DEPENDENCY UPDATE[1]

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IMPORTANT DEPENDENCY LEGISLATION CHAPTERED

In my last article, I mentioned the progress of several bills in the 2005 Session affecting juvenile court procedure and foster care. One bill, SB 678 (Ducheny) concerning ICWA, was held over into the 2006 session, and two others, AB 1338 (Nation) providing for appointment of counsel specializing immigration law to assist immigrant children, and AB 880 (Cohn) concerning efforts to identify relative placements, were vetoed by the Governor. The other laws are chaptered. A brief recap follows:

Reopening Parental Rights Termination. Welfare and Institutions Code section 366.26, subdivision (i)(2) now provides that a child who has not been adopted within three years of entry of a parental rights termination order and who is no longer in a permanent plan of adoption may file a section 388 modification petition to modify the permanent plan. The petition may be filed before these conditions arise if the State Department of Social Services or a qualifying adoption agency stipulate that the child is no longer adoptable. In the case of children over 12 years old, the petition must be signed by the child unless there is a showing of good cause why the child could not sign.

Under the new law, if the court sees sufficient showing, it sets a hearing on the petition, and orders notice as required under section 297 to the social worker or probation officer, Indian tribe, child's attorney or to the child who does not have an attorney, and the parents.

A modification order issued after the hearing must include findings that the child is no longer adoptable and that modification is in the child's best interest. Also, in the case of a child who is over twelve years of age, the facts providing the basis for the best interests finding must be specified when there will not be reunification services or a plan of guardianship.

The new law is retroactive to all cases in which the child is still under juvenile court jurisdiction.

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There are a couple caveats in the drafting of petitions under this section. First, since the petitions are described as section 388 petitions to modify, it appears likely that the courts will require them to meet the standards required for other modification petitions, most significantly the requirement that a petition include a prima facie showing of how the child's best interests will be furthered. (See, e.g., *In re Edward H.* (1996) 43 Cal.App.4th 584.) Although the showing required to obtain a hearing may rest more on speculation than the showing to be made at the hearing itself (see, e.g, *In re Daijah T.* (2000) 83 Cal.App.4th 666), the petition should include more than the summary conclusion that the child's best interests will be furthered.

Second, in the specific case of a 12-year-old who has not signed the petition, the showing of good cause for not obtaining that signature is not likely to be satisfied merely by a statement that the child lives in another county. There is a risk that the court will not act on a petition that is not signed unless it is ratified by the child, in writing, or there was a showing that the child was disabled from signing. The policy behind having the child sign the petition is to make it possible to determine that the minor actually supports it, and the courts are not likely to dispense with the child's signature on weak showing of good cause.

Abandonment of Newborns. The "safe surrender" provisions of Health and Safety Code section 1255.7, creating exceptions from abandonment as defined in Welfare and Institutions Code sections 300, subdivision (g) and 361.5, subdivision (b)(9) are now permanent.

Disposition and Review Hearings – Sibling Group Defined. The term "sibling group" in section 361.5, subdivision (a)(3) (incorporated into other sections, as well) now includes "full or half-siblings." The change is also made in several other places in section 361.5, subdivision (b). (See also, *Anthony J. v. Superior Court* (2005) 132 Cal.App.4th 419, discussed below, on examining the previous definition in sec. 361.5, subd. (b).")

Disposition and Review Hearings - Teen Parents. Welfare and Institutions Code section 300, subdivision (j) now provides that a child may not be found at risk of abuse or neglect merely because of the age, dependent status or foster care status of the child's parents.

Visitation When Teen Parent Has Custody. Welfare and Institutions Code section 362.1, subdivision (a)(3) now provides that an order placing a teen parent in foster care shall provide for visitation of the non-custodial parent and other family members of the teen parent's child with that child except when it is found that there is clear and convincing evidence that visitation would be detrimental to the teen parent.

Placement with Non-Custodial Parent – "Adam's Law." Welfare and Institutions Code section 366.23 now requires the social worker to provide the care giver an

information form to complete and return to the court when a non-custodial parent has requested custody, and section 361.2, subdivision (b)(2) requires the court to order social worker to conduct a home visit and provide a report within 3 months when the non-custodial parent assumes custody.

Foster Placement - Record Checks.[3] There is a new exemption under Health and Safety Code section 1522, subdivision (b)(3)(C) from the licensing requirements for babysitters engaged by the foster parent for periods of 24 hours or less. Under Welfare and Institutions Code section 362.04, the foster parent is held to a "prudent parent" standard in the selection of babysitters.

Foster Placement - Educational Requirements. Several sections of the Education Code[4] are amended to require that educational agencies have a process for dispute resolution as to where the child will be enrolled or placed, and to require written explanation of those decisions to the parent, guardian or other person having the right to make educational decisions. Also, section 319 is amended by adding subdivision (g), providing for a determination at the initial hearing of who is to make educational decisions for the child. If no one else is available and the court assumes the responsibility for making the decisions, it must order efforts be made to find a responsible adult to make the educational decisions.

Foster Placement - Stability of Adoptive Placements. New subdivision (n) of Welfare and Institutions Code section 366.26 provides that a child's current caretaker who has cared for the child for six months, expressed a commitment to adopting the child and who has taken a step to facilitate the adoption may be designated as the child's prospective adoptive parent. A child may not be removed from this placement without a noticed hearing.

Foster Placement - Services Before and After Minor's Transition. Sections 366, 366.1, 366.21, 366.22, 366.26, and 366.3 are amended to expand the requirement that social studies prepared for juvenile court hearings include a list of persons important to children in group homes who are over 10 years of age. The requirement now applies to all children of that age who are in out of home placements. Also, children who are 12 years of age or older have a right to participate in the development of their case plans and permanent placement plans.

Another new law amends Welfare and Institutions Code section 11403 and adds sections 11403.6 and provisions beginning at section 13750 to require counties to notify

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[3] Cases continue to require a specific exemption to the rule against placement in the home where a person has a criminal conviction. (*In re S.W.* (2005) 131 Cal.App.4th 838.)

[4] Education Code sections 48853, 48853.5, 48859, 59069.5, 52052, 56034, 56366.1, and 56366.2.

the Social Security Administration of the foster care status of youths who receive benefits. The county is to apply to be the payee. Counties are to provide information about federal requirements to minors approaching their 18th birthday who may qualify for SSI benefits.

Similarly, Welfare and Institutions Code section 391, which requires social workers to include in their reports filed at the time of termination of jurisdiction to list the transitional services that have been provided the minor, has been amended to require inclusion of a health and education summary.

Cases Limit Examination of Reasonableness of Services and Parent's Current Fitness

Several cases decided in the second half of 2005 appear to construe narrowly, perhaps too narrowly, the requirement that reunification services be provided to families whose children have been removed from the care of their parents or guardians. In the first case, *Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, a case ordered published by the California Supreme Court, the appellate court held that since the "twelve-month" hearing under Welfare and Institutions Code section 366.21 was continued several times and was not finally conducted until 22 months after the detention of the children, the hearing was now in effect an "18 month" hearing for which no reasonable services finding was required.

In *In re Dakota H.* (2005) 132 Cal.App.4th 212, it was the section 366.26 hearing that was continued many times. The challenge on appeal was to the absence of a current finding on the parent's current fitness. The reviewing court found the parent waived the issue by failing to object and also rejected the issue on the merits, finding among other things that the mother had not pursued a modification petition under Welfare and Institutions Code section 388 in which she could have established her current fitness.

Perhaps what is said in *Dakota H.* about the parent's failure to file a petition for modification is correct. But the resolution of cases in the manner approved in *Dakota K.* and *Denny H.* do reopen questions about the California dependency scheme that were seemingly resolved by *Cynthia S. v. Superior Court* (1992) 5 Cal.4th 232. It was claimed by the parents in *Cynthia S.* that California's then new statute did not require the findings of current parental unfitness necessary to justify state action in severing parental bonds. The holding of the California Supreme Court in *Cynthia S.* that the California dependency scheme is constitutional relied largely on the numerous findings made along the way, at disposition and each of the review hearings. However, if the making of those findings is excused, especially as done in *Denny H.*, that may provide an argument some of the due process safeguards critical to the analysis in *Cynthia S.* are not in fact being provided by the California scheme.

The third case was the Third District's decision in *In re Aryanna C.* (2005) 132

Cal.App.4th 1234, which holds that Welfare and Institutions Code sections 361.5, subdivision (a) and 366.21 do not guarantee a family six months of services. Rather, the determination of the length of services is may be subject to the discretion of the court, based on a determination of the best interests of the child. *Aryanna C.* is based on overall statements of policy contained in the Welfare and Institutions Code.

It seems likely that *Aryanna C.* will be controversial. Although the decision purports to have a basis in legislative intent, that may be subject to question. Reunification services have their ultimate basis in the best interests of the child – the child's best interest in preservation of the family, and section 361.5 appears to set a baseline minimum attempt to preserve the family. That should be seen as six months rather than a few days or weeks. The Legislature has listed numerous exceptions to reunification services in section 361.5, subdivision (b), and amendments now include a specific limitation of six months in the case of minors under three years of age. If the Legislature had intended less than this six months of the services, in the discretion of the court, it could have said so.

Jurisdictional Hearings - Due Process. In *In re Wilford J.* (2005) 131 Cal.App.4th 742, a notice to the parent of that a hearing would be conducted on a petition at a certain time and place was held not to constitute notice of what could happen at a pre-trial resolution conference, such that, on the father's non-appearance at the time of the conference, the court could convert the settlement conference into a jurisdictional hearing and sustain the petition. This procedure violated his due process right to notice, the notice requirements of Welfare and Institutions Code section 291, and local rules governing pre-trial resolution conferences..

Jurisdiction - Failure to Protect. In *In re Savannah M.* (2005) 131 Cal.App.4th 838, the reviewing court found the evidence insufficient to support a finding of jurisdiction under Welfare and Institutions Code section 300, subdivisions (b) and (j), where the parents had been drinking beer with an acquaintance and had left children with him while they went to the store. When they returned he was changing the diaper on one of the children and denied "messing" with her. They left the children with him again, and upon their second return learned that he had molested the child. They ordered the man out of their house and immediately called the police. This conduct did not demonstrate that the children were at risk of harm.

Similarly in the recent case, *In re David M.* (2005) 134 Cal.App.4th 822, the evidence was likewise found insufficient under subdivision (b) and (j) where the mother had failed a reunification plan addressing her marijuana abuse four years earlier concerning an older half-sibling Aaron, and the present case involved at least one use of marijuana while raising a second child and pregnant with a third child. There was also evidence that she had a delusional disorder related to marijuana use. Although the reviewing court found evidence of neglect in her abuse of marijuana while pregnant, there was insufficient evidence of a risk of harm where the children had not been harmed

and in fact were well cared for in the parents home. And the additional fact that the parents had allowed their children to be cared for by a babysitter who they knew had abused marijuana in the past was held not to present a risk of harm where they had agreed not to use her again and where the children had not been harmed. Further, the reunification failure four years past was found not to confer jurisdiction under subdivision (j) because there was no recent information indicating a risk of harm to the children.

Disposition - Denial of Reunification Services. Welfare and Institutions Code section 361.5, subdivision (b)(6), which provides for denial of services when the dependency was based on severe physical abuse or sexual abuse of a sibling or half-sibling, applies even when the parent has no biological relationship with the half-sibling. (*Anthony J. v. Superior Court.*, *supra*, 132 Cal.App.4th 415; note also 2006 changes in Welf. & Inst. Code sec. 361.5, defining "sibling," discussed above.)

Restraining Orders. A three-year restraining order issued under Welfare and Institutions Code, section 340.5, restraining the father from contacting the social worker, continues in effect even after the social worker is no longer assigned to the case. (*In re Matthew F*. (2005) 132 Cal.App.4th 883.)

Permanent Plans - Adoptability and Termination of Parental Rights. On findings of adoptability under Welfare and Institutions Code section 366.26, subdivision (c)(1)(A), *In re Marina S.* (2005) 132 Cal.App.4th 138, holds that where the child is adoptable by some family, it is of no significance that the home study on the home of her maternal grandparents who were committed to adopting her was not completed as of the date of the section 366.26 hearing. The result was similar in *In re Gabriel G.* (2005) 2005 Cal. App. LEXIS 1936 . The reviewing court affirmed a finding that two brothers were adoptable under section 266.26, subdivision (b) because they were young, healthy and developmentally on track, but difficult to place in that the two were to be placed together as a sibling group and the had behavioral problems in that they fought each other a lot. By contrast, a finding under section 366.26, subdivision (b) that the minor was adoptable but difficult to place was reversed in *In re Ramone R.* (2005) 132 Cal.App.4th 1339,
because not only did the minor have behavioral problems but two of his placements failed. In these circumstances, there was insufficient evidence that this minor was adoptable.

Permanent Plans - Sibling Relationship Exception to Adoption. *In re Naomi R.* (2005) 132 Cal.App.4th 808, is an affirmance of a decision of the juvenile court finding the section 366.26, subdivision (c)(1)(E) exception due to the sibling relationship. The evidence, although contested, supported the trial court's findings that severance of the relationship of the three-year-old minor who visited with her three siblings who were placed in another home would be detrimental to her, and that it was possible that the

caretaker would sever the sibling contact were the case to proceed to adoption.[5]

Permanent Plans - Other - Visitation. Amendments to Welfare and Institutions Code section 366.26, subdivision (c)(4)(C) effective in 2005 abrogate that part of the California Supreme Court's decision in *In re S.B.* (2004) 32 Cal.4th 1287 permitting juvenile courts to delegate to the legal guardian the decision whether or not visitation with the parents will occur. The court must make visitation orders in both guardianships and long term foster placements. (*In re M.R.* (2005) 132 Cal.App.4th 269.)

Paternity. A biological father who neither had standing under Family Code section 7630 to file a paternity/custody action as a presumed father, nor had lived with the child such that he obtained a protected liberty interest, was not permitted to proceed on the petition. (*Lisa I. v. Superior Court* (133 Cal.App.4th 605.)

In a dependency case, a stepfather who had lived with the dependent child and her mother for seven years, and subsequently was married to the mother, and had suppported and held the child out as his child, was denied presumed father status under Family Code section 7611 because he was not the biological father, had not known the child for the first three years of her life, and he had not disclosed his status as a sex offender to the mother, which was antithetical to a parent's role. Presumed status was rebutted under these facts. (*In re T.R.* (2005) 132 Cal.App.4th 1202.)

Indian Child Welfare Act. Non-compliance with ICWA notice requirements was found harmless error in *In re Alexis H.* (2005) 132 Cal.App.4th 11, when the petitioning agency did nots not propose to place the child in foster care at the dispositional hearing and the court awarded custody of the child to the non-offending party. The reviewing court in distinguished *In re Jennifer A.* (2005) 103 Cal.App.4th 692, on the grounds that in that case foster care had at least been proposed before the court ordered placement with the other parent. Here the reviewing court found there was no risk of foster placement and therefore no duty to comply with ICWA.

In *In re I.G.* (2005) 133 Cal.App.4th 1246, the reviewing court found inadequate the record of ICWA notice that did not include copies of the notices sent, return receipts, and any subsequent correspondence. The court also refused to take judicial notice of copies of notices submitted by the petitioning agency, on the grounds that these items where not part of the trial court record, and their consideration by the reviewing court would in be in effect a retrying of the case (citing *In re Jennifer A., supra,* 103 Cal.App.4th 692). Noting the large number of recent reversals for ICWA non-compliance, and the resultant delays, the court directed the further proceedings in this matter be conducted by the supervising judge of the juvenile court.

[5] A more typical case is *In re Salvador M.* (2005) 133 Cal.App.4th 1415.

Although a majority of California cases hold that a party does not forfeit an appellate challenge to ICWA notice non-compliance merely by not objecting to the error, one case now holds that ICWA notice error will be forfeited by a party who obtains a reversal for non-compliance and still does not complain of ICWA non-compliance when the matter is remanded to the juvenile court for the purpose of determining that question. (*In re X. V.* (2005) 132 Cal.App.4th 794.)

Appellate Procedure - Appealable Orders, Forfeiture and Judicial Notice.

A decision of the Sixth District, *In re Gabriel G., supra,* and one of the First District, *In re Ramone R., supra,* held that decisions under Welfare and Institutions Code section 366.26, subdivision (b) finding a minor adoptable but difficult to place, are appealable orders notwithstanding the fact that the order is somewhat non-final in that the ultimate decision on plan is postponed for 180 days. The courts noted that the order has the effect of removing long term foster care as an option. (See, sec. 366.26, subd. (c)(3). The order is immediately appealable, if for no other reason, so that this placement may receive earlier consideration if the child should be considered for foster care.

The reviewing court denied a respondent's application to take judicial notice of ICWA notices in *In re I.G., supra,* on the grounds that this would constitute re-trying the case on facts not presented to the trial court, in violation of the holding in *In re Zeth S.* (2003) . But neither of two courts had any problem taking additional evidence on appeal of subsequent minute orders approving home studies in *In re Marina S.* and *In re Salvador M., supra,* to counter appellate contentions that the home studies were incomplete at the time of the hearings. The justification in *Marina S.* was that the new evidence was indisputable.

Two "waiver-forfeiture" cases have already been discussed, *In re Dakota H., supra,* [failure to demand consideration of parental fitness at section 366.26 hearing] and *In re X.V.* [failure to challenge ICWA notice after remand on that issue]. In two other cases the appellate court has cited the California Supreme Court decision in *In re S.B.* (2004) 32 Cal.4th 1287, in reaching crucial issues despite the failure to raise the issue in the trial court. (*In re Aryanna C., supra* [failure to challenge termination of reunification services]; *In re M.R.* (2005) [failure to object to order delegating to the guardian the power to decide whether visitation would occur].)

Juvenile Court Records. Under Welfare and Institutions Code section 827, a parent established good cause to inspect the juvenile dependency record in a case involving her child insofar as the file contained records relevant to an invasion of privacy claim the parent wished to pursue. Also, she could communicate the contents the portion of that file relating to her civil action to the attorney representing her on that claim, especially since none of material she requested concerned private matters about the minor. However section 727 does not authorize a parent to have copies made of the file.

(*In re Gina S.* (2005) 133 Cal.App.4th 1074.)