DEPENDENCY UPDATE 2002-2004[1]

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Two Years of Interest in Foster Care and ICWA

The Legislature continues its focus on the conditions of minors in foster care. (For background see, Schwartz, *Torn Apart No More* (2000) 32 McGeorge L.Rev. 704.) Notable among legislation effective this year were two bills, one favoring placement of dependent children near their school of origin, and the other emphasizing the importance of maintaining their important relationships, especially the relationships of older children. This interest in foster care is likely to continue following the June 2004 release of the recommendations of the Pew Commission on Children in Foster Care, which suggest increased funding (for pre-placement services, guardianships, etc.), more advocacy for minors, and the need to study the caseloads of dependency attorneys.

Caseload studies were also part of the 2002 amendments to Welfare and Institutions Code 317 which increased the role of minor's counsel and directed the Judicial Council to study the caseloads carried by attorneys representing parents and children in the juvenile courts. In December 2003 the Judicial Council modified its Operational Plan to include a goal of improving the courts' management of juvenile cases. Then in June of 2004, the Administrative Office of the Courts, with the collaboration of the Humane Association, completed the dependency case load study in June of 2004, resulting in what will be 10-county experimental program. The study suggested proposed a caseload maximum of 174 cases, noting that the average study participant had 273 cases.

As expected, the section 317 amendments caused minors' counsel to assume leadership in the juvenile courts. But the California Supreme Court, in *In re Zeth S.* (2003) 31 Cal.4th 396, and *In re Celine R.* (2003) 31 Cal.4th 45, did not apply these changes expansively. *Celine R.* does not require appointment of independent counsel for each of the siblings to avoid conflicts. And *Zeth S.* holds section 317 does not apply to appellate counsel. The Supreme Court may resolve questions as to the role of minor's appellate counsel in *In re Josiah Z* (2004) 118 Cal.App.4th 944 (rev. gr. July 28, 2004).

By comparison, the appellate courts have much more actively interpreted and followed the Indian Child Welfare Act, 25 U.S.C. 1901 et seq. (ICWA), publishing two dozen opinions on the subject in the past two years, many of the decisions reversing

parental rights termination orders where there has not been full compliance with ICWA.

Appellate cases have also implemented recent amendments requiring social workers and judges to consider the preservation of sibling groups when placing minors and the detriment to siblings that may be caused by termination of parental rights.

Procedure - Generally

Service of Notices. Many of the most significant changes in the past two years are in the new notice requirements of sections 290.1 to 297, enacted in 2002 and amended in 2003. These changes, which apply at all stages of the dependency process, too extensive for detailed discussion in this article,[2] place more responsibility on the clerk for sending notices of hearing, and provide for service on new and different persons/entities, including siblings. Counsel should check notices for compliance with the law.

Presence At Hearing. Amendments effective in 2004 permit anyone entitled to be served with notice (including, e.g., a sibling) to be present at the hearing. (Sec. 349.) The amendments also assure the presence of minors over the age of 10 (see, e.g., sec. 366.26, subd. (f)), and when they are not present, the court must inquire whether they were properly notified. (Sec. 349.) Implementing rules are proposed for January 2005.

Timely Service of Reports. The failure to serve the social study 10 days before the pre-permanency review hearing as required by section 366.21, subdivision (c), is grounds for a continuance on behalf of adversely affected parties. Failure to grant the continuance is reversible per se. (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535.) The principle seems to apply to late service of reports on family members at least up until the parental rights are terminated. (See, *In re Carrie M.* (2003) 110 Cal.App.4th 746 [non-compliance not structural error as to guardian in post-permanency planning].) A recent amendment applicable only in Los Angeles County permits compliance by mailing the report 15-20 days before the hearing. (Secs. 364.05, 366.05.)

Contents of Reports. Beginning in 2004, reports for review hearings, reports on 180-day adoptive searches and on minors who have been freed for adoption but not adopted by the review hearing, and post-permanency planning reports must set forth the relationships formed by child 10-years-old or older with persons other than siblings and the efforts the agency has made to maintain these relationships. (Secs. 366.21, subd. (a)(1)(B), 366.1, subd. (g), 366.21, subd. (c), 366.26, subd. (c), sec. 366.3, subs. (e),(f).)

Educational Rights. Section 361, subdivision (a) permits the juvenile court to limit the parent or guardian's right to make educational decisions. The court is required to

appoint a responsible adult (such as the foster parent) who does not have a conflict of interest. Government Code section 7579.5 requires the appointment of a surrogate parent to make these decisions when the child already has an individualized education plan or may qualify for special education or related services. California Rules of Court, rule 1499, implementing these laws, as amended in 2004, provides for notification of the local agency by Judicial Council form JV-535. If a responsible adult cannot be found, the court makes the educational decisions with the input of any interested person.

Jurisdiction under Section 300

Subdivision (b). In *In re James C.* (2002) 104 Cal.App.4th 470 (also discussed below in connection with subdivision (g) allegations), jurisdiction was upheld under subdivision (b) as to a father who was incarcerated at the time the mother abused the children. He did not show that he had inquired as to their care and supervision.[3]

Subdivision (e). *In re E. H.* (2003) 108 Cal.App.4th 659 held the trial court should have found "serious abuse" under the doctrine of *res ipsa loquitor*, where the parents were the caretakers and the infliction of their child's broken bones was by an unidentified party. They reasonably should have known of the danger. It was not appropriate to require the petitioner to establish the perpetrator's identity in this situation.

Subdivision (g). Whether an incarcerated parent is unavailable within the meaning of subdivision (c) depends on whether the parent has attempted to arrange for the child's care. Thus, in *In re S.D.* (2002) 99 Cal.App.4th 1068, the reviewing court found that a parent's appointed counsel was ineffective for failing to object to jurisdiction when the parent had arranged for care at the time of her incarceration, and *In re James C.* (2002) 104 Cal.App.4th 470, jurisdiction was affirmed under subdivision (g) where the father, imprisoned on a lengthy sentence, did not offer proof that he had attempted to arrange for care for his children. However an incarcerated parent who makes unsuccessful efforts to arrange for care of a child and then gives up, may be unavailable for purposes of subdivision (g). (See, *In re Athena P.* (2002) 103 Cal.App.4th 617.)

Subdivision (j). On "sibling petitions," it is not enough to simply allege that jurisdiction has been sustained as to the minor's siblings. *In re Ricardo L.* (2003) 109 Cal.App.4th 552, states that the evidence must show how the minor would be subject to the same harm. Moreover, when a petition alleges non-compliance with a case plan, the report must established the nature of the plan and how the parent did not comply.

Disposition - Mandatory Services Orders

The juvenile court may not require a "non-offending" parent to take parenting classes, even under a family maintenance plan set up under section 362, subdivisions (a) and (c), without any evidence that the parent is unfit. In *In re Jasmine C.* (2003) 106 Cal.App.4th 117, the court held that where the estranged father had abused the child without warning, and where the mother immediately reported the incident, and there were no other indications of her unfitness, she could not be ordered to attend parenting classes.

Dispositions under Section 361.2

In *In re Catherine H.* (2003) 102 Cal.App.4th 1284, sections 358 and 361.2 were held to permit the non-offending parent to prove her current suitability to parent even though her child was under Probate Code guardianship at the time of detention.

But perhaps the most important development in section 361.2 is the court's discussion in *In re Isayah C.* (2004) 118 Cal.App.4th 684, of the detriment finding under section 361.2, subdivision (a) required before a court declines to place a child with a non-custodial parent. *Isayah C.* contains favorable language that may be cited in others cases in which a child is not returned to the parent. The court held that when the child was removed from the mother's home due to the mother's substance abuse, the facts that the father was temporarily unavailable to care for the child due to his temporary incarceration and that the child might have to live with in a new home with suitable relatives in another county was not enough to deny placement with the father. Assuming the trial court used the detriment standard set forth in section 361, subdivision (c)(3), that standard requires "extreme anxiety, depression, withdrawal, or untoward aggression...." This is not satisfied by a danger only to the minor's "emotional well-being." Note that the same facts would likely be sufficient to *maintain jurisdiction.* (See, e.g., *In re Austin P.* (2004) 118 Cal.App.4th 1124 [where the non-offending parent's previous contact with his child was sporadic and he may not have acted to protect the minor from the other parent].)

But the strength of sibling bonds of two minors with their siblings was a major consideration in their placement with their paternal aunt rather than their father, in *In re Luke M.* (2003) 107 Cal.App.4th 1412. The reviewing court noted the provisions in section 358, subdivision (d)(2), 358.1 and 16002 requiring the juvenile court's consideration of the bonds between the siblings. Here, the detriment to the minors in being placed away from their siblings and mother outweighed the detriment of being away from their father and justified the decision under section 362.1 to place the children with their aunt instead of the non-offending parent.

And in the situation where it appears that there would not be detriment in placing the child with either parent, the court determines the question of placement according to

the best interests of the child. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251.)

Disposition - Denial of Services

Section 361.5, Subdivision (a). There are no "common law" exceptions to reunification. In *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, the juvenile court denied services because the family had *successfully* completed a reunification plan. The appellate court granted writ relief to the parent. Services must be offered under subdivision (a) unless there is an express exception under subdivision (b).

Section 361.5 Subdivision (b)(2). But there is an unwritten exception -- *disentitlement* for not complying with court orders -- when there is evidence that a parent suffers from a mental illness making her incapable of reunification under subdivision (b)(2), but she refuses to undergo evaluation. The court may not order services. The parent must be given a reasonable opportunity to comply before refusal to comply with a valid order may result in a denial of services. (*In re C.C.* (2003) 111 Cal.App.4th 76.)

Section 361.5, Subdivision (b)(11). For purposes of this section, previous termination of parental rights a to sibling includes termination through voluntary relinquishment. (*In re Angelique C.* (2003) 113 Cal.App.4th 509.)

Section 361.5, Subdivision (e) Although the denial of services in *In re James C.* (2002) 104 Cal.App.4th 470, is understandable where the parent would be imprisoned on multiple violent felony convictions past the presumptive reunification time period,[4] the appellate court's conclusion that clear and convincing evidence of detriment may be based on the minor's failure to remember seeing his father in recent years is mere speculation.

Review Hearings - Detriment Generally. The parents received a good decision in *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, a case in which two young children had been left alone, and the mother had a marijuana abuse problem. Although she then completed her entire reunification program, and the social worker felt that she had become an adequate parent, the juvenile court was concerned that of 95 tests, there were 84 negative test results, nine missed tests, one positive test, and a couple "ties." The court set a section 366.26 hearing. The appellate court granted writ relief, holding, "Mother was not required to demonstrate perfect compliance."[5]

Review Hearings - Sibling Group Detriment. *Abraham L. v. Superior Court* (2003) 112 Cal.App.4th 9, interprets the 1999 amendments requiring consideration of sibling relationships at all stages of dependency proceedings. The court erred in setting a section 366.26 hearing when the report failed to address and the court failed to consider the

closeness of the children, the propriety of keeping them together, their wishes, and the detrimental effect of severing their relationship. (See, sec. 366.21, subd. (e)(4).)

Review Hearings - Reasonable Services. The holding in *In re Alvin R.* (2003) 108 Cal.App.4th 962 is simple – when conjoint counseling is necessary to enable the parent to visit with and regain care of his child, the social services agency must provide the service. While it was true that eight individual sessions were needed before the conjoint therapy could begin, the parent was not responsible for the delays in completing the sessions.

Review Hearing - Extended Services The court erred in extending services beyond the 18-month limitation of section 361.5, subdivision (a), where the parent's failure to reunify within that period was more than a mere relapse in substance abuse rehabilitation. (*In re N. M.* (2003) 108 Cal.App.4th 845.)[6]

Permanency Planning - Due Process and Penal Code Section 2625. The Third District's paternity decisions in *In re Paul H.* (2003) 111 Cal.App.4th 753, and *In re Christopher M.* (2003) 113 Cal.App.4th 155, are significant due process cases in their emphasizing the right of an alleged parent to establish paternity before parental rights are terminated, but the right to establish paternity occurs *before* rather than during the section 366.26 hearing. *Paul H.* requires the parent be given an opportunity to establish biological or presumptive parentage, but *Christopher M.* denies section 366.26 hearings to those who have not advanced beyond "alleged" father status by that stage in the proceedings.

In re J. I. (2003) 108 Cal.App.4th 933, notes the difference between notice requirements under former Welfare and Institutions Code section 366.23, and the newer provisions in section 294 enacted in 2002. Also, while under *In re Jesusa V.* (2004) 32 Cal.4th 588, the alleged parent does not have an absolute right under Penal Code section 2625 to be present at the determination of paternity, *In re J. I.* upholds the right under this section of personal presence of the parent at the section 366.26 hearing.

Permanency Planning - Adoptability. The recent cases of *In re Josue G.* (2003) 106 Cal.App.4th 725, and *In re Asia L.* (2003) Cal.App.4th were close on the question of whether the children were likely to be adopted. In *Josue G.*, a trial court selection of guardianship was reversed because the court did not in fact have the option of leaving the child with the current foster parents who did not want to adopt and with whom the child had bonded. Where the two-year-old child was healthy, all the evidence supported a likelihood of adoption. On the other hand, in *In re Asia L.*, the children had emotional and psychological problems that made them difficult to adopt. Although there was testimony

of the social worker as to likelihood of eventual adoption, this was not clear and convincing evidence, when a pre-adoptive home could not be found in the child's county. (See also, *In re Brian P.* (2002) 99 Cal.App.4th 616 [worker's opinion without basis].)

Permanency planning - Beneficial Relationship Exception. The reversal of an order terminating parental rights in *In re Amber M.* (2002) 103 Cal.App.4th 681, seems a "no-brainer" where the psychologist on the bonding assessment found the children had lived with their mother for half or more of their lives, were strongly bonded to her, and would be detrimentally effected by severing that bond (albeit somewhat less so because they were placed with their extended family). All evidence showed a beneficial relationship within the meaning of sec. 366.26, subdivision (c)(1)(A).

Permanency Planning - Sibling Exception. As discussed below in the section on writs and appeals, the appellate courts have been willing to address the new exception to adoption under section 366.26, subdivision (c)(1)(E) without an objection in the trial court. However, thus far, the exception has not been interpreted favorably to the parents in at least three respects: 1) the California Supreme Court in *In re Celine R.* (2003) 31 Cal.4th 107, held that the juvenile court is to consider detriment only to the children who are the subject of the hearing, not the other siblings; 2) at least at this stage, the court is concerned with termination of an existing sibling relationship, and not with the detriment in not establishing relationships that have not previously existed (*In re S.M.* (2004) 118 Cal.App.4th 1108); and 3) even when severance of the sibling tie would be detrimental to the subject minor, that harm can be outweighed by the benefit of the child finding a permanent home. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942.)

Post-Permanency – Guardianships. Many of the recent post-permanency cases concern court supervision of guardianships. First, should the court maintain jurisdiction over the guardianship? Section 366.4 permits this, and jurisdiction must be sustained when the guardian requests it and indicates potential problems such as a potential inability to support the minor. (*In re Joshua S.* (2003) 106 Cal.App.4th 1341.)

Second, is parent-child visitation regulated by the court? The California Supreme Court held in *In re S. B.* (2004) 32 Cal.4th 1287, that the legislative amendment effective in 2004 dividing subdivision (c)(4) into further subdivisions – (A) governing foster care, and (B) governing guardianship, resolves the question. Mandatory visitation orders are only required in plans of long term foster care where the caretaker or foster parent is unwilling to be a guardian. Visitation orders are not mandated under (B) in guardianships, but the court *may* provide for visitation under California Rules of Court, rule 1465 (d)(2).

Post-Permanency - Permanent Living Arrangements. The Third District has held that these arrangements are properly classified as "long term foster care." (*In re Stuart S.* (2002) 104 Cal.App.4th 1103.) Recent amendments to section 366.27, effective in 2004 specify the relatives who may qualify for such placement and empowers the court to determine who will make educational decisions.

ICWA - Triggering of Law. ICWA applies to *involuntary* child custody proceedings. Thus, compliance is required at disposition in a dependency case even if the child is placed with a parent. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692.) And private "freedom from control" proceedings under Family Code section 7800 et seq. must comply with ICWA. (*In re Suzanne L.* (2002) 104 Cal.App.4th 223.)

When is the description of the child's Indian heritage too vague to invoke ICWA? In *In re O.K.* (2003) 106 Cal.App.4th 162, vague information obtained from a *non-party* was found too unreliable to trigger ICWA requirements. But even *unspecific* information about the child's Indian heritage obtained from a *parent or other party* to the proceeding invokes ICWA. (Guidelines for State Courts; Indian Child Custody Proceedings (44 Fed.Reg. 67584, 67587 (Nov. 26, 1979)) (Guidelines); Calif. Rules of Court, rule 1439(d)(2).)

Where the record neither shows the child's Indian heritage nor an inquiry by the social worker or the court, it will be presumed for purposes of appeal that this duty was performed. (*In re Aaliyah G.* (2003) 109 Cal.App.4th 939.) However, in one recent Third District case, a parent whose parental rights had been terminated later obtained habeas corpus relief because the trial attorney rendered ineffective assistance in not inquiring about the child's Indian status. Attorneys should inquire about the child's Indian heritage.
ICWA - Sufficiency of Notice. In previous years, the ICWA litigation concerned whether the correct entities were notified. In the past two years, the emphasis shifted to the *contents* of the notice. "One of the primary purposes of giving notice to the tribe is to enable it to determine whether the minor is an Indian child. (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1455.) Notice is meaningless if no information or insufficient information is presented to the tribe. (*Ibid.*) The notice must include the name, birth date, and birthplace of the Indian child; his or her tribal affiliation; a copy of the dependency petition; the petitioner's name; a statement of the right to the tribe to intervene in the proceeding; and information about the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases, birthdates, places of birth and death, current and former addresses, tribal enrollment numbers, and/or other identifying information." (*In re Karla C.* [2003] 113 Cal.App.4th [167] at p. 175; *In re C.D.* (2003) 110 Cal.App.4th

214, 225; 25 C.F.R. § 23.11(a), (d).)

Authorized Forms. The California forms are provided by the Department of Health and Human Services and the Department of Social Services: SOC 318 ("request for Confirmation of Child's Status as Indian") and 319 (Notice of Involuntary Child Custody Proceedings Involving an Indian Child." So, a statement that a "request for verification" was sent is not enough. (*In re Jeffrey A.* (2002) 103 Cal.App.4th 1103.) According to the Fifth District, SOC 319 should be filed with the proof of service by registered or certified mail, the appropriate return receipts, and any response from the tribe. (*In re H.A.* (2002) 103 Cal.App.4th 1206.) Even SOC 319 has been held inadequate in that it does contain places for the names of the grandparents and great-grandparents and other identifying information, but this may be corrected by providing the information on SOC 318. (*In re C.D.*, *supra*, 110 Cal.App.4th 214.)

Failure to Prove Contents of Notices. The Third District has held that the reviewing court can presume the proper notice even when the notices are not included in the record. (*In re L.B.* (2003) 110 Cal.App.4th 1420.) However, the *L.B.* holding is contrary to the Guidelines. The majority of authority, including cases from all three divisions of the Fourth District, holds that the agency must submit the contents of the notices so that the juvenile court can determine what the tribe was told they could do, how much information they were given, etc. (See, *In re Karla C.*, *supra*, 113 Cal.App.4th 166, 177, and cases cited therein; see also, *In re Asia L.*, *supra*, 107 Cal.App.4th 498 [First District case] .)

Take Additional Evidence on Appeal? A typical back up position for the social services agencies in such cases has been to request the appellate court to augment or take judicial notice of information not before the juvenile court to show that notices were in fact more complete than the notices contained in the record. Some of the decisions have declined to do this on the grounds that the trial court, not the appellate court, should be the trier of fact. (See, e.g., *In re Nikki R.* (2002) 106 Cal.App.4th 844; *In re Jennifer A.* (2002) 103 Cal.App.4th 692.) These cases are consistent with in *In re Zeth S.*, *supra*, discussed below. Other courts take additional evidence to achieve early resolution of the issue, but only if the evidence was in existence at the time of the judgment (to comply with *Zeth S.*). (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856; *In re Louis S.* (2004) 117 Cal.App.4th 622; *In re S. M.*, *supra*, 118 Cal.App.4th 1108.) Some cases recognize an extraordinary case exception (also consistent with *Zeth S.*) and consider additional evidence, to show that the error was harmless. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401 [where additional evidence showed that untimeliness of the notice was harmless as a tribe could not have been notified with the information provided].)

Tribal Request for Further Information. The agency includes any response from the tribe. In evaluating ICWA compliance, courts examine a request by the tribe for further information and whether the additional information was sent. (*In re S.M., supra*, 118 Cal.App.4th 1108.) The court considers identifying information possessed by the agency but not provided to the tribe. (*In re Gerardo A.* (2004) 119 Cal.App.4th 998.)

Placements. The recent placement decisions continue to accord great discretion to the trial court. *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, upheld the trial court decision not to place the child with the grandmother who had a history of child abuse and neglect notwithstanding the relative placement preference of section 361.3 (See also, placement decisions discussed above under section 362.1 dispositions.)

Paternity. The California Supreme Court decision in *In re Nicholas H.* (2002) 28 Cal.4th 56, giving the "green light" to courts to order placement services, etc., to certain non-biological, presumptive fathers under Family Code section 7611, was followed not only by the First District, Division 2, on remand (*In re Nicholas H., supra*, 112 Cal.App.4th 251), but in several other cases (see, e.g., *In re Joshua R.* (2002) 104 Cal.App.4th 1020; *In re A.A.* (2003)114 Cal.App.4th 771). The presumption also works for presumptive mothers (*In re Salvador M.* (2003) 111 Cal.App.4th 1353), but was not found controlling in an as yet non-final opinion by the Third District in an action for child support from a person in a same-sex relationship, who had encouraged her partner to give birth to a child by artificial insemination. (*Elisa B. v. Superior Court* (2004) 118 Cal.App.4th 966.)

Minor's Counsel. The impact of the amendments to section 317 are observable in juvenile court where minors' counsel now appear to be taking leadership roles in many of the cases. Early litigation concerned how to resolve questions concerning one attorney's representation of multiple siblings with conflicting interests or potentially conflicting interests. (See, e.g., *Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423.) Of course, one simple way to resolve this would be to have separate representation for each minor, but In *In re Celine R., supra,* 31 Cal.4th 45, an appeal from an order terminating parental rights, the California Supreme Court did not choose this alternative. Moreover, the court, attempting to reconcile section 317 with the ethical requirements set forth in California Rules of Professional Conduct, rule 3-310 chose to require appointment of separate counsel only where there is: 1) an actual conflict of interest, or 2) a reasonable likelihood, based on case-specific reasons, that a conflict will later arise. Finally, on appeal any party attempting to challenge on appeal the representation of multiple interests in the trial court must establish that the error was prejudicial. The court suggested the use of a petition for extraordinary relief as a more expeditious and reliable remedy.

There are still unresolved questions concerning the role of minor's counsel on appeal, including how far counsel may differ in position from the position asserted by minor's counsel in the trial court, and how much post-judgment information can figure into counsel's decision. In *In re Zeth S., supra,* 31 Cal.4th 356, the California Supreme Court held that section 317 does not govern the responsibilities of minor's counsel on appeal. As discussed earlier, the Supreme Court has granted review of the controversial opinion[7] of the Fifth District in *In re Josiah Z., supra,* 118 Cal.App.4th 944. The Fifth District in holding that the minor's appellate counsel could not unilaterally *abandon* an appeal, questioned the decision of the Fourth District in *In re Eileen A.* (2000) 84 Cal.App.4th 1284, which granted independence to the minor's counsel, and, relying on *Zeth S.*, even questioned the minor's counsel authority for considering post-judgment facts. How the California Supreme Court should resolve these questions is controversial, even within CPDA, but it seems that counsel on appeal must maintain *some degree of independence* in order to fulfill counsel's ethical responsibilities. And counsel must determine the child's interests based on *current facts*, as the child's current situation may be of more significance in determining the child's interests.

Guardians ad Litem (GAL). The Fifth District's decision in *In re Sarah D.* (2001) 87 Cal.App.4th 661, requiring a parent be accorded an opportunity to be heard on the GAL issue when the parent's interest in a dependency proceeding is to be represented by a GAL, has been followed in *In re Joanne E.* (2002) 104 Cal.App.4th 347, *In re Daniel S.* (2004) 115 Cal.App.4th 903, and *Contra Costa Children and Family Services Bureau v. Superior Court* (2004) 117 Cal.App.4th 111. A GAL error may be raised without an objection in the trial court, but is subject to harmless error analysis; and final orders are not void, but voidable (such as by petition to modify under section 388.)

Regulation of Foster Care.

Protection. Section 16000.1 was added, to state that California has a duty to care for and protect foster children (but not consenting to any additional legal liability!)

Anti-Discrimination Measures. Effective, 2004, foster children's rights include the right not to be discriminated against in services, including placement, on the grounds of race, ancestry, national origin, color, religion, sex, sexual orientation, gender, identity, mental or physical disability or HIV status. (Sec. 16001.9.)

Educational Stability. Several measures were added to permit educational stability, including a stated preference for maintaining the child in his or her school of origin if possible. When there is to be a transfer, the agency must immediately notify the previous school and records must be turned over to the new school within 48 hours.[8]

Maintaining Relationships. Under the 2004 requirement, not only must the minor's relationships be discussed in social studies provided for review hearings, but in the case of a minor 10 years or older who is placed in a group home, the social worker must ask the minor to identify these relationships, and the court must make a finding as to whether the agency's efforts to preserve such relationships have been appropriate. (Secs. 366, subd. (a)(1)(B), 366.1, subd. (g), 366.21, subd. (c).) Information must be provided to the caretaker about court-ordered sibling interaction, contact, or visitation shall be provided as soon as possible after the order is made. (Sec. 16002, subd. (f).) This subdivision (f) may permit argument parents or minors to argue that services have been inadequate when the information has not been turned over and may also relate to the existence of the sibling exception to adoption under section 366.26, subdivision (c)(1)(E).

Services Prior to Termination of Jurisdiction. Section 391, effective in 2001, requires the social services agency to provide specific assistance to foster children over whom jurisdiction is about to terminate at age 18, including providing important documents, assisting with college, housing, employment applications, and ensuring their attendance at the final hearing if they wish to attend. A recent addition effective in 2004 (sec. 391, subd. (b)(5)), requires the agency to assist the child in maintaining relationships. But *In re Holly H.* (2002) 104 Cal.App.4th 1324, holds that jurisdiction need not be maintained to provide section 391 services to an adult who does not want them.

Writs and Appeals - Writ Requirements.

Post-termination Placement Decisions. Section 366.28, effective 2004 (and proposed for implementation by rules 38.2 and 38.3, on January 1, 2005, if adopted) requires appellate challenges to placement orders made after parental rights are terminated to be pursued by a petition for extraordinary relief. Much like the rule 39.1B writ requirement, the order may be appealed only if the appellate court does not address the petition on the merits.[9] All other orders made at section 366.26 hearings are appealable.

Conflicts of Interest in Representation of Minors. Two other cases on "writs versus appeal" are worth examining. First, in *In re Celine R.*, discussed at several places in this article, the California Supreme Court advised using a petition for extraordinary relief in lieu of an appeal to address conflict of interest issues. An expedited ruling can be obtained without making the required appellate showing of prejudicial error.

Adequacy of Services Finding. In *In re Melinda K.* (2004) 116 Cal.App.4th 1147, the Second District, Division Two, held that challenges made to a adequacy of services finding were not significant enough to justify a right to appeal under section 395 when the finding was not coupled with any other adverse action such as a termination of services. This unprecedented ruling is questionable because an adequacy of services finding may set in stone the future direction of services in that particular case (see, e.g., *Dylan T. v. Superior Court* (1998) 65 Cal.App.4th 765), and the matter may not later be challenged after the order becomes final. While an appellate attorney may wish to challenge the *Melinda K.* holding, the best approach is to seek a writ, as well as the appellate remedy.

Writs and Appeals – Waiver. In criminal cases, the California Supreme Court has continued apply the concepts of waiver and forfeiture on appeal to issues not raised in the trial court. (See, *People v. Stowell* (2003) 31 Cal.4th 1107.) That has also been the recent trend in dependency appeals, but *In re S. B.* (2004) 32 Cal.4th 1287, a case discussed earlier in connection with guardianships, holds that a reviewing court in its "carefully exercised discretion" may address otherwise forfeited issues in a dependency appeal. Justice Kennard noted, "Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance," (*Id.*, at p. 1293), and reached the visitation issue because it was important to the child's well-being.

Writs and Appeals - Judicial Notice of Post-Judgment Facts. In *Zeth S., supra,* 31 Cal.4th 396, the California Supreme Court held that the reviewing court should not take judicial notice of post-judgment facts, except in extraordinary circumstances (with one possible exception being where the parties were willing to stipulate that the factual

underpinnings underlying the ruling had since changed, as was case in *In re Elise K.* (1982) 33 Cal.4th 138). The court did not elaborate on what constitutes extraordinary circumstances. So this question will be likely be determined on case by case basis, and it appears that counsel for the parties will continue to offer post-judgment evidence under Code of Civil Procedure, section 909, and California Rules of Court, rule 22.

Writs and Appeals – Post-termination Habeas Corpus. *In re Darlice C.* (2003) 105 Cal.App.4th 459, joins the wave of cases rejecting the holding in *In re Meranda P.* (1997) 56 Cal.App.4th 1143 that appeal is the only remedy to cure error occurring at the section 366.26 hearing. *Darlice C.* authorizes appointment of counsel to pursue a petition for writ of habeas corpus alleging ineffective assistance of trial counsel at the hearing, as long as the habeas corpus petition was filed while the appeal was still pending.

Notes

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1. This article covers legislation, rule changes, and cases from July 1, 2002, to July 1, 2004. Thanks to CCAP staff attorney Melissa Nappan, Judicial Council staff attorneys Audrey Evje, Leah Wilson, Chris Wu, and attorneys Janet Sherwood and Janet Saalfield for their contributions.
2. For specifics, see Janet Sherwood's update in the 2003 Juvenile Dependency Seminar.
3. Also on subdivision (b), see *In re O.S.* (2002) 102 Cal.App.4th 1402.
4. Services were also denied under section 361.5, subdivision (b)(12).
5. This decision is final, but a depublication request was pending as of July 15, 2004.
6. *In re N. M.* also holds the 18- month period begins at initial detention and includes intervening family maintenance service periods where the child is placed with the parent.
7. The court received a petition for review and at least a half dozen letters supporting review or non-certification for publication. Several different positions were advocated.
8. There are also several amendments to Education Code, secs. 48645.5, et seq. which implement proper educational placements.
9. But note that unless a very speedy process is set up to resolve the writ, it may become necessary for trial counsel to file notice of appeal by the 60th day, perhaps before the writ is resolved, to avoid risking dismissal of the appeal as untimely.