

In districts holding section 361.2 applies regardless of a parent's status as offending or nonoffending, a parent's "status" as offending is just one consideration in determining whether placing the child with that parent would be detrimental. (*In re V.F.* (2007) 157 Cal.App.4th 962, 970; *In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1503 [following *In re V.F.*].)

3. Was There Substantial Evidence of Detriment?

The court must place the child with his or her noncustodial parent unless the Department demonstrates that action would pose a risk of detriment to the child's well-being. (Welf. & Inst. Code § 361.2, subd. (a).) Recent case law strengthens the existing body of law commemorating the preference for placement with noncustodial parents. (*In re Patrick S., III* (2013) 218 Cal.App.4th 1254, 1262 [section 361.2 evinces a legislative preference for placement with a noncustodial parent when safe for the child].)

In two 2013 cases, the court reversed orders denying noncustodial parents placement. (*In re Patrick S., III, supra*, 218 Cal.App.4th at pp. 1265-1266; *In re E.D.* (2013) 217 Cal.App.4th 960, 966-967.) In both cases, the juvenile court found that, given the child's bond to the caretaker and other children in the home, it would be detrimental to place the child with his noncustodial parent. (*Ibid.*) In both cases the appellate court reversed. "When the parent is competent, the standard of detriment is very high." (*In re Patrick S., III, supra*, at p. 1263.) Where there are competing affections, the preference for placement with the noncustodial prevails absent actual evidence that action would emotionally harm the child. (*Ibid.*; *In re E.D., supra*, at pp. 966-967.)

4. Section 361.2 Versus Section 361: Implied Findings or Reversal?

When the juvenile court errs by ordering a child's removal from a noncustodial parent under section 361, some courts are willing to imply a finding of detriment under section 361.2. (*In re Nickolas T., supra*, 217 Cal.App.4th at p. 1507; *In re V.F., supra*, 157 Cal.App.4th at p. 973; *In re Miguel P.* (Dec. 19, 2013, B250621) [nonpub. opn.]

Those courts that will not imply a finding of detriment, hold that a parent is entitled to have their claim first considered by the juvenile court within the correct statutory context, with corresponding express findings. (*Ibid.*; see also *In re Abram L.* (2013) 219 Cal.App.4th 452, 461; *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1824-1825 [finding under section 361 cannot substitute for detriment findings under § 361.2].) To bolster an argument opposing implied findings on appeal, counsel can distinguish cases decided under section 361 and analogize to cases decided under section 361.2 to show prejudice and emphasize the importance of a dispositional finding as the foundational finding of unfitness required for the termination of parental rights. (*Ibid.*; *In re T.G., supra*, 215 Cal.App.4th at pp. 18-19.)

F. Bypass Under Section 361.5, subdivision (b)(10): This Child or Another Child?

Section 361.5, subdivision (b)(10) authorizes the court to deny a parent the opportunity to reunify (“bypass”) with his or her child if the parent previously failed to reunify with the child’s “siblings or half siblings” and has not “made a reasonable effort to treat the problems that led to [that child’s] removal[.]” (Welf. & Inst. Code § 361.5, subd. (b)(13).) In *In re Gabriel K.* (2012) 203 Cal.App.4th 188, 196, the First District, Division 4 held this provision also permits the court to bypass the parent if he or she previously failed to reunify with the child at issue in the present proceeding.

In *In re B.L.* (2012) 204 Cal.App.4th 1111, 1116, the Fourth District disagreed, holding this provision only applies when there is proof the parent failed to reunify with a sibling or half-sibling. In 2013, the Third District adopted this view, noting that extending the statute to include the same child is the Legislature’s prerogative, not the court’s. (*J.A. v. Superior Court* (2013) 214 Cal.App.4th 279, 283-284.)

IV. Status Review Hearings

A. Reasonable Services: Must Show that Services Were Unreasonable Despite the Parent’s Failure to Participate.

At each status review hearing, the court must find reasonable services were offered or provided. (Welf. & Inst. Code § 366.22, subd. (a).) The Fifth District has affirmed several reasonable services findings, holding any error was harmless based on the parent’s failure to participate in services that were offered or provided. In each of these cases, the court held the problem was not that reasonable services weren’t provided, but that the parent did not participate in them. (*In re Justin L.* (Aug. 27, 2013, F066679) [nonpub. opn.]; *In re Trinity S.* (June 7, 2013, F065737) [nonpub. opn.]; *In re James P.* (Sept. 11, 2013, F065284) [nonpub. opn.]

B. Stay Away Orders: A Restraining Order Can Only Require a Parent to Stay Away from His or Her Children if There is Substantial Evidence the Child Would Otherwise be in Jeopardy.

A restraining order can only require a parent to stay away from his or her children if there is substantial evidence that the children would be in jeopardy if not included in the restraining order. (*In re C.Q.* (2013) 219 Cal.App.4th 355, 363-364; *In re B.S., Jr.* (2013) 172 Cal.App.4th 183, 194.) Although domestic violence may support a restraining in order requiring a parent to stay away from his or her spouse, it does not necessarily justify a

requirement the parent stay away from the children.

When determining whether a stay away order keeping a parent from his or her children is justified, courts focus on whether the parent's conduct posed a direct threat of harm to the children. For example, in *In re C.Q.* (2013) 219 Cal.App.4th 355, 363-364, the court held insufficient evidence supported the provision requiring father to stay away from his children where father discontinued his fight with mother when the child stepped in between the parents. Conversely, there was sufficient evidence to support a stay away order in *In re B.S., Jr.* (2013) 172 Cal.App.4th 183, 194 where the father's abuse of mother in close proximity to the child demonstrated a "disregard[]" for the child's safety, also.

V. Section 388 Petitions

Under section 388, the court may modify a prior order if the petitioning party demonstrates 1.) a change of circumstances or new evidence, and 2.) that the requested change is in the child's best interest.

A. Changed: Establishing Changed, versus Changing, Circumstances

To satisfy the first prong under section 388, the parent must show changed circumstances. Changing circumstances are not sufficient. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) To determine whether the parent's circumstances have changed, or are merely changing, courts look at a number of factors, including the duration of the change, whether the change is ongoing, evidence the change is permanent, and the parent's ability to present assume custody of the children based on the purported change.

Here are some examples where the court relied on these factors to find the parent's circumstances were changing but had not yet changed.

1. *In re Dana A.* (Feb. 13, 2013, F065597) [nonpub. opn., holding mother's circumstances were changing, not changed, where mother's "relatively recent sobriety was untested...outside her residential treatment program," after her program she planned to resume living with a drug-user, and, despite frequent reminders, she did not begin counseling for domestic violence victims until just before the .26 hearing].
2. *In re J.F.* (Jan. 29, 2014, B251159) [nonpub. opn., finding the mother's circumstances were changing, not changed, where she was still participating in a substance abuse program, her counselor and therapist said she still had more work to do, and she continued

- to engage in behaviors that led to the child’s detention].
3. *In re L. V.* (Jan. 28, 2014, D064325) [nonpub. opn., holding mother’s circumstances were changing but not changed where there was no evidence she was ready to assume custody of the child or provide suitable care; she had less stable housing and less sobriety than she did the last time the court had returned the child to her care].
 4. *In re C.G.* (Apr. 22, 2013, F065594) [nonpub. opn., holding mother’s circumstances were changing, not changed where she was addressing her issues but not yet ready to assume custody of the child].
 5. *In re Cherish W.* (Oct. 23, 2013, C071878) [nonpub. opn., father demonstrated only changing, not changed, circumstances; his continued participation in substance abuse treatment and failure to get a sponsor evidenced that his sobriety was an ongoing, instead of a permanent change].

B. Best Interests: *In re Stephanie M.* versus *In re Kimberly F.*

The analysis under the second prong of section 388 depends on what is happening in the case. If a change of placement is requested after the court has terminated reunification services, the appellant must satisfy the standard articulated in *In re Stephanie M.* (1994) 7 Cal.4th 295, 324-325 and overcome the presumption that the child should remain in foster care. (*Ibid.*; see e.g. *In re S.H.* (May 28, 2013, C072380) [nonpub. opn.]; *In re William H.* (Mar. 25, 2013, F065411) [nonpub. opn.]; *In re Arianna M.* (Feb. 5, 2013, F065332) [nonpub. opn.].) In all other cases, the court utilizes the factors articulated in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, weighing these factors against each other to determine whether the requested change is in the child’s best interest. (See e.g. *In re Dana A.* (Feb. 13, 2013, F065597) [nonpub. opn.]; *In re Cherish W.* (Oct. 23, 2013, C071878) [nonpub. opn.]; *In re C.W.* (Sept. 20, 2013, C072539) [nonpub. opn.].)

VI. Termination of Parental Rights

A. Beneficial Relationship Exception: Standard of Review

The districts are split on the standard of review governing application of the section 366.26, subdivision (c)(1)(B)(i) “beneficial relationship exception.” (*In re Josiah H.* (Feb. 26, 2013, C071928) [nonpub. opn.].) Some courts have used the substantial evidence standard, while others review this finding for an abuse of discretion. (*Ibid.* [providing citations to numerous cases, illustrating this split among the districts].)

The Fifth District has decided to apply the abuse of discretion

standard. (*In re Chloe J.* (May 8, 2013, F066199) [nonpub. opn.]; see also *In re Drake B.* (Oct. 15, 2013, F066867) [nonpub. opn.].) It reviews factual findings for substantial evidence and conclusions of law de novo, and it will reverse only if the application of the law to the facts is arbitrary and capricious. (*In re Alissa M.* (Oct. 16, 2013, F066545) [nonpub. opn.].) It also emphasized that, when the appellant is the parent, “the question for a reviewing court becomes whether the evidence compels a finding in favor of [the parent] as a matter of law.” (*In re C.G.* (Apr. 22, 2013, F065594) [nonpub. opn.].)

The Third District was not so consistent and often would not commit to a standard of review, instead noting the “practical differences” between the two standards are not significant. (*In re I.N.* (May 21, 2013, C072216) [nonpub. opn.]; *In re Josiah H.* (Feb. 26, 2013, C071928) [nonpub. opn.].) When it did commit to a standard of review, it applied a hybrid standard. It reviewed the exception’s factual predicate for substantial evidence and the detriment finding for abuse of discretion. (*In re Nathaniel S.* (Feb. 19, 2013, C071703) [nonpub. opn.]; *In re Michael R.* (October 3, 2013, C072236) [nonpub. opn.].)

Although the courts are split on the standard of review, courts are not split on who had the burden below. Many courts, even though applying the substantial evidence test on review, have called it “misleading” to characterize the claim as one of insufficient evidence where the parent is the appellant. (See e.g. *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528.) Where the issue turns on a failure of proof at trial, the question on review is whether the evidence compels a finding in favor of the appellant. (*Ibid.*)

B. Visitation, the Beneficial Relationship Exception and Due Process

The beneficial relationship exception to the termination of parental rights only applies where the court finds regular visitation and contact has fostered or developed a significant, positive, emotional attachment between a parent and child. (Welf. & Inst. Code § 366.26, subd. (c)(1)(B)(i); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; see also *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504-1505 [holding that, unless effective visitation is provided, a parent is denied due process and the child’s permanent plan is effectively predetermined].)

A parent who is not afforded effective visitation will likely be prevented from establishing that his or her relationship with the child merits application of the beneficial parent-child relationship exception to the termination of parental rights. (Welf. & Inst. Code § 366.26, sub. (b)(1)(c)(i).) Without visitation, a parent will not have a realistic opportunity of developing his or her relationship with the child, or, consequently, of retaining his or her parental rights over an adoptable child.

To challenge the termination of parental rights on this basis, the parent must show 1.) the denial of visitation was an abuse of discretion, and 2.) had visitation been granted it likely would have yielded a positive result.

1. *In re J.C.* (April 12, 2013, E056837) [nonpub. opn., holding mother's due process rights were not violated where, although she was denied visitation while incarcerated, she did not show the denial of visitation was an abuse of discretion].
2. *In re Lily T. et al.* (Jan 30, 2013, F065270) [nonpub. opn., affirming the termination of parental rights; although mother was denied visitation while incarcerated, that order was not an abuse of discretion and "through the glass" visitation likely would not have been of such a high quality to bring the children within the beneficial parent-child relationship].
3. *In re H.T.* (Mar. 15, 2013, E056713) [nonpub. opn., holding the parent's due process rights were not violated where the court denied the parent's section 388 petition requesting visitation be reinstated; any error was harmless because the parents would not have been able to establish the requisite beneficial relationship in the time between the 388 petition and the termination of parental rights, and they received due process prior to having their visitation terminated].
4. *In re D.M.* (Apr. 10, 2013, B242264) [nonpub. opn., noting parents claiming a due process violation must show prejudice; the standard of review on appeal is whether the error was harmless beyond a reasonable doubt].
5. *In re C.J.* (Jan. 9, 2014, B249199) [nonpub. opn., holding there was not a denial of due process where the court denied parents' request for a contested hearing on the beneficial relationship exception because there was insufficient evidence a contrary result would have been obtained had the request been granted].

C. Late Arriving Parents: Must Make a Finding of Unfitness Before Parental Rights can be Terminated

Generally, "[b]y the time dependency proceedings have reached the stage of a section 366.26 hearing, there have been multiple specific findings of parental unfitness." (*In re T.G.* (2013) 215 Cal.App.4th 1, 15 [citing *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253-254.]) However, parental rights cannot be terminated until the State has established unfitness by at least clear and convincing evidence. (*Id.* at p. 14.) This finding is generally made at disposition, when the court finds, by clear and

convincing evidence, that the child cannot be placed with the parent. (*Ibid.*)

When a parent does not come forward until after disposition, or does not achieve presumed status until after disposition, these findings may not have been made. (*In re T.G., supra*, 215 Cal.App.4th at pp. 15, 18-19 [reversing the termination of a noncustodial father’s parental rights where no detriment finding was made at disposition because he had not yet achieved presumed status].) As a result, where there is a late-arriving, or late-elevated parent, counsel should carefully review the record to ensure the court made a detriment finding by clear and convincing evidence.

D. Post-Termination Placement Orders

Only an aggrieved party has standing to appeal. A party is aggrieved when an order injuriously affects that party’s rights in an immediate and substantial way. (*In re B.C.* (Mar. 5, 2013, C071627).)

In two 2013 cases, the Third District held the appellant-parents lacked standing to challenge post-termination placement orders because they were not aggrieved. (*In re T.G.* (Oct. 22, 2013, C072860) [nonpub. opn.]; *In re B.C.* (Mar. 5, 2013, C071627) [nonpub. opn.].) In these cases, the court held the appellant-parents were not aggrieved by the post-termination placement orders because their parental rights had already been terminated, and, since they did not appeal the termination of parental rights, appealing the placement order would not “advance” their interests. (*Ibid.*)

Although it is plausible some parents may be aggrieved by a post-termination placement order (e.g. the placement is far away and would impair a post-termination visitation order), the court did not acknowledge this possibility. Instead, it held a parent only has standing to appeal a post-termination placement order “if the placement order’s reversal advances the parent’s argument against terminating parental rights.” (*In re T.G.* (Oct. 22, 2013, C072860) [nonpub. opn.].)

VII. Terminating Jurisdiction

A. Compliance with Section 391 is a Prerequisite for Terminating Jurisdiction over Nonminor Dependents.

Dependency jurisdiction does not automatically terminate when the child turns 18. (*In re Shannon M.* (2013) 221 Cal.App.4th 282, 292.) The juvenile court may continue to exercise jurisdiction over the nonminor until the nonminor turns 21. (*Ibid.*; Welf. & Inst. Code § 303.) Although the decision to retain jurisdiction is within the sound discretion of the court, there are multiple provisions that provide standards governing the court’s

exercise of this discretion. (See e.g. Welf. & Inst. Code §§ 364 [governing the termination of jurisdiction after the child has been returned to parental care]; 361.2 [governing the termination of jurisdiction after a child has been placed with a previously noncustodial parent].)

Regardless of which standard applies, two cases in 2013 have held that when terminating jurisdiction over a nonminor dependent, section 391 always applies. In both *In re Shannon M.* and *In re Nadia G.*, the court reversed the court's findings for failure to comply with section 391, holding the juvenile court cannot terminate its jurisdiction under any provision without first ensuring compliance with section 391. (Welf. & Inst. Code § 391; *In re Shannon M.* (2013) 221 Cal.App.4th 282, 294, fn. 7, 295-297, 299-300, fn. 14, 302; *In re Nadia G.* (2013) 216 Cal.App.4th 1110, 1122-1124.) The Department must “[s]ubmit a report describing whether it is in the nonminor’s best interests to remain under the court’s dependency jurisdiction,” the court must hold a hearing and determine whether the termination of jurisdiction would be in the nonminor’s best interest, and the nonminor must be present or unavailable despite diligent efforts to locate him or her. (*In re Shannon M.*, *supra*, at p. 300; *In re Nadia G.*, *supra*, at pp. 1122-1124.) Failure to comply with these requirements is reversible error. (*Ibid.*)

- a. *In re Shannon M.* (2013) 221 Cal.App.4th 282, 294, fn. 7, 295-297, 299-300, fn. 14, 302 [reversing the termination of jurisdiction over nonminor dependent where the court did not consider whether the termination of jurisdiction was in the nonminor’s best interests].
- b. *In re Nadia G.* (2013) 216 Cal.App.4th 1110, 1122-1124 [reversing the termination of jurisdiction with instructions that the Department and the court comply with the terms of section 391].

B. Section 364 Applies Whenever a Child is Placed with a Previously Custodial Parent.

Both section 364 and section 361.2 have provisions governing the termination of jurisdiction over the child. When a child is placed with a noncustodial parent, section 361.2 governs whether there is an ongoing “need for supervision.” (*In re Michael M.* (Apr. 26, 2013, F065905) [nonpub. opn., affirming the court’s decision to continue its jurisdiction even though it proceeded under section 364 instead of section 361.2, the appropriate statutory provision].) Section 364, on the other hand, applies whenever a child is placed with a previously custodial parent, even if only placed with

one of the child's two previously custodial parents. (*In re Justin L.* (Aug. 27, 2013, F066679) [nonpub. opn., holding section 364 applied where the child was returned to only one of his previously custodial parents' care].)

VIII. The Intent to Abandon Under Family Code Section 7800 is an Objective Test

A parent's parental rights can be terminated under Family Code section 7822 if one parent has left the child in the care and custody of the other parent for a period of one year without any communication or support, with the intent to abandon the child. To fall within section 7822, the parent need not intend to abandon the child permanently. An intent to abandon the child for the statutory period is sufficient, and failure to communicate with or provide support for the child raises a presumption the parent intended to abandon the child. (*In re K.O.* (Sept. 18, 2013, F066933) [nonpub. opn.])

In determining whether a parent intended to abandon the child, the court looks objectively at the parent's conduct. (*In re K.O.* (Sept. 18, 2013, F066933) [nonpub. opn.]) A parent's inability to provide support or financial troubles that prevent contact, does not defeat a claim under section 7822. (*In re A.P.* (Oct. 15, 2013, F066285) [nonpub. opn.]) Even if the child was left with another due to the parent's inability to provide for the child, the intent requirement is satisfied if the parent leaves the child for the statutory period. (*In re K.O.* (Sept. 18, 2013, F066933) [nonpub. opn.])

- A. *In re K.O.* (Sept. 18, 2013, F066933) [nonpub. opn., affirming the termination of parental rights; even though mother left the child with the guardian when she lacked the resources to care for her child, her conduct objectively evidenced an intent to abandon the child, and her failure to communicate with or support the child raised a presumption of intent to abandon].
- B. *In re A.P.* (Oct. 15, 2013, F066285) [nonpub. opn., affirming the termination of parental rights; although father was not asked for support, he failed to visit and support his child when he was able to, and the fact he was sometimes unable to did not overcome the presumption that he intended to abandon the child].

Conversely, a claim under section 7822 will fail if the parent was prevented from contacting the child.

- A. *In re A.F.* (Jan. 31, 2013, F064928) [nonpub. opn., reversing the termination of father's parental rights because mother cut-off contact, terminated the visitation agreement, and provided father no avenue

for communicating with her or the child, indicating father was making efforts mother was attempting to evade].

- B. *In re Samantha B.* (Mar. 15, 2011, F060429) [nonpub. opn., reversing the termination of parental rights; mother shut father out of the child's life by cutting off all communication with him and making her whereabouts unknown, and, although there may have been an unanswered demand for support, this only occurred six months before the filing of the petition and therefore did not constitute a failure to support for the statutory period of one year].

IX. Indian Child Welfare Act ("ICWA")

- A. Initial Inquiry & Late Arriving Parents: Did the Court and the Department Make the Required Initial Inquiries?

The Department and the court must make the inquiries required under Welfare and Institutions Code section 224.3, subdivision (a) and California Rules of Court, rule 5.481 subdivisions (a)(1)-(3). Problems in this area often arise when a parent does not come forward until after the detention hearing (when these inquiries are generally made), or in proceedings held under the family or probate code (where ICWA is not always applicable). One quick way to check compliance with these inquiry requirements is to make sure each biological - or potentially biological - parent completed the ICWA-010 and -020 forms. (California Rules of Court, rule 5.481 subdivisions (a)(1)-(3).)

1. *In re A.T.* (Jan. 11, 2013, C071893) [nonpub. opn., reversing for ICWA inquiry where father came forward after disposition and neither the Department nor the court asked whether he had Indian heritage].
2. *In re T.V.* (Aug. 23, 2013, F066305) [nonpub. opn., reversing for ICWA inquiry where father was unable to appear and neither the court nor Department asked whether he had Indian heritage].
3. *In re K.O.* (Sept. 18, 2013, F066933) [nonpub. opn., reversing finding under Family Code section 7800 because the court failed to make ICWA inquiries].

- B. An Ongoing Obligation: Did the Department Comply with Its Ongoing Obligation to Make Further Inquiry When it "Knows or Has Reason to Know" the Child May be an Indian Child?

If the Department "knows or has reason so know" the child may be an Indian child, it has an ongoing obligation to "make further inquiry" by contacting family members or other persons who may have additional information regarding the

child's membership status or eligibility. (Cal. Rules of Court, rule 5.481, subd. (a)(4); Welf. & Inst. Code §§ 224.3, subd. (c) and 224.2, subd. (a)(5)(A)-(C).) The Department does not have a duty to make every possible effort, but it must follow up on information it has and attempt to obtain information requested by the tribes.

1. *In re A.W.* (Aug. 27, 2013, C072502) [nonpub. opn., reversing for failure to follow up with grandmother after mother provided grandmother's contact information].
2. *N.M. v. Superior Court* (Feb. 7, 2013, C072290) [nonpub. opn., reversing for failure to provide the tribe with the additional information it requested].
3. *In re J.G.* (July 11, 2013, F066085) [nonpub. opn., holding the Department's investigation complied with ICWA where the Department's efforts, although not "exhaustive," were "extensive"].

C. The Contents of ICWA Notice: Did Notice Provide the Tribes with all Necessary, Known and Readily Attainable Information?

The notice provided to the tribes must contain information sufficient for the tribe to make a determination about the child's eligibility. It should include all known and readily attainable information, including the information that was or should have been obtained through "further inquiry." (Cal. Rules of Court, rule 5.481, subd. (a)(4).)

1. *In re A.D.* (July 31, 2013, C069972) [nonpub. opn., reversing for ICWA compliance where the Department failed to designate the father as the child's "legal father", and thus failed to provide the tribe with information adequate to determine whether the child was eligible for membership].
2. *In re D.W.* (July 15, 2013, E057650) [nonpub. opn., reversing because the notice did not provide information sufficient to determine the child's direct ancestors where the Department misspelled father's name and failed to provide known information about the child's grandparents].
3. *In re Destiny M.* (Aug. 26, 2013, B246944) [nonpub. opn., holding that, although the Department omitted information from the ICWA-030 form, any error was harmless because the information provided was sufficient for the tribe to make an eligibility determination].

D. Sufficiency of the Notice: Did the Department Notice all Tribes that it Knew or Had Reason to Know the Child May be Eligible for Membership in?

The Department is only required to notice those tribes that it "knows or has reason to know" the child may be a member of, or eligible for membership in. (Cal.

Rules of Court, rule 5.481, subd. (b)(1); Welf. & Inst. Code §§ 224.3, subd. (d) and 224.2, subd. (a)(5).)

1. *Guardianship of D. W.* (2013) 221 Cal.App.4th 242, 250-251 [reversing where, despite the appellant-grandmother's repeated objections, the court ordered her to provide notice to the tribes].
2. *In re Anthony E.* (Aug. 20, 2013, F066110) [nonpub. opn., reversing for compliance with notice requirements where mother indicated possible Navajo heritage and the Department failed to notice one of the federally recognized Navajo tribes].
3. *In re H.C.* (Mar. 14, 2013, C071803) [nonpub. opn., holding the Department was not required to notice the Blackfeet tribe where the parent indicated possible Blackfoot heritage]
4. *In re A.D.* (July 12, 2013, C072659) [holding ICWA notice was not required where father retracted his claim of Indian heritage].

E. Forfeiture in the Fifth: Other than the Fifth District, Most – if Not All – Of the Districts Hold the Rule of Forfeiture “Cannot be Invoked to Bar Consideration of a[n ICWA] Notice Error On Appeal.”

In the Fifth District, failure to comply with ICWA's inquiry and notice requirements is forfeited if not timely challenged. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 189; but see *In re K.O.* (Sept. 18, 2013, F066933) [nonpub. opn., reversing the family court's failure to comply with ICWA after a hearing freeing the child for adoption].) However, in most - if not all - other districts, the rule of forfeiture “cannot be invoked to bar consideration of a notice error on appeal.” (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.)

1. Districts following *In re Marinna J.*:
 - a) First District: *In re David H.* (July 11, 2013, A136336) [nonpub. opn.]; *In re Matthew D.* (Nov. 4, 2013, A137345) [nonpub. opn., second division]; *In re A.G.* (2012) 204 Cal.App.4th 1390, 1400 [third division]
 - b) Second District: *In re S.E.* (2013) 217 Cal.App.4th 610, 615 [fourth division]; *In re Z.G.* (June 25, 2013, B245353) [nonpub. opn., fifth division].
 - c) Fourth District: Parents should raise ICWA noncompliance in their *first* appeal. (*In re A.M.* (Oct. 31, 2011, E053706) [nonpub. opn., without deciding whether the issue was forfeited, the second division noted she should have raised ICWA notice issues in her first appeal]; *In re J.S.* (Apr. 16, 2013, E057431) [nonpub. opn., fourth district, division two, holding the father forfeited his right to challenge ICWA compliance after the termination of parental rights by failing to raise

the issue in the writ filed after his reunification services were terminated].)

d) Sixth District: *In re S.F.* (Nov. 20, 2013, H039612) [nonpub. opn.].

However, even in the Fifth District, there are limited exceptions to *In re Pedro N.*, which will excuse what might otherwise be deemed an untimely challenge to ICWA inquiry or notice issues. For example, the court will reach appeals raising a timely challenge to subsequent or second ICWA findings. (*In re Francisco H.* (Dec. 4, 2013, F067469) [nonpub. opn, declining to find forfeiture despite *In re Pedro N.* and the parent's failure to object in the trial court where a second set of notices were sent and the notice of appeal was filed within 60 days of the second ICWA hearing].) The court will also reach the merits of an ICWA issue if the parent was not noticed that the other parent claimed Indian heritage. (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 993.)

F. Prejudice: When Possible Provide an Offer of Proof or Declaration Stating the Appellant has Indian Heritage.

Not all districts require a showing that the failure to comply with ICWA resulted in prejudice. (See e.g. *In re T.V.* (Aug. 23, 2013, F066305) [nonpub. opn., holding the juvenile court has a sua sponte duty to ensure ICWA compliance and thus failure to comply is reversible error]; *In re J.B.* (Oct. 3, 2013, F066404) [nonpub. opn., same].) However in those that do, the courts have indicated that an offer of proof or declaration, stating the appellant has Indian heritage is sufficient.

1. *In re William H.* (Mar. 25, 2013, F065411) [nonpub. opn., failing to make inquiries was harmless where it was determined father did not have Indian heritage during prior dependencies].
2. *In re A.T.* (Jan. 11, 2013, C071893) [failing to comply with ICWA inquiries was prejudicial because father claimed to have Indian heritage on appeal].
3. *In re Y.L.* (June 4, 2013, C071787) [nonpub. opn., holding an offer of proof with appellant's reply brief was sufficient to establish prejudice].
4. *In re R.S.* (Sept. 26, 2013, C072172) [nonpub. opn., affirming the termination of parental rights despite mother's argument the court failed to comply with ICWA because the parent's failure to head and argue prejudice resulted in forfeiture].

G. Limited Reversal: Other than After the Termination of Reunification Services or Parental Rights, a Limited Reversal for the Purpose of Ensuring ICWA Compliance is the Best Relief Available.

Some courts have held that only the termination of parental rights and the termination of reunification services merit reversal. These courts have historically held that remand is the appropriate relief in all other cases and put the impetus on parents to petition the court to set aside prior findings if ICWA is found to apply. This may be changing. Recently, courts have been reversing the lower courts' orders for the limited purpose of ensuring compliance with ICWA, relieving parents of any future obligation to petition the court.

1. *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385-386 [holding the only order subject to reversal for failure to give adequate ICWA notice is the termination of parental rights].
2. *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 785 [holding the failure to comply with ICWA notice requirements also merits reversal of the termination of reunification services].
3. *In re Veronica G.* (2007) 157 Cal.App.4th 179, 187-188 [holding on a dispositional appeal the appropriate remedy for failing to comply with ICWA notice requirements is to remand and allow parents to petition to set aside any prior orders should ICWA be later found to apply]
4. *In re J.B.* (Oct. 3, 2013, F066404) [nonpub. opn., reversing for the limited purpose of ensuring compliance with ICWA's notice requirements with instructions that the jurisdiction and disposition orders be reinstated only if ICWA is found not to apply].
5. *In re Rebecca R.* (Aug. 1, 2013, F066061) [nonpub. opn., reversing for the limited purpose of ensuring compliance with ICWA's inquiry requirements with instructions that the jurisdiction and disposition orders be reinstated only if ICWA is found not to apply].