DEPENDENCY UPDATE: July 2006[1]

COURTS REVIEW A NEW PARENTAL RIGHTS TERMINATION LAW

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In the first half of 2006 the decisions of two different appellate panels addressing the constitutionality of a new adoption statute came to different conclusions. Petitions for review have been granted and both decisions will be reviewed by the California Supreme Court. The constitutional challenges are directed at Probate Code section 1516.5, which authorizes termination of parental rights by the probate court where the children have been in a guardianship, upon a lesser showing than that in other adoption statutes. Both cases hold that the new law is generally constitutional, but one concludes that the law may not be constitutional as applied to an unwed father who has made a full commitment to his parental responsibility without a showing of current unfitness.

Section 1516.5 was enacted in 2003 for the purpose of permitting adoption by guardians of a child who has been in guardianship for two years or longer upon a showing that adoption is in the child's best interest. The constitutional challenge is that there is no inherent finding upon entry of the guardianship order that the parents are currently unfit, nor is the finding required in the Probate Code section 1516.5 action. Such a finding is constitutionally required before the state may free children for adoption without the consent of the parents. The United States Supreme Court has stated in this respect, "[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing the erroneous termination of their natural relationship." (*Santosky v. Kramer* (1982) 455 U.S. 745, 760.)

The Second District, Division 6, in *In re Charlotte D.* (2006) 136 Cal.App.4th 1027, rev. granted 5/24/06 (S142028), saw no facial constitutional problem with the guardianship law, but found a problem in its application to children in guardianship who have unwed fathers who have made a full commitment to their parental responsibilities as outlined in *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. The Second District noted that United States Supreme Court cases such as *Stanley v. Illinois* (1972) 405 U.S. 645, and *Quilloin v. Walcott* (1978) 434 U.S. 246, strongly suggest a finding of unfitness is required before the parental rights of a parent who has taken the child into his home and acknowledged paternity may be terminated. And the court noted that Probate Code section 3041 does not require a showing of unfitness – a finding "'that the parents have failed or are likely to fail in the future, to maintain an adequate parental relationship with the child.'" (*In re Charlotte D., supra,* 136 Cal.App.4th at p. 1043, quoting from *In re Jasmon O.* (1994) 8 Cal.4th 398, 423.) Moreover, as to parents who did not object to the initial guardianship, the court noted that section 3041 expressly provides that an unfitness requirement *is not required.*

The Third District came to another conclusion in In *Guardianship of Ann S.* (2006) 138 Cal.App.4th 644, rev. granted 7/19/06 (S143723). The Third found that the statute in fact

requires a finding that it would be detrimental to return the child to the parents where the parent objects to the guardianship, and as to the parents whose children were placed into guardianship with the parent's consent, Probate Code section 3041 justifiably establishes a rebuttable presumption of parental unfitness when the child has been cared for by the guardian for a substantial period time. In the view of this conclusion, the requirement for a finding that the parents were currently "unfit," a finding required in other parental rights termination cases pursuant to *Stanley v. Illinois, supra,* was not problematic in a probate guardianship adoption because, unlike the Illinois statute reviewed in *Stanley,* California's presumption is not mandatory. The questions raised by the Third District's decision include whether detriment is the equivalent of an unfitness finding in the case of non-consensual guardianships and whether the parent's mere acquiescence in a legal status – guardianship – should by itself be viewed as the functional equivalent of unfitness so as to justify a rebuttable presumption, and whether the parent should have the burden of proof where the guardianship was consented to by the parent.

So far, both *Charlotte D.* and *Guardianship of Ann S.* are lead cases, as briefing has not been deferred in either case.

Jurisdictional Hearings - Due Process. In *In re Vanessa M.* (2006) 138 Cal.App.4th 1121, one of this year's decisions protecting the due process rights of parents in dependency proceedings, the First District, Division 5, held that the court could not punish a parent for his previous failures to appear by refusing to let him testify at the jurisdictional hearing. Although a failure to appear without good cause at a particular hearing may constitute a waiver of the right to be present at that hearing, the court may not sanction the non-appearance at a previous hearing by excluding the testimony by a parent who appears on the continued date of the hearing.

Disposition - Denial of Services. *Cheryl H. v. Superior Court* (2006) 139 Cal.App.4th 87, finds that a basis for denying services was not established under Welfare and Institutions Code[3] section 361.5, subdivision (b)(10) (denial of services when the parent has previously failed to reunify with children). Here the parents had mental disabilities (but the County failed to allege that they could not benefit from services under subdivision (b)(2)). The court lauded them on their efforts, such as in finding an apartment, but denied services because the court believed services would essentially be fruitless – the parents probably would not become better parents through counseling and parenting classes. The Fourth District granted writ relief directing the juvenile court to grant the parents six months of services. Subdivision (b)(10) requires an examination of whether the parents had made reasonable efforts, and because the court felt the parents had tried hard, their efforts had been reasonable. Essentially, where services are denied because they would be fruitless there must a showing under the appropriate subdivision -- (b)(2).

Disposition - Visitation and Contact Orders. *In re J.N.* (2006) 138 Cal.App.4th 450, holds that when the court has not ordered reunification to a parent, section 361.5, subdivision (f) makes visitation and contact between that parent and the child discretionary with the court. Unlike orders made for parents who are in reunification, no-contact orders may be ordered for such parents without a finding that contact would be detrimental, as subdivision (f) states the court "may" order visitation, not "shall." In this case, J.N. was 11 years old and his mother had been in prison for nine years. He had telephone contact with her for two years, but there was no evidence as to the nature of that contact. He did not ask for contact with her, although he had requested contact with his father and sister. There would be scheduling problems for him to

receive calls from prison. Under these facts, the court did not abuse its discretion in not providing for contact.

Review Hearings - Due Process. *David B. v. Superior Court* (2006) 140 Cal.App.4th 772, is another recent decision protecting due process rights of the parents, this time at a 18-month review hearing. The Sixth District followed the Third District's holding in *In re James Q.* (2000) 81 Cal.App.4th 255 [six-month hearing]: a parent has a due process and statutory right to a contested hearing untrammeled by an offer of proof requirement on fundamental issues such as the reasonableness of services (and in *David B.* the appropriateness of the child's placement).

Review Hearings - Termination of Services. In my last article, I mentioned the decision of the Third District in *In re Aryanna C.* (2005) 132 Cal.App.4th 458, holding that when services are offered to a family for a child who was under three years of age at the time of detention, section 361.5, subdivision (a)(2) provides a *maximum* of six months services, unless extended, and the mere fact that hearings under section 366.21, subdivision (a) are conducted every six months does not mean that the court cannot terminate services on an earlier date if the continued provision of services is determined to no longer be in the child's best interest.

More recently, in *In re Alana A.* (2005) 135 Cal.App.4th 555, the Fourth District, Division One, relied on *Aryanna C.* in holding that the mere extension of services to the mother at the 12-month review hearing did not mean that the court was required to extend services for the father, who had not shown significant progress or the capacity and ability to complete the plan and provide for the child (and who had not visited his two-year-old child for over a year). The appellate court found that the ruling of the juvenile court did not constitute an abuse of discretion or a violation of substantive due process. What is interesting is that the decision noted that it would not necessarily be an abuse of discretion for the court to award services to the second parent, especially because that parent often has continuing contact with the child. (The trial court noted that it would often grant services to both parents in this situation.)

Modification Petitions. The significant case in 2006 on modification petitions under section 387 is *In re Javier G.* (2006) 137 Cal.App.4th 453. In that case petitions under section 300 had been sustained as to two older children, Javier and Hector, but the children were maintained in the mother's home under a family maintenance plan. Later, the section 387 petition was filed when it was learned that these two children had sexually abused one child in the home and physically abused another child. Jurisdiction was sustained, and after psychological evaluations of Javier and Hector were completed, they were placed in separate group homes where they were ordered to have therapeutic treatment. On appeal, the mother contended that jurisdiction could not be sustained without a showing that the previous disposition had not "protected" rather than "failed to rehabilitate" the children, as section 387 uses only the term "protection." The Fourth District, Division One, held that protection includes protection from the serious emotional damage that their behaviors would cause them, and thus their protection included a need for rehabilitation. And the standard on disposition out of the home, in this case, section 361, subdivision (e), was found not to require a risk of physical harm to Javier and Hector, but only a showing that their health could not be protected. That showing was made in this case by the mother's inability to structure the situation during the 18 months of services offered during family maintenance.

Two modification petitions under section 388, *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, and *In re Eric E.* (2006) 137 Cal.App.4th 252, are discussed in several different contexts in this article. With respect to modification petitions, *Eric E.* requires a parent, who has been offered but does not accept the opportunity to establish paternity during the reunification stage, establish that his request for presumptive parent status is in the best interests of the child, if his request is made after the case is no longer in reunification. But *In re Baby V.* does not require this showing where the father was wrongly denied his attempt to establish paternity earlier in the case.[4]

Permanent Plans - Caretaker Unable or Unwilling to Adopt Exception.[5] In *In re Fernando M.* (2006) 138 Cal.App.4th 529, the Second District, Division 8, found that the juvenile court had abused its discretion in selecting a long term plan of adoption and terminating the mother's parental rights to 18-month-old Fernando, who at that time resided with his two older siblings in his grandmother's home. The reviewing court found two of the section 366.26 exceptions to adoption applicable in this case. One exception -- subdivision (c)(1)(D) – applied because this was an "exceptional circumstance" case. Forcing the grandmother to adopt in this case, where the other children were not also in a plan of adoption, would create complications and would increase the probability that the siblings would be separated, which because it had been established that it would be detrimental for Fernando not to live in that home with that family, would not be in his best interests.

However, in *In re P.C.* (2006) 137 Cal.App.4th 279, the Fourth District, Division One did not find an exceptional circumstance under subdivision (c)(1)(D) where the child had been placed in the home of the paternal grandfather and the reason he did not wish to adopt was, in the court's view, a lack of awareness on his behalf – his belief that the parents would one day be able to adopt. It was reasonable to infer that if he had been fully apprised he would not hesitate to adopt the children.

Permanent Plans - Sibling Detriment Exception. Also in reversing the parental rights termination order in *In re Fernando M., supra,* the appellate court found that, in finding the sibling detriment exception under subdivision (c)(1)(E) inapplicable, the juvenile court had not adequately considered the impact that adoption would have on the relationship between the minor and his two older siblings. Removing him from his grandmother's home and searching for another adoptive family would disturb the stability that uncontested evidence showed he needed. There was no evidence that removal from the only family he had ever known would not be detrimental to him. The appellate court ordered selection of guardianship as Fernando's permanent plan.

Section (c)(1)(E), the sibling detriment exception, may even apply when the half-sibling has been adopted. In *In re Valerie A.* (2006) 139 Cal.App.4th 1519, the Fourth District, Division One, found the juvenile court erred in finding the exception legally inapplicable solely on the grounds of the previous adoption of the half-sibling without analyzing the quality of the relationship between the children. The policy of juvenile law is to protect the important relationships and contacts of children and that policy is not be furthered by using the narrower definition of "sibling," but only by considering the importance of the relationship to the child.

Permanent Plans - Due Process - GAL Appointments for Parents. Following *In re Sara D.* (2001) 87 Cal.App.4th 661, and other authorities, the Fourth District, Division One, in *In re Enrique G.* (2006) 140 Cal.App.4th 676, an appeal from an order terminating parental rights, held that the juvenile court erred in appointing a guardian ad litem for the mother without making a competency determination, without having an indication on the record of why a guardian ad litem was necessary, and without notifying the mother of the request and giving her a chance to respond to the request. This decision follows the cases finding this error not to be structural (but see, *In C.G.* (2005) 129 Cal.App.4th 27 [same error found to be structural and therefore did not require a showing of prejudice]), and finds the error harmless because the guardian ad litem acted to preserve the mother's parenting rights at all stages, and it was the mother who failed to participate in services, attend visits, and make her court appearances.

Paternity. In another development, in *In re Baby Boy V.*, *supra*, 140 Cal.App.4th 1108, one of several cases enforcing parents' due process rights in juvenile court, the Second District, Division One, overcame all technical procedural defaults to hold that an father in a dependency case who had been denied paternity testing by the social worker and the juvenile court at the outset of the case, could appeal that decision from a subsequent order terminating the parental rights of all those claiming parentage of the child. California Rules of Court, rule 1413(h), is mandatory rather than discretionary. The father was entitled to a determination of his presumed father status, and reunification services if he qualified as a presumed father.

At the other end of the spectrum from *In re Baby Boy V.*, *In re Eric E.*, *supra*, 137 Cal.App.4th 252, shows how it is possible for a biological father to lose a paternity case even when he has a voluntary declaration of paternity which he contends is the equivalent of a paternity judgment if he fails to assert that claim while a dependency case is in reunification. In this case, the minor, Eric, was removed from the home of the mother and her husband, Robert. At the detention hearing, Robert asked to be declared Eric's presumed father. Both Robert and the biological father, Gene, were offered services. Gene did not ask to be declared the presumed father, and did not take part in the reunification plan. Later, services were terminated, and Gene requested presumed parent status at the section 366.26 hearing. The court awarded Robert presumed father status and denied it as to Gene. On appeal, the Second District, Division Eight, held that Gene's request, made after the termination of services, would have to be made by a section 388 modification petition establishing that an award of presumed father status would be in the minor's best interest.

Placements - Placement Preferences. The provisions of section 361.4, prohibiting the placement of a minor in the home of a relative or other foster parent who has a criminal record when no exemption has been granted does not apply to guardians appointed under section 360, as this appointment is not within the foster placement scheme. Although the Department's views on the propriety of the guardian and his home are significant, the decision is the court's to make. (*In re Summer H.* (2006) 139 Cal.App.4th 1315.)

Placement - Post-Permanency. In *In re Shirley K.* (2006) 140 Cal.App.4th 65, the Fourth District, Division One, found that the juvenile court abused its discretion denying a petition by the grandparents for modification under section 388 to reinstate the placement of the child in their home or award them liberal visitation with their grandchild. The child had been placed with them for almost all of the two years since her birth, and they had been identified as pre-adoptive parents after parental rights were terminated. But she was removed from their home due to the grandfather's alcohol dependence and the grandmother's reporting that a half-sibling in the home had used methamphetamine. The juvenile court upheld the Department's decision, stating that the juvenile court's determination of what was in the child's best interests was irrelevant when reviewing that decision.

The Court of Appeal disagreed and reversed the denial of the post-permanency modification petition, holding first that the juvenile court's decision was appealable notwithstanding section 366.28, which subjects post-permanency placement decisions to review solely by writ, since section 388 petition rulings are directly appealable. Reaching the merits, the court held that a review of the Department's placement decision must be done within the context of the minor's best interests. Here the trial court expressly abused its discretion in failing to apply this standard. Upon remand, the trial court was to determine whether the child's best interest would be better served by an order returning her to her grandparents' care or, in the alternative, by a grant of liberal visitation. [The opinion also notes the enactment of section 366.26, subdivision (n), effective January 1, 2006, requiring a noticed court hearing when a child is to be removed from a pre-adoptive placement.]

Indian Child Welfare Act.[6] The ICWA cases in early 2006 went off in several new directions. First, in *In re Enrique O.* (2006) 137 Cal.App.4th 728, the Fifth District held that ICWA has no application to delinquency cases, at least those cases that involve more than simple infractions, and where the minor is actually adjudicated in delinquency court and the matter has not been dismissed in favor of a dependency proceeding after a section 241.1 assessment. This is true even though the minor may be placed in a foster home in the wardship proceeding. The court noted that 25 U.S.C. section 1903(1) excludes the application of ICWA from "a placement based on an act which, if committed by an adult, would be deemed a crime...." Although rule 1439 requires ICWA notices in all section 601 and 602 proceedings "in which the child is at risk of entering foster care or is in foster care," the court found the rule inapplicable in this case where the minor was adjudicated a ward for vandalism and sexual battery, as felonies, and was ultimately placed in foster care, concluding that the drafters of the rule had intended that it be interpreted consistently with the terms of ICWA.

While *Enrique O.* may not finally resolve the question of the applicability of ICWA in placements arising out of delinquency cases, the decision hints at, without deciding, some possible things an attorney for a child charged with an offense may do to obtain consideration by juvenile court probation officers of the terms of ICWA or at least help to find a tribally approved placement for that child. First, the court referred to the situation where the commission of an infraction might increase the risk of foster placement as being a situation where tribal

participation could be sought.

Second, even on more significant offenses, when the child's possible Indian heritage is raised in the section 241.1 assessment, and the juvenile court must decide whether to proceed in dependency or in delinquency, the fact that ICWA applies in dependency may be a factor in favor of choosing dependency as the system more likely to meet the child's needs. So, the attorney for the minor may have the most success in obtaining ICWA benefits for minor when asserting the law's possible application at the time of the assessment.

Third, the court said there would be nothing wrong with the juvenile court seeking input from a tribe as to the child's appropriate placement.

The problem with some of these suggestions is that if the notice pursuant to rule 1439 is not sent to recognized tribes, then the minor and the court may not have known the tribe or tribes for which the minor may be eligible for enrollment.

The scope of ICWA was also discussed in a roundabout way – the duty of a minor's trial counsel to investigate and contest parental rights termination under section 366.26 if parental rights termination will cause the child to lose the benefits of tribal membership – in *In re Barbara R.* (2006) 137 Cal.App.4th 941. This case, discussed in greater detail in the section on the duties of minor's counsel, holds that counsel could correctly determine that his client, who wished to be adopted, would benefit more from that than from tribal membership. With regard to the parent's contention that the court erred in not renewing at the 2005 section 366.26 hearing its March 2004 finding at a contested review hearing that active efforts had been unsuccessful within the meaning of 25 U.S.C. section 1912, the Court of Appeal held that there was no error. The older finding was still valid because the parent did not allege in her section 388 petition that she was then available to care for the child.

Another recent ICWA decision concerns the ability of a juvenile court to transfer jurisdiction of a dependency case to a tribal court. In *In re M.A.* (2006) 137 Cal.App.4th 439, the Third District affirmed an order of the Siskiyou juvenile court transferring the case of an Indian child to the Karuk Tribal Court, notwithstanding the Department's claims that there had not been compliance with the provisions of 25 U.S.C. 1918 by obtaining authorization of the Secretary of Interior. Section 1918 concerns exclusive rather than concurrent jurisdiction. The state courts and the tribal courts have concurrent jurisdiction over children who are not domiciled nor reside on tribal lands. Section 1911(b) and rule 1439(c)(2) provide for transfer of a case to the tribal court when the tribe has petitioned, the parents have no objection, and there is no good cause not to grant the request. Since section 1911 was complied with in this case, the transfer was proper.

Minor's Counsel. In *In re Barbara R., supra,* 137 Cal.App.4th 941, the child's counsel had been appointed to represent half-siblings, one of whom, Jade, is a member of the Sycuan Band of the Kumeyaay Nation, and the other, K.N. who is not an Indian child. The children were placed with K.N.'s grandparents, and the tribe did not object. After almost two years,

reunification services were terminated and the section 366.26 hearing was set. The tribe objected to adoption on the grounds that it would cause Jade to lose her culture, and benefits of tribal membership, which included a reservation home, financial support and medical and dental benefits. The Department had originally supported guardianship but moved toward adoption when the child became upset after visits with her parents and expressed the wish to be adopted. The child's counsel agreed. He objected on relevancy grounds to the court's consideration of the tribal benefits available to Jade. On appeal from the order terminating parental rights, the mother argued that the trial court should have appointed a separate guardian ad litem for Jade, and child's counsel was ineffective for not investigating and protecting her interests in tribal benefits.

On appeal in *Barbara R.*, the appellate court affirmed. First, the court found no duty to appoint separate counsel for each minor merely because Jade was an Indian child and K.N. was not. Under *In re Celine R.* (2003) 31 Cal.4th 45, there is no duty to appoint separate counsel until an actual conflict arises, and here the children did not have adverse interests. They were tied together and the plan was that they would be raised together.

Second the court held that the child's counsel was not ineffective. Counsel had fully investigated the child's needs and determined that she wished to be adopted and that she was adoptable. Even if counsel was unreasonable in not presenting to the juvenile the financial benefits of tribal membership, these benefits were speculative and probably unenforceable, and it was also speculative whether the benefits would be denied in the event of Jade's adoption. And, even assuming that it would be in Jade's best interest to receive tribal benefits, there is no general best interest exception to adoption.

Appellate Procedure - Appealable Orders - Forfeiture - Standing. The paternity cases discussed above, in *In re Baby Boy V., supra*, 140 Cal.App.4th 1108, and *In re Eric E. supra*, 137 Cal.App.4th 252, show how two alleged fathers attempting to obtain presumed parent status after services have been terminated may have differing levels of success. In *In re Baby Boy V.*, the alleged father prevailed over all allegations of procedural default and was found to have standing to challenge the denial of a paternity test mandated by rule 1413(h) on appeal from the subsequent order terminating the parental rights of all alleged fathers because the testing was mandatory. (See also, *In re Julia U.* (1998) 64 Cal.App.4th 532 [father had standing to file a section 388 petition without making a best interests showing where court had previously terminated reunification services without awaiting the results of the paternity that had been ordered].)

But, in *Eric E., supra*, the biological father had an opportunity to seek presumed father status, had been offered reunification services, and did not seek either while the case was still in reunification. The appellate court held that to establish standing to pursue his modification petition he needed to show that his presumed parent status would be in the best interests of the child.

And in *Amber R. V. Superior Court* (2006) 139 Cal.App.4th 897, a mother whose parental rights had previously been terminated was found not to have standing to challenge under section

366.3 her non-inclusion on the list of persons important to her 15-year-old daughter and the refusal of the court to give her visitation and telephone contact with her daughter. The list requirement was intended for the benefit of the child rather than individuals who want to be included on the list.

ENDNOTES

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2. Staff Attorney, Central California Appellate Program. Thanks to CCAP Staff Attorneys Melissa Nappan and Colin Heran for their assistance with this article.
3. All statutory references are to the Welfare and Institutions Code unless otherwise stated.
4. A more typical section 388 petition was filed and denied after a hearing in *In re Alaliyah R.* (2006) 136 Cal.App.4th 437, shortly before the section 366.26 hearing was set to be heard. But the Second District Division 8, held that the trial court did not abuse its discretion in finding that the mother's four months of recent success was too little when compared to the two-year time period that the four-year-old child had spent out of her mother's home.
5. A more typical section 366.26 appeal was *In re Alaliyah R.*, *supra*, decided under *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576. The mother had not maintained regular visits with her child until three months before final section 366.26 hearing, and the expert testimony was that the child would not suffer substantial detriment should parental rights be terminated.
6. Other ICWA cases include *In re J.N.*, *supra,* 138 Cal.App.4th 450, holding that where the clerk's transcript of the detention hearing states that the court has no reason to know that the child may be an Indian child, but the reporter's transcript contains no reference to the court making this inquiry, there has not been an adequate inquiry by the court under rule 1439(d) as to whether the child is an Indian child.

Also, *In re Francisco W.* reaffirms the practice of limited reversals for ICWA compliance, permitting the juvenile court to reinstate its judgment where no tribe seeks to intervene after proper notice is given.