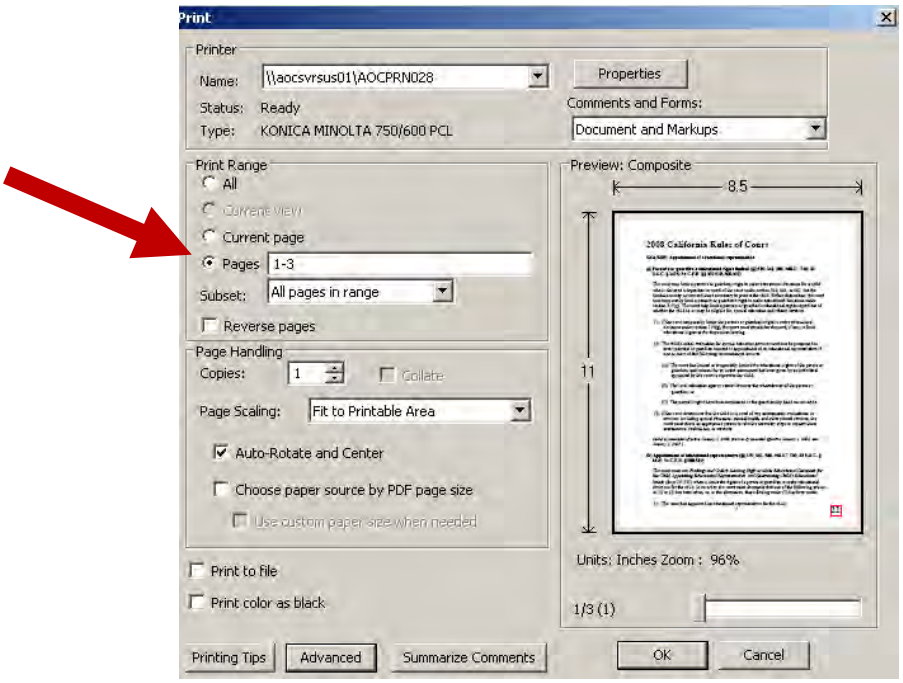
Dear Colleague:

Enclosed are Beyond the Bench 2010 handouts, PowerPoint slides, articles, and other resources made available by faculty.

In keeping with the efforts of going “green”, we encourage you to read from the electronic document rather than print hundreds of pages.

If you choose to print these materials, please make sure to **specify the range of pages**.



Thank you.

Beyond the Bench conference staff

This *PDF* of workshop materials is to be used only for non-commercial reference purposes, to supplement the trainings presented at Beyond the Bench 20. We thank the conference faculty and their colleagues for their contributions to this CD.

The highlighted workshops below provided handout materials:

THURSDAY – JUNE 3, 2010

3:30 pm – 4:45 **Workshop Session IV**

- **IV.A.** **Assessing Risk in Domestic Violence Cases**
- **IV.B.** **Dependency Legal Update (repeat)**
- **IV.C.** **Expanding Self-Help Centers to Assist Victims of Crime**
- **IV.D.** **Grant Application Writing: Tips to Improve Your Odds for Success**
- **IV.E.** **Hear My Voice! Strategies for Including Youth in Court Proceedings**
- **IV.F.** **Indian Child Welfare Act (ICWA) and Tribal Customary Adoption**
- **IV.G.** **Legal Matters Youth May Bring to Civil Court Without an Adult or Guardian** ***[*Y]***
- **IV.H.** **Making Custody Decisions in Family Law**
- **IV.I.** **Understanding Issues of Poverty in Family and Juvenile Court Proceedings**
- **IV.J.** **Prop 21, SB 81, and Department of Juvenile Justice: Where Are We Now?**
- **IV.K.** **Using New Dependency Court Data**
- **IV.L.** **Using Social Worker Assessment to Help Guide Judicial Decision Making**
- **IV.M.** **SHARE Tolerance Program (Stop Hate And Respect Everyone)**

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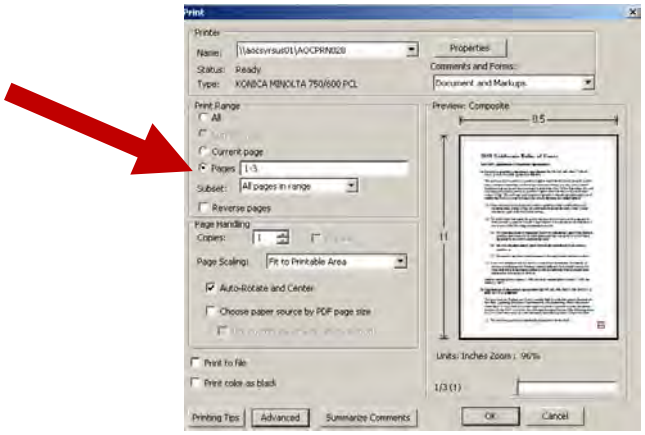

THURSDAY – JUNE 3, 2010

3:30 pm – 4:45

Workshop Session IV

IV.A.

education credit:
BBS
MCLE
PSY

Cal. Rules of Court, rule10.464, for judicial officers

target audience:
all

Assessing Risk in Domestic Violence Cases

Assessing dangerousness and lethality in domestic violence cases is one important means for the court system to address domestic violence in daily practice. In this workshop representatives from the San Diego Superior Court and justice system agencies will discuss risk assessment procedures and tools. The workshop will include a focus on ways that family court mediators and family law facilitators might be involved and will provide recommendations to address the needs of children exposed to domestic violence.

This course meets the requirements of rule 10.464 of the California Rules of Court, for judicial officers who hear criminal, family, juvenile delinquency, juvenile dependency, or probate matters.

Learning Objectives:

- Identify important features of a systemic, multi-agency death review process in domestic violence cases.
- Recognize ways to implement risk assessment practices and processes.
- Explore important recommendations for system changes relating to assessing risk in domestic violence cases.
- Apply risk assessment tools and resources in a family law setting and in cases involving children.

Faculty:

- **Hon. Lorna Alksne**
  Supervising Judge of Family Law, Superior Court of San Diego County
- **Terra K. Marroquin**
  Program Specialist II, San Diego County Health and Human Services Agency
- **Tracy Prior**
  Assistant Chief of the Family Protection Division, San Diego County District Attorney's Office
- **Kristine Rowe**
  Staff Attorney, Family Justice Center

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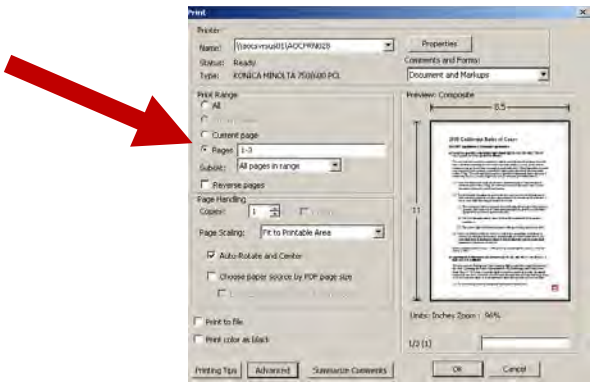


Assessing Risk in Domestic Violence Cases

Beyond the Bench 2010

Presenters

Supervising Judge Lorna Alksne, Family Law, San Diego Superior Court

Deputy District Attorney Tracy Prior, San Diego District Attorney's Office, Family Protection & Chair of the San Diego Domestic Violence Fatality Review Team

Kristine Rowe, Staff Attorney, Archstone Hope Team - "Help and Outreach for Prevention of Elder Abuse," San Diego Family Justice Center

CA Penal Code - Domestic Violence

"Abuse committed against an adult or minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship" (PC 13700 (b)).

CA Family Code - Domestic Violence

"Domestic violence" is abuse perpetrated against a spouse or former spouse, cohabitant or former cohabitant, person with whom the respondent is having or has had a dating or engagement relationship, person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act, a child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected, or any other person related by consanguinity or affinity within the second degree. (FC 6211)

CA Family Code - Domestic Violence

"Abuse" means any of the following: (a) Intentionally or recklessly to cause or attempt to cause bodily injury. (b) Sexual assault. (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. (d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320. (FC 6203)

San Diego County Prevalence Domestic Violence

- There was a 5% increase in DV incidents from CY 2008 to 2009. (SANDAG)
- There was a 25% increase in intimate partner homicides from CY 2008 to 2009. (SD DVFRT)
- There was a 79% increase in intimate partner related fatalities from CY 2008 to 2009. (*Homicides, suicides, related others) (SD DVFRT)

National Prevalence

- About 623,000 violent crimes—554,000 against female victims and 69,000 against male victims—were committed by an intimate partner in 2007.
  US DOJ, Bureau of Justice Statistics
- In a study by the National Violent Death Reporting System of 16 participating states that collected statewide fatality data in 2007, they found that 4,048 homicides occurred. Of this total, for 10.5% of these homicides the relationship of the homicide victim to the suspect was the spouse or intimate partner of the victim.

Domestic Violence Fatality Review

- There are about 144 DV death review teams nationally.
- Laws on DV death review vary by state.
- For California, PC 11163-11163.6 was enacted in Jan 1996 to ensure incidents of DV are recognized and that system involvement are systematically studied.

San Diego Domestic Violence Fatality Review Team

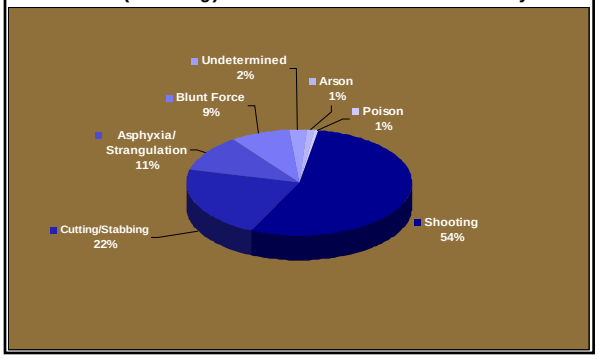
The DVFRT a confidential multidisciplinary team that conducts in-depth retrospective case reviews of intimate partner-related fatalities that have occurred in San Diego County.

San Diego Domestic Violence Fatality Review Team

- Mission
- Objectives
- Cases reviewed may include homicides by intimate partners or any homicides as related to such relationship
- Cases are reviewed post-sentencing
- Team meets 10 times each year
- Not all cases of intimate partner or intimate partner related homicides are reviewed, but rather, a selected few

All Known Intimate Partner Related Homicides 97-07

Firearms (shooting) was #1 method used across all years



Trends – A Few Examples

- In sixty-four percent (64%) of cases the intimate partner homicide victim had recently separated or was in the process of separating his or herself from the abuser.
- Thirty-two percent (32%) of perpetrators were known to have been unemployed at the time of the homicide.

Trends – A Few Examples

- Thirteen percent (13%) of intimate partner homicide victims had an active protective order at the time of their murder.
- When combined, over one half (54%) of the cases reviewed in 2006-2007 involved a victim or perpetrator who was a current user or had a known history of methamphetamine use.

Consider… Types of Abuse & Power and Control

- Sexual abuse
- Physical abuse
- Emotional abuse
- Verbal abuse
- Financial abuse
- Stalking
- Religious abuse
- Use of the children
- Isolation
- Intimidation
- Coercion and threats

Risk Factors - Examples

- Prior history of domestic violence.
- Access to a gun.
- Threats, especially increased threats with increased specificity.
- Prior history of poor mental health or substance abuse, especially alcohol.
- Previous history of abuse.
- Prior criminal history.
- The perpetrator exhibits possessive, obsessive and jealous behavior.
- Control of daily activities.
- Time period after leaving the relationship or perpetrator aware victim is planning to leave.

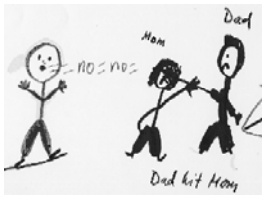
NIJ

Lessons Learned

Three case examples from the SD Superior Court system.

- Nicole Sinkule
- Linda Brown
- Evan Nash

Children and Domestic Violence



3.3 to 10 million children witness the abuse of a parent or adult caregiver each year in the U.S.

Office for Victims of Crime

Video Clip

- “Stairs” video clip

Children Exposed to DV

- Exposure to this trauma negatively effects children's emotional, social, and cognitive development.
- As these children grow up, they are at increased risk for delinquency, adult criminality, and violent behavior

Office for Victims of Crime

Children Exposed to DV

- **Direct injury** – Most serious risk to children and adolescents is from being direct victim.
- **Psychological conditions** – behavioral problems, anxiety, depression, PTSD
- **Interference with learning and cognition** – difficulty with school performance, distracted, trouble completing tasks

Children and DV Homicide

- In 54% of cases reviewed, victims and/or perpetrators had at least one minor child.
- Of these minor children, 11 of 38 were exposed to the homicide through direct observation, witnessing the body(s), seeing the blood, or by being present at the scene when the fatality(s) occurred.

What happens to the DVFRT recommendations?

- Brought to the DV council
- Implemented by systems/agencies
- Appear in the biennial reports

Recommendations in Action

- DV Phone Guide
- DV Risk Assessment Bench Guide:
  Intended to assist judges at all stages of family, Order for Protection, civil or criminal involving domestic violence in assessing some of the risks present.
- DV Risk Assessment for DV TRO Clinic Staff and Family Law Facilitators:
  Intended to assist Domestic Violence Temporary Restraining Order Clinic Staff and Family Law Facilitators in assessing some of the risks present in domestic violence cases, as they assist the petitioner in the TRO process.

San Diego County

- Standard DV Supplemental and DV and CEDV Law Enforcement Protocol
- Child Victim Witness Protocol
- DA's Family Protection Division
- San Diego DV Council
- DVRO Roundtable
- DV Hotline
- DV Shelters, Counseling, Legal Services
- TRO Clinics and Family Law Facilitators
- Family Justice Centers
- DV Response Teams
- Many other collaborative teams such as DVFRT, CFRT, EDRT, MDT's, TDM's, CPT, Stalking Strike Force, Meth Strike Force, DV Council subcommittees

Consider Safety

Consider short and long-term safety issues

- Immediate safety as they leave the court or settings.
- Safety during exchange of the children.
- Future court appearances and mediation sessions.

Websites for More Information:

San Diego Superior Court http://www.sdcourt.ca.gov

San Diego District Attorney's Office http://www.sdcda.org/

The San Diego Domestic Violence Council: www.sddvc.org

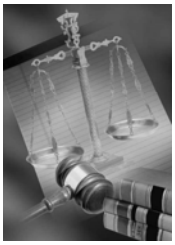
San Diego Family Justice Center:
http://www.sandiego.gov/sandiegofamilyjusticecenter

County of San Diego Domestic Violence Fatality Review Team
http://www.sdcounty.ca.gov/hhsa/programs/phs/office_violence_prevention/domestic_violence_fatality_review_team.html

Family Violence Prevention Fund http://www.endabuse.org/
National Consensus Guidelines:
http://endabuse.org/userfiles/file/Consensus.pdf

Danger Assessment: www.dangerassessment.com

Questions?



County of San Diego
Domestic Violence Fatality Review Team

2008 REPORT

County of San Diego
Health and Human Services Agency
Office of Violence Prevention

County of San Diego Board of Supervisors

Greg Cox - District 1

Dianne Jacob - District 2

Pam Slater-Price - District 3

Ron Roberts - District 4

Bill Horn - District 5

Chief Administrative Officer
Walter F. Ekard

Director
Health & Human Services Agency
Nick Macchione

The County of San Diego Domestic Violence Fatality Review Team is coordinated by
the County of San Diego Health and Human Services Agency, Office of Violence Prevention
4438 Ingraham Street, MS-N510, San Diego, CA 92109 (858) 581-5800.
www.sdcounty.ca.gov

Table of Contents

Foreword

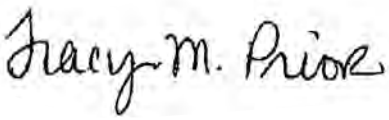
Domestic violence, also called Intimate Partner Violence, affects all of us. It is a crime where abusers use power and control against their victims, and affects children for generations. Domestic violence knows no social, economic, or racial class.

Research shows that children who are exposed to domestic violence often experience depression, anxiety, and an impacted sense of well-being. It is no surprise that children exposed to domestic violence may well become perpetrators or victims when they start their own intimate partnerships.

The Domestic Violence Fatality Review Team (DVFRT) challenges itself to look inward at how agencies respond to domestic violence. This team of dedicated professionals analyzes domestic violence cases and seek to never let a victim die in vain. The DVFRT promotes prevention, education, and awareness in its many recommendations to our community. For example, this team recommended increased training for law enforcement in the area of how children are affected by domestic violence. In 2008, a new law enforcement protocol was signed by each Police Chief in our county, which focuses on the response to children exposed to domestic violence.

Knowledge is power when it comes to domestic violence. We trust the information and data contained in this report will help all citizens take a stand against this crime, and never let a victim die in vain. Victims deserve this. Their children deserve this. San Diegans deserve this.

Sincerely,



Tracy Prior

Tracy Prior is a Deputy District Attorney and Assistant Chief of the Family Protection division of the County of San Diego District Attorney's Office & Co-Chair of the San Diego County DVFRT

Prevalence of Intimate Partner Violence

- Summarizing the results of forty-eight population-based surveys, the World Health Organization found between ten and sixty-nine percent of women worldwide reported a physical assault by an intimate partner.[1]
- Nearly 1.5 million women and 834,700 men are raped or physically assaulted by an intimate partner each year. [2] Intimate partner homicides account for 40-50 percent of all murders of women in the United States.[3]
- In California, about 700,000 women experience intimate partner violence each year — 3 times the national average.[4]
- Each year San Diego County receives about 20,000 calls to law enforcement for domestic violence (ARJIS, 1998-2006). In 2004-2007 there was an annual average of 4,767 calls to the San Diego countywide DV hotline (DV LINKS) with over 30% of those calls including requests for shelter and/or safety planning. There were 28 domestic violence homicides identified in San Diego County in 2006, and 20 identified in 2007 (County of San Diego, HHSA, Office of Violence Prevention, 2007).

DVFRT Membership Roster

Outgoing Co-Chair:
Linda Wong Kerberg, MS, MFT
Rady Children's Hospital
Chadwick Center

Co-Chair:
Tracy Prior, JD
County of San Diego
District Attorney's Office
Family Protection Division

Coordinator:
Terra Marroquin, MSW
County of San Diego
Health & Human Services Agency
Office of Violence Prevention

Co-Chair:
Linda Lake, RN, PHN, MSN
County of San Diego
Health & Human Services Agency
Public Health Nursing

Co-Chair:
Barbara Jimenez
County of San Diego
Health & Human Services Agency
Office of Violence Prevention

Sue Lindsay, Ph.D., MSW, MPH
Institute for Public Health
San Diego State University

Cynthia Burroughs
County of San Diego
District Attorney's Office
Victim Assistance Program

Bethann Schaber, MD
County of San Diego
Medical Examiner's Office

Kristeen McKenzie
Superior Court of California
County of San Diego, Pretrial Services

Patty Chavez-Fallon, LCSW
Superior Court of California
County of San Diego, Family Court Services

Shelley Webb, JD
Office of the San Diego City Attorney
Domestic Violence and
Special Victims Unit

Paula Obrigewitch
County of San Diego
Juvenile Probation Department

Nancy Garcia-Drew, MSW
County of San Diego
Health & Human Services Agency
Aging and Independence Services

Karen Johnson, MSW
County of San Diego
Health & Human Services Agency
Child Welfare Services

Wendy Maramba, MS, MFT
County of San Diego
Health & Human Services Agency
Alcohol and Drug Services

Ellen Stein, Ph.D.
LGBT Community Representative,
Clinical & Forensic Psychology Representative

Andrea Hazen, Ph.D.
Rady Children's Hospital
Child & Adolescent Services
Research Center

Dawn Griffin, Ph.D.
SD Domestic Violence Council President
& Forensic Psychology Representative

Deborah Shriver, MA, MFT
T & I Committee, DV Council
North County Lifeline

Jorge Gonzalez
County of San Diego
Probation Department

Morris Touriel, Ph.D.
United States Navy
Navy Family Advocacy Center

Kristine Rowe, JD
Legal Action Committee, DV Council
Center for Community Solutions

Rachel Solov, JD
County of San Diego
District Attorney's Office
Sex Crimes and Stalking Unit

Lt. Kim McElroy
San Diego Police Department
Domestic Violence Unit

Lt. Dennis Yoshonis
San Diego Sheriff's Department
Domestic Violence Unit

Nancy Graff, MD
University of Calfornia, San Diego
Department of Pediatrics

Sgt. Juan Cervantes
Chula Vista Police Department
Family Protection Unit

Sgt. Jeff Arvan
El Cajon Police Department
Crimes of Violence Unit

Membership as of August, 2008

Introduction

Cross-system collaboration is one of the most important means of providing effective, non-duplicative, and easily accessible services for victims and their families.

Intimate partner violence (IPV) is a major public health and criminal justice concern. It is the leading cause of serious injury to women, accounting for three times as many emergency room visits as car crashes and muggings combined.[4] From 1976 to 2005, about 11% of murder victims in the United States were determined to have been killed by an intimate partner.[5]

In order to prevent intimate partner homicide, steps must be taken to prevent the occurrence and reoccurrence of IPV in general. "Unlike stranger murder, domestic violence is typically not a crime of sudden, unanticipated violence by an intimate partner. Rather, these murders are often the culmination of escalated violence in relationships where there is a history and pattern of abuse..." [6] Whether it is the social service system, healthcare community, legal services, family courts, criminal justice system, or an individual's personal support network – each of these "systems" is responsible for intervening and responding to IPV before the violence escalates into serious injury or death.

While significant progress has been made in addressing intimate partner violence, prevention and intervention efforts are most effective if they can be addressed through collaborative multi-system, agency, and community based approaches.

In accordance with the California Penal Code, the Domestic Violence Fatality Review Team (DVFRT) is a confidential multidisciplinary team that conducts in-depth retrospective case reviews of intimate partner-related fatalities that have occurred in San Diego County. The goal of this process is to identify system gaps in order to make recommendations for systems change and to expand effective violence prevention policy. Information related to selected intimate partner fatalities is gathered and used by the DVFRT to identify and address system issues that can then be used to inform prevention, intervention and service efforts in San Diego County.

The DVFRT recommends that traditional agencies working to address family and community violence (e.g. victim services, child welfare, and law enforcement), should work more closely together and with other non-traditional partners such as alcohol and drug services, mental health, the medical community, and housing/income support programs.

Cross-system collaboration is one of the most important means of providing effective, non-duplicative, and easily accessible services for victims and their families.

DVFRT 2008 Recommendation

We recommend that all systems and agencies work toward fostering and improving relationships, cross-training, and cross-reporting in order to better serve San Diego families.

Overview of the San Diego Domestic Violence Fatality Review Team

In 1995, California Senate Bill 1230 was passed by the state legislature authorizing the formation of county-wide interagency death review teams to examine homicides and suicides related to domestic violence. This legislation resulted in California Penal Code Sections 11163.3-11163.5 and was enacted in January 1996. Domestic violence death review teams were established to ensure that incidents of domestic violence and abuse are recognized and that agency/system involvement with homicide and suicide victims are systematically studied.

In April 1996, at the recommendation of Supervisor Pam Slater-Price, the Board of Supervisors established the County of San Diego Domestic Violence Fatality Review Team (DVFRT) to review intimate partner-related deaths. The County of San Diego Health and Human Services Agency's Office of Violence Prevention was designated to assist in the coordination of the local review team. The DVFRT assembled in October 1996 and began reviewing intimate partner-related deaths a year later.

At that time, there were about ten formal teams nationwide. Today, there are approximately 100. The State and National DVFRT initiatives provide technical assistance and coordination.

There are currently 25 systems/agencies represented on the San Diego DVFRT. Membership is generally limited to representatives that may provide case information. Written and oral communication may be provided to and shared amongst team members for the purpose of the death reviews and is held strictly confidential (PC 11163.3).

San Diego DVFRT Mission

To prevent future deaths from intimate relationship violence by utilizing a systematic, confidential, multi-agency death review process and to identify system gaps in order to expand effective violence prevention policy and coordinated strategies.

Objectives

1) To bring together public and private agencies, identify their respective roles, and generate collaborative opportunities.
2) To collect data from various agencies and systems about the victims and perpetrators of intimate partner-related homicides and suicides and evaluate the coordination of systems and the accessibility of services.
3) To determine the trends and specific indicators for intimate partner-related homicides and suicides and develop policy and program recommendations for violence prevention programs.
4) To increase public awareness and involvement in the prevention and intervention of intimate partner violence.

What Do Fatality Review Teams Do?[7]

- Identify deaths – both homicides and suicides related to domestic violence.
- Examine the effects of all domestic violence interventions that took place before the victim's death.
- Consider changes in prevention and intervention systems to help prevent such deaths in the future.
- Develop recommendations for coordinated community prevention and intervention initiatives to reduce domestic violence.

The DVFRT is a confidential multidisciplinary team that conducts in-depth retrospective case reviews of intimate partner-related fatalities that have occurred in San Diego County.

All known intimate partner-related fatalities are tracked and a select number are chosen for case review.

CASE IDENTIFICATION AND SELECTION

The DVFRT Coordinator tracks all identified intimate partner-related fatalities in San Diego County. These are first identified by one or more of the team's partners, particularly the Medical Examiner, District Attorney's Office, and law enforcement. The Medical Examiner's Office conducts its investigation, determining whether the manner of death(s) was deemed a homicide and/or suicide and provides the cause of death as well as other basic demographic details. Law enforcement and, in many cases, the District Attorney's office provide other case details such as the relationship between the victim and perpetrator. There are cases that are not immediately identified as related to intimate partner violence. Thus, the number of identified intimate partner-related fatalities in this report may be an underestimate of the actual number.

In order for a case to be eligible for review, the fatality must be related to an intimate partner relationship, as defined in the box below. In cases where the intimate partner was not the homicide victim (e.g. friend, new partner, etc. was murdered instead), the review will still include an in-depth examination of the intimate relationship. In many cases an intimate partner-related fatality occurs without the existence of any known intimate partner violence (IPV) and thus a history of IPV is not held as a contingency for review.[8, 9, 10]

"Domestic violence" is abuse committed against an adult or minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship (PC 13700 (b)).

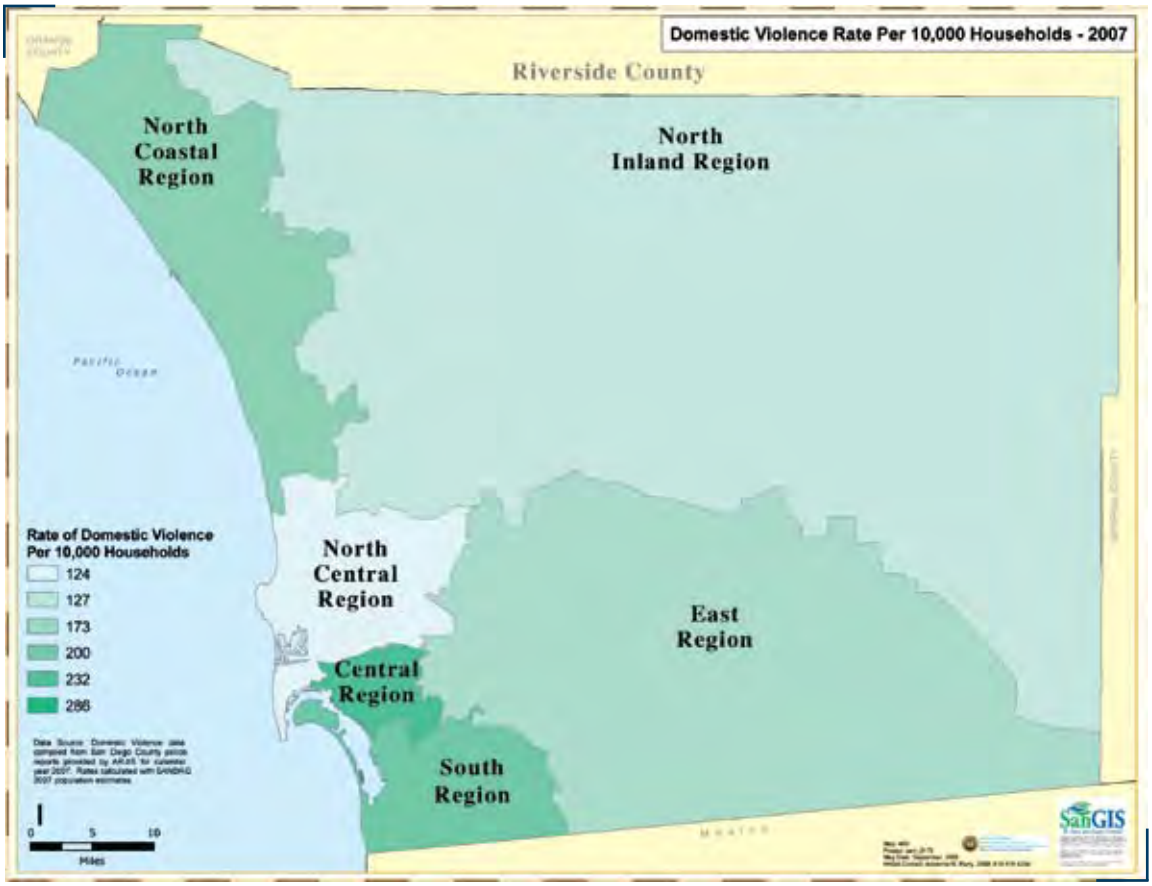
When a perpetrator commits a homicide and is apprehended alive, the DVFRT will only review the case once the perpetrator of the crime has been sentenced through the San Diego Superior Court System. This process averages 18 months. The DVFRT may also review cases in which the perpetrator commits suicide. This review of suicide cases can take place once law enforcement has completed their investigation, which may take a few months. Once specific cases are selected for the DVFRT to review, law enforcement or the prosecutor will present the case to the DVFRT.

Similar to other DVFRTs nationwide, the Coordinator tracks all known intimate partner-related fatalities, but the team reviews a limited number of cases (typically 10-12 per year) in order to conduct more in-depth reviews of selected fatalities. Thus, ***reviewed cases are not a representative sample of all intimate partner fatalities in San Diego***. Once cases have been identified, the Co-Chairs select the cases if at least one system was involved with the perpetrator, victim or their families or the case may illustrate an emerging trend or generate cross-system discussion. The findings and recommendations from DVFRT case reviews that took place during 2006 and 2007 are presented beginning on page 9 of this report.

Intimate Partner Violence Statistics in San Diego County 2006-2007

- In San Diego County, there were 19,886 domestic violence (DV) related incidents in 2006 and 18,874 in 2007.[11] For 2006 and 2007 combined, 6,849 juveniles (0-17) were listed on the witness lists for these incidents and the average age of these children was 10 years (ARJIS, 2006 & 2007).
- There were over 5,200 calls to the San Diego countywide DV hotline (DV LINKS) with over 30% of those calls including requests for shelter and/or safety planning (County of San Diego, HHSA, Office of Violence Prevention, 2007).

Figure 1. Domestic Violence Incidents by HHSA Region 2007



- SDPD received the highest number of DV Cases/Calls for 2007 among all law enforcement jurisdictions, totaling 9,247 (ARJIS, 2007).
- For DV Incidents (Cases/Calls) to SDPD in 2007, the majority of the victims were between 20 and 49 years of age, with the highest number (37%) falling in the age range of 20-29 (SDPD, 2007).
- In 2007, the spouse was the identified perpetrator in 33% of San Diego County Emergency Department discharges where battering or maltreatment was noted; 89% of the victims were female (HASD&IC, CHIP, County of San Diego, HHSA, PHS EMS, ED Database, 2007).
- The Domestic Violence Response Team (DVRT) was called out to 832 *(continued)*

in-person crisis responses and in over half of them the victim had custody of at least one child (County of San Diego, HHSA, Office of Violence Prevention (OVP), FY 2006-2007).

- In 2007, a sample of 222 San Diego domestic violence victims completed the Danger Assessment (a risk assessment tool) during the intake process for DV advocacy services. Over 44% reported their partner had threatened to kill them and 47% said that their partner had attempted to strangle her/him (County of San Diego, HHSA, OVP, DVSF Program, 2007).
- There were over 6,000 Domestic Violence Temporary Restraining Order filings countywide (2007). There were 756 felony cases filed (San Diego Superior Court, FY 2006-2007).
- There were 28 intimate partner-related fatalities in San Diego County in 2006 and 20 in 2007 (County of San Diego, HHSA, Office of Violence Prevention, 2006-2007).

Figure 2. Domestic Violence Incidents 2006 - 2007

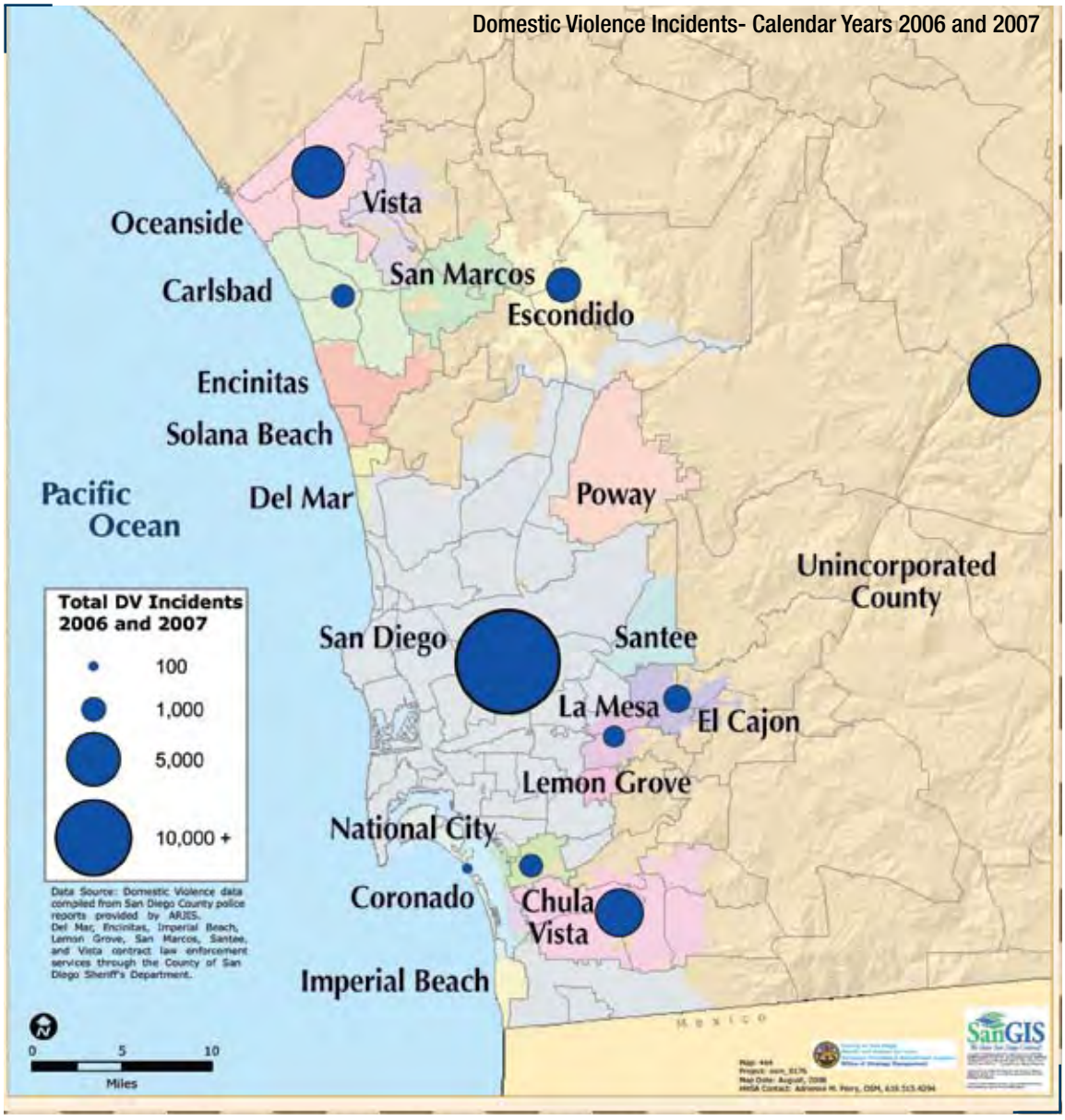
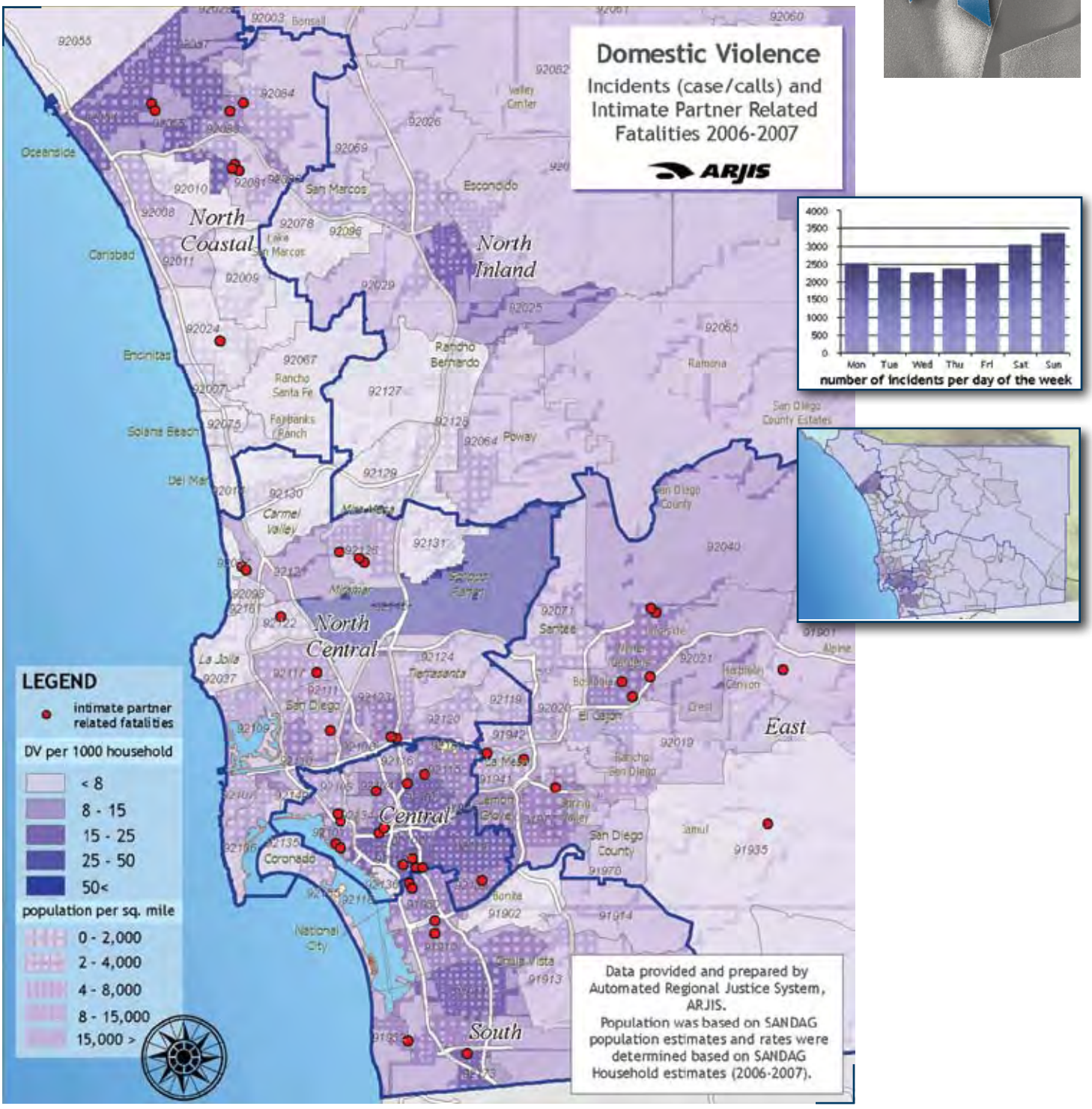


FIGURE 3. DOMESTIC VIOLENCE INCIDENTS AND INTIMATE PARTNER-RELATED FATALITIES 2006-2007



Source: Intimate partner-related fatality data (IPF) was provided by the Office of Violence Prevention, HHSA. This data includes all *known* IPF. Due to undercounting (discussed in this report) this data may not include all IPF.

Note: Intimate partner-related fatalities may include homicides, suicides (perpetrator), and additional homicides resulting from an intimate partner-related incident.

There have been 220 intimate partner-related fatalities identified between 1997 and 2007.

Table 1, below, shows the total number of known Intimate Partner-related Fatalities (IPF) in San Diego County including homicides and suicides. IPF may include homicides, suicides, and additional homicides resulting from an intimate partner-related incident. Homicide victims may include those who were in the intimate relationship with the perpetrator as well as 'additional victims' who were killed as a result of the IPF (e.g. friend, a victim's new partner, co-worker, bystander, family member, etc.). The suicides represented below are perpetrator suicides.

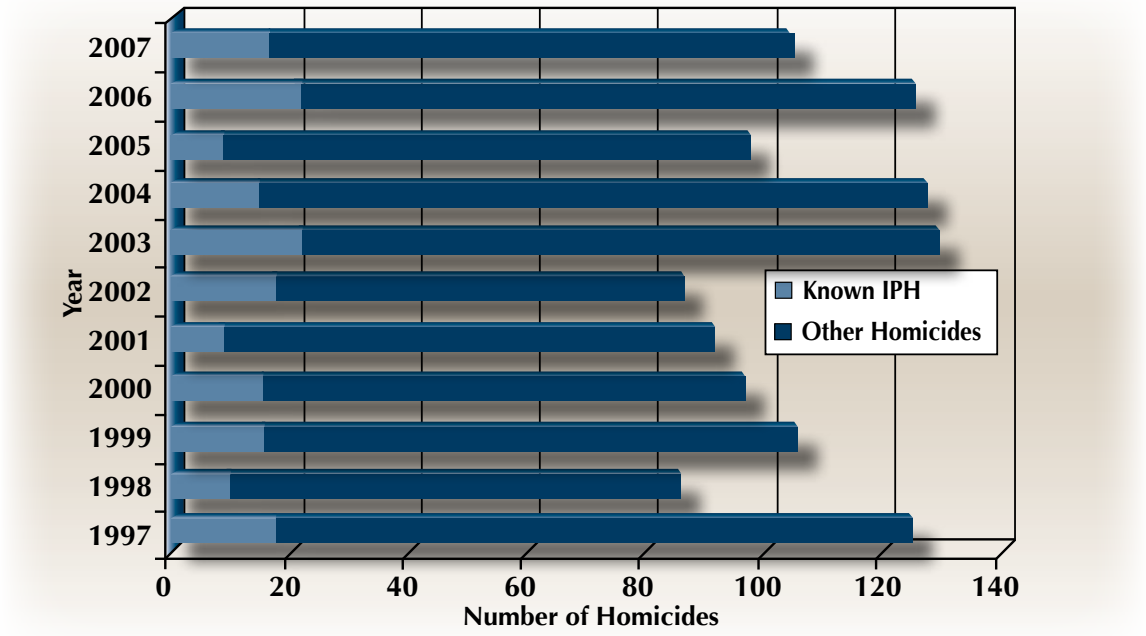
Table 1. Intimate Partner-related Fatalities 1997-2007

	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06	'07
Total Intimate Partner-Related Fatalities	22	13	23	20	13	24	27	17	13	28	20
Homicides	18	10	16	16	9	18	22	15	9	22	17
Suicides	4	3	7	4	4	6	5	2	4	6	3

Note: The table includes all *known* Intimate Partner-related Fatalities (IPF). Due to undercounting (discussed in this report) this data may not include all IPF.
Source: Intimate partner-related fatality data (1997-2007) was provided by the Office of Violence Prevention, HHSA.

Figure 4, below, shows the total number of homicides in San Diego County and the number of those determined to be Intimate Partner-related Homicides (IPH) (a subset of IPF - see table above) from 1997 to 2007. In 2005, 9% of homicides were identified as IPH. This contrasts with 2002 when IPH accounted for 21% of homicides and in 2007 they accounted for 16% of homicides.

Figure 4. Total Homicides and Intimate Partner-related Homicides in San Diego County 1997-2007



Note: The data presented here includes all *known* Intimate Partner-related Homicides (IPH). Due to undercounting (discussed in this report) this data may not include all IPH.
Source: Intimate partner-related homicide data (1997-2007) was provided by the Office of Violence Prevention, HHSA.
Source: Total homicide data (1997-2007) was provided by SANDAG.

Table 2, below, breaks down the number of IPH by the methods used to commit each homicide. Firearms (shooting) have consistently topped the list as the method most used between 1997 and 2007. Stabbing, asphyxia, and blunt force trauma are also quite common with arson and poisoning only occasionally being used.

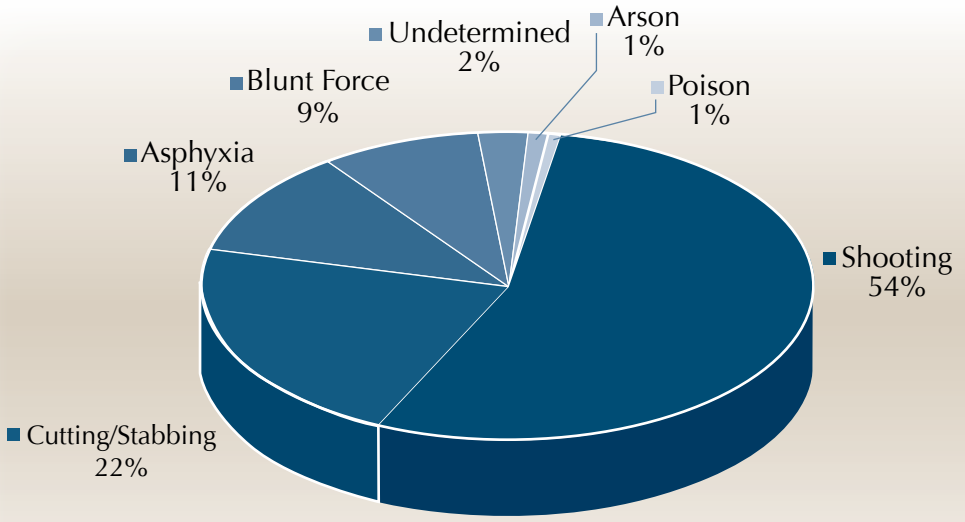
Table 2. Method of Homicide in San Diego County Intimate Partner-related Homicides 1997-2007

Method	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Shooting	10	6	9	5	6	11	10	10	6	8	12
Stabbing/Cutting	4	1	--	4	1	5	8	2	--	8	5
Asphyxia (strangulation, sufocation, etc.)	1	--	5	1	1	2	2	1	2	4	--
Blunt Force	2	3	2	3	1	--	--	2	1	1	--
Arson	--	--	--	1	--	--	--	--	--	1	--
Poison	--	--	--	1	--	--	--	--	--	--	--
Undetermined	1	--	--	1	--	--	2	--	--	--	--
Total Known IPH	18	10	16	16	9	18	22	15	9	22	17

Note: The data presented here includes all *known* Intimate Partner-related Homicides (IPH). Due to undercounting (discussed in this report) this data may not include all IPH.

Source: Intimate partner-related homicide data (1997-2007) was provided by the Office of Violence Prevention, HHSA.

Figure 5. Methods Used in Intimate Partner-related Homicides in San Diego County 1997-2007



DVFRT Recommendations

At the completion of each case review, the team determines the following for each case:

- Whether the victim or perpetrator had been involved with any system prior to the intimate partner-related fatality and whether that system identified intimate partner violence (IPV).
- Whether there were opportunities for intervention at the individual/family level, agency level, or public policy level.

The team then makes recommendations for system or policy changes that could prevent a similar domestic violence fatality in the future. In many cases, team members will take the identified recommendations and return to their agencies to discuss implementation. In other cases, the recommendations made by the team are brought to the community at large for implementation. For example, a relationship has been fostered with the San Diego Domestic Violence Council in which recommendations are brought each month to the meetings and membership takes on the implementation of the recommendations.

As discussed on page 1 of this report, the DVFRT is making the following key recommendation in this 2008 report to improve San Diego County's ability to more effectively respond to domestic violence and to prevent such future tragedies.

Key Recommendation

We recommend that all systems and agencies work toward fostering and improving relationships, cross-training, and cross-reporting in order to better serve San Diego families.

The DVFRT made additional recommendations which have been organized into the following five broad categories. They are described below with examples of how they are being designed and implemented by the community.

1) Public Awareness

Build greater culturally and linguistically appropriate public awareness about intimate partner violence (IPV), as well as children's exposure to domestic violence, teen relationship violence, and intimate partner violence amongst elders.

In many of the cases reviewed by the DVFRT, family members, friends, and even bystanders (such as neighbors) were aware of the IPV between a homicide victim and his/her partner long before the homicide took place. Therefore, public awareness campaigns are essential to ensure earlier identification, resources, and assistance for families.[12]

Some recent public awareness activities in San Diego County include:

- KPBS produced a Public Service Announcement about the prevention of family violence called "I Feel Safe," including phrases in both English and Spanish.
- A short video, set in San Diego, was created by the California Attorney General's Office, Crime and Violence Prevention Center called "First Impressions: Exposure to Violence and a Child's Developing Brain." This video will be shown in parenting classes, trainings to the community, to law enforcement, etc..
- Distribution of posters and resource pamphlets to 44 health clinics and 35 schools. The posters include the DV Links San Diego countywide (bilingual and 24 hour) domestic violence hotline number and address the impact that exposure to domestic violence has on children. Posters that include the Adult Protective Services hotline number and address elder abuse were also distributed to the 44 health clinics.

2) System Specific Education/Training

Provide training and education to professionals whose roles are not specific to intimate partner violence, but are significantly related, such as staff of alcohol and drug treatment programs, legal clinics, healthcare settings, schools, and other "doors" where victims and their families receive services. Train these professionals with the goal of assisting them to respond effectively when family violence is identified. Furthermore, create opportunities for cross-training with an emphasis on relationship building, cross-reporting, accessing services, prevention of duplicative services, and cross-referral/linkage to services. Some examples of on-going efforts include:

- The District Attorney's Office is funding a training video for law enforcement first responders on "The 2008 Domestic Violence and Children Exposed to Domestic Violence Law Enforcement Protocol" and standardized/updated DV Supplemental.
- 20 professionals have received train-the-trainer training on the Safe Futures curriculum which focuses on supporting children and families affected by domestic violence. The trainers are now conducting trainings in such settings as schools, healthcare facilities, and community meetings.
- The court system is an important point of intervention for victims and their families and it is essential that the judiciary is trained in intimate partner violence (IPV), related resources, and in conducting screening/assessment. The DVFRT adapted a risk assessment tool that can be used in the court system. This tool is based on the Danger Assessment[13] and may be used to draw attention to dangerous elements of the relationship that may not otherwise be revealed during court processes. Additionally, this tool may also be used to educate clients on their risks, and about family violence in general. The Legal Action Committee of the Domestic Violence Council will work with the courts to "roll out" this tool in the coming year. It will be used to assist judges in identifying risks that may be present such as threats with weapons, verbal threats to kill, or attempts at strangulation.[14,15]
- "Cut it Out" is a nonprofit national domestic violence awareness program formed in 2003. The program teaches beauty salon professionals and students how to recognize the warning signs of domestic violence and safely refer clients through literature to national and San Diego area assistance resources. Supervisor Pam Slater-Price and District Attorney Bonnie Dumanis introduced an initiative in October 2007, which received unanimous support for the implementation of Cut it Out (CIO) through the County of San Diego. To date, the beauty schools have distributed over 200 CIO referral cards and have connected 3 students to local domestic violence programs–all three students are now safe.

3) Assessment/ Evaluation of Existing Services

Each system/agency that comes in contact with individuals experiencing intimate partner violence must constantly evaluate itself and its programs emphasizing linkages between systems, organizations, and individuals. Some examples of ways that this is being implemented include:

- The Medical Subcommittee of the Domestic Violence Council has decided to conduct an assessment of the healthcare system in San Diego County to identify how family violence is being addressed in that system. The committee will then work with the healthcare system to address any "gaps" in family violence identification/screening, services, training, etc..
- ARJIS is developing an online system for medically mandated ("suspicious injury") reports though the Domestic Violence Communication System (DVCS). This system is expected to make

The DVFRT continues to identify the impact that exposure to violence has on children and the need for prevention and early intervention.

reporting easier for medical staff, reducing the time it takes for reports to reach the appropriate law enforcement jurisdictions. It is also expected to ease the process for law enforcement due to a reduction in the number of misrouted reports.

4) Children Exposed to Violence

The DVFRT continues to identify the impact that exposure to violence has on children and the need for prevention and early intervention. Two initiatives in San Diego County addressing this issue are:

- Raising the Bar is an initiative sponsored by the County of San Diego, HHSA Office of Violence Prevention and the Institute for Public Health at San Diego State University with the goal of developing a System of Care relating to children exposed to violence through a comprehensive pubic health approach. Through a series of regional dialogues, strengths and barriers are being identified in the context of the Model Continuum: awareness, prevention, identification/screening, assessment, treatment/intervention, and evaluation. Each region is developing their own vision for children and families experiencing violence and through this process a San Diego Countywide model of care will be formed.
- Safe Start is a federally funded four-year pilot project being conducted in the Central, North Central and East HHSA regions and aims to improve access to, delivery of, and quality of services for young children exposed to domestic violence. Safe Start has two primary goals: 1) to develop a public/private partnership aimed at improving outcomes for DV-exposed children and their families involved in Child Welfare Services (CWS); and 2) to provide culturally relevant and evidenced based interventions to children and families impacted by DV.

5) Protocol/Policy

The DVFRT recommended in the 2006 report, and continues to recommend, the updating of existing protocols regarding domestic violence identification and response. Some protocol/policy updates that have occurred in the past two years include:

- In December 2007, the Chiefs of Police signed off on an updated version of San Diego's law enforcement protocol: "The 2008 Domestic Violence and Children Exposed to Domestic Violence Law Enforcement Protocol." In addition to necessary updates, it also now includes an entire section focused on children exposed to domestic violence and the removal of firearms from domestic violence incidents. At the same time, the DV Supplemental form - completed by law enforcement when a domestic violence incident has taken place – was standardized countywide and now includes additional fields to capture information about children who are in the custody of the victim or suspect, as well as additional firearms-related information.
- The "Child Victim-Witness Protocol" was updated in June 2006. It addresses how law enforcement, child welfare services, mental and medical health, and the judicial system may best "...assist and protect all children, both victims and witnesses, who are exposed to any kind of abuse through multi-disciplinary collaborative efforts."
- County of San Diego HHSA Public Health Nursing (PHN) adopted a "Family Violence Screening Protocol" early in 2008 and trained all of their staff in its implementation. Public Health Nurses in many settings are now routinely screening, assessing, and conducting safety planning and referrals for individuals experiencing abuse.

Cases Selected for Review 2006-2007

Twenty-five cases were reviewed by the DVFRT between January 2006 and December 2007. In these cases there were twenty-five homicide victims who were the intimate partner of the perpetrator and five additional homicide victims. Victims may include those who were in the intimate relationship with the perpetrator as well as 'Additional Victims' (i.e. friends, co-workers, bystanders, family members, etc.). The team also examined an attempted murder case, which will be addressed on page 21.

There were two perpetrators who each killed two of their intimate partners. For the purposes of this table they are represented as "Perpetrator killed (2) Intimate Partners." One of these perpetrators is represented in two cases selected for full review. The other perpetrator killed two intimate partners but one of the murders took place outside of San Diego County. Only cases in which the incident occurred within San Diego County are reviewed by the team; thus the second case was not included in the data represented further on in this report.

Table 3. Types of Cases Selected for Review 2006-2007

Situation	Reviewed Cases
Perpetrator killed (1) Intimate Partner	13
Perpetrator killed (1) Intimate Partner and Committed Suicide	6
Perpetrator killed (1) Intimate Partner and (1) Additional Victim	2
Perpetrator killed (2) Intimate Partners	2
Perpetrator killed (1) Intimate Partner and (2) Additional Victims	1
Perpetrator killed (1) Additional Victim	1

Note: This is not a representative sample of cases in San Diego County.
Note: In one of the cases where the perpetrator killed his intimate partner and an Additional Victim (AV), the AV was a fetus who was seven months in-utero. The state of California does not differentiate between the murder of a fetus (with definable gestational features) and the murder of a person – they are both prosecutable under the same law.
Note: One reviewed case concerned a man who was murdered because of his association with the perpetrator's former girlfriend, which is an example of a case in which the intimate partner was not killed but one AV was murdered.

Table 4, below, describes the characteristics of those cases selected for review. The perpetrators in the cases selected for review were overwhelmingly male and were evenly distributed across all age groups (the mean age of perpetrators was 43 years, ranging from 19-85). Also represented are characteristics of the victims in the cases selected for review. The victim data includes all victims (intimate partners as well as additional victims). Over eighty percent of victims in the reviewed cases were female and more than half were white. Victims were generally younger than perpetrators. However, the mean age of victims was 40 years (ranging from fetus to 88), which is similar to the perpetrator mean age of 43.

Table 4. Demographic Characteristics in Cases Selected for Review 2006-2007

Characteristics	Perpetrators Number	Perpetrators % of Total	Victims Number	Victims % of Total
Gender				
Male	24	96%	5	17%
Female	1	4%	24	83%
Race				
White	9	36%	17	59%
Black	10	40%	7	24%
Hispanic Mexican	4	16%	2	7%
American Indian	1	4%	3	11%
Asian Indian	1	4%	-	-
Age				
Under 18	-	-	1	3%
18 - 24	3	12%	6	21%
25 - 34	7	28%	8	28%
35 - 44	4	16%	2	7%
45 - 54	3	12%	5	17%
55 - 64	5	20%	3	10%
65+	3	12%	4	14%

Note: This is not a representative sample of all cases in San Diego County.
Note: Race categories are assigned by the Medical Examiner.
Note: This data includes the same perpetrator twice as he was the perpetrator in two different reviewed cases, in which the homicides occurred at a different point in time.
Note: The victim data includes all victims, including intimate partners and additional victims.
Note: This data does not include one victim mentioned above who was murdered outside of San Diego County.
Note: The additional victim under 18 was a fetus.

Trends Amongst Intimate Partner Fatality Cases

The length of the relationship between the perpetrator and their intimate partner varied dramatically across reviewed cases (from under two months to over 60 years), with a mean of nearly eight years. These fatalities typically took place in a house (32%) or apartment (39%) setting. The type of relationship was also mixed; 13 (52%) were dating, 7 (28%) were married, 3 (12%) were separated and 2 (8%) had formerly dated. Another important area examined was the age of the intimate partner when they met the perpetrator. In 23 cases the age of the victim when she/he met the perpetrator was known. The mean age was just under 32, ranging from 13 to 56 years.

A man used a hammer to beat his girlfriend to death in an apartment they shared. He had two prior convictions for domestic violence. A 'stay away' order had been placed; unfortunately the victim had persuaded a judge to remove the order. A neighbor witnessed the perpetrator carrying a hammer and behaving extremely agitated just prior to the homicide. The perpetrator was high on methamphetamine at the time of the homicide.

Lethality Risk Factors

Domestic violence risk assessments have been developed in recent years to determine levels of risk in abusive intimate partner relationships. The risk assessments generally identify the level of risk of fatality and are used in the field by law enforcement and health and social service agencies specifically for safety planning with victims of abuse. In addition, these tools provide a common language across all agencies for talking about victimization. Jacquelyn Campbell, a well known researcher in the field of intimate partner violence, reported that there is a "need for law enforcement, the courts, victim assistance programs, and the hospital emergency departments to have valid and systematic means of evaluating IPV cases and identifying those most likely to escalate to lethality."[14] In an 11 city study of intimate partner homicides of women, she found that only about half of the women who were victims of actual or attempted intimate-partner homicides accurately assessed their risk correctly.[16]

Some major lethality risk factors include:[13,14,15,16,17,18]

- Estrangement- (i.e. the victim was leaving the relationship, legal seperation, etc.).
- The perpetrator has used or threatened to use a gun, knife, or other lethal weapon against the victim
- The perpetrator has threatened to kill or injure the victim
- The perpetrator has tried to strangle (choke) the victim
- The perpetrator has inflicted violence during pregnancy
- The perpetrator is controlling and/or constantly jealous
- The perpetrator has forced the victim to have sex
- The perpetrator is avoiding arrest for domestic violence
- The perpetrator is unemployed

In sixty-four percent of cases the intimate partner homicide victim had recently separated or was in the process of separating his or herself from the abuser at the time of the murder.

Access to a gun, previous threats of deadly violence, and estrangement are the strongest predictors of female homicide in abusive relationships in addition to a prior history of IPV.[16]

General recommendations to help reduce risks to victims of intimate partner violence were outlined by Campbell.[16] These are paraphrased below.

- Firearms should be removed from the place of residence.
- Victims should not inform perpetrators in person that they plan to leave them.
- Victims in severe danger should be urged to enter a shelter.
- If the victim left the perpetrator so they could attend batterer's treatment, the victim should stay separated from the perpetrator until the completion of the treatment.
- Stalking laws should be applied to arrest the perpetrator if possible.
- If the victim is taking steps to minimize risk, be sure to include steps to reduce risk to children.
- Help the victim to engage his/her support systems.
- The victim should be encouraged to begin to put money away.
- Identify depressed (and suicidal) perpetrators in an attempt to get him/her a mandated suicide assessment and mental health hospitalization, as appropriate.

The San Diego County DVFRT identified the following trends amongst the cases reviewed in 2006-2007:

Many perpetrators had prior contact with the criminal justice system. Seventy-two percent (72%) of perpetrators had a criminal history of domestic violence or some other crime.

Firearms were the weapon used most often in the murder. In forty-eight percent (48%) of cases reviewed, the perpetrator used a firearm to kill their intimate partner (IP).

Few IP victims obtained a protective order. Thirteen percent (13%) of intimate partner homicide victims had an active protective order at the time of their murder and seventeen percent (17%) ever (past and present) had a protective order.

Many perpetrators had made prior threats on the intimate partner's life. Forty percent (40%) of perpetrators had made graphic threats to kill their intimate partner.

Victim was leaving or left the perpetrator. In sixty-four percent (64%) of cases the intimate partner homicide victim had recently separated or was in the process of separating his or herself from the abuser.

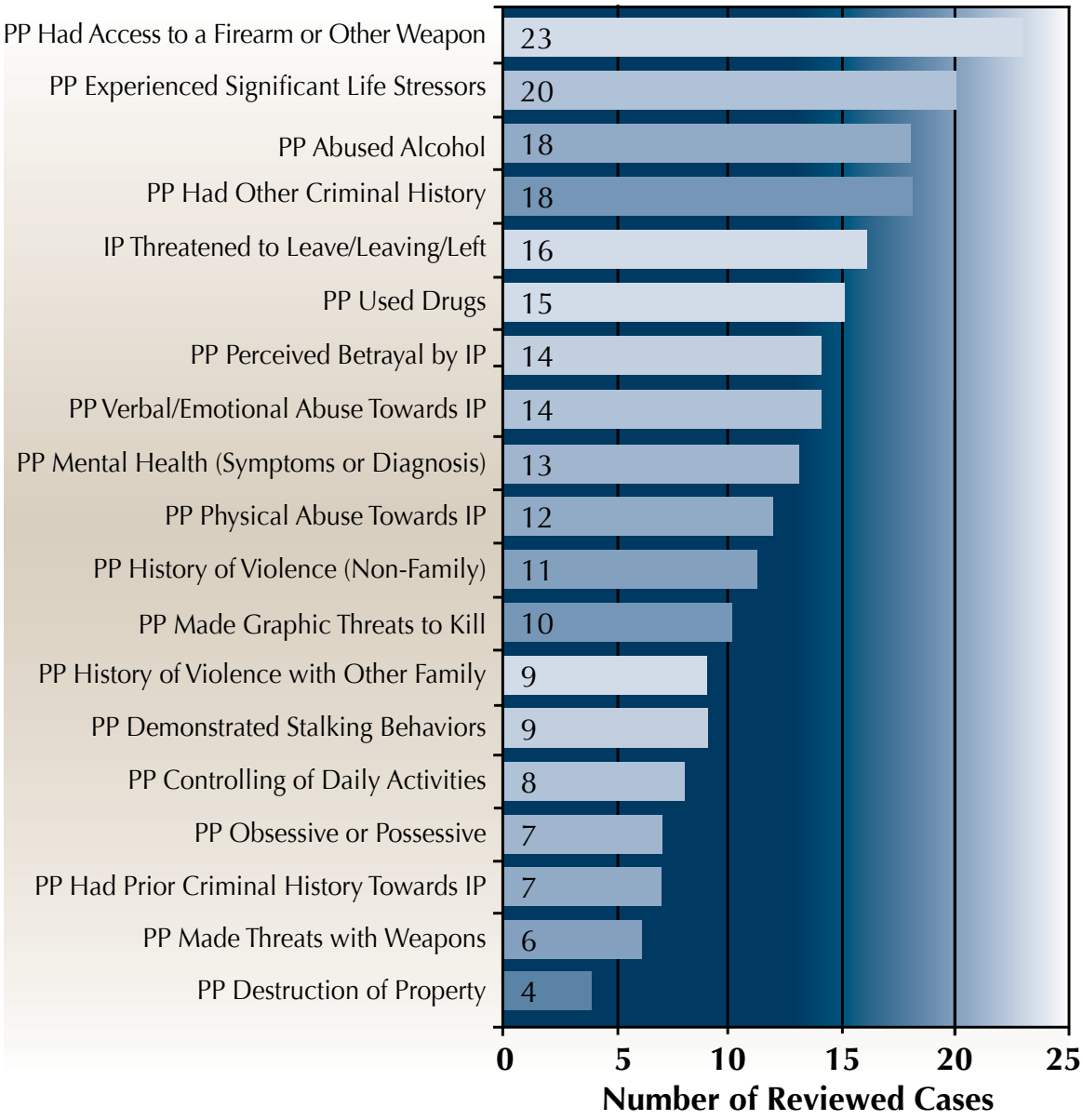
Many perpetrators committed suicide after killing their partner. In twenty-four percent (24%) of cases, the perpetrator killed him/her self after killing his/her intimate partner.

Many perpetrators were unemployed. Thirty-two percent (32%) of perpetrators were known to have been unemployed at the time of the homicide.

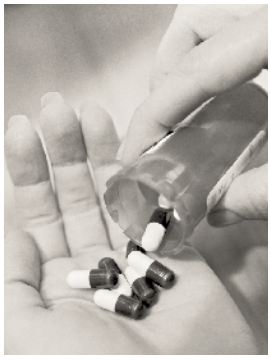
Identified Risk Factors

During each case review, information about the perpetrator and his/her intimate partner is collected. The figure below reflects the number of cases in which risk factors were present. In 56% of the cases reviewed during 2006-2007, 10 or more of these risk factors were present (of the 19 selected here for demonstration).

Figure 6. Number of Reviewed Intimate Partner-related Fatality Cases with Identified Risk Factors



Note: 'PP' denotes perpetrator; 'IP' denotes intimate partner.
Note: The data presented in this figure represents only those fatality cases for which a full case review was completed and is not representative of all intimate partner-related fatalities in San Diego County.



Topics of Special Interest

During the past two years, the DVFRT made particular note of three areas: substance abuse, children exposed to IPV, and attempted murder.

Substance Abuse

Methamphetamine Use & Intimate Partner Homicide

Overview:

In recent decades, methamphetamine use has soared across America with far reaching implications. When used in excess, methamphetamine ("speed" or "crystal") may cause such symptoms as irritability, severe anxiety, depression, paranoid states, aggression, and/or violent behavior. The U.S. Department of Justice reported that chronic abusers of methamphetamine frequently behave in a violent and erratic manner.[21]

A survey conducted by the National Association of Counties (NACO) found that 88% of respondents reported that arrests where methamphetamine was involved had increased in their county in the last five years.[20] In a report produced by San Diego Association of Governments (SANDAG) on adult arrestee drug use in San Diego County, it was found that 62% of female and 55% of male arrestees in San Diego County acknowledged that they had used methamphetamine sometime in their lifetime.[23]

In the NACO survey, 62% of respondents indicated that domestic violence had increased because of the presence of methamphetamines in their county.[20] In a 2003 study conducted by SANDAG of domestic violence victimization among arrestees in San Diego County, it was found that of those who tested positive for methamphetamine, 48% reported that they had experienced "lifetime" abuse and 35% had experienced "recent abuse."[24] Adding to the problem, in situations where both members of an intimate relationship are users, the victims of IPV are often dependent on the perpetrator to supply them with the drug.[22]

DVFRT Case Review Findings:

When combined, over one half (54%) of the cases reviewed in 2006-2007 involved a victim or perpetrator who was a current user or had a known history of methamphetamine use.

Table 5. Methamphetamine Use & Intimate Partner Homicide (n=24)

Meth. Use	Victim	Perpetrator	Both***
Current Use*	7 (29%)	8 (33%)	5 (21%)
History**	8 (33%)	10 (42%)	5 (21%)

*Current Use: Detected in the system at the time of the murder, as indicated by post-mortem toxicology screen results or law enforcement records.

**History of Use: As reported by witness testimony or via system records (LE, CWS, etc.).

***Both the intimate partner victim *and* perpetrator abused methamphetamine.

Note: Due to delay in apprehending and retaining perpetrators following homicides, it is often uncertain whether they were under the influence at the time of the murder.

Note: The data in this table reflects cases in which an intimate partner homicide occurred.

Note: This data does not include one victim mentioned earlier who was murdered outside of San Diego County.

Note: This data includes the same perpetrator twice as he was the perpetrator in two different reviewed cases, in which the homicides occurred at different points in time.

Alcohol Abuse & Intimate Partner Homicide

Overview:

Although causation cannot be proven, many studies have suggested that alcohol is a risk factor for intimate partner violence (IPV), albeit one of many.[26, 27] Other risk factors that commingle with alcohol use include aggression and power imbalances.[26] Essentially, alcohol is not the cause of IPV. However, it can combine with other risk factors to increase the intensity or frequency of the IPV. Alcohol has also been found to be a "trigger" of criminal violence.[27] Among San Diego County adult arrestees, 9% reported that they had pushed, shoved or hit an intimate partner or one of their children after using drugs or alcohol.[24]

DVFRT Case Review Findings:

When combined, 79% of the cases reviewed in 2006-2007 involved a victim or perpetrator of intimate partner homicide who was a current user or had a known history of alcohol abuse.

A man shot his girlfriend, a mother of four children, in the head. She was seven months pregnant with his child at the time and the fetus did not survive. He had a long criminal history and had used alcohol and methamphetamine prior to the homicide.

Table 6. Alcohol Abuse & Intimate Partner Homicide (n=24)

Alcohol Abuse	Victim	Perpetrator	Both***
Current Use*	7 (29%)	10 (42%)	6 (25%)
History**	11 (46%)	18 (75%)	11 (46%)

*Current Use: Detected in the system at the time of the murder, as indicated by post-mortem toxicology screen results or law enforcement records.

**History of Use: As reported by witness testimony or via system records (LE, CWS, etc.).

***Both the intimate partner victim and perpetrator abused alcohol.

Note: Due to delay in apprehending and retaining perpetrators following homicides, it is often uncertain whether they were under the influence at the time of the murder.

Note: The data in this table reflects cases in which an intimate partner homicide occurred.

Note: This data does not include one victim mentioned above whom was murdered outside of San Diego County.

Note: This data includes the same perpetrator twice as he was the perpetrator in two different reviewed cases, in which the homicides occurred at different points in time.

Children are often present during violent incidents and their exposure to this violence can have short and long-term detrimental effects. Witnessing violence for a child can take the forms of seeing, hearing, actively taking part, and/or experiencing its aftermath.

Children Exposed to Intimate Partner Violence and Fatality

Overview:

Approximately 15.5 million U.S. children are estimated to live in families in which intimate partner violence occurs.[28] Exposure to domestic violence, child abuse, and the violent death of a parent has enduring effects that will last throughout one's lifetime.[28,29,31,35] Children are often present during violent incidents and their exposure to this violence can have short and long-term detrimental effects.[28,30] Witnessing violence can take the forms of seeing, hearing, actively taking part, and/or experiencing its aftermath.[31,35] For the past twenty-five years, researchers and practitioners have focused attention on children as witnesses, and only recently has this exposure been considered for many as a violation of community standards.[30] In the presence of violence, children are deprived of healthy emotional, social, cognitive, and physical growth. In addition, physiological changes in the development of a child's brain due to the traumatic exposure may occur and can contribute to a transgenerational cycle of violence.[32] Adults are the product of what they learn as children; violence is a learned behavior.

In recent years, the DVFRT has worked towards collaborating more closely with the San Diego County Child Fatality Review Team (CFRT) and the San Diego County Elder Death Review Team (EDRT). Some important findings from these teams include:

- The EDRT has found that of the suspicious deaths they reviewed and included in their most recent report, the majority were suspected to be at the hands of family members, with the most common perpetrator being an adult child (50%), followed by a spouse (29%).
- The CFRT found that of 321 cases reviewed between 2001 and 2005, 24 were the result of Child Abuse/Neglect (CAN) related homicides and many of these had previous child welfare involvement.

Trauma for families can extend long after the event itself. The majority of severely and chronically distressed children can be found in systems such as Child Protective Services, mental health programs, substance abuse treatment programs, the juvenile justice system, and the criminal justice system.[33] It is becoming more widely recognized that early identification, collaboration, and sharing of resources are fundamental steps for success in addressing the specific needs of children.[34]

"One of the most concerning aspects arising from the case reviews of the DVFRT is of the children who are present or who witness the homicide of one parent at the hands of the other. Every member of the team has grave concerns regarding the aftermath for these children. As a team we are acutely aware of the need to connect children to essential services for healing their trauma.

We ask the community to join us in developing more efforts to prevent children's exposure to violence and to commit to intervene as early as we can in the lives of children who are currently in homes where family violence is occurring."

Linda Wong Kerberg
Outgoing Co-Chair of the DVFRT

Case Review Findings:

The DVFRT found that in 54% of cases reviewed in 2006-2007, victims and/or perpetrators had at least one minor child. Of these minor children, 11 of 38 were exposed to the homicide through direct observation, witnessing the body(s), seeing the blood, or by being present at the scene when the fatality(s) occurred. There was also one fetus that was killed when her mother was shot to death.

Table 7. Taxonomy of Exposure: Children Exposed to Intimate Partner Fatality[35]

Type of Exposure	Example of Exposure	Reviewed Case Findings
Exposed Prenatally	Fetus was alive when the assault occurred	Both fetus (7 months in utero) and mother died
Child Present	Child was present when the assault occurred	Nine (9) children were present
Child Witness	Child directly observed or heard the assault	Six (6) children witnessed the homicide
Child Observed Initial Effects	Child sees immediate consequences (body, blood, etc.) of the assault	Ten (10) children witnessed the initial effects

Note: These categories are not mutually exclusive. For example, the same child may be present, witness, and observe the initial effects.

Attempted Murder: What Can We Learn?

These cases can provide information that cannot be captured through fatality review, such as the experience of the victim and her/his children. For the purpose of this report, one survivor has agreed to share her story.

Overview:

For the first time, the DVFRT has begun to examine attempted murder cases. These cases can provide information that cannot be captured through fatality review, such as the experience of the victim and her/his children. For the purpose of this report, one survivor has agreed to share her story. (All names have been changed).

Her Story:

When Valerie was 22, she began dating Mark. Soon after Valerie and her 5-year-old son moved in with Mark. Mark was very attentive to her and she fell in love with him.

Mark began abusing both Valerie and her son almost immediately. Mark was extremely jealous and controlling of her and would often accuse her of cheating. He would follow her on her errands and show up early at home to "catch her cheating." He often verbally threatened her saying that he would kill her, her children, and her family. He controlled her daily behavior telling her what she could and could not wear; he made her eat off of the floor; and he destroyed her property. Valerie worked but was forced to give him her pay checks. He pressured her to drink and to take drugs with him including Methamphetamine and Marijuana. He limited her contact with her family and friends, eventually ending it all together. He threatened her with knives and guns on a few occasions. He was physically abusive on a weekly basis, including punching her in the stomach, ribs, and face; kicking her; covering her face with pillows; pulling her hair; hitting her with the butt of his gun; forcing sex; and strangling her causing her to lose consciousness.

Mark had also been abusive towards Valerie's son. He would hit him and force him to take cold showers in the middle of the night. He witnessed the abuse of his mother on a frequent basis. Valerie would pack up their belongings to leave but her son would say, "No, Mom, he's just going to find us." Mark once stuck her son's hand in a bucket with water and put in a cable that was hooked up to a light as means of punishing him. Valerie felt helpless and went to another room and cried.

The survivor in this case eagerly volunteered to be interviewed by DVFRT membership. She wants other victims of abuse to know that there is assistance available. When asked what recommendations she has for the team for helping victims of abuse while they are still in the relationship, she said: "I want professionals to know that they need to reach out to individuals who are suffering from domestic violence because they cannot always do so for themselves." She also now recognizes the impact that the violence had on her child and wants other victims of abuse to learn from her experience so that their children may not suffer in this way.

The abuse she suffered ended in a final assault in which the perpetrator broke her vertebrae causing her to become quadriplegic. The perpetrator in this case is serving two life sentences. Despite her disabilities, she has become an advocate for domestic violence prevention and organizes marches, reaches out to victims, and frequently shares her story with the media.

Her message: "The first step someone has to take is to stop and have the courage and anger to tell someone what is happening and have self-respect and love for one's self. If there are kids involved then you need to defend them with claws and teeth because the damage it causes is unforgivable. My abuser damaged me mentally and physically and my family. Now that I'm free I can make my own decisions. I try to give all the advice [to other victims of IPV] that in that moment I could not take because of fear. I think that there's nothing more important than life."

Team Accomplishments

Since the release of the last report, the DVFRT recognizes the following accomplishments:

- The San Diego Domestic Violence Council has recently agreed to become the implementation "arm" for the recommendations that result from DVFRT case reviews. The DVFRT has also added a seat in its membership for the DV Council president who assists in bringing applicable recommendations to the Council each month. The DVFRT Coordinator will track the implementation of recommendations.
- The development of a DVFRT database for tracking intimate partner-related fatalities and storing case review data has been completed. This will increase the data tracked and analyzed and will facilitate reporting of case review data and team findings.
- The children of the victims and perpetrators have become an important focus for the team. Special presentations, in depth discussion, and increased information gathering have taken place around this critical issue.
- In collaboration with Barbara Ryan, former director of Clinical Programs at the Chadwick Center for Children and Families, the DVFRT Co-Chairs presented "What About the Children: Lessons Learned from the Domestic Violence Fatality Review Team" at the 22nd Annual San Diego International Conference on Child and Family Maltreatment.
- The DVFRT was invited by the San Diego Meth Strike Force to describe the relationship between DV fatality and methamphetamine. Linda Wong Kerberg (former DVFRT Co-Chair) presented on the panel "Meth and Family Violence: Across the Age Span" in September 2007.
- Each year, the Not to Be Forgotten Rally commemorates the lives of victims who were murdered by intimate partners. The DVFRT also provides all of the information about the DV fatalities for the rally. Many members of the DVFRT participate in this rally each year.
- The DVFRT has developed a collaborative relationship with the San Diego Elder Death Review Team (EDRT). The DVFRT and EDRT conducted joint reviews for four cases of intimate partner-related fatalities that involved elders in February and October 2007. Furthermore, the DVFRT Coordinator now participates on the EDRT and many members of the EDRT are on the DVFRT.
- In collaboration with the Elder Death Review Team and Child Fatality Review Team, the DVFRT presented "Fatality Review Teams: Three Teams Discuss Familial Homicide Across the Generations" at the 12th International Conference on Violence, Abuse, and Trauma (IVAT).
- The DVFRT presented "The San Diego County Domestic Violence Fatality Review Team: What We have Learned About Intimate Partner Violence" at the 12th IVAT Conference.

Future Focus

The team continually seeks to improve its processes and is responsive to emerging regional priorities and trends:

- The DVFRT would like to gather more information on the backgrounds of the victims and perpetrators in the cases reviewed in order to better understand the dynamics that lead to intimate partner fatalities. Currently, information is limited to information the team is able to access via its system/agency records and contacts. For this reason, the team would like to begin conducting family interviews. Presently, family members, friends, coworkers, etc. are invited to speak at the case review, but interviews are not yet taking place.
- The team has reviewed one attempted murder case and would like to continue to conduct these case reviews. There is much that may be learned from these cases in terms of better identifying points of intervention and how to improve system response to family violence.
- Now that the confidential DVFRT database has been created, the team can work towards increasing the information that it is bringing to case review. Furthermore, the database may be enhanced to include a "Network Analysis" which will allow the team to better observe the many opportunities for intervention that may occur throughout the relationship of the victim and perpetrator prior to the fatality.
- The team has gained much insight through the recent collaboration with the Elder Death Review Team and the Child Fatality Review Team. The DVFRT would like to continue joint reviews with the EDRT and to begin joint reviews with the CFRT.

For More Information

County of San Diego, Health and Human Services Agency, Office of Violence Prevention: (858) 581-5800
http://www2.sdcounty.ca.gov/hhsa

California Domestic Violence Death Review Teams:
http://www.safestate.org/index.cfm?navId=352

National Domestic Violence Fatality Review Initiative:
http://www.ndvfri.org

Resource Links

San Diego County DV Hotline (888-DV-LINKS, Countywide 24-hour, Bilingual):
http://www2.sdcounty.ca.gov/hhsa/ServiceDetails.asp?ServiceID=919

San Diego Domestic Violence Council:
http://www.sddvc.com/home.html

San Diego County Sheriff's – DV Information:
http://www.sdsheriff.net/CID/services_dvwhatis.html

County of San Diego District Attorney's Office:
http://www.sdcda.org/helping/index.php

San Diego Regional DV Resources Phone Guide: Contact the County of San Diego, HHSA Office of Violence Prevention (858) 581-5800
http://www2.sdcounty.ca.gov/hhsa/ServiceCategoryDetails.asp?ServiceAreaID=13

The San Diego County Domestic Violence and Children Exposed to Domestic Violence Law Enforcement Protocol - Posted on the SDDVC site:
http://www.sddvc.com/home.html

California Partnership to End Domestic Violence:
http://www.cpedv.org/resources.html

California Attorney General's Safe from the Start:
http://www.safefromthestart.org

Family Violence Prevention Fund:
http://endabuse.org

A Statewide Law Enforcement Protocol -Children Exposed to Domestic Violence:
http://www.safefromthestart.org/pdfs/Protocol.pdf

Danger Assessment: Intimate Partner Violence Risk Assessment (J. Campbell):
http://www.dangerassessment.org

U.S. Department of Justice: Domestic Violence:
http://www.usdoj.gov/whatwedo/whatwedo_hdv.html

Office on Violence Against Women, United States Department of Justice:
http://www.ovw.usdoj.gov/

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County of San Diego

Health and Human Services Agency

County Board of Supervisors
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Bill Horn, District Five

Chief Administrative Officer
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Health & Human Services Agency Director
Nick Macchione

What is the SDDVC?

The SDDVC currently has a membership of over 300 agencies and individuals and functions through a network of seventeen working committees. The members of the Council range from private nonprofit social service providers, hospitals, and law enforcement agencies, to local governments, and community clinics. Each committee has a volunteer Chair from a local organization who reports monthly to the full SDDVC. The SDDVC is overseen by a volunteer Executive Committee that is elected annually. This group consists of a President, President Elect, Secretary, Secretary of Finance, and Membership Coordinator. The Executive Committee is overseen by an 18-member volunteer Advisory Board.

San Diego Domestic Violence Council
707 Broadway, Suite 700
San Diego, CA 92101

Phone: 619-533-6041
Fax: 858-272-5361
Membership E-mail: caity@ywcasandiego.org
SDDVC E-mail: dgriffin@alliant.edu

To bring people together—in coalitions and committees—to build healthy families in San Diego County.

Membership Benefits & Information

www.sddvc.org

Many members – one voice.

The San Diego Domestic Violence Council (SDDVC) has a vision. As a convener of people in coalitions and committees, the SDDVC strives to build a community of healthy, violence-free families. We are an organization which embraces collaboration and exchange, controversy and creativity, and at its core – change. The mission of the SDDVC is to develop, promote and enhance creative prevention and intervention initiatives, which will reduce the amount of violence in intimate relationships in San Diego County.

The SDDVC Membership "rallied" together in October 2009 to kick off the EVERYONE campaign.

To respond to our families and neighbors, the SDDVC works to connect people. As a collaborative of over 300 individuals and organizations, we work together to address domestic violence as a united movement.

Many members – one voice.

More is possible with *your* membership. Please, consider giving your voice and your contribution to the San Diego Domestic Violence Council.

Benefits of Membership

- Community forum—monthly meetings, e-blasts, and community trainings
- Newsletter—free event, job, calendar, and media postings exclusively for members
- Agency logo placement on "Not to be Forgotten Rally 2010" Materials
- Access to the SDDVC Mini-grant application process (twice per year)
- Letters of Support / Memorandums of Understanding from the SDDVC

Join us!

The San Diego Domestic Violence Council Meets Monthly on the **3rd Wednesday** of the month!

Networking begins at 11:30am

Council Meeting (members & guests!) begins at 12pm

Meeting concludes at 1:30pm

- We are generously hosted by Price Charities at: 4305 University Ave. San Diego, CA 92105

Membership Form

PERSONAL/AGENCY INFORMATION

Name of Agency or Individual

_____

Authorizing Official & Title

_____

Address

_____

City _____

Zip Code _____

Phone _____

Fax _____

E-mail _____

MEMBERSHIP INFORMATION

☐ **$20 - Individual Membership**

☐ **$40 - Agency Membership**

☐ New Member

☐ Renewing Member

****Current Committee Attendance:**

_____

☐ I/Our agency would like to make an additional contribution to support the critical work of the San Diego Domestic Violence Council.
Amount $ _____

Kindly send ***check or money order*** payable to the San Diego Domestic Violence Council, ***along with this form*** to:

707 Broadway, Suite 700

San Diego, CA 92101

Attn: Membership Coordinator

Domestic Violence Risk Assessment Bench Guide

A research-based bench guide for use by San Diego Superior Court judges at all stages of family, Order for Protection, civil or criminal involving domestic violence.

This tool was made available to assist you in assessing some of the risks associated with domestic violence situations. It is intended to provide you a checklist for risk-related items for your consideration as you review the case. Please note that this checklist does *not* address all forms of risk related to domestic violence. The presence of these factors can indicate elevated risk of serious injury or lethality. The absence of these factors is not, however, evidence of the absence of risk of lethality. **Please *not* include this form in the court file.**

	Mark Yes or No	
1. Has the **victim left or threatened to leave** the alleged perpetrator within the last year?	Yes ☐	No ☐
2. Is the alleged perpetrator violently and constantly **jealous** of the victim? (For instance, does he say "If I can't have you, no one can.")	Yes ☐	No ☐
3. Does the alleged perpetrator **threaten to kill** the victim?	Yes ☐	No ☐
4. Does the alleged perpetrator threaten to harm or has he/she harmed the victim's family members, friends, or new partner/dating relationship?	Yes ☐	No ☐
5. Does the alleged perpetrator **own or have access to a gun**?	Yes ☐	No ☐
6. Has the alleged perpetrator ever **used a weapon** against the victim or **threatened the victim with a lethal weapon**?	Yes ☐	No ☐
7. If there has been physical violence, has the **violence increased** in severity or frequency?	Yes ☐	No ☐
8. Does the **victim believe** the alleged perpetrator is **capable of killing** him/her or that the alleged perpetrator will **re-assault** him/her?	Yes ☐	No ☐
9. Does the alleged perpetrator use any of these **illegal drugs:** "uppers" or amphetamines, meth, speed, angel dust, cocaine, "crack", street drugs, mixtures?	Yes ☐	No ☐
10. Is the alleged perpetrator an **alcoholic or problem drinker**?	Yes ☐	No ☐
11. Does the alleged perpetrator **control** most or all of the victim's daily activities? (For instance: does the alleged perpetrators tell the victim who he/she can be friends with, how much money he/she can use, or when he/she can take the car?)	Yes ☐	No ☐
12. Does the alleged perpetrator **follow or spy** on the victim, **leave threatening notes or messages** on his/her answering machine, **destroy his/her property**, or call him/her when he/she doesn't want him to?	Yes ☐	No ☐
13. Has the alleged perpetrator ever **threatened or tried to commit suicide**?	Yes ☐	No ☐
14. Are there any pending or prior Orders for Protection, criminal or civil cases involving this alleged perpetrator?	Yes ☐	No ☐
15. Has the alleged perpetrator **ever been arrested for domestic violence**?	Yes ☐	No ☐
16. Has the alleged perpetrator ever **forced the victim to have sex** when he/she did not wish to do so?	Yes ☐	No ☐
17. Does the alleged perpetrator ever try to choke/**strangle** the victim?	Yes ☐	No ☐
18. Has the victim ever been beaten by the alleged perpetrator while pregnant?	Yes ☐	No ☐
19. Does the alleged perpetrator **threaten to harm the children**?	Yes ☐	No ☐
20. Does the alleged perpetrator have a child that is not the victim's child?	Yes ☐	No ☐
21. Is the alleged perpetrator a member or veteran of the **armed forces**?	Yes ☐	No ☐
22. Has the alleged perpetrator ever been diagnosed with a **mental illness**?	Yes ☐	No ☐
23. Has the alleged perpetrator ever suffered a **traumatic brain injury**?	Yes ☐	No ☐

These questions were adapted from Campbell, JC, Danger Assessment 2004 www.dangerassesment.org
and modified by the Legal Action Committee of the Domestic Violence Council

Updated 4-24-10

Domestic Violence Risk Assessment Tool

A research-based bench guide for use by Family Law Facilitators and TRO Clinic Staff

Please read this checklist verbally to the Domestic Violence Restraining Order Petitioner. Please note that this checklist does not address all forms of risk related to domestic violence and is merely intended to inquire about some of the many risks the Petitioner may be experiencing; nor is the purpose of this form to determine the legal basis of the restraining order. **Do *not* include this form in the Petitioner's file and shred upon submission of the Petitioner's TRO application.**

The "respondent" refers to whoever is hurting you including your spouse, former spouse, girlfriend, boyfriend, domestic partner, mother/father of your child(ren), live together or formerly lived together as members of a "household", or are related the other party by blood, marriage or adoption, e.g. mother, father, in-laws, siblings, adult children. **Please ask the petitioner to answer the following questions as related to the respondent:**

	Mark Yes or No	
1. Have you left him/her or threatened to leave within the last year?	Yes ☐	No ☐
2. Is he/she violently and constantly jealous of you? (For instance, does he say "If I can't have you, no one can.")	Yes ☐	No ☐
3. Does he/she threaten to kill you?	Yes ☐	No ☐
4. Does he/she threatened to harm or has he/she harmed your family members, friends, or new partner/dating relationship?	Yes ☐	No ☐
5. Does he/she own or have access to a gun?	Yes ☐	No ☐
6. Has he/she ever used a weapon against you or threatened you with a lethal weapon?	Yes ☐	No ☐
7. Has the physical violence increased in severity or frequency?	Yes ☐	No ☐
8. Do you believe he/she is capable of killing you or that he/she will re-assault you?	Yes ☐	No ☐
9. Does he/she use any of these illegal drugs: "uppers" or amphetamines, meth, speed, angel dust, cocaine, "crack", street drugs or mixtures?	Yes ☐	No ☐
10. Is he/she an alcoholic or problem drinker?	Yes ☐	No ☐
11. Does he/she control most or all of your daily activities? (For instance: does he/she tell you who you can be friends with, how much money you can use, or when you can take the car?)	Yes ☐	No ☐
12. Does he/she follow or spy on you, leave threatening messages, destroy your property, or call you when you don't want him to?	Yes ☐	No ☐
13. Has he/she ever threatened or tried to commit suicide?	Yes ☐	No ☐
14. Are there any pending or prior Orders for Protection, criminal or civil cases involving the respondent?	Yes ☐	No ☐
15. Has he/she avoided being arrested for domestic violence?		
16. Has he/she ever been arrested for domestic violence?	Yes ☐	No ☐
17. Has he/she ever forced you to have sex when you did not wish to do so?	Yes ☐	No ☐
18. Does he/she ever try to choke/strangle you or has he/she ever tried?	Yes ☐	No ☐
19. Have you ever been beaten by him/her while pregnant? (If applicable).	Yes ☐	No ☐
20. Does he/she threaten to harm your children? (If applicable).	Yes ☐	No ☐
21. Do you have a child that is not the respondent's child? (If applicable).	Yes ☐	No ☐
22. Is he/she a member or veteran of the armed forces?	Yes ☐	No ☐
23. Has he/she ever been diagnosed with a mental illness?	Yes ☐	No ☐
24. Has he/she ever suffered a traumatic brain injury?	Yes ☐	No ☐

These questions were adapted from Campbell, JC, Danger Assessment 2004 www.dangerassesment.org
and modified by the Legal Action Committee of the San Diego Domestic Violence Council

Updated 4-24-10

SAN DIEGO REGIONAL GUIDE
DOMESTIC VIOLENCE RESOURCES

San Diego Domestic Violence Hotline
1-888-DVLINKS (1-888-385-4657) 24 hours, bilingual, confidential

DV shelter bed availability, counseling referrals, batterer's treatment information, safety planning
Referrals may be provided for a services in every region of the County

For a complete list of resources and services see the Regional Maps at www.sddvc.org

Other 24 Hour Hotlines:

Access & Crisis Line	**800/479-3339**
Children Welfare Services & the Child Abuse Hotline	**800/344-6000**
Aging and Independent Services & Adult Protective Services	**800/510-2020**
Center for Community Solutions - Sexual Assault Crisis Line	**888/385-4657**
Lesbian, Gay, Bisexual, Transgender, Questioning (LGBTQ) Heidorn	**858/212-LIFE (5433)**
National DV Crisis Intervention, Information and Referral	**800/799-SAFE (7233)**
Rape, Abuse, Incest National Network (RAINN) Hotline	**800/656-HOPE (4673)**
211	**211 (cell 800-227-0997)**
Meth Hotline	**877/NO-2-METH (877-662-6384)**

COUNSELING & LEGAL REFERRALS

San Diego County Domestic Violence/Sexual Assault Hotline- 24 Hour Hotline	**888/DV-LINKS (385-4657)**
Access & Crisis 24-Hour Hotline	**800/479-3339**
211	**211 (From Cell 800-227-0997)**

DOMESTIC VIOLENCE SERVICES *(Partial list)*

Family Justice Center (Central)	**619/533-6000**
YWCA (Central)	**619/234-3164**
East County Family Justice Center (East County)	**619/456-9609**
Center for Community Solutions (East County)	**619/697-7477**
North County Family Violence Prevention Center (North County)	**760/798-2835**
Center for Community Solutions (North County)	**760/747-6282**
Community Resource Center (North County)	**877/633-1112**
Women's Resource Center (North County)	**760/757-3500**
Center for Community Solutions (Coastal)	**858/272-5777**
South Bay Community Services (South County)	**800/640-2933**
Jewish Family Services – Project Sarah	**858/637-3200**
Rancho Coastal Humane Society - Animal Safehouse Program (North County)	**760/753-6413**
Stalking Hotline (County of San Diego District Attorney's Office)	**619/515-8900**
Lesbian, Gay, Bisexual, Transgender, Questioning, (LGBTQ) Community Center	**619/692-2077**

SD District Attorney's Office, Victim Assistance Program:
Central: 619/531-4041, East: 619/441-4538, Juvenile: 858/694-4595, South: 619/691-4539, North: 760/806-4079

SPANISH SPEAKING AGENCIES (SE HABLA ESPAÑOL) *(Partial list)*

San Diego Domestic Violence Hotline 24 hour (Domestic Violence & Sexual Assault)	**888/DVLINKS (385-4657)**
Access & Crisis 24-Hour Hotline	**800/479-3339**
Casa Familiar	**619/428-1115**
Chicano Federation of San Diego County, Inc.	**619/ 285-5600**
Children's Hospital's Family Violence Program	**619/533-3529**
North County Lifeline	**760/726-4900**
San Diego Family Justice Center	**866/933-HOPE (4673)**
South Bay Community Services 24-Hour Hotline and Services	**800/640-2933**

MILITARY RESOURCES *(Partial list)*

For referrals for family service and advocacy centers serving Camp Pendleton, MCAS Miramar, MCRD, Naval Base San Diego, NAS North Island, & Sub Base Fleet:
Call the Family Justice Center Military Liaison 619/533-3592 (confidential) or SD County DV Hotline 888/385-4657(confidential)
For other resources referrals & assistance, you may call Military OneSource at 800/342-9647 (24-hour hotline)

CHILDREN'S RESOURCES *(Partial list)*

Rady's Children's Hospital, Chadwick Center - Trauma Counseling Program	**866/576-4011**
Rady's Children's Hospital & Family Justice Center - Family Violence Program	**619/533-3529**
Child Welfare Services & the Child Abuse Hotline	**800/344-6000**

SAFETY PLANNING

Taking time to think about steps to increase your safety and the safety of your children is important, whether you have left, are considering leaving, or are currently in an abusive relationship. You may want to consider calling a domestic violence advocacy agency to assist you in safety planning. Call 888-DV-LINKS (888-385-4657) to speak with a confidential advocate or to be referred to an agency that specializes in domestic violence.

You may also view the San Diego Domestic Violence Council Website for safety planning ideas and steps for internet safety: http://www.sddvc.org

JAIL NOTIFICATION

Inmates may be released at any time of the day. By calling to set up a "jail notification," you may receive a call (usually about one hour) ahead of when your partner is to be released. Based on your area code you may call any one of the following: (619) 531-3200 (858) 694-3200 (760) 940-4473
Two attempts will be made to contact you at the number you provide.

DOMESTIC VIOLENCE SHELTERS

There are shelters in San Diego County specifically geared to assisting domestic violence victims. In addition to housing and accommodations, most provide such services as advocacy, legal assistance, and counseling onsite.

Call the 24 hour confidential, bilingual DV Hotline at 888-DV-LINKS (888-385-4657) for bed availability.

ORDERING POLICE REPORT(S)

Victims have a right to a free copy of their police report. Contact the responding law enforcement agency in the jurisdiction in which the incident occurred. Requests for reports can be made to most jurisdictions through the mail or in-person. The following information is necessary to identify the requested report: parties involved, date and location of occurrence, and the report number if available. Bring identification if you go in-person to pick up your report. The crime incident report is available no later than 48 business hours and the reports are available no later than 5 business days after they are taken.

SAFE AT HOME – CONFIDENTIAL MAILING ADDRESS

Program participants are provided a confidential mailing address, at no cost, so that they may use this instead of their home address. This may forwarding program allows participants to safeguard their address when receiving first-class mail, opening a bank account, completing a confidential name change, filling out government documents, registering to vote, getting a driver's license, enrolling a child in school, and more. You may call toll-free at 1-877-322-5227 or visit http://www.casafeathome.org for a local enrolling agency.

RESTRAINING ORDERS

You can file at no cost for a restraining order, which may be granted by a judge to last up to 5 years. There are no cost domestic violence clinics available to assist you in the application process:

Downtown San Diego (Madge Bradley)	1409 4th Ave San Diego, CA 921014th Floor Room 107 Clinic Hours: Monday-Friday 8:30am-4:30pm; Business Office for filing closes at 3:30pm
El Cajon Courthouse:	250 E. Main Street El Cajon, CA 92020 Clinic Hours: Monday-Friday 8:30am-3:30pm; Business Office closes at 3:30pm
North Building of Vista Court Complex:	325 S. Melrose Drive Vista, CA 92083 Hours: Monday-Friday 8:30am to 4:30 pm (except Wed. close at 3:30); Business Office closes at 3:30pm
South Bay Court House:	500 Third Ave., Chula Vista, CA 91911, Room 155 Hours: Monday-Friday 8:30am to 3:30pm; Business Office closes at 3:30 pm
Family Justice Center (Central):	Call (619) 533-6043 to schedule an appointment

Arrive at a minimum of 2 hours before the clinic closes. Be prepared to spend a minimum of one-half of a day to a full day at the court to obtain your restraining order. Space is limited at child care facilities at each court house. You are encouraged to make other child care arrangements.

Things to bring with you when you complete your paperwork, if available: The address for the person you would like restrained; Date of birth for the person you would like restrained; Physical description of the person you would like restrained; Photographs of any injuries; Copy of the police report(s).

THURSDAY – JUNE 3, 2010

3:30 pm – 4:45 **Workshop Session IV**

IV.B.

education credit:
BBS
MCLE

target audience:
attorneys
CASAs
judicial officers
probation officers
social workers

Dependency Legal Update (repeat)

This session summarizes 2009 legislation, rules of court, and Judicial Council forms relevant to dependency and provides an overview of significant appellate and Supreme Court cases.

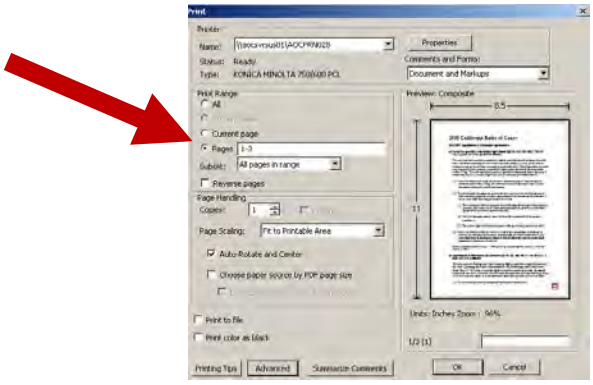
Learning Objectives:

- Analyze recent legislation, rules of court, and new forms relevant to dependency practice.
- Identify significant new case law in dependency.

Faculty:

- **Hon. Jacqueline Lewis**
  Commissioner, Superior Court of Los Angeles County
- **Hon. Anthony Trendacosta**
  Commissioner, Superior Court of Los Angeles County

Before you choose to print these materials, please make sure to **specify the range of pages**.



In re Adam D. et al (3/30/10)
Second Appellate Dist, Division Three

Issue

Does an order for informal supervision entered under Welfare and Institutions Code §360(b) deprive the appellate court of jurisdiction to address issues of whether substantial evidence support the sustained petition as raised by the parents? Good discussion of WIC 360(b).

Facts

In May 2009, the Agency detained the five and a half month old child, Amy, who weighed only 10 pounds. The normal weight for a child that age was 16 pounds. The baby had not received recent immunizations. The Emergency Room doctor diagnosed the baby with failure to thrive with dehydration and admitted the baby to the pediatric unit. The baby's siblings were also detained because they had fallen behind on their immunizations as well. One Dr. believed that Amy's failure to thrive was due to a low calorie intake because the mother didn't have enough breast-feeding knowledge. The three oldest children were released to the parents one week after their detention. After a multi-disciplinary assessment of Amy, the doctor concluded that Amy did not suffer from failure to thrive syndrome but her low weight was based on the parent's lack of knowledge. Two months after detention, the trial court released Amy (who was now 17 pounds) to her parents with numerous conditions. After the release of all the children, the social worker noted that the parents had not participated in counseling and were resistant to family preservation services. At the adjudication, the court sustained two counts indicating that Amy was dehydrated due to being underfed and undernourished and being fed an inadequate dies which was neglectful by her parents and that the parents failed to obtain necessary medical care for Amy's lack of weight gain and dehydration. At disposition, the juvenile court found Amy was a person described under WIC 300(b) and then ordered the case "dismissed" under §360(b). The parents appealed.

Holding

The appellate court held that an order for informal supervision is tantamount to a disposition which is an appealable order. In explaining WIC §360(b) the appellate court stated "the court may also determine on its own or following a request by one of the parties that even though it has jurisdiction, the child is placed in the home, and the family is cooperative and able to work with the social services department in a program of informal services without court supervision that can be successfully completed within 6 to 12 months and which does not place the child at an unacceptable level of risk. In such cases the court may order informal services and supervision by the social services department *instead of* declaring the child a dependent. If informal supervision is ordered pursuant to WIC §360(b), the court 'has no authority to take any further role in overseeing the services or the family unless the matter is brought back before the court' pursuant to WIC §360(c)."

"If the court agrees to or orders a program of informal supervision, it does not dismiss the dependency petition or otherwise set it aside. The true finding of jurisdiction remains. It is only the dispositional alternative of declaring the child a dependent that is not made."

Therefore if a family is unwilling or unable to cooperate with the services provided by the social worker, the agency can institute proceedings pursuant to WIC 332 alleging that a previous petition has been sustained and that informal supervision was ineffective (WIC 360(c)). After hearing that petition, the court may either dismiss it or order a new disposition hearing…

The appellate court found that as to the sufficiency of the evidence, the fact that Amy was seriously underweight and developmentally delayed, and mother and father's refusal to acknowledge her medical condition or accept any responsibility for it was sufficient to support the jurisdictional findings.

A.H. v. Superior Court (3/11/2010)
182 Cal. App. 4th 1050
Fourth Appellate District, Division Three

Issue:

In deciding whether to terminate reunification services, how is the trial court to "harmonize" W and I Code § 361.5(a)(2) requiring the court to take into consideration barriers to reunification due to incarceration, with 366.21(g)(1) requiring the court to make a finding of the substantial probability of return without reference to its application to incarcerated parents.

Facts:

Father has four children. From the time of detention to jurisdiction/disposition, father was in and out of custody. While out of custody, father and the mother were living in deplorable conditions, he was testing positive for drugs, he continued to engage in criminal activity and was associating with gang members. He also failed to comply with the case plan. At jurisdiction/disposition, he was again incarcerated pending trial on numerous criminal charges. Reunification services were ordered, including visits while incarcerated. During the first six months, the children visited him in jail and the visits were appropriate. The Social worker gave him a parenting work book, which he completed, but there were no other services available to him.

At the 366.21(e) the agency reported that although father was cooperative while incarcerated, he was not when he was out of custody. The agency recommended six more months of reunification to determine if father was truly motivated to reunify and comply with the case plan while out of custody.

At the 366.21(f) hearing, the agency recommend termination of FR in that father had not shown he was able to comply while out of custody and he could not show a substantial probability of return of the children in that father would be able to obtain a job and provide a safe home for the children once released. The trial court terminated FR and set a 366.26 hearing. Father appealed.

Holding:

Writ denied. Section 361.5(a)(2) applies to a parent who is incarcerated and requires the court to take into account the special circumstances of an incarcerated parent. In those situations, the court may extend reunification services for an additional six months. However, 366.21(g) requires the court to find: (A) that the parent has consistently and regularly visited; (B) that the parent has made significant progress in resolving the problems which led to removal; and (C) has demonstrated the capacity to both complete the case plan and provide for the safety and well being of the children.

Father argued that 366.21(g) is incompatible with the recently enacted incarcerated parent amendments and should never apply to an incarcerated parent because that parent could never comply with 366.21(g).

The Court of Appeal disagreed. There is no reason to infer from the current statutory scheme the legislature intended to toll timelines, or automatically extend reunification services to 18 or 24 months for incarcerated parents. To the contrary, the statutory provisions calling for special considerations do not suggest the incarcerated parent should be given a free pass on compliance with his/her service plan or visits. That there are barriers unique to incarcerated parents is but one of many factors the court must take into consideration when deciding how to proceed in the best interest of the dependent child.

The Court reasoned that dependency provisions must be construed with reference to the whole system of dependency law, so that all parts are harmonized. (In re David H. 33 cal.app.4th 368).

(Note: Suggest you read the whole decision. It is the best and most concise discussion of the reunification time frames and the effect of incarcerated parents amendments on the reunification scheme.)

In re Anna S. (1/15/10)
180 Cal. App. 4th 1489
Fourth District, Division One

Issue

May the trial court rely on a Court of Appeal decision before the remittitur issues to shape the outcome of ongoing proceedings in the same case.

Facts

11/05 minors removed from parent's custody
3/07 HOPs
6/07 Removed again
9/08 at .26, §388 granted and HOP(mother)
1/09 attorney for minor files §388 seeking removal
Without detaining, court sets this §388 for hearing on 3/09

Meanwhile

3/13/09 Court of Appeal reverses the 9/08 decision granting mo's §388
3/20/09 Trial court detained minor based on Court of Appeal decision and NOT on minor's §388, which had been continued for further hearing.

Holding

Trial Court cannot use the non-final appellate decision to influence the outcome of the matter before it.

Trial Court IS authorized to continue to decide issues concerning child's placement and well-being during the pendency of the appeal – BUT: decision must be based on current evidence and the law and NOT on the anticipated appellate decision.

In re Andrew A. (3/30/10)
Fourth Appellate District, Division One

Issue

Did the trial court have the legal authority to entertain mother's motion for reconsideration of its jurisdictional finding and dismiss the petition prior to disposition?

Facts

- Mother, with history of scoliosis, learning disabilities, bi-polar, schizophrenia and multiple personalities, gave birth to Andrew in June 2009.
- After working with mother and her sister, Agency files a petition on July 1 alleging that mother is unable to provide regular care for the child due to her physical limitations and developmental disability.
- At a continued detention hearing 5 days later, the mother waived her trial rights and pled no contest to a three count petition with the agreement that the child would be placed with her. The court accepted the mother's no contest plea and waiver of rights and continued the matter for disposition.
- Less than a month later and prior to the disposition hearing, the Agency filed a 342 petition and redetained Andrew.
- At the jurisdictional hearing for the 342 petition, the trial court dismissed the 342 petition.
- The trial court then, after an 18 minute break, dismissed the original 300 petition based on mother's motion for reconsideration of its jurisdictional finding.
- This appeal ensued.

Holding

The appellate court concluded on two separate grounds that the juvenile court lacked the authority to reconsider its jurisdictional finding: (1) Mother's plea of no contest barred her from bringing a motion for reconsideration; and (2) the juvenile court was barred from reconsidering its jurisdictional finding at the hearing on the section 342 petition because the parties were not provided with prior notice that the issue would be addressed at the hearing.

The appellate court states that "a plea of 'no contest' to allegations under section 300 at a jurisdictional hearing admits all matters essential to the court's jurisdiction over the minor." Like the act of filing an appeal of a jurisdictional finding for insufficiency of the evidence, the act of making a motion for reconsideration of a jurisdictional finding serves to *contest* that finding, which is an action inconsistent with a plea of no contest. The mother could have filed a motion to set aside her no contest pleas and made a showing of circumstances that rendered the plea involuntary or unknowing but a motion for reconsideration was the wrong vehicle.

In addition, neither the Agency nor the child was provided prior notice (18 minutes is not notice) that a motion for reconsideration was going to be considered at the hearing and therefore it was improper for the trial court to hear it on that date even if it was the correct vehicle.

Finally, the appellate court noted that a juvenile court may, at a disposition hearing, dismiss the petition on whatever valid grounds it finds to be applicable. However, this hearing was clearly not a disposition hearing on the section 300 petition.

In re Andy G. (4/20/10)
Second Appellate District, Division Eight

Issue

Did sufficient evidence support the trial court's finding that father's 2 ½ year old son was at risk of being sexually abused by his father when the court found that the father had molested his girlfriend's two daughters?

Facts

The trial court found that the father if Andy had molested two of his girlfriend's girls when he fondled Maria's breast and Janet's vagina, exposed his penis and exposed Maria to a pornographic movie and masturbated in her presence. One of the times that father exposed himself to Janet, Andy was in the same room although he wasn't watching and in fact the father had asked Janet to take Andy to the store and then asked her to approach the bed to get the money when he exposed himself to her. The court found the girls credible and found that Andy was "at risk of physical and emotional harm, damage, sexual abuse, danger and failure to protect under WIC 300 (b)(d)&(j). The trial court removed Andy from father's custody and ordered the father to participate in sex abuse counseling amongst other things. Father appealed.

Holding

The court examined three of the cases that address risk to the male sibling of a sexually abused female sibling. (In re Rubisela E.(2000) 85 Cal.App.4th 177, In re Karen R.(2001) 95 Cal.App.4th 84 and In re P.A.(2006) 144 Cal.App.4th 1339.) This appellate court agreed with the court in P.A. and reiterated that "aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior". The only difference between this case and P.A. was the fact that Andy was only two and one-half years old at the time of the court's orders, so he was not "approaching the age at which [his sisters] were abused (age 11). However, the appellate court noted that while Andy may have been too young to be cognizant of father's behavior, the father exposed himself to Janet while Andy was in the same room and in fact used Andy to get Janet to approach him so that he could expose himself to her. "This evinces, at best, a total lack of concern for whether Andy might observe his aberrant sexual behavior."

The appellant court held that substantial evidence support the juvenile court's jurisdictional findings and dispositional orders.

In re Christopher C (2/2/10)
182 Cal.App.4th 73
Second District, Division Four

Issue:

1) Does a party forfeit the right to appeal the issue that the petition failed to state a cause of action if that party fails to object, demur and/or waived notice of the trial court's proposed amendments to conform to proof;

2) Are there circumstances where the trial court may make jurisdictional findings under 300(b) and (c) that the extent and nature of a family law dispute places the children at risk of physical or emotional harm?

Facts:

The mother and father in this case have seven children, including a set of twins and a set of quadruplets. Since 2000, there have been over thirty (30) referrals to the Department (DCFS), three of which led to voluntary maintenance agreements and one to a 300 filing in 2004. The parents have also been in and out of family law courts for years on various contested issues related to the children. The current filing in 2008 resulted from referrals alleging, *inter alia*, sexual abuse by the father, inappropriate sexual contact amongst the siblings, as well as physical abuse by the mother. The social worker and the police officers investigating the various allegations were confronted with a series of wildly inconsistent statements some of which occurred within the same interview. The police investigators opined that the children alleging sexual abuse were coached by the mother and the Dependency Investigator (DI) noted that it was difficult to tell which if any of the allegations were true. The DI did note that the ongoing "bitter custody battle" over the last eight years had an obvious emotional effect on the children.

During the course of the jurisdictional hearing and after some of the children had testified, the trial court conferred with counsel and advised that the court's tentative was to amend the petition to conform to proof: "that there exists a severe dysfunction within this family resulting in an ongoing and severe family law conflict, resulting in cross-allegations of sexual abuse, physical abuse [and] 'coaching' and there also exists evidence of the failure of the mother and father to properly supervise the children, all of which places the children at risk of serious physical and emotional harm." Counsel and the parties were willing to submit on the court's tentative. At that point the trial court asked all parties if they would stipulate to the court conforming the petition consistent with its findings and to waive any notice as to the petition as amended. All parties stipulated. The court then made its orders.

Father appealed, alleging that the petition as amended failed to state a cause of action and that there was no proof that the parents actions placed the children at risk.

Holding

Affirmed. The Court of Appeal found that by failing to object or demur and by stipulating to waiver of notice to the amendments, the father forfeited his right to appeal. Although there is one case that supports father's position based upon the Code of Civil Procedure § 430.80, the C of A noted that the greater weight of authority finds that the application of the CCP in this instance is inconsistent with the dependency scheme regarding the expeditious resolution of dependency matters. Enforcing the forfeiture rule forces the parties to promptly resolve all issues at the earliest opportunity for the best interests of the children.

The C of A also found there was overwhelming evidence that the children were suffering as a result of the parents ongoing "tug-of-war" for the children's affections. The gauntlet these children endured from the numerous referrals, interviews, medical examinations, "psychological" warfare and testimony in court "cannot help but subject the children to a substantial risk of emotional harm" within the parameters of 300(c).

Thus, two points are clear from this case:

1) When conforming to proof, the trial court should make the appropriate record eliciting waivers and stipulations; or, in the alternative, the parties must raise these objections in the trial court or they are forfeit; and,

2) Although the general rule that "[t]he juvenile courts must not become a battleground by which family law war is waged by other means" (*In re John W.* 41 Cal.App.4th 961) there are situations where juvenile court intervention is necessary.

In re Desiree M. (1/26/10)
181 Cal. App. 4th 329
4th District, Division One

Issue:

The mother does not have standing on appeal to challenge the judicial officer's failure to address notice to the children and failure to inquire about the absence of the children at a continued 366.26 hearing.

Facts:

Notice was proper at the first 366.26 hearing. The children were not present but they were represented by counsel. The matter was continued two months. At the next 366.26 hearing the children were not present. The Court found that notice had been made and preserved. The Court did not inquire regarding the absence of the children. The Court terminated parental rights.

The mother appeals, contending that the children were not properly noticed and the Court did not inquire as to the reason for their absence.

Holding:

The Court of Appeal affirmed the trial Court. (1) The mother did not raise the issue at the trial level, (2) the mother did not have standing to raise the issue on appeal (this is different from asserting the sibling relationship exception) and the children did not appeal, (3) the Court could infer notice since counsel was present at the properly noticed first hearing and remained silent when the second notice finding was made by the Court, and (4) any error in failing to inquire of the children's absence was harmless.

Note: *WIC 349(d) and WIC 366.26(h)(2) require the Court to determine whether a child over 10 was properly noticed, inquire whether the child was given an opportunity to attend, and inquire why the child is not present. WIC 349(d): "If that minor was not properly notified or if he or she wished to be present and was not given an opportunity to be present, the court shall continue the hearing to allow the minor to be present unless the court finds that it is in the best interest of the minor not to continue the hearing."*

In re E.B. (4/9/10)
Second Appellate District, Division One

Issue

Did the fact that mother was the victim of domestic violence mean that nothing she did or is likely to do endangers the children?

Facts

After a trial, the juvenile court sustained allegations that the mother had an alcohol problem and that both parents' conduct in domestic "altercations" endangers the children's physical and emotional health. The court also sustained allegations against the father regarding sexual abuse of the daughter and physical abuse of the children among other things. The children remained with their mother at disposition. Mother appealed everything other than the children remaining with her.

Holding

The appellate court held that "mother's remaining in the abusive relationship, and her record of returning to Father despite being abused by him, supports the juvenile court's finding that her conduct in the domestic violence altercations endangered the children."

The court noted that a prior court in Heather A (1996) 52 Cal.App.4th 183 stated that "domestic violence in the same household where children are living… is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it." The court went on to cite from Heather A stating that children can be "put in a position of physical danger from [spousal] violence" because "for example, they could wander into the room where it was occurring and be accidentally hit by a thrown object, by a fist, arm, foot or leg…"

The appellate court goes on to cite from various cases and articles regarding domestic violence, the many ways a child can be adversely affected from domestic violence in their home including "studies show that violence by one parent against another harms children **even if they do not witness it**." {Cahn, *Civil Images of Battered Women: the Impact of Domestic Violence on Child Custody Decisions* (1991) 44 Vand.L.Rev. 1041) That article goes on to say "first, children of these relationships appear more likely to experience physical harm from both parents than children of relationships without woman abuse. Second, even if they are not physically harmed, children suffer enormously from simply witnessing the violence between their parents… Third, children of abusive fathers are likely to be physically abused themselves."

The appellate court believes that father's past violent behavior toward the mother is an ongoing concern. "Past violent behavior in a relationship is 'the best predictor of future violence.' Studies demonstrate that once violence occurs in a relationship, the use of force will reoccur in 63% of those relationships… Even if a batterer moves on to another relationship, he will continue to use

physical force as a means of controlling his new partner." (Comment, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence* (2000) 75 Wash.L.Rev. 973)

In this case, the appellate court noted that the facts that mother admitted to the Agency that the father abused her emotionally and physically, the latter within hearing of the children, that when father berated mother after the daughter was born, the mother would sometimes leave but she always returned when he apologized and that after he struck her four times and the children heard her screaming, she stayed with him another 7 months, was substantial evidence to sustain the 300(b) allegation that mother's conduct in the domestic altercations endangered the children.

In re E.O. (3/3/10)
182 Cal. App. 4th 722
First Appellate District, Division Five

Issue

Once a paternity judgment is entered, does that equate to presumed father status?

Facts

The two children in this case were 14 and 7 years old when the petition was filed. Their biological father had no contact with the children until about three months prior to the petition filing. The father had never lived with the mother. He had learned that the older child was his several years after she was born when he dated mother for a year. He did not establish a relationship with the girls at that time because he thought he was unable to visit the girls because he hadn't paid child support. In 2002, a judgment of paternity was entered finding him to be the father of both children and stating that he had the obligation to pay child support. Although he asked the dependency court for presumed father status, the trial court denied his request concerned that he was aware of the childrens' existence but had done nothing to establish a relationship with the children.

Holding

The appellate court held that a paternity judgment, as the name implies, is a judicial determination that a parent child relationship exists. It is designed primarily to settle questions of biology and provides the foundation for an order that the father provide financial support. Presumed father status, by contrast, is concerned with a different issue: whether a man has promptly come forward and demonstrated his full commitment to his parental responsibilities – emotional, financial and otherwise. They do not equate.

In this case, although a judgment of paternity had been entered, it was only to establish child support and did not rise to the requirements necessary to establish presumed father status as defined in FC §7611.

In re G.M. (1/27/10)
181 Cal. App. 4th 552
Fifth Appellate District

Issue: Whether legal impediment evidence is relevant and therefore admissible when the social worker's opinion that the child is likely to be adopted is based in part on the identified prospective adoptive parent's willingness to adopt?

Facts: G. (eight years old) and L. (six years old) had been in and out of foster care since 2004 due mostly to mother's drug abuse. After reunification failed, a first 366.26 hearing was held in January 2008. At that hearing it was determined that Long Term Foster Care was the appropriate permanent plan, mostly because the relative caregiver was not able to commit to a plan of adoption. It was also determined at the first .26 hearing that termination of parental rights would be detrimental to the children. She was visiting regularly and other siblings who were older objected to termination because it would interfere with sibling relationships. An adoption assessment was never ordered.

Months later the Department filed a 388 petition asking that another 366.26 hearing be held. A department panel had determined that a plan of adoption would be in the children's best interest. The children now wished to be adopted by their caretaker who was also their great-aunt. The great aunt had also decided she was willing to adopt. Further it was determined that the mother no longer had a strong bond with the children and all but one of the older siblings was now in agreement with adoption.

Mother filed a statement of contested issues prior to the second .26 hearing. She questioned whether the department had assessed the aunt's marital status. She contended that the aunt was separated from her husband and not divorced. She stated that the department had not properly evaluated the prospective adoptive parent's lifestyle. The trial court did not allow questions pertaining to the aunt's lifestyle, agreeing with the department that it was not a proper issue for trial.

Holding: Affirmed. Mother never raised the legal impediment to the adoption at trial. She only raised the aunt's "lifestyle" and not the impediment of spousal waiver. Evidence of the legal impediment to adoption is relevant at a 366.26 hearing when it is the social worker's opinion that the children were likely to be adopted based solely on the existence of a prospective adoptive parent who is willing to adopt. In this case the evidence did not support the mother's claim that these children were only adoptable by their aunt. The trial court could properly find that it was likely adoption would be realized within a reasonable time. (specifically v. generally adoptable). (Court also said that most cases are on a continuum of specific to general adoptability.)

H.S. et al v. Superior Court of Riverside County (4/22/10)
Fourth Appellate District, Division Two

Issue

Did the trial court err when it ordered genetic testing in a paternity action when real party in interest had no standing as a presumed father other than a voluntary declaration of paternity that was executed and subsequently rescinded by a married woman?

Facts

- Husband and wife remarried in 2002.
- In 2005 husband and wife living apart during work week but spending the weekends together, wife has affair with S.G.
- Wife gets pregnant.
- Husband and wife separate prior to child's birth. Wife hid pregnancy from husband and S.G. pressured her to get an abortion.
- At child's birth, S.G. accompanies mother to hospital and he and mother sign declaration of paternity. (Hospital gave obsolete form instead of revised form that states that the procedure is only available to unmarried mothers.)
- Two weeks after child's birth, husband and wife reconcile.
- Within 60 days of child's birth, wife executed rescission of the declaration of paternity. S.G. admits to receiving rescission although proof of service is defective.
- Husband has accepted child as his daughter and husband and wife have lived together since. A father-daughter relationship has developed between husband and child.
- Husband and wife allow S.G. to visit two times per month for about three years, then stop allowing the visits.
- S.G. files petition to establish paternity and requested genetic testing
- Wife files motion to quash the proceedings and motion to set aside Declaration of paternity.
- Trial court denied the motion to quash the proceedings, granted the motion to set aside the declaration of paternity (finding that it was not void on its face). Trial court also found husband to be presumed father under FC7611(a) and (d) and not FC7540 (because husband and wife not cohabitating at time of conception). Trial court granted the request for genetic testing and the husband and wife petitioned appellate court for a writ of supersedeas, mandate or prohibition.

Holding

The appellate court held that the trial court erred when it ordered genetic testing in a paternity action when real party in interest had no standing as a presumed father other than a voluntary declaration of paternity that was executed and subsequently rescinded by a married woman. When the trial court granted the motion to set aside the declaration, it should have found that the declaration was void and had no effect. The POP (Declaration of Paternity) was meant to establish a simple procedure so that children of unmarried mother's can be assured of having

child support and other benefits. The marital presumptions under FC 7540 and 7611(a) do allow the mother and her husband to prevent the biological father from ever establishing parental rights over a child. However, the state's interest in preserving marriage will not necessarily outweigh the interests of a man and a child with whom the man has established a paternal relationship. Recognizing a POP declaration executed by a married woman does undermine the state's interest in preserving marriage at least under some circumstances though and this appears to be one of those cases because the husband and wife were raising this child in a stable family.

In re Jackson W. (4/29/10)
Fourth Appellate District, Division One

Issue

1) Can a parent who waives the right to have the juvenile court appoint counsel trained in juvenile dependency law in order to retain counsel who does not meet those qualifications claim privately retained counsel provided ineffective representation?
2) Is a section 388 petition the proper mechanism by which to raise a claim of ineffective assistance of counsel?

Facts

The case came into the system when two-month-old Trenton was discovered to have multiple injuries, including a fractured femur and several fractured ribs in various stages of healing. When the case first came into court, the parents appeared in court with their appointed counsel and the matter was set for trial. A month later, the mother informed the court that she wanted to hire her own attorney. When the mother appeared in court with her retained counsel, the trial court inquired as to whether he was a certified specialist in juvenile dependency law and learned that he was not. The court verified that the mother knew that he was not a specialist and yet that she still wanted him to represent her. The allegations were sustained and no reunification services were ordered for either parent. Mother filed a notice of intent to file a writ petition that day. The next day, the mother filed a substitution of attorney substituting herself in as counsel. When the writ petition was not timely filed, the appellate court dismissed the matter. At the 366.26 hearing, the trial court relieved mother's retained counsel and appointed counsel for her. The mother told the court that she had "fired" her retained counsel because he was not "child dependency qualified" and this was not helping her case. Prior to the contested 366.26 hearing, the mother filed a 388 petition seeking to have the court vacate the jurisdictional and dispositional findings and orders on the grounds of ineffective assistance of counsel by retained counsel. The court denied setting the 388 petition for a hearing because the IAC issue was an appellate issue and that there was not showing that the outcome would have been different. This appeal ensued.

Holding

1) The appellate court held that, after proper advisement, a parent may knowingly, intelligently and voluntarily waive the statutory right to be represented by appointed counsel meeting the definition of "competent counsel" under California Rules of Court, rule 5.660(d). Once that right is waived, the parent is precluded from complaining about counsel's lack of juvenile dependency qualifications.

"Competent counsel" is defined by CRC 5.660(d) as "an attorney who is a member in good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrated adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceedings, the specific statutes,

rules of court, and cases relevant to such proceedings, and procedures for filing petitions for extraordinary writs."

Because mother knowingly, intelligently and voluntarily waived the right to competent counsel, she cannot thereafter complain that he was not competently representing her precisely because he was not "child dependency qualified".

2) The appellate court held that a parent who has a due process right to competent counsel can seek to change a prior court order on the ground of ineffective assistance of counsel by filing a section 388 petition, although the customary and better practice is to file a petition for writ of habeas corpus in the juvenile court.

To raise the issue in a 388 petition, however, the petitioner must show that there is a change of circumstances or new evidence and that the proposed change is in the child's best interests. In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case.

In this case, even assuming that mother's counsel did not competently represent her, there was no prima facie showing that the proposed modification would be in the child's best interest. Therefore, mother was not entitled to an evidentiary hearing on the WIC 388 petition.

In re Jennifer O. (5/6/10)
Second Appellate District, Division Four

Issue

Does the Hague Convention apply to service of notice of review hearings in Dependency?

Facts

Prior to the jurisdictional hearing in this case, the case worker had located the appellant in Mexico and spoken with him. The juvenile court assured that the caseworker served multiple notices of the hearing on him in English and Spanish by certified or registered mail. Copies of the 300 petition were attached to the notices also in both English and Spanish. Counsel was appointed for the appellant. The caseworker left detailed messages for the appellant concerning the upcoming court dates. A DIF investigation was initiated although no response was ever received. The juvenile court found notice good and sustained a WIC 300(g) allegation against the appellant for failure to provide. Reunification services were offered to the father. Over the next six months, caseworkers were never again able to reach appellant by telephone and he did not contact the Agency. Caseworkers sent letters to his last known address. At the six month review hearing, the Agency recommended that the father's reunification services be terminated. They sent him notice of this recommendation by first class mail (in English and Spanish) to his last known address (as required under WIC 293). The juvenile court found notice good and terminated appellant's reunification services. This appeal followed. Father contends that the Hague Service Convention required the Agency to serve notice of the six-month review hearing by "international registered mail, return receipt requested".

Holding

The appellate court held that the Hague Convention does not apply to service of notice of review hearings in Dependency. Prior court decisions [Jorge G 164 Cal.App.4th 125 and Alyssa F 112 Cal.App.4th 846] concluded that when a parent is a resident of Mexico or other signatory nation, the petition and notice of jurisdictional and dispositional hearings must be served pursuant to the Convention's requirements. The appellate court held that once the juvenile court acquires "personal jurisdiction" over the non-resident parent in this manner at the jurisdictional hearing, that subsequent notices only need to comply with California law. In this case, the juvenile court assured that appellant was properly served with the petition and notice of the jurisdictional hearing (by registered international mail with a copy of the petition all translated into Spanish). In addition the juvenile court knew that appellant was aware of the pendency of the juvenile court proceedings involving his three children pursuant to the telephone call and he had made more than one general appearance including filing a notice of appeal.

In re J.N. (1/6/10)
181 Cal.App.4th 1010
Sixth Appellate District

Issue:

Was there sufficient evidence to support the Juvenile Court taking jurisdiction under WIC §300(b) where the parents' excess use of alcohol occurred one time and there was no evidence of ongoing substance abuse problem?

Facts:

Santa Clara County DCFS detained 3 children (8-year old J.N., 4-year old Ax.B, and 14-month old As.B) after the parents were involved in an alcohol-related car accident. The family went to dinner where the parents drank alcohol; the father had about 6 beers. The mother told a social worker that she was a little drunk and the father may be drunk. Because the family lived nearby the father decided to drive home rather than walk. On the way home, the father struck another car, drove away from the scene with the other car following them, lost control of the minivan and struck a street light signal. Two of the children were hurt in the accident. According to the family, the parents did not drink much at home and both parents acknowledged fault. DCFS recommended the court sustain the petition and ordered HOP-mother. The Court entertained the idea of informal supervision but ended up sustaining a (b) count to reflect that the father was currently incarcerated and that both parents "*appear to* have a substance abuse problem that negatively impacts their ability to parent the children." The Court indicated there was no pattern of past risk but found the one incident to be significant and severe enough to find future risk.

Holding:

No. The Juvenile Court cannot take jurisdiction under §300(b) where the evidence shows a lack of current risk. The Court of Appeal disagreed with *In re J.K.* (2009) 174 Cal.App.4th 1426, to the extent that *In re J.K.* found that §300(b) authorizes dependency jurisdiction based on a single incident resulting in physical harm absent current risk. (*In re J.K.* was a Second Appellate District decision that found the father's rape of his daughter, although remote in time, was sufficiently serious to find that J.K. was at substantial risk of physical and emotional harm.) This Court of Appeal reasoned that while past harmful conduct is relevant to the current risk of future harm, the evidence as a whole must be considered. Here, even though the accident was serious, there was no evidence from which to infer there is substantial risk such behavior will recur or that either parent's parenting skills, general judgment, or understanding of the risks of inappropriate alcohol use is so materially deficient that the parent is unable to adequately supervise or protect the children.

In re K.C. (4/26/10)
Fifth Appellate District

Issue

Does the father have appellate standing to contest the denial of WIC §388 by paternal grandparents asking for placement just prior to WIC §366.26 hearing?

Facts

At the disposition hearing, the court denied family reunification services to both parents under various code sections. The matter was set for a WIC 366.26 hearing. In the meantime, the paternal grandparents requested placement of their grandchild but placement was denied by the Agency. The grandparents subsequently filed a 388 petition asking for placement. The court denied the WIC 388 after a hearing and then proceeded with the WIC 366.26 hearing. The court proceeded to terminate parental rights after finding that the parents had had no visitation with the child since his detention. The father and the grandparents then filed this appeal based on the court's denial of the 388 asking for placement with the paternal grandparents. Father contended that he had standing to challenge the trial court's denial of the grandparent's placement request because 1) he still had a fundamental interest in his son's companionship, custody, management and care at the time of the court's ruling even though family reunification was no longer a goal of the proceedings and 2) relative placement had the potential to alter the trial court's determination of the appropriate permanent plan for the child and thus might affect the father's interest.

Holding

The appellate court held that a parent does not have appellate standing to challenge an order denying a relative placement request once a permanency planning hearing is pending unless the parent can show his or her interest in the child's companionship, custody, management and care *is*, rather than *may be* "injuriously affected" by the court's decision. A decision that has the "potential" to or "may affect" the parent's interest, even though it may be "unlikely" does not render the parent aggrieved. In this case, even if the relative placement had been made, nothing would have stopped the trial court from terminating parental rights at the 366.26 hearing based on the lack of visitation by the parents. Therefore, under the circumstances in this case, it was not the court's decision on the placement request that directly impacted the father's interest and so the father was not entitled to an on-the-merits review of the trial court's ruling on the relative placement request.

K.C. v. Superior Court (3/18/10)
182 Cal. App. 4th 1388
Third Appellate District

Issue

Mother argues the juvenile court abused its discretion in denying her services pursuant to section 361.5(b)(10) and (11), because she did make reasonable efforts to treat the problems which led to the removal of the half siblings.

Facts

This case involves a newborn removed from mother's custody in September 2009 due to the risk of neglect. Mother had a history of addiction and had failed to reunify with the minor's half siblings and her parental rights were terminated for those half-siblings. The minor was also at risk of sexual abuse because the father had a conviction for violation of Penal Code § 288(a), involving a five-year-old child. Mother was aware of the father's conviction but did not appear to recognize the danger he posed to the minor.

A sibling born in 2003 had complications due to withdrawal from caffeine and nicotine. Mother's continued abuse of nicotine was a factor which led to her neglect of the siblings. The mother had been counseled not to smoke while pregnant with the minor due to the negative effects her smoking had on a half sibling, but petitioner did not stop smoking. This minor was also born testing positive for nicotine

In the prior case, evidence of mother's neglect of her children was based, in part, on her behavior which put her own needs, including smoking, ahead of their needs, i.e., she left the infant half sibling unattended to go outside and smoke, neglecting the infant's care, and ignored the infant's distress to attend to her own comfort first. A psychological evaluation in the prior case concluded mother was caffeine and nicotine dependent. The evaluation noted that she rationalized her neglect and laziness and resisted taking responsibility for herself or the half siblings.

Mother continued to smoke. Additionally, the father's probation officer did not think mother a suitable responsible adult to supervise the father's contact with children because she had a history of neglecting her children and of being molested as a child yet chose the father as a partner.

At the jurisdiction hearing, the social worker testified petitioner's fingers and teeth were always stained from tobacco. The social worker agreed that quitting smoking was not a service objective of the previous dependency, but smoking was related to lack of supervision of the half siblings. While pregnant with the minor, the issue was discussed frequently with the mother and she was offered services. However, she consistently downplayed her dependence on nicotine and resisted any and all services or programs.

The court sustained the petition, noting that mother had a long history of nicotine abuse, was made aware of the dangers of smoking, and chose to do nothing about it. The court cited

evidence of mother's tobacco stained fingers, the minor's positive test for nicotine at birth, and mother's ongoing positive tests for nicotine as indicative of failure to protect the minor and noted it was consistent with the prior psychological evaluation that she rejected assistance and lacked commitment to her children.

The court denied services, finding mother came within the provisions of 361.5 (b)(10) and (11). The court found mother rejected treatment for nicotine addiction in the prior dependency case and while pregnant with the minor. The court stated mother's behavior said a lot about her willingness to comply with services and that it was not up to mother to pick the plan she intended to follow. It was disturbing to the court that she was unsure whether to keep the minor rather than take effective steps to become a responsible parent.

Holding

Affirmed. The juvenile court did not abuse its discretion in denying services pursuant to 361.5(b)(10) and (11).

In this case, the problems which led to removal of the half siblings were severe neglect resulting from mother's lack of concern about their welfare and characterized by her extreme dependence upon nicotine which she pursued to the exclusion of caring for the half siblings' needs. Mother was provided services to address her neglect and inadequate parenting, as well as her dependence upon nicotine. However, as the psychological evaluation concluded, mother resisted taking responsibility for herself or her children. One of the minors in the prior case was born dependent on nicotine and suffered withdrawal symptoms.

Overall, her efforts to address the issues which caused her to neglect the half siblings were, at best, lackadaisical. In short, the issues which led to the prior removal remained and had actually worsened due to her relationship with the minor's father and her inability to recognize the risk he posed to the minor.

Manual C. v. Superior Court (1/26/10)
181 Cal. App. 4th 382
Second Appellate District, Division Four

Issue

Can a party to an action file a 170.6 where case had previously been in front of same bench officer?

Facts

The original dependency petition filed on January 27, 2009, raised issues of domestic violence and parenting with respect to the father. The commissioner terminated dependency jurisdiction in that case with family law orders on October 7, 2009. Then, on October 30, 2009, a new dependency petition was filed, alleging that the father had sexually abused one of the children; that the mother knew or should have known of the abuse, but failed to take action to protect the child; and that the children were at risk of physical and emotional harm from the conduct of both parents. The current dependency petition arose out of events which occurred after the conclusion of the original dependency case. This was an original petition, not a supplemental petition in a pending case. In a dependency proceeding filed pursuant to Welf. & Inst. Code, § 300, respondent, the Los Angeles County Superior Court, California, denied petitioner father's peremptory challenge to a court commissioner on the ground that it was untimely pursuant to Code Civ. Proc., § 170.6, subd. (a)(2). The father filed a petition for a writ of mandate challenging the denial of his peremptory challenge.

Holding

The appellate court held that the §170.6 filed by the party was timely. The instant court concluded that the juvenile court erred in denying the father's peremptory challenge as untimely. Because the peremptory challenge was filed within 10 days of the father's appearance in the new proceeding, it was timely under § 170.6, subd. (a)(2).

In re Marcos G. (2/4/10)
182 Cal. App. 4th 369
Second Appellate District, Division Two

Issue:

Should the appellate court utilize a "harmless error" standard in determining whether to uphold a TPR, when there has been a failure to follow certain notice provisions (which were prior to and unrelated to the 26 hearing), as well a failure to also provide a JV-505 form to a father in a timely fashion, so that the father may have been elevated above an alleged father status?

Facts

This is a detailed and fact-specific case. The Agency failed to properly comply with various notice provisions for certain hearings, unrelated to the 26 hearing. Also, the Agency failed to timely provide a blank JV-505 form to father, as required by WIC 316.2(b). Father contended that notice errors resulted in his failure to appear, as well as his failure to obtain FR services, since he was only an alleged father. Although he was a "non-offending" parent, his parental rights were inevitably terminated. He contends that this never would have occurred IF he had been given proper notice of certain hearings, and IF he had been given a timely opportunity to submit a JV-505 form.

Holding

Yes. Although there may have been an error in certain notice provisions, and an error in failing to timely provide a JV-505 form to the father, any errors should be reviewed on a "harmless error" standard. This case has a detailed and excellent discussion of various notice provisions. The court finds that certain of these provisions were not complied with by the Agency and/or court. Despite these failures, the court found that these errors were "harmless," in that the father essentially slept on any of his rights, and thus may have waived them, or was also responsible for failing to take any actions to protect his rights in a timely manner. Moreover, these errors were not "prejudicial" since the court concluded that even if the father had acted promptly, he never would have obtained the rights he was seeking, under the facts and circumstances in this case. "Actual notice would not have changed the outcome of the jurisdiction and disposition hearing." The child still would have been declared a dependent and would have taken custody both mother and father, and he would not have been placed in any of the paternal relatives' homes.
No harm, no foul.

In Re M.B. (3/22/2010)
182 Cal. App. 4th 1496
Fourth Appellate District, Div. Two

Issue:

Does ICWA require the Indian expert to interview parents in every case?

Facts:

The trial court found that ICWA applied at time of detention. Appropriate notice and findings made. Tribe intervened. Prior to M.B.'s birth, parents had lost custody of four other minors due to allegations that father has molested the oldest stepchild and that mother has failed to protect. At jurisdiction hearing, found that M.B. was a dependent due to the abuse and neglect of his siblings.

M. B. was removed and services were denied on the based on termination of parental rights for siblings and father's violent felony conviction. The tribe agreed with the recommendation to deny services.

At 366.26 hearing, Indian expert testified at hearing. During parents' cross examination, expert testified that she normally does not speak to parents. Expert testified that termination of parental rights would not be detrimental to the child. The parents appealed.

Holding:

No. The purpose of the Indian expert's testimony is to offer a cultural perspective on the parent's conduct with his or her child to prevent the unwarranted interference with the parent-child relationship due to cultural bias. The Indian expert's testimony is directed to the question of whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and not because the family did not conform to any decision maker's stereotype of what a proper family should be. Here, Father's behavior including sexual abuse of a half-sibling could not be interpreted differently in a cultural context, so knowledge of cultural practices would not be helpful.

Court also found that there was substantial evidence to support ICWA detriment finding. Court found that although parents had not objected to expert, a claim that there is insufficient evidence to support the judgment is not waived by a failure to object. Court found sufficient evidence to support finding.

In re Rebecca S (2/8/10)
181 Cal. App. 4th 1310
Second Appellate District, Division One

Issue

Does the court need to designate the frequency, duration and location of parental visits when it terminates jurisdiction with a legal guardianship in place?

Facts

The court terminated jurisdiction after granting a legal guardianship to the maternal aunt. When terminating jurisdiction, the court stated "and as to visitation, that while I will order that the parents have monitored visits, your responsibility as a guardian is to arrange the frequency, location, duration, et cetera, taking into consideration the children's well-being." The written order provided "Monitored visits for parents. Duration, frequency and location to be determined by the legal guardian." The father did not object at the trial court level but later this appeal followed.

Holding

The appellate court held that while the time, place and manner of parental visitation may be left to the legal guardian, the frequency and duration of the visitation must be delineated by the trial court to assure that visitations will actually occur.

In re S. A. (3/15/10)
182 Cal. App. 4th 1128
Fourth District, Division One

Issue:

Does a parent have standing to assert that minor's counsel provided ineffective assistance to the child? Secondly, was it an abuse of discretion for the court to exclude the prehearing statements of the child's therapist?

Facts:

The petition alleged Father sexually molested S.A. At the jurisdiction hearing, S.A. testified to the abuse. Father sought to introduce the prehearing statements of the therapist S.A. had been seeing for about three years. The jurisdiction report and a police report included the therapist's statements to the social worker and a police detective that S.A. never revealed Father had molested her and that the therapist did not believe the minor's story. Father also sought to elicit the therapist's live testimony on the same issue. At that point in the hearing, minor's counsel invoked the psychotherapist-patient privilege, indicating the therapist had disclosed the information without consideration of S.A.'s right to confidentiality and before minor's counsel had an opportunity to speak to the therapist. The trial court upheld the privilege and excluded the therapist's prehearing statements. On appeal Father argued, among other things, S.A. had forfeited the privilege when her therapist made the statements, that the claim during trial was untimely, that S.A. should have personally claimed the privilege, that the court should have had all the available information before rendering a decision, and that minor's counsel was ineffective for not interviewing the therapist herself, thereby failing to properly investigate S.A.'s credibility.

Holding:

Affirmed. Father had no standing to challenge the competency of minor's counsel because the right to be represented by competent counsel is personal to S.A. Further, it would be nonsensical to confer standing on a party whose interests may be adverse to those of the minor when the minor has independent counsel on appeal. The Court of Appeal also held excluding the therapist's prehearing statements was not an abuse of discretion. The privilege was not forfeited because the patient holds the privilege, not the therapist. The claim was properly made at time of trial when Father actually sought to introduce the therapist's statements. Section 317(c) provides that either the child or counsel for the child may invoke the psychotherapist-patient privilege, although a child of sufficient age and maturity may waive the privilege. S.A. did not waive the privilege. In fact, her attorney specifically advised the court to the contrary. In some cases the court may permit limited information from a therapist even after the privilege is claimed – such as a general progress report without the details of disclosures made by the child or advice given or any diagnosis. However, in this case the court's decision to redact the therapist's statements from the reports and to opt for full confidentiality was not an abuse of discretion. The trial court

presumably determined the information to be provided by the therapist was unhelpful to its decision.

In re Z.N. (1/22/10)
181 Cal. App. 4th 282, 104 Cal. Rptr. 3d 247
First Appellate District, Division Two

Issues:

1) Did the trial court abuse its discretion in denying counsel's motion to be relieved (P. v. McKenzie) and parent's motion to relieve counsel (P. v. Marsden) after the court began the W and I § 366.26 hearing; and,
2) Did the trial court err when it failed to require ICWA notice and was there any prejudice to the parent as a result?

Facts:

This appeal involves the termination of parental rights involving twins born in April, 2002. Mother had a total of five children with different fathers. The twins half siblings were born in 1992 (Dexter), 1994 (Benjamin) and 1995 (L). The twins, Dexter and L were detained in 2006 and petitions filed due to mother's incarceration, homelessness and failure to provide proper support and care for the children.[1] Mother was also facing criminal charges for welfare fraud and her refusal to provide information on Benjamin's whereabouts.[2]

Mother was appointed counsel at the initial hearing but she either refused of failed to appear at any hearing until almost two years later. Mother reported that one of her grandmothers had Cherokee heritage and that another was "part Apache." She went on to say that neither she nor her mother were registered or affiliated with any tribe. There were ICWA notices and findings in the siblings' cases but the agency did not notice and the court did not make any findings regarding ICWA regarding the twins.

Mother failed to make any progress in reunification. She was in and out of custody and was ultimately convicted in the fraud case and sent to State prison. Reunification was terminated in June 2008.[3]

Mother was paroled in August 2008 and immediately entered a Female Offender Treatment Employment Program. She filed a WIC 388 in Jan. '09 and was heard just prior to the commencement of the 366.26 hearing. The petition was denied based upon a lack of showing of best interests. The matter then proceeded to hearing on the 366.26. After the Agency rested, mother asked for and was granted a continuance.

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[1] Each child was subject to a separate petition and the trial court maintained a separate file for each child.
[2] Benjamin was 12 at the time of detention but he had not been seen since he was six-months old. Mother gave various stories regarding his whereabouts, none of which could be confirmed.
[3] By that time Dexter was 17 and in planned permanent living arrangement and L.'s case was dismissed as she was living with her father.

On the date of the continuance, mother's counsel made a "McKenzie" motion to be relieved and mother made a "Marsden" motion to relieve her counsel. Both cited a complete breakdown in communication, counsel citing abusive and threatening phone calls and mother citing counsel's failure to communicate and failure to follow mother's requests. In her argument on the Marsden hearing, mother conceded that she had very little chance of succeeding on the 366.26. Due to the fact that the 366.26 hearing had commenced, the trial court denied the motions without prejudice, noting that while the attorney could have done a better job of communication, she had fought vigorously for the mother at every opportunity; that her decisions on trial tactics were within her discretion; and, that mother should not have made the inappropriate calls to the attorney.

Holding:

Affirmed on appeal:

1) The trial court did not abuse its discretion in denying either the motion to be relieved as counsel or mother's motion to relieve counsel. The trial court has the discretion to deny the motions where they are made on the date of the hearing or, as in this case, where the hearing is already commenced; additionally, the court made an adequate inquiry into all of the reasons the attorney and party had for their motions and found them inadequate under the circumstances; and, there was no actual harm done by the denial. Counsel continued to represent mother and put up a vigorous defense and, in any event, the outcome would not have been any different had new counsel been appointed.
2) There was insufficient information to conclude that ICWA notice was required. Mother was vague about the affiliation and the relatives were great grandmothers. The court of appeal further found that even if notice was required, the error was harmless. The agency asked the court to take judicial notice of the information and findings in the siblings file. The Court of Appeal declined to take notice for the purpose of an ICWA finding as it was improper to do so; however, the C of A did find judicial notice was proper to determine whether any error was prejudicial. Here there was more than sufficient evidence that the inquiries made with respect to the siblings did not result in any information that ICWA applied and there was little if any likelihood that had notice been done in this case, the result would have been different.
3) In this case, the C of A noted that in the siblings' cases, no tribe had intervened and the court found no ICWA. The court failed to see the logic used by other districts (i.e., the Second) to use judicial notice instead of the policy of limited remands as a coercive tool to force the trial courts and the agencies to comply with the ICWA notice requirements where the result is pre-ordained. Such a policy flies in the face of the policy of resolving dependency cases expeditiously and in the best interest of the children.

CASE LAW INDEX

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Appellate Issues

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A.	141 Cal. App. 4th 47 Cal. Rptr. 3d 115 Second Appellate Dist Division Five	Discussion of time line for granting of rehearings.	The court held that the date of denial of a rehearing is the date of judge's signature on the rehearing from. The clerk must create a order showing the denial forthwith, but such minute order does n to be within the same twenty day time line. The failure to create minute order does not result in the right to a rehearing.
ndy R.	150 Cal. App. 4th 607 58 Cal. Rptr.3d 456 Fourth Appellate Dist. Division Three	Does a pending writ automatically stay the trial court proceedings?	The appellate court held that unlike appeals, writs do not result i automatic stay of the trial court proceedings. (The appellate cou that the trial court could proceed to the WIC 366.26 hearing even the writ on the termination of reunification services had yet to be resolved.)
len W.	150 Cal. App. 4th 71 57 Cal. Rptr. 3d 914 Fourth Appellate Dist Division Three	Was the appeal properly authorized by parent given that parent's attorney signed the notice of appeal?	The appellate court changed their previous practice of requiring t parent to sign the notice of appeal. The appellate court held that 8.400(c) now provides that "the appellant *or* the appellant's attor must sign the notice [of appeal]."
nifer T.	159 Cal. App. 4th 254 71 Cal. Rptr. 3d 293 Second Appellate Dist Division Three	Must the court orally advise a parent of their writ rights?	The appellate court held that the court must orally advise a paren their writ rights even if the clerk sends out the written writ rights Failure to do so caused the appellate court to construe the appeal petition for writ of mandate.

iah Z.	36 Cal. 4th 664 115 P. 3d 1133 CA Supreme Court	Under what circumstances may appellate counsel investigate whether dismissal of an appeal is in the child's best interest.	The court held that the appellate counsel does have the power an appellate court has the power to consider and rule on a motion fo dismissal by the child's appellate counsel. The court also held th appellate counsel may actually file a motion to dismiss only afte consultation with, and authorization from, the child or the child's guardian ad litem.
3.)	173 Cal. App. 4th 562 Second Appellate Dist Division Five	Can an appeal be filed before the party is aggrieved?	The appellate court held that a party cannot file an appeal before aggrieved. In this case the simple setting of a 366.21(f) hearing possibly untimely manner is not appealable at this point because hearing has not yet been held and therefore the parent was not in
dison W.	141 Cal. App. 4th 1447 47 Cal. Rptr. 3d 143 Fifth Appellate Dist	Should the appeal court review the denial of the 388 petition even though it was not specifically mentioned in the notice of appeal?	The appellate court held that they would henceforth liberally con parent's notice of appeal from an order terminating parental righ encompass the denial of the parent's WIC 388 petition provided court issued its denial during the 60 day period prior to filing the parent's notice of appeal. The appellate court held such for prag reasons such as the unnecessary consumption of limited judicial resources.
oenix H. 0)	47 Cal. 4th 835 220 P.3d 524 CA Supreme Court	Does appellant have a right in dependency proceedings to file supplemental brief after attorney files Sade C. letter.	The supreme court held that the appellant does not have a right t supplemental brief after the reviewing attorney files a Sade C. le The court reiterated that Sade C. had previously held that Anders protections inapplicable in dependency proceeding and that it wo lead to error as appointed counsel faithfully conduct themselves advocates for indigent parents. In addition, dependency proceedi require the timely resolution of a child's status and adequate safe are in place that negates any purpose in allowing a parent to file supplemental brief as a matter of right.
ardo V.	147 Cal. App. 4th 419 54 Cal. Rptr. 3d 223 Second Appellate Dist Division One	Can a dependency court judge vacate a referee's order while a rehearing is pending?	The court held that pursuant to WIC 250 that a dependency judg prohibited from vacating or modifying a referee's order until afte rehearing. A referee's order remains in full force and effect unti order is made after a rehearing of the original order or pursuant t procedures authorizing the court to modify an existing order.

A.)	182 Cal. App. 4th 1128 Fourth Appellate Dist Division One	Does a parent have standing to assert that minor's counsel provided ineffective assistance to the child?	The appellate court held that the father had no standing to challe competency of minor's counsel because the right to be represent competent counsel is personal to S.A. Further, it would be nonse to confer standing on a party whose interests may be adverse to t the minor when the minor has independent counsel on appeal.
pitha W.	143 Cal. App. 4th 811 49 Cal. Rptr. 3d 565 Fourth Appellate Dist Division Two	Can parents appeal some issues from dispo and writ the others when 26 hearing is set?	The appellate court held that all orders issued at a hearing in whi WIC 366.26 hearing is ordered are subject to WIC 366.26(l) and reviewed by extraordinary writ.

Confidentiality/WIC 827

me	Case Cite	Issue	Holding
ah S.	12 Cal. App. 4th 1532 24 Cal. Rptr. 3d 16 First Appellate Dist Division Three	Does WIC 827 govern children for whom a petition has never been filed in juvenile court? Is there a different standard of confidentiality for living v. deceased children?	The court held that WIC 827 allows for the disclosure of records child who by definition comes "within the jurisdiction of the juv court pursuant to WIC 300 without regard to whether a section 3 dependency petition has been filed." In addition, the court found that unlike records pertaining to a liv dependent, which must be maintained as confidential unless som sufficient reason for disclosure is shown to exist, records pertain deceased dependent must be disclosed unless the statutory reason confidentiality are shown to exist.
a S.	133 Cal. App. 4th 1074 35 Cal. Rptr. 3d 277 First Appellate Dist Division Four	Does the right to inspect documents include the right to copy the same documents? Did the court abuse its discretion by denying mother's WIC 827 motion.	The right to inspect documents as outlined in WIC 827 does not the right to copy the same documents. The court held that the trial court did err in denying mother's WI motion because it could have given the mother the information s sought without violating the child's privacy issues. Rule of Cou (B) requires that the court balance the interests of the child and c parties to the Juvenile Court proceedings, interests of the petition interests of the public. The Court must permit disclosure or disc however access to Juvenile Court records, only in so far as is nec and only if there is a reasonable likelihood that the records in qu will disclose information or evidence of substantial relevance to pending litigation.
. 9)	172 Cal. App. 4th 1049 91 Cal. Rptr. 3d 546 Fourth Appellate Dist Division Three	Good discussion of statutory scheme and balancing of interests court must do in disclosing conf. juvenile records.	The appellate court held that the rights of the parents of the victi tape of their child's interview regarding the abuse outweighed th of the perpetrator and his family's privacy concerns.

me	Case Cite	Issue	Holding
C.	169 Cal. App. 4th 636 88 Cal. Rptr. 3d 1 Fourth Appellate Dist Division Three	When does the 361.5 reunification time line begin if a child is placed at dispo with another parent?	The appellate court held that when a child is placed with any par disposition that the time limits for reunification services set forth 361.5 does not begin. The 6/12/18 month date does not begin un child is removed from both parents and placed in "foster care".
rianna P.	166 Cal. App. 4th 44 81 Cal. Rptr. 3d 918 Fourth Appellate Dist Division One	Do the bypass provisions of WIC 361.5 apply to non-custodial parents who requested and are denied custody under WIC 361.2?	The appellate court held that when the court removes a child fro parental custody, it must first determine whether there is a non-c parent that desires to assume custody of the child. If the court do order the non-custodial parent to assume custody under WIC 361 because placement with that parent would be detrimental to the s protection, or physical or emotional well-being of the child, the c then proceeds to WIC 361.5 to govern the grant or denial of FR s
vin P.)	178 Cal. App. 4th 958 100 Cal. Rptr. 3d 654 Fourth Appellate Dist Division One	May the court provide FR services to one parent when the child is placed with the other parent and, if ordered, must those services be reasonable?	The appellate court held that a trial court may offer family reunif services to one parent when the child has been placed with the ot parents and family maintenance services ordered for that parent. appellate court also held that if those reunification services have offered, they must be reasonable.
rolyn R.	41 Cal. App. 4th 159 48 Cal Rptr. 2d 669 Fifth Appellate Dist	Does the child's return to the parents after disposition toll the 361.5 time line for services that began at disposition?	The appellate court held that once a court sustains a supplementa petition to remove a dependent child for a second time from a pa physical custody, it may set the matter for a permanency plannin 366.26 if that parent received 12 or more months of reasonable c welfare services. In determining how many months of services t has received the court found that both reunification and maintena services are part of the continuum of child welfare services. [In case, the child was suitably placed at the time of disposition and returned to the parent; therefore receiving 8 mos of FR and 10 m FM - 18 months in total].

briel L. 9)	172 Cal. App. 4th 644 91 Cal. Rptr. 3d 193 Fourth Appellate Dist Division One	If, after a period during which both parents were offered FR, the child is placed with one parent, what is the court's discretion to continue FR to the other parent?	The appellate court held that the trial court, may, but is not requi continue FR for the now non-custodial parent. The appellate cou explained that the court's discretion should be examined under W rather than WIC 366 or 366.21 and that the discretion to order se the same whether the child is placed with a previously noncustod parent or is returned to one parent after a period of offering reuni services to both parents. Like 361.2, the court can provide servic the previously custodial parent, to the parent who is assuming cu to both parents, or it may instead bypass the provision of service terminate jurisdiction
l T.	70 Cal. App. 4th 263 82 Cal. Rptr. 2d 538 Third Appellate Dist	Do family maintenance services count when determining the 18 months time line under WIC 361.5?	The appellate court held that because the children had been place their mother at the disposition hearing, it was truly family mainte services which had been offered. Therefore, the time lines under 361.5 had not started to run and mother should have been offered reunification services at the first disposition hearing removing th children from her care unless one of the exceptions to offering reunification services existed.
M.	108 Cal. App. 4th 845 134 Cal. Rptr. 2d 187 Fourth Appellate Dist Division Two	When does 18 month clock begin?	The appellate court held that the 18 month clock begins for both if the child is detained from their custody at the onset of the depe action regardless of whether the court grants one parent custody disposition under a family maintenance plan (which was done pu to WIC 362 in this case)
sa S.	100 Cal. App. 4th 1181 122 Cal. Rptr. 2d 866 Fourth Appellate Dist Division Three	Do reunification services need to be provided to a parent on a new petition after the court returns the child to that parent and terminates jurisdiction on a previous petition?	The appellate court held that where a child had been returned to and jurisdiction terminated that the trial could was obliged to pro reunification services to that parent at disposition on a subsequen petition unless one of the exceptions under WIC 361.5(b) applie court stated that where a supplemental or subsequent petition is f an existing dependency proceeding, the parent has not yet been successful enough to justify the termination of juvenile court juri over his or her child. Where jurisdiction has been terminated, ho the parent-child relationship is restored to its former status, free governmental interference absent extraordinary circumstances, a new dependency proceeding must include all the statutory provis designed to protect that relationship.

.	154 Cal. App. 4th 1262 65 Cal. Rptr. 3d 444 Second Appellate Dist Division Eight	Is a non-custodial parent who is not seeking custody entitled to FR services?	The appellate court held that a previously non-custodial parent w not seeking custody of the child at the disposition of the case is n entitled to reunification services. The court stated that WIC 361 specifically with the removal of a child from a custodial parent w there also exists a non-custodial parent. When a court orders ren a child per WIC 361, the court shall first determine whether there parent of the child, with whom the child was not residing at the t the events or conditions arose that brought the child within WIC who desires to assume custody of the child. If such a parent requ custody, the court shall place the child with the parent unless find placement with that parents would be detrimental to the child (W 361.2(a). WIC 361.5 requires the provision of services to parent purpose of facilitating reunification of the family. The provision services to a non-custodial parent who does not seek custody of t children does not in any way serve this purpose.

Defacto Parents

me	Case Cite	Issue	Holding
ttany K.	127 Cal. App. 4th 1497 26 Cal. Rptr. 3d 487 First Appellate Dist Division Three	Termination of defacto parent status	The court affirmed the Patricia L court in stating that once a cou an adult 'defacto status', in order to terminate that status, the mo party must file a noticed motion and 'has the burden of establish change of circumstances which no longer support the status, such when a psychological bond no longer exists between the adult ar child', or when the defacto parent no longer has reliable or uniqu information regarding the child that would be useful to the juven court. The facts supported those findings in this case.
ricia L.	9 Cal. App. 4th 61 11 Cal. Rptr. 2d 631 Fourth Appellate Dist Division One	Defines defacto parent status.	The court listed some of the considerations relevant to the decisi whether a person qualifies as a defacto parent. Those considerat include whether 1) the child is 'psychologically bonded' to the a the adult has assumed the role of a parent on a day-to-day basis f substantial period of time; 3) the adult possesses information abo child unique from other participants in the process; 4) the adult h regularly attended juvenile court hearings and 5) a future proceed may result in an order permanently foreclosing any future contac the adult. Once the court finds someone to be a defacto parent, t defacto parent may 1) be present at the hearing; 2) be represente retained counsel or, at the discretion of the court, by appointed c 3) present evidence.
.	134 Cal. App. 4th 1357 37 Cal. Rptr. 3d 6 Fourth Appellate Dist Division Two	Does a de facto parent have standing to complain of the decision to place the child in a new adoptive home?	De facto parents "do not have a right to reunification services, cu or visitation," so a defacto parent's legal rights are not impacted order to replace the child, and de facto parents, therefore, have n standing to appeal the placement decision. Even if they have suc standing, a de facto parent's equivocation about adopting the chi itself, is substantial evidence supporting the Court's order to cha placement.

.	164 Cal. App. 4th 219 79 Cal. Rptr. 184 Third Appellate Dist	What is the standard of proof to trigger a hearing on a defacto parent motion?	The appellate court held that there is no standard of proof to trig hearing on a defacto motion. In the instant case, the grandmothe to provide any authority showing that she was entitled to an evid hearing. The appellate court noted that the grandmother was not caretaker of the children on a day-to-day basis and that the grand have no constitutionally protected interest in the care and custod their grandchildren.

Delinquency Issues

me	Case Cite	Issue	Holding
rmen M.	141 Cal. App. 4th 478 46 Cal. Rptr. 3d 117 Second Appellate Dist Division Seven	Can a dependency court require a non-delinquent child to submit to random drug tests?	The appellate court held that the trial court can order drug testing program has reasonable cause to believe the child may be under influence of drugs. The court suggest that orders be made regard type of testing and the circumstances as well as the scope of who results can be released. Case supports WIC 362 which gives the broad discretion to make orders for the care, custody ... of the ch for their best interests.
Superior)	173 Cal. App. 4th 1117 93 Cal. Rptr. 3d 418 Fourth Appellate Dist Division Three	Does a 241.1 assess. have to be prepared by both the child welfare agency and probation?	The appellate court held that the requirement under WIC 241.1 f child welfare agency and probation to do a "joint assessment" fo child could be satisfied with one agency consulting the other eve the phone.
nry S.	140 Cal. App. 4th 248 44 Cal. Rptr. 3d 418 Fifth Appellate Dist	Does minor have right to full evid. hrg. for purposes of determination under 241.1?	The court found that a child does not have a due process right to evidentiary hearing for purposes of a determination under WIC 2 However, nothing precludes the court from granting a full hearin admitting further evidence if the court believes such a proceedin necessary to enable it to make a properly informed decision.
fany A.	150 Cal.App. 4th 1344 59 Cal. Rptr. 3d 363 Second Appellate Dist Division Seven	Discussion of when shackling a juvenile delinquent in court is appropriate.	The appellate court held that any decision to shackle a minor wh appears in the Juvenile Delinquency Court for a court proceedin be based on the non-conforming conduct and behavior of that in minor. Moreover, the decision to shackle a minor must be made case-by-case basis... The amount of need necessary to support th will depend on the type of proceeding. However, the Juvenile Delinquency Court may not justify the use of shackles solely on inadequacy of the courtroom facilities or the lack of available se personnel to monitor them.

Emancipation/ Terminating Jurisdiction

me	Case Cite	Issue	Holding
nnie P.	134 Cal. App. 4th 1249 37 Cal. Rptr. 3d 77 Fourth Appellate Dist Division One	Requirements to formally emancipate child under Family Code section 7120.	The trial court must make two findings under Family Code sectio to emancipate a child; 1) that the minor willingly lives separate a from the minor's parents or guardian with the consent or acquies the minor's parents or guardian and 2) minor is managing his or financial affairs. Also, although considered an informal hearing, process requires all witnesses to be sworn in.
A. v. Court	148 Cal. App. 4th 285 55 Cal. Rptr. 3d 647 Second Appellate Dist Division Seven	Is the court required to terminate jurisdiction when it returns children to the custodial parent at a review hearing?	The appellate court held that the trial court was not required to te jurisdiction when it returned the children to the care of the paren WIC 366.22 hearing. The court held that it was within the court discretion to return the children to the parents, order family main services to the family and set a hearing under WIC 364. In addit appellate court stated that the 18 month limit on family reunifica services constrains the juvenile court's authority to order family maintenance services beyond that time for a child who had been to the custody of his or her parent. There is no statutory limit on provision of family maintenance services if the court believes the objectives of the service plan are being met.
l T.	70 Cal. App. 4th 263 82 Cal. Rptr. 2d 538 Third Appellate Dist	How long can family maintenance services and supervision be provided when a child is in the parent's home?	The appellate court stated that unlike the situation in which the c removed from the home and court-ordered services are statutoril limited to 18 months, nothing in the statutes or rules limits the ti period for court supervision and services when the child remains home. If supervision is no longer required, the court simply term the dependency. Otherwise, the state may continue to provide supportive services and supervision to parents until the dependen children reach their majority.
mika C.	131 Cal. App. 4th 1153 32 Cal. Rptr. 3d 597 Fifth Appellate Dist	Requirements to terminate jurisdiction after child turns 18.	The court held that regardless of the funding issues that the court terminate jurisdiction over a child who is over 18 just because fe funding stops when child turns 19. The court should not termina jurisdiction over a dependent until all the requirements of WIC 3 been met and it is in the best interest of the dependent to close th

me	Case Cite	Issue	Holding
ril C.	131 Cal. App. 4th 599 31 Cal. Rptr. 3d 804 Second Appellate Dist Division Two	Was the trial court required to strike the child's statements in the reports after all the parties stipulated that the child was not competent to testify. Does Crawford apply to dependency cases?	The court held that WIC 355 expressly authorizes the admission hearsay statements of a child victim contained in a social study, does not meet the requirements of the child dependency exceptio even if the minor is incompetent to testify unless such a statemer product of fraud, deceit, or undue influence. Due process requir finding by the court that the statement bears special indicia of re In this case, the child's statements, together with the corroborati evidence of sexual abuse, constituted substantial evidence to sup jurisdictional findings. The court held that unlike the Crawford decision, the right to confrontation does not apply to parties in ci proceedings, including juvenile dependency proceedings.
e C.	174 Cal. App. 4th 900 95 Cal. Rptr. 3d 62 Fourth Appellate Dist Division One	Discussion of who holds psychotherapist -patient privilege for the child in dependency case.	The appellate court held that once minor's counsel is appointed t represent a minor in a dependency case, they hold the psychothe patient privilege. The holder of the privilege is determined at the the disclosure of confidential communications are sought to be introduced into evidence and the attorney can assert the privilege about pre-filing therapy sessions.
vid B.	140 Cal. App. 4th 772 44 Cal. Rptr. 3d 799 Fourth Appellate Dist Division Three	Can an offer of proof be required for a contested review hearing?	The appellate court held that a parent of a dependent child has a process right to a contested review hearing, unfettered by the prerequisite of a juvenile court's demand for an offer of proof. A case law allowing the requirement for an offer of proof is at the 366.26 hearing at which the burden of showing non-adoptability with the parent once DCFS has met its initial burden. The court that a party must be able to make its best case, untrammeled by evidentiary obstacles arbitrarily imposed by the court without leg sanction.

nna Y.	8 Cal. App. 4th 433 10 Cal. Rptr. 2d 422 Sixth Appellate Dist	Interpretation of WIC 355.1(f) Does a parent have the right to "plead the 5th" in dependency court?	The court held that a parent does not have a right to "plead the 5 dependency court because pursuant to WIC 355.1(f), the testimo parent shall not be admissible as evidence in any other proceedi court held that the privilege against self-incrimination is inappli child welfare proceedings because all relevant evidence should b disclosed to protect the paramount interest of the safety and welf the child. In addition that a parent should never have to elect be trying to regain custody of his children and defending himself ag criminal charges. However, the court added the caveat that use immunity would not bar use of statements if the criminal defend such statements in issue through squarely inconsistent testimony criminal trial because the purpose of use immunity is to secure t testimony, not to license perjury.
nela v. LA Court)	177 Cal. App. 4th 1139 99 Cal. Rptr. 3d 736 Second Appellate Dist Division Three	Did physician-patient privilege or constitutional right to privacy support trial court's quashing of subpoenas for medical records?	The appellate court held that the physician-patient privilege only for the doctor who treated the patient before his marriage but not doctor where the mother was present for the appointment and the talked about the diagnosis in front of the mother. The court also indicated that the father's right to privacy was not absolute and t father's privacy interest was outweighed by the state's compelli interest in protecting the child's best interests.
.)	182 Cal. App. 4th 1128 Fourth Appellate Dist Division One	Was it an abuse of discretion for the court to exclude the prehearing statements of the child's therapist?	The Court of Appeal held excluding the therapist's prehearing statements was not an abuse of discretion. The privilege was no forfeited because the patient holds the privilege, not the therapis claim was properly made at time of trial when Father actually so introduce the therapist's statements. Section 317(c) provides tha the child or counsel for the child may invoke the psychotherapis privilege, although a child of sufficient age and maturity may wa privilege. S.A. did not waive the privilege. In fact, her attorney specifically advised the court to the contrary.
.	38 Cal. App. 4th 396 41 Cal. Rptr. 3d 453 Third Appellate Dist	When is the Child Sexual Abuse Accommodation Syndrome (CSAAS) admissible?	The court held that "it has long been held that in a judicial proce presenting the question whether a child has been sexually molest CSAAS is admissible evidence for the limited purpose of disabu fact finder of common misconceptions it might have about how c victims react to sexual abuse." (Note - all the cases cited in this c are criminal and not dependency cases.)

nessa M.	138 Cal. App. 4th 1121 41 Cal. Rrtr. 3d 909 First Appellate Dist Division Five	Was court's refusal to hear father's further testimony a denial of father's due process?	The court held that the court's refusal to allow father to finish hi testimony after his failure to appear at a court date was a denial o process and was not harmless beyond a reasonable doubt. The c noted that there was no statutory authority to impose such an "ev sanction" against the father.

me	Case Cite	Issue	Holding
xandria	156 Cal. App. 4th 1088 68 Cal. Rptr. 3d 10 Fourth Appellate Dist Division One	Does juvenile court have jurisdiction over child support issues? Did court err in not accepting stipulated family law order?	The appellate court held that the juvenile court has no jurisdictio determine child support issues. In addition, the appellate court held that the trial court erred in n accepting a stipulated family law order. In the absence of risk, t family court, rather than the juvenile court, is the proper forum f adjudicating child custody disputes?
zabeth M.	158 Cal. App. 4th 1551 70 Cal. Rptr. 3d 746 Fourth Appellate Dist Division Three	Was the father denied due process when a new visitation order was made part of the family law order without notice and a hearing?	The appellate court held that the father was denied due process w bench officer signed a family law order which cut the father's vi by interlineation. The father had not been given notice of a poss change to his visitation or an opportunity to be heard on the issu was no indication on the record of where or why the change was and because the change was made in a different writing on the or origin was questionable. The moral: Make sure that any orders y are consistent with what was said on the record.
rriage of & Yana	37 Cal. 4th 947 CA Supreme Court	Can the non-custodial parent challenge the right of the custodial parent to move out of state with the children?	The court held that Family Code 7501 contemplates that even a p with sole legal and sole physical custody may be restrained from changing a child's residence, if court determines that the change be detrimental to the child's rights and welfare. However, the co deny the non-custodial parent a full evidentiary hearing if the pl show only an abstract detriment which is insufficient. The facto consider in changing custody to the non-custodial parent in light proposed move would include 1) the child's interest in stability a continuity in existing custody arrangement; 2) distance of the pr move; 3) child's age; 4) child's relationship with both parents; 5 relationship between parents which included their ability to communicate and cooperate; 6) willingness to put child's interes individual interests; 7: child's wishes (if mature enough); 8) reas the move; and 9) the extent parents share custody.

rriage of & Martha 6)	140 Cal. App. 4th 96 44 Cal Rptr. 3d 388 Second Appellate Dist Division Seven	What standard must family law court use in modifying a prior juvenile court exit order.	The appellate court found that pursuant to WIC 302, the family l court must find a significant change of circumstances in order to a juvenile court exit order issued pursuant to WIC 362.4. The ap court also affirmed that WIC 302(d) provides that a 362.4 exit or "final order" pursuant to Montenegro.

Funding Issues

me	Case Cite	Issue	Holding
rrine W. 9)	49 Cal. 2d 112 315 P. 2d 317 CA Supreme Court	Did the trial court err when it refused to order the agency to pay for the child's automobile liability insurance?	The CA Supreme Court found that WIC 11460 did not require th Agency to pay for automobile liability insurance. The court indi that federal and state appropriations for foster care are finite and shared by all the foster care providers in the state. It is up to the to exercise judgment in the use of the limited resources. Therefo while the Agency can use its funds to pay for automobile liabilit insurance, it is not compelled to do so.
rlene T.	163 Cal. App. 4th 929 78 Cal. Rptr. 3d 119 Second Appellate Dist Division Two	Did trial court exceed its authority when it ordered DCFS to pay retroactive funds before the caretaker exhausted admin. remedies?	The appellate court held that the trial court erred in finding that V 362(a) gives the juvenile court the authority to order the Departm make [AFDC-FC] payments without an administrative determina the children's eligibility for those payments." The court held tha caretaker was required to exhaust administrative remedies before could consider the issue of AFDC-FC funding.
hua S.	41 Cal. 4th 261 59 Cal. Rptr. 3d 460 CA Supreme Court	Can a caretaker, living with the children in a foreign country get financial assistance from U.S.?	The California Supreme Court held that to be eligible for foster c payments, a child must be in foster care. Since foster care is def foster family home for children which is licensed by the State in is situated or has been approved by the agency of such state, a ca residing out of the Country is not eligible for any financial assist from any source in the U.S. (County, State or Federal), at any sta the Dependency proceedings (jurisdiction/disposition, during reunification or after) or under any type of permanent plan (LTFC/PPLA, Guardianship, or Adoption) even if court ordered.
nuel G. 9)	174 Cal. App. 4th 502 94 Cal. Rptr. 3d 237 Fourth Appellate Dist Division One	May the court order the Agency to pay for the travel of a dependent's education representative to visit the child?	The appellate court held that the trial court could order the Agen pay for the travel of a dependent child's educational representati visit the child in an out-of-county placement. Ordering the Agen pay for the CASA's travel expenses would otherwise be inappro (without an MOU), but in this case, the order was made for the C her separate capacity as the educational decision maker and educ a fundamental interest that must be made available to all on an e basis.

Guardian ad Litem

me	Case Cite	Issue	Holding
C.	166 Cal. App. 4th 146 82 Cal. Rptr. 3d 542 Fifth Appellate Dist	Did court error in not appointing a GAL for a father for whom a conservator had been appointed in another proceeding?	The appellate court held that the trial court did err in failing to ap GAL for a father under CCP 372 once another court had appoint conservator for that parent under the Lanterman-Petris-Short Act appellate court held that when a dependency court has knowledg party's minor status or incompetence under CCP 372, the depend court has an obligation to appoint a GAL sua sponte. The error, however, was harmless, because the father's interests were not substantially prejudiced.
J.	141 Cal. App. 4th 326 45 Cal. Rptr. 3d 854 Fourth Appellate Dist Division One	Requirements for appointment of GAL for parents	The court held once again that a parent must be given notice of t possible appointment of a GAL and an opportunity to be heard. court goes on to say that the hearing may be closed to other parti the court or counsel must explain to the parent the purpose of ap a guardian ad litem, the parent's loss of authority over the litigat guardian ad litem's role, and why counsel believes the appointm necessary. The court clarifies that the presence of mental illness necessarily determinative of the need for a GAL.
G.	129 Cal. App. 4th 27 27 Cal. Rptr. 3d 872 Second Appellate Dist Division Four	Requirements for appointment of GAL for parents.	The court found that because the court failed to make any inquir parent prior to appointing a GAL, that there was insufficient evi support the appointment. The court points out that the test for appointment of a Guardian ad Litem in dependency court is whe person has the capacity to understand the nature or consequences proceedings and whether the person is able to assist counsel in p the case. If a person consents to a GAL, then no need for inquiry but if the person does not consent, the court must advise the pers the request, inquire as to the parent's position and then determin person is competent (understands the nature of the proceedings a assist their attorney).
D.	144 Cal. App. 4th 646 50 Cal. Rptr. 3d 578 Fifth Appellate Dist	Must the court appoint a GAL for a father who is a minor before the juri hrg?	The court held that the trial court must appoint a GAL for a mino who is a presumed father, even if he does not appear. The court CCP 372 and 373 and found that when a minor is a party, a GAL be appointed.

rique G.	140 Cal. App. 4th 676 44 Cal. Rptr. 3d 724 Fourth Appellate Dist Division One	Requirements for appointment of GAL for parents.	The court found that the trial court must assure that a parent is pr notice of attorney's request for the appointment of a GAL and ar opportunity to respond to the request. The court must assure tha parent is provided an explanation of what a GAL is and the funct the GAL services, in addition to the requirements set forth in In r
meralda S.	165 Cal. App. 4th 84 80 Cal. Rptr. 3d 585 Fourth Appellate Dist Division Two	Discussion of harmless error analysis in cases involving appointment of GAL.	In the harmless error analysis in cases involving the appointment GAL, the appellate court held that it harmless error if the outcom proceedings would not have been affected even if the GAL had n appointed (not only if the GAL would have been appointed desp due process violation). The appellate court also addressed wheth standard of review for the harmless error analysis was harmless b a reasonable doubt or by clear and convincing evidence. The cou harmless beyond a reasonable doubt because they weren't sure.
nes F.	42 Cal. 4th 901 CA Supreme Court	Is appointment of a GAL without proper inquiry of the party, structural or harmless error?	The California Supreme Court held that the appointment of a GA without the consent of the party or without the appropriate inquir his competence with an explanation of the purpose of the appoin should be subject to a harmless error review and is not a structur requiring reversal as a matter of law.
F.	161 Cal. App. 4th 673 74 Cal. Rptr. 3d 383 Third Appellate Dist	Pursuant to CCP 372(a), must the trial court appoint a GAL for a minor parent? If the trial court fails to do so, is the failure subject to the "harmless error" doctrine?	The appellate court held that while the provisions of the CCP "do automatically extend to the dependency context", in the absence dispositive provision in the WIC, we may look to these requirem guidance. The court found that an attorney for a parent in depen proceeding must have meaningful input from his/her client and s CCP 372 recognizes that minors are considered legally incapable providing adequate direction to counsel, a guardian ad litem is no in such cases to stand in the role of the client. In addition, since there were possible arguments that the attorney have made had a "client" been present and the mother was not pr and didn't have a GAL, the error was not harmless.

Incarcerated Parents

me	Case Cite	Issue	Holding
R.	131 Cal. App. 4th 337 32 Cal. Rptr. 3d 146 Second Appellate Dist Division Two	Can juri. hearing on a 300(g) proceed w/o parent who is inc. and not transported to court hearing?	There is no statutory right for an incarcerated parent to be presen adjudication of a petition under 300(g) and findings at such a hea would not be reversed for constitutional due process violation ab showing that there is a reasonable probability the result would ha different if the parent had personally attended the hearing.
usa V.	32 Cal. 4th 588 85 P. 3d 2 CA Supreme Court	Interpretation of Penal Code 2625. Does the trial court need the prisoner and the prisoner's attorney to adjudicate the petition?	Cal. Penal Code section 2625 requires a court to order a prisoner parent's temporary removal and production before the court only the proceeding seeks to terminate parental rights under WIC 366 adjudicate the child of a prisoner a dependent child. Although P indicates that no dependency petition may be adjudicated withou physical presence of 'the prisoner *or* the prisoner's attorney", the held that *or* should be construed in the conjunctive and means *ar* Therefore, the prisoner <u>and</u> his attorney had to be present before court could adjudicate the petition.

me	Case Cite	Issue	Holding
A.	167 Cal. App. 4th 1292 84 Cal. Rptr. 3d 841 Fifth Appellate Dist	Good discussion of definition of active efforts, adoptability and assessments in ICWA cases, relative and ICWA preferences and when they apply and finally the WIC 366.26(c)(1)(B)(vi) exception.	The appellate court held that active efforts and reasonable efforts essentially the same. There is no requirement for a generally ado finding, or backup families, or an assessment that provides for m families. These kids are adoptable because there is a family appr adopt them. The appellate court looked to WIC 361.31, in conju with 361.3 and determined that after disposition, once placement made, no ICWA preference applies unless the child must be mov Finally the court held that the Tribe's preference for legal guardi is only one factor to look at and is not necessarily compelling cau trump the stability and permanence of adoption.
B.	164 Cal. App. 4th 832 79 Cal. Rptr. 3d 580 Fourth Appellate Dist Division One	Is failure to have parent sign JV-135 form error? Can that error become harmless when augmented by JV-135 from another proceeding?	The appellate court held that the trial court's failure to inquire as mother's Indian heritage (court failed to get a signed JV-135 forn before terminating parental rights constituted harmless error beca mother denied knowledge of any Indian heritage in another judic proceeding (mother signed JV-135 form in another county as to a child). The court allowed the Agency to augment the record bec any court could take judicial notice of this form.
C.	155 Cal. App. 4th 282 65 Cal. Rptr. 3d 767 Third Appellate Dist	Does a non-federally recognized tribe need to be noticed of the dependency action?	The court held that while Section 306.6 of the Indian Child Welf allows a non-federally recognized tribe to appear in a dependenc proceeding and present information to the court, it does *not* requ notice of the action to such a tribe.
exis H.	132 Cal. App. 4th 11 33 Cal. Rptr. 3d 242 Second Appellate Dist Division Eight	Do the notice requirements of ICWA apply if the court does not place the child out of the parents' custody.	Pursuant to Rule of Court 1439, the notice requirements under th ICWA apply "to all proceedings... in which the child is at risk of entering foster care or is in foster care..." The court held that bec the Department in this case sought neither foster care nor adoptio Act did not apply. (Note: this may be different pursuant to In re A. if the Department *recommends* foster care placement even if t doesn't follow the Department's recommendation.)

ce M.	161 Cal. App. 4th 1189 74 Cal. Rptr. 3d 863 Sixth Appellate Dist	1) After the enactment of WIC 224.3, did the ICWA notice requirements change? 2) Were the ICWA notices sufficient? 3) Can the parents forfeit their right to object to ICWA notices on appeal?	1) The court held that legislature did not intend to modify CA c and raise the threshold upon which notice to the tribes is required it enacted WIC 224.3. The suggestion that the child is a member eligible for membership in a tribe is still sufficient to trigger the requirements. 2) Notices were insufficient because they were not sent to the tr chairperson or his designee and one was sent to the wrong addre 3) Although this was the second appeal from the termination of rights on the ICWA issues, their is no forfeiture by the parent on issue because the court found no statutory support or persuasive basis for shifting the burden of ICWA compliance to the child's even if ICWA was raised in a prior appeal.
r F.	150 Cal. App. 4th 1152 58 Cal. Rptr. 3d 874 Fourth Appellate Dist Division Three	Does a parent forfeit her right to appeal the sufficiency of the ICWA notices when she fails to object at the trial level at the remanded hearing for ICWA notices?	This case involves a case that was remanded for the trial court to sure that appropriate ICWA notices were sent. The parent who h initially raised the issue on appeal failed to object at the trial leve second round of notices. That parent then appealed the same issu appellate court held the parent forfeited her right to appeal those by her failure to raise them at the trial level. The appellate court that the parent had ample opportunity to review and correct the n documents involved in the second round of notices and failed to any discrepancies to the attention of the trial court and therefore forfeited her right to do so at the appellate level.
bara R.	137 Cal. App. 4th 941 40 Cal. Rptr. 3d 687 Fourth Appellate Dist Division One	Does preserving potential Indian financial benefits outweigh the benefit of adoption and did minor's counsel have a duty to investigate the specifics of the potential tribal monetary benefits?	The court held that the benefit of permanency and stability outwe potential financial benefits that would have come to the child. T also held that the child's counsel did not have a duty to investiga potential financial benefits before advocating for adoption. *Note*: There is a strong dissenting opinion that stated that the chi counsel did have a duty to investigate and consider all the factors regarding the termination of parental rights and advocating for a including the potential financial benefits that the child might hav entitled to through the tribe if the child was not adopted.

R.)	176 Cal. App. 4th 773 97 Cal. Rptr. 3d 890 First Appellate Dist. Division One	Do ICWA notice provisions apply when the presumed father's adoptive father is the one with Indian ancestry?	Yes. The appellate court held that the question of whether a child Indian child is for the tribe to determine and not the state court o social worker. The definition of "Indian child" under ICWA doe its terms automatically exclude minors who are grandchildren by adoption of an ancestor with Indian blood.
ndon T.	164 Cal. App. 4th 1400 80 Cal. Rptr. 3d 287 Third Appellate Dist	How many experts are needed to testify in ICWA case before court can TPR?	One. The appellate court held that although ICWA itself is writte plural "witnesses", the BIA Guidelines for state courts specify th testimony of one or more witnesses is required. Further applying federal rules of construction, the plural use of witnesses includes singular "witness".
ooke C.	127 Cal. App. 4th 377 25 Cal. Rptr. 3d 590 Second Appellate Dist Division Two	Were the notice requirements of ICWA met and if not, was that jurisdictional error?	The court held that because the Dept. had failed to notice all of t possible Navajo and Apache tribes and because they failed to ful investigate and develop the record with respect to the identity of ancestors, ICWA notice was defective. However, the court held defects were not jurisdictional error and that rather once notice w properly given, the prior defective notices become harmless erro
eyanne F.	164 Cal. App. 4th 571 79 Cal. Rptr. 3d 189 Fourth Appellate Dist. Division Two	Is missing information on the non-Indian parent harmless?	The appellate court held that the fact that the ICWA notices lack information about the non-Indian parent was harmless error.
mian C.)	178 Cal. App. 4th 192 100 Cal. Rptr. 3d 110 Fourth Appellate Dist Division One	Was their sufficient information to suggest that the child may be an Indian child?	The appellate court held that even though the MGF had been unsuccessful in establishing the family's Indian heritage, the que membership in the tribe resides with the tribe and that notices sh have been sent. The trial court indicated that it believed that WI was more stringent than the federal law and that the information provided gave the court "reason to know" that an Indian child is be involved, thus triggering the requirement to give notice.
Superior Humboldt 9)	171 Cal. App. 4th 197 89 Cal. Rptr. 3d 566 First Appellate Dist. Division Five	Does a parent have to be enrolled in an Indian tribe for ICWA to apply?	The appellate court stated that a "lack of enrollment is not dispos tribal membership because each Indian tribe has sole authority to determine its membership criteria and to decide who meets those criteria."
G. 9)	170 Cal. App. 4th 1530 88 Cal. Rptr. 3d 871 Third Appellate Dist	Did the court have to notice the possible Indian tribes id'ed by the non-bio father?	The appellate court held that until biological parentage is establi alleged father's claim of Indian heritage does not trigger the requ of ICWA notice because absent a biological connection, the child claim Indian heritage through the alleged father.

I.	141 Cal. App. 4th 1330 46 Cal. Rptr. 3d 787 Fourth Appellate Dist Division Two	If parent submits on Agency reports stating no ICWA, must the court inquire per Rule of Court 1439(d)?	The appellate court held that when the mother submitted on man Agency reports indicating that there was no American Indian He that the trial court did not need to overtly inquire about it pursua Rule of Court 1439(d). Basically, even though the court never specifically asked, the appellate court found that the Agency had and that satisfied 1439.
ncisco W.	139 Cal. App. 4th 695 43 Cal. Rptr. 3d 171 Fourth Appellate Dist Division One	Is the appellate court practice of limited reversals in defective ICWA appeals keeping with public policy?	The court held that the appellate court practice of limited reversa defective ICWA appeals does keep with public policy because p policy in the dependency scheme favors the prompt resolution of Therefore, it is acceptable for the court to remand these cases for trial court to make sure that appropriate ICWA notice is given ar to reinstate the termination of parental rights if it turns out the ch not fall under the Indian Child Welfare Act. In addition, the court held that under California Rules of Court 1439(f)(5), the juvenile court needs only a <u>suggestion</u> of Indian a to trigger the notice requirements to the tribes and/or the Bureau Indian Affairs.
L.	177 Cal. App. 4th 1009 99 Cal. Rptr. 3d 356 Fourth Appellate Dist Division One	Did the court err in failing to provide appropriate notice to the Indian custodian?	The appellate court held that "like parents, Indian custodians are to ICWA's protections, including notice of the pending proceedi the right to intervene". The court states that because of the exten family concept in the Indian community, parents often transfer p custody of the Indian child to such extended family member on a informal basis, often for extended periods of time and at great di from the parents. The designation of an Indian custodian by a pa does not require a writing but can be done informally.
orianna K.	125 Cal. App. 4th 1443 24 Cal. Rptr. 3d 582 Second Appellate Dist Division Four	Can the court accept the word of the Dept. that the tribes received notice? Does all counsel need to be present when the court reviews ICWA notices?	The court held that the juvenile court may not rely on mere representations that proper notice was given; there must be a cou record of the notice documents. In addition, the lack of authenti on the notice documents were compounded by the fact that neith parent nor her counsel was in attendance on the date the court re the notice documents to test the authenticity of the evidence. *Practice Tip*: Make sure that you see and receive all notices, retu receipts and letters from the tribes. Also, make sure that if you h been reversed on ICWA notices, that previous counsel is reappoi and present when you review the new notices and other notice

			documents.
n of S.	143 Cal. App. 4th 988 48 Cal. Rptr. 3d 605 Third Appellate Dist	Discusses "active efforts", "break-up of Indian family" and "existing Indian family doctrine"	The court held that any termination of parental rights of an India is subject to ICWA and the use of an expert is only one factor in decision to terminate parental right. The court rejects the "existi Indian family doctrine". The court discusses "active efforts" and that the standard for finding active efforts is by clear and convinc evidence and not beyond a reasonable doubt. Finally, the court d the "breakup of Indian family" to mean "circumstances in which Indian parent is unable or unwilling to raise the child in a healthy manner emotionally or physically".
B.	161 Cal. App. 4th 115 74 Cal. Rptr. 3d 27 Second Appellate Dist Division Seven	If a parent doesn't even allege possible American Indian heritage at the appellate level, should the case be reversed because the trial court didn't do the proper inquiry?	The appellate court held that even though the trial court failed to proper inquiry of the parents regarding possible American Indian heritage that the case should not be reversed. It was harmless err appellant did not claim, even at the appellate level, that she had p American Indian heritage. The court again stated that "ICWA is get out of jail free card dealt to parents of non-Indian children" r in an unreasonable delay in permanency.
lly B. 9)	172 Cal. App. 4th 1261 92 Cal. Rptr. 3d 80 Third Appellate Dist	Did court properly comply with ICWA on 388 hearing?	The appellate court held that ICWA is not implicated in the orde appealed from and unlike orders placing a child in foster care or terminating parental rights, failure to comply with the ICWA not provisions had not impact on the court's orders.
.	133 Cal. App. 4th 1246 35 Cal. Rptr. 3d 427 First Appellate Dist Division Two	Did the trial court comply with the ICWA notice requirements?	No, the trial court did not comply with the ICWA notice requirer because it did not strict comply with the notice requirements. Th appellate court refused to take additional evidence as to the notic because that proof must be given to the trial court. In this case, t record was silent as to the specifics of the courts findings as to n responses etc.

.)	178 Cal. App. 4th 751 100 Cal. Rptr. 679 Fifth Appellate Dist	Does ICWA require expert testimony when removing custody from one parent and placing with another?	The appellate court held that the requirement under ICWA for ex testimony before removal from a parent is waived when the plac with another parent. The court stated that the change of custody one parent to another is deemed to be "custodial" under ICWA a therefore that no expert was required.
emiah G. 9)	172 Cal. App. 4th 1514 92 Cal. Rptr. 3d 203 Third Appellate Dist	Did ICWA notice requirements arise when father claimed Indian heritage and later retracted that claim?	The appellate court held that both the federal regulations and the require more than a bare suggestion that a child might be an Indi to trigger notice to the tribes. The claim must be accompanied b information that would reasonably suggest that the child had Ind heritage.
.	138 Cal. App. 4th 450 41 Cal. Rptr. 3d 494 Fifth Appellate Dist	Did failure to inquire from party if they had Indian heritage require reversal?	The court reversed and remanded because there was no evidence record that anyone had inquired of the mother whether there was American Indian heritage.
athan S.	129 Cal. App. 4th 334 28 Cal. Rptr. 3d 495 Fourth Appellate Dist Division Two	Does the parent not claiming possible American Indian heritage have standing to assert ICWA notice violations?	The court held that even the parent not claiming American Indian heritage, has standing to assert ICWA notice violations on appea addition, the court held that even though the father stated that he a part of the Blackfeet tribe, that his possible Indian heritage did the notice requirements of ICWA and that failure to provide appr ICWA notices reversed all the orders going back to the jurisdicti hearing (from TPR appeal).
e C.	155 Cal. App. 4th 844 66 Cal. Rptr. 3d 355 Fifth Appellate Dist	Does the petitioning agency have the obligation to enroll the children as members of a tribe?	The appellate court held that the tribe is the determiner of its membership, and the tribe did not claim the children as members they weren't enrolled. The appellate court held that the Departm no duty to enroll them. (Note: Tribe was given an opportunity to intervene on the appeal chose not to file a brief.)
eph P.	140 Cal. App. 4th 1524 45 Cal Rptr. 3d 591	Does a parent's late claim identifying a particular tribe give new reason to believe ICWA applies after notice already given	The court found that a parent's late claim identifying a particular tribe does not give the trial court new reason to believe that the c might fall under ICWA if notice has already been given to the B the determination about ICWA made. In addition, the court can other factors regarding why the parent might have changed their including the fact that the parent first voiced the claim at the per

	Fifth Appellate Dist	to BIA?	planning hearing.
.	154 Cal. App. 4th 986 65 Cal. Rptr. 3d 320 First Appellate Dist Division Five	Does the Indian Child Welfare Act require notice to all the bands of an identified tribe?	The appellate court held that the juvenile court did err when it fa assure that all 16 Sioux tribes were appropriately noticed. The a court noted that it was not enough to just notice the BIA because tribes had been identified. The court also mentioned that the not must be addressed to the tribal chairperson, unless the tribe has designated another agent for service and that the Federal Registe the appropriate place to find all the information about the tribes a addresses.
tin L.	165 Cal. App. 4th 1406 81 Cal. Rptr. 3d 884 Second Appellate Dist Division Three	Discussion of compliance with ICWA	The appellate court held that the trial courts need to comply with
tin S.	150 Cal. App. 4th 1426 59 Cal. Rptr. 3d 376 Sixth Appellate Dist	On limited reversal from the appellate court for ICWA notice, must the parent be noticed and represented by counsel?	The appellate court held that when a case is remanded for the lim purpose of providing appropriate ICWA notice, the trial court mu notice the parents for the hearing and allow the parents to be repr by counsel. In addition, the court must not hold a hearing less th days from the time appropriate notices were given.
B.)	173 Cal. App. 4th 1275 93 Cal. Rptr. 3d 751 Fourth Appellate Dist Division Two	Good discussion of "active efforts".	The appellate court provided a useful guide in distinguishing bet passive and active efforts. "Passive efforts are where a plan is dr and the client must develop his or her own resources towards bri to fruition. Active efforts is where the state caseworker takes the through the steps of the plan rather than requiring that the plan b performed on its own." The appellate court indicated that what constitutes active efforts would need to be determined on a case basis.
M. 9)	172 Cal. App. 4th 115 90 Cal. Rptr. 3d 692 Second Appellate Dist	How much is required for "affirmative steps" to gather info for ICWA notice?	The appellate court held that ICWA does not require further inqu based on mere supposition. In a case where the grandparents ref cooperate and give the Agency further information on possible American Indian heritage , the court held that the Agency did en and that "the agency is not required to conduct an extensive inde investigation, or cast about, attempting to learn the names of pos

	Division Six		Tribal units to which to send notices."
P.)	175 Cal. App. 4th 1 95 Cal. Rptr. 3d 524 Third Appellate Dist	Does the Court have a duty to comply with the notice provisions of ICWA for a non-federally recognized tribe?	The appellate court held that neither the Agency nor the juvenile was under a duty to comply with the notice provisions of ICWA there was no evidence that the mother's tribe was federally recog "We decline to extend ICWA to cover an allegation of membersh tribe not recognized by the federal government."
B.)	182 Cal. App. 4th 1496 Third Appellate Dist	Does ICWA require the Indian expert to interview the parents in every case?	The appellate court held that ICWA does not require the Indian e interview the parents in every case because the purpose of the In expert's testimony is to offer a cultural perspective on the parent conduct with his/her child to prevent the unwarranted interferenc the parent-child relationship due to cultural bias. The Indian exp testimony is directed to the question of whether continued custoc child by the parent or Indian custodian is likely to result in seriou emotional or physical damage to the child and not because the fa not conform to any decision maker's stereotype of what a proper should be. Here, Father's behavior including sexual abuse of a h sibling could not be interpreted differently in a cultural context, s knowledge of cultural practices would not be helpful.
lissa R.)	177 Cal. App. 4th 24 98 Cal. Rptr. 3d 794 First Appellate Dist Division Three	Were ICWA notice defects moot given that the "child" is now 20?	The appellate court held that while the Agency did fail to send IC notices even though it knew that the "child" might be of Indian h the error was moot. An Indian child is "any unmarried person w under age eighteen…" Since the "child" at the time of the appea years old, she cannot be considered an Indian child.
racle M.	160 Cal. App. 4th 834 73 Cal. Rptr. 3d 24 Second Appellate Dist Division Seven	Must a case be reversed if the ICWA notices do not contain the name of all the children?	The appellate court held that ICWA notices must contain the nam the children. In addition, the ICWA notices must also be sent to parents. The case was sent back to the trial court in regards to th not listed on the ICWA notices on a limited reversal.
M.	154 Cal. App. 4th 897 65 Cal. Rptr. 3d 273 First Appellate Dist Division Five	Can an order of transfer from the dependency court to the tribal court be appealed?	The appellate court held that a transfer order cannot be appealed court noted that because no party requested a stay of the transfer prior to the completion of the transfer to the tribal court, the state lost all power to act in the matter upon completion of the transfe addition, the appellate court cannot provide relief from that orde because it has no power to order the court of a separate sovereign tribal court) to return the case to the state court.

E.	160 Cal. App. 4th 766 73 Cal. Rptr. 3d 123 Fourth Appellate Dist Division Three	If a parent doesn't even allege possible American Indian heritage at the appellate level, should the case be reversed because the trial court didn't do the proper inquiry?	The appellate court held that even though the trial court failed to proper inquiry of the parents regarding possible American Indian heritage that the case should not be reversed. The appellant did claim, even at the appellate level, that he had possible American heritage. The court again stated that "ICWA is not a get out of j card dealt to parents of non-Indian children" resulting in an unreasonable delay in permanency. The court held that the pare at lease allege sufficient facts to have triggered ICWA notice to relief.
ole K.	146 Cal. App. 4th 779 53 Cal. Rptr. 3d 251 Third Appellate Dist	Does reversal for appr. ICWA notice require a full reversal of the orders or simply remand for appr. ICWA notices and what comprises appr. ICWA notice.	The appellate court held that ICWA notices were insufficient bas the facts that the notice to one tribe was not sent to the latest add the Federal Register nor was the return receipt signed by the pers listed as the agent for service by the tribe. The appellate court a vacated the orders for the setting of the 26 as they held that a lim reversal for ICWA notices was not sufficient.
M.)	174 Cal. App. 4th 329 94 Cal. Rptr. 3d 220 Third Appellate Dist	Was their sufficient evidence to deviate from the relative preference of ICWA?	The appellate court held that in this fact specific case the court h cause to deviate from the relative preference of ICWA and appoi non-related legal guardian for the child. Those facts included tha child had been in that home for two years, the caretaker was ded maintaining sibling contact and the lack of real contact by the re
M.	161 Cal. App. 4th 253 74 Cal. Rptr. 3d 138 Second Appellate Dist Division Eight	What is the requisite period the court must wait before making any finding regarding the applicability of ICWA?	The appellate court held that pursuant to WIC 224.2(d) prevents juvenile court from setting a hearing to terminate parental rights earlier than 10 days after receipt of notice by the parent, the tribe Bureau of Indian Affairs. WIC 224.3(e)(3) allows a tribe or the 60 days after receipt of notice to confirm that a child is an Indian CRC 5.664 makes clear that the juvenile court is constrained onl 10-day time limitation set forth in WIC 224.2(d) after notice bef terminating parental rights.

yna N.	163 Cal. App. 4th 262 77 Cal. Rptr. 3d 628 Second Appellate Dist Division Four	1) Should the court have terminated FR services without assuring notice requirement of WIC 224.2 were complied with? 2) Is limited reversal still appropriate given enactment of WIC 224.2.	1) The appellate court held that the trial court should not have proceeded with the hearing to terminate reunification services wi assuring that proper notice had been given to the Indian tribes pu to WIC 224.2. This included timely and appropriate notices with return receipts being received or letters from the tribe. (This cas not address whether the court did/didn't have reason to know the would fall under ICWA). 2) The appellate court held that even after the enactment of WIC a limited reversal and remand are appropriate and nothing in WI prohibits that established remedy,l
pecca R.	143 Cal. App. 4th 1426 49 Cal. Rptr. 3d 951 Fourth Appellate Dist Division Two	Can a parent not tell a court or Agency about possible Am. Indian heritage and then bring it up on appeal?	The court held that the burden on an appealing parent to make an affirmative representation of American Indian heritage is de min and in the absence of such a representation there can be no preju no miscarriage of justice requiring a reversal. The court held tha is not a 'get out of jail free' card to parents of non-Indian childre allowing them to avoid a termination order by withholding secre knowledge, keeping an extra ace up their sleeve. Parents cannot the matter for the first time on appeal without at least showing th hands.
bert A.	147 Cal. App. 4th 982 55 Cal. Rptr. 3d 74 Fourth Appellate Dist Division One	Can the court use the notices sent and findings made on a half- sibling's case to show that ICWA does not apply on the child currently before the court?	The court held that the court can not use the investigation done, t notices sent and the findings made on a half-sibling on a differen show that the child in the instant case does not fall under the Ind Child Welfare Act. The court denied the agency's motion to aug the record with the documents from the half-sibling's case becau records were not before the juvenile court at the time of the proc and were not part of the juvenile court case file.

.	130 Cal. App. 4th 1148 30 Cal. Rptr. 726 Fourth Appellate Dist Division Two	Did mother waive right to raise notice issues for hearing preceding 366.26 on appeal if MGM, not mo, finally gave info re: possible Indian heritage?	The court held that even if notice is belated, the mother here cou asserted possible Am Indian heritage at earlier hearing and did n allow her to raise it on appeal would allow a party to play fast an with administration of justice by deliberately standing by withou making an objection. While the CSW and the trial court have a c inquire into the child's Indian ancestry, (they have no duty to ma inquiries of persons not parties to proceedings) and a parent has access to this information. A parent has a right to counsel, who l only the ability but also the duty to protect the parent's rights un ICWA.
. 9)	174 Cal. App. 4th 808 94 Cal. Rptr. 3d 645 Second Appellate Dist Division Four	Are parents' counsel responsible to advise the trial court of any problems with notices issued under ICWA?	The appellate court affirmed the trial court and held that counsel parents share responsibility with the Agency and minor's counse advise the trial court of any infirmities in these notices in order t for prompt correction and avoid unnecessary delay in the progres dependency case.
.	138 Cal. App. 4th 396 41 Cal. Rptr. 3d 453 Third Appellate District	Can the court proceed to a disposition hearing if the tribes had not received notice 10 days prior to the hearing?	The court held that Section 912(a) of ICWA states "no dependen proceeding shall be held until at least ten days after receipt of no the... tribe ..." Practice tip - You can proceed to disposition even if you don't ha proper notice to the tribes yet if you can still find that you "have reason to believe" that the child would fall under the Indian Chil Welfare Act. It would be a good practice to make that finding ag before you proceed. If you do have reason to believe that the chi would fall under ICWA, wait to conduct the hearing until 10 day all the tribes have received notice.
ne G.	166 Cal. App. 4th 1532 83 Cal. Rptr. 3d 513 Fourth Appellate Dist Division One	Did failure to give proper notice to the Comanche tribes necessitate reversal of the termination of parental rights?	The appellate court held that because the record was devoid of an evidence the child was Indian, reversing the termination of paren rights for the sole purpose of sending notice to the tribe would ha served only to delay permanency for the child rather than further important goals and ensure the procedural safeguards intended b ICWA.

rrance B.	144 Cal. App. 4th 965 50 Cal. Rptr 3d 815 Fourth Appellate Dist Division One	Does the trial court have juri to hear 388 petition where there has been a limited remand for ICWA purposes/notices only?	The court held that when an appellate court issues a limited reve address ICWA issues only, the juvenile court does not have juris to address or hear any other issue even if it is raised in a 388 peti The appellate court does warn that this might not be the same if t is remanded and parental rights reinstated for any other issue oth ICWA.
.)	175 Cal. App. 4th 1031 96 Cal. Rptr. 3d 706 Third Appellate Dist	Is the court obligated to adopt the permanent plan identified by the tribe?	The appellate court held that the juvenile court was not obligated adopt the permanent plan designated by the tribe without conduc independent assessment of detriment. In this case, the tribe iden guardianship with maternal cousins who had criminal histories a not approved by the Agency. Therefore, the juvenile court did n when it terminated parental rights and placed the child with som other than the cousins.
ronica G.	157 Cal. App. 4th 179 68 Cal. Rptr. 3d 465 First Appellate Dist Division Three	Does the stipulated reversal for ICWA findings require vacating all findings and orders or renotice only?	The court held that the only improper notice which requires a rev findings is a 366.26 TPR reversal. That reversal reinstates paren rights, without the ability to file a 388, but requiring reinstateme termination if the case is not ICWA. All other cases, such as this care reversed for notice only, and all prior findings and orders re full force and effect.
acent M.	150 Cal. App. 4th 1247 59 Cal. Rptr. 3d 321 Sixth Appellate Dist	Does the existing Indian family doctrine exist in Santa Cruz County?	The court held that ICWA notices were insufficient and remande case for appropriate notice. The court held that the Existing Indi Family Doctrine does not exist in Santa Cruz County and that the Child Welfare Act rules. The appellate court urged the Californi Supreme Court to reconcile the split in jurisdictions on this issue
V.	132 Cal. App. 4th 794 33 Cal. Rptr. 3d 236 Fourth Appellate Dist Division One	May ICWA be raised on appeal a second time if not timely raised in the trial court.	The court held that the principles of waiver apply and the parents to object at the hearing held to determine ICWA notice is fatal. indicated that while ICWA is to be construed broadly, it should n impediment to permanence for children. Failure of the parents to in the trial court at the hearing, so that any deficiencies might be cured, forfeited the right to raise it on appeal again.

Jurisdiction/Disposition Issues

Case Name	Case Cite	Issue	Holding
In re Adam D. (3/30/10)	Second Appellate Dist Division Three	Good discussion of WIC 360(b).	The appellate court held that an order for informal supervision is tantamount to a disposition which is an appealable order. If informal supervision is ordered pursuant to WIC §360(b), the court 'has no authority to take any further role in overseeing the services or the family unless the matter is brought back before the court' pursuant to WIC §360(c)." "If the court agrees to or orders a program of informal supervision, it does not dismiss the dependency petition or otherwise set it aside. The true finding of jurisdiction remains. It is only the dispositional alternative of declaring the child a dependent that is not made."
In re A.E. (2008)	168 Cal. App. 4th 1 85 Cal. Rptr. 3d 189 Second Appellate Dist Division Eight	Discussion of reasonableness of disposition orders to "non-offending" parent.	The appellate court held that the trial court's order for the "non-offending" father to complete parenting and individual counseling was reasonable given the father did not appear to understand the inappropriateness of mother's physical discipline and by the time of trial was in complete denial although he had reported the original allegations. The appellate court did encourage the trial courts to make a good record regarding the reasons for all dispositional orders especially when ordering services for "non-offending" parents.
In re Alexis E. (2009)	171 Cal. App. 4th 438 90 Cal. Rptr. 3d 44 Second Appellate Dist Division Three	Did parent's use of "medicinal" marijuana place the child at risk?	The court held that father's use of prescription marijuana did place the child at risk in this case. The court summarized "We have no quarrel with father's assertion that his use of medical marijuana, without more, cannot support a jurisdictional finding ..." However the court stated the numerous reasons that "more" existed such as father's behaviors when he was using marijuana as well as the children's exposure to second hand smoke as the reasons that risk existed.
In re Alexis H. (2005)	132 Cal. App. 4th 11 33 Cal. Rptr. 3d 242 Second Appellate Dist Division Eight	Does the court have to sustain allegations against both parents to take jurisdiction of a child?	The court held that a jurisdictional finding good against one parent is good against both. The child is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. The purpose of dependency proceedings is to protect the child rather than prosecute the parent.

In re Andy G. (4/20/10)	Second Appellate Dist Division Eight	Is the male sibling at risk of sexual abuse if the abuser molested the female siblings?	This appellate court agreed with the court in P.A. and reiterated that "aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior". The appellate court noted that while Andy may have been too young to be cognizant of father's behavior, the father exposed himself to Janet while Andy was in the same room and in fact used Andy to get Janet to approach him so that he could expose himself to her. "This evinces, at best, a total lack of concern for whether Andy might observe his aberrant sexual behavior."
In re Angel L. (2008)	159 Cal. App. 4th 1127 72 Cal. Rptr. 3d 88 Second Appellate Dist Division Eight	Was the trial court mandated to contact another state when there was no previous child custody order?	This was a very fact specific case. The appellate court held that the trial court was not mandated to contact another state about assuming jurisdiction because no previous child custody order had ever been made. The appellate court held that FC 3410 indicates that the juvenile court "may" communicate with a court of another state. In this case, there was no evidence that there was another home state, but it was possible.
In re Baby Boy M. (2006)	141 Cal. App. 4th 588 46 Cal. Rptr. 3d 196 Second Appellate Dist Division Seven	When a child's whereabouts are unknown at the jurisdictional hrg, can court sustain the petition and proceed to disposition?	The appellate court held that when a child's whereabouts are unknown at jurisdiction, the court may not sustain the petition and move to disposition because of the importance of assessing the child's present condition and welfare. The appellate court found that the trial court should have issued a protective custody warrant and then continued the matter for a jurisdictional hearing when the child was found. (This decision *may* leave open the question about whether the court can sustain the petition and just put over disposition because there were subject matter jurisdiction issues in this case.)
In re B.D. (2007)	156 Cal. App. 4th 975 67 Cal. Rptr. 3d 810 Third Appellate Dist	How much corroborating evidence is required to sustain a dependency petition if WIC 355(c)(1) objections are made?	The appellate court held that only a slight amount of corroborating evidence was sufficient to sustain a dependency petition in light of the 355.(c)(1) objections made by counsel. The court stated that when ruling in dependency proceedings, the welfare of the minor is the paramount concern of the court. Since the purposed of the proceedings is not to punish the parent but protect the child, the trial court should not restrict or prevent testimony of formalistic grounds, but should, on the contrary, avail itself of all evidence which might bear on the child's best interest.

In re Brenda M. (2008)	160 Cal. App. 4th 772 72 Cal. Rptr. 3d 686 Fourth Appellate Dist Division Three	Does the privilege against self-incrimination apply in dependency proceedings?	The appellate court held that the privilege against self-incrimination does apply in dependency proceedings. The appellate court stated that the protections addressed in WIC 355.1(f) were not sufficient protections and that the parent should not have been forced to answer the questions posed. In addition, that not allowing that parent to present any evidence as an evidence sanction for failing to testify was not appropriate.
In re Carlos T. (6/3/09)	174 Cal. App. 4th 795 94 Cal. Rptr. 3d 635 Second Appellate Dist Division Four	In order to find an allegation true under WIC 300(d), does the court have to find a current risk?	The appellate court held that under WIC 300(d) unlike with WIC 300(b) or (j) does not require a *current* substantial risk of detriment. Therefore, even though the father was currently incarcerated and had no current contact with the child that the court could sustain a (d) allegation because the Agency did not need to prove a *current* risk. In addition, the father might get out of jail and therefore pose a future risk to the child.
In re Claudia S. (2005)	131 Cal. App. 4th 236 31 Cal. Rptr. 3d 697 Fourth Appellate Dist Division One	Does the disentitlement doctrine apply in dependency proceedings? Did the court have jurisdiction over the child or the parents if the parents were never properly noticed of the dependency proceedings?	The disentitlement doctrine means that a party to an action cannot seek the assistance or protection of the court while the party stands in an attitude of contempt to legal orders or processes of the court. This doctrine does apply to dependency proceedings but, in this case, because there were no pending dependency proceedings when the mother took the children to MX, it did not apply. The court did have jurisdiction over the child because the child's home state was California pursuant to FC 3421 et seq even through the mother had just taken the child to MX. The court did not have personal jurisdiction over the parents because notice to them of the dependency proceedings was not properly given pursuant to WIC 290 et seq. The court only had the authority to make the detention findings, issue warrants for the parents and the child(ren) and then hold the case in abeyance until either the child(ren) were taken into protective custody or the parents apprehended.

In re Christopher C. (2/22/10)	182 Cal. App. 4th 73 Second Appellate Dist Division Four	Does the on-going allegations of abuse by each other from both parents, place the children at risk of serious emotional harm?	The appellate court held that when children are at substantial risk of emotional harm as a result of being utilized as weapons in an on-going familial fight, the dependency court properly exercises its jurisdiction and declares them dependent children. Unlike Brison C., the parents in this case have turned a blind eye to the substantial risk of emotional damage to the children that their conduct has spawned and therefore the risk of emotional damage is on-going.
In re David M. (2005)	134 Cal. App. 4th 822 36 Cal. Rptr. 3d 411 Fourth Appellate Dist Division Three	Is evidence of past misconduct without something more current, enough to find WIC 300 (j)?	Under WIC 300 (b) there are three necessary elements 1) neglectful conduct, 2) causation and 3) serious harm or illness to child or substantial risk of serious harm or illness. The court found that evidence of past misconduct without something more current is not enough to even declare under WIC 300(j). This case is fact driven but... *Practice Tip*: Take judicial notice of old reports and evidence in sustaining a (j) subdivision.
D.M. v. Superior Court (4/13/09)	173 Cal. App. 4th 1117 93 Cal. Rptr. 3d 418 Fourth Appellate Dist Division Three	Does a WIC 300(g) finding require a finding of "bad faith"?	The appellate court held that a finding that a child was left without any provision of support under WIC 300(g) does not require a finding that a parent acted in "bad faith". Although the parent kicked this child out to protect the siblings, the child was still left without any provision of support. The appellate court held that bad faith is not an element of WIC 300(g) because the focus of the system is on the child and not the parents.
In re E.B. (4/9/10)	 Second Appellate Dist Division One	Did the fact that mother was the victim of domestic violence mean that nothing she did or is likely to do endangers the children?	In this case, the appellate court noted that the facts that mother admitted to the Agency that the father abused her emotionally and physically, the latter within hearing of the children, that when father berated mother after the daughter was born, the mother would sometimes leave but she always returned when he apologized and that after he struck her four times and the children heard her screaming, she stayed with him another 7 months, was substantial evidence to sustain the 300(b) allegation and that "mother's remaining in the abusive relationship, and her record of returning to Father despite being abused by him, supports the juvenile court's finding that her conduct in the domestic violence altercations endangered the children." (Good cites to dv cases and articles).

In re E.H. (2003)	108 Cal. App. 4th 659 133 Cal. Rptr. 2d 740 Second Appellate Dist Division Seven	Does a finding under WIC 300(e) require the court to identify the perpetrator of the abuse?	The court held that since the child was never out of the custody of either the mother or father, they reasonably should have known who inflicted the child's injuries. The fact that the parents denied that they knew who was abusing the child did not preclude the court finding that the parents reasonably should have known someone was abusing the child since the child was never out of their custody.
In re Hadley B. (2007)	148 Cal. App. 4th 1041 56 Cal. Rptr. 3d 234 Fourth Appellate Dist Division Three	Did the juvenile court err by refusing to allow the Agency to amend the original petition to include out of county evidence?	The court held that the juvenile court did err by refusing to allow the Agency to amend the original petition to include allegations that occurred out of county and to include out of county evidence. The court stated that concern for the child's welfare requires the court to consider all the information relevant to the present conditions and future welfare of the person in the petition and that if the court had wanted to change venue, it should have adjudicated the petition and then transferred the case pursuant to WIC 375.
In re H.E. (2008)	169 Cal. App. 4th 710 86 Cal. Rptr. 3d 820 First Appellate Dist Division Two	Is a risk of emotional harm enough to justify removal under WIC 361(c) without a risk of physical harm?	The appellate court held that it was well established under case law and CRC 5.695(d)(1) that a court can remove a child based upon a risk of emotional *or* physical harm.
In re James R. (7/15/09)	176 Cal. App. 4th 129 97 Cal. Rptr. 3d 310 Fourth Appellate Dist Division One	Did substantial evidence support juvenile court's finding of jurisdiction?	The appellate court held that in spite of the mother's mental illness and substance abuse history and father's inability to protect the children, that substantial evidence did not support the juvenile court's findings of jurisdiction. The court stated that there was no evidence of actual harm to the children from the parents conduct and no showing the parents conduct created a substantial risk of serious harm to the children. Any casual link between the mother's mental condition and future harm to the children was speculative and the Agency failed to show with specificity how mother's drinking harmed or would harm the children.

In re Javier G. (2005)	130 Cal. App. 4th 1195 30 Cal Rptr 3d 837 Fourth Appellate Dist Division One	Are the findings at the jurisdictional portion of a 387 petition appealable? Good language for out of control kids.	The court held that in proceedings on a supplemental petition, a bifurcated hearing is required. In the first phase of a section 387 proceeding, the court must make findings whether 1) the factual allegations of the supplemental petition are or are not true and) the allegation that the previous disposition has not been effective in protecting the child is, or is not, true. Then the court must hold a separate dispositional hearing where the court has a number of options including dismissing the petition, permitting the child to remain at home or removing the child from the parent's custody. A dispositional order on a supplemental petition is appealable as a judgment and issues arising from the jurisdictional portion of the hearing may be challenged on appeal of the dispositional order. The court held that the mother was unable to provide the older brothers with "sufficient structure and supervision to moderate their behaviors" and that the trial court reasonably concluded that the boys "required therapeutic treatment in an appropriately structured environment". The court found that the fact that the older brother's removal from the mother's care served to protect the younger child from further physical abuse was of no import because the analysis would have been the same if the older brothers were assaulting non-family members.
In re J.K. (6/17/09)	174 Cal. App. 4th 1426 95 Cal. Rptr. 3d 235 Second District Dist Division Seven	When are allegations of abuse so remote in time as to negate a finding of current risk of harm?	The appellate court held that old acts of abuse may be sufficient to sustain a petition and remove custody from a parent. In this case, the court found that the prior acts of abuse were sufficiently serious and further that the father had not taken any steps to address his behaviors which led to the abuse.
In re J.N. (1/6/10)	181 Cal. App. 4th 1010 104 Cal. Rptr. 3d 478 Sixth Appellate Dist	Was evidence of a single episode of parental conduct sufficient to bring the children with the court's jurisdiction?	This appellate court concluded that WIC 300(b) does not authorize dependency jurisdiction based upon a single incident resulting in physical harm absent current risk.

In re John M. (2006)	141 Cal. App. 4th 1564 47 Cal. Rptr. 3d 281 Fourth Appellate Dist Division One	Does court need ICPC approval to place with non-offending parent out of state? Should the court have continued the dispositional hearing to receive the ICPC report? Discussion of clear and convincing evidence of placement being "detrimental" pursuant to WIC 361.	The court clarified that ICPC approval is NOT required before a court places a child with a non-offending out of state parent and that to the extent that Rule of Court 1428 suggests that it does, it is "ineffective" as is any like local regulation. The court suggested that the trial court use the ICPC evaluation as a means of gathering information before placing a child with a parent. However, the court is not bound by a requirement that ICPC approve the placement. The court also held that awaiting the ICPC evaluation was an exceptional circumstance to allow the court to continue the disposition hearing to more than 60 days beyond the detention hearing. The court discusses the Agency's failure to meet the burden that placement with his father would be detrimental to John pursuant to WIC 361. The court defines clear and convincing evidence to be evidence that is so clear as to leave no substantial doubt. It indicates that John's unwillingness to go should have been taken into account but was not determinative and that his relationship with his relatives here, his relationship with his half sibling who would continue to be in this state and his mother's FR services was not enough to find it detrimental for him to be placed with his father. When addressing the sibling relationship, the court stated that the facts would have to support a finding that there was a high probability that moving to the other state would have a devastating emotional impact on the child.

In re Karen R. (2001)	95 Cal. App. 4th 84 115 Cal. Rptr. 2d 18 Second Appellate Dist Division Three	Discussion of whether the male siblings are at risk of sexual abuse based on sexual abuse of their sister.	The appellate court held that WIC 300(d) does not require a touching but does require conduct a "normal person would unhesitatingly be irritated by" and "motivated by an unnatural or abnormal sexual interest" in the victim. The court found that based on the brother witnessing the physical abuse and hearing about the sexual abuse of his sister, a normal child would have been disturbed and annoyed at having seen these events and therefore the brother was properly described by WIC 300(d). In addition, the court held that the two forcible rapes of the 11 year old girl was so sexually aberrant that both male and female siblings of the victim are at substantial risk of sexual abuse within WIC 300(d). This court disagreed with the court in Rubisela E. and found that although the danger of sexual abuse of a female sibling in such a situation may be greater than the danger of sexual abuse of a male sibling, the danger of sexual abuse to the male sibling is nonetheless still substantial.
In re L.A. (12/18/09)	180 Cal. App. 4th 413 103 Cal. Rptr. 3d 179 Sixth Appellate Dist	Can the Court order a LG under WIC 360(a) without a parent explicitly waiving their right to reunification?	The court held that as long as the court finds notice proper under WIC 291, even if a parent does not appear and formally waive reunification services, the court can order a legal guardianship under WIC 360(a). The court must also read and consider the evidence on the proper disposition of the case and find that the guardianship is in the best interests of the child.
In re Mark A. (2007)	156 Cal. App. 4th 1124 68 Cal. Rptr. 3d 106 Fourth Appellate Dist Division Three	Does the 5th amendment privilege against self incrimination apply in dependency proceedings?	Yes, the 5th amendment privilege against self incrimination does apply in dependency and is not replaced by WIC 355.1(f). Since the privilege is broader than the code section, it remains intact in dependency and it is error for a dependency court to force a person to testify after the privilege is asserted. In addition, the appellate court held that the trial court could not impose evidence sanctions for the failure of the person to testify.
In re Mariah T. (2008)	159 Cal. App. 4th 428 71 Cal Rptr. 3d 542 Second Appellate Dist Division Eight	Is WIC 300(a) unconstitutionally vague?	The court held that WIC 300(a) is not unconstitutionally vague. The court found that the finding of "serious physical harm" is no less specific than "great bodily injury" in the criminal code. The court said that serious physical harm is sufficient even though there may be a certain "I know it when I see it" component.

In re Neil D. (2007)	155 Cal. App. 4th 219 65 Cal. Rptr. 3d 771 Second Appellate Dist Division Fourth	Did the trial court have the ability to order a parent into a residential drug treatment program at disposition?	The appellate court held that the juvenile court could order a parent into a residential drug treatment program. The appellate court noted that under WIC 362, the court may make any and all reasonable orders to alleviate the conditions that brought the child within the juvenile court's jurisdiction. The court stated "Our courts have recognized that severe measures are necessary to prevent drug usage from undermining the prospect of the successful reunification of families."
In re P.A. (2006)	144 Cal. App. 4th 1339 51 Cal. Rptr. 3d 448 Second Appellate Dist Division Three	Are the male siblings at risk of sexual abuse if the abuser molested the female sibling?	The appellate court held that the male siblings were at risk of sexual abuse when the court found that the perpetrator sexually abused their nine year old sister. The appellate court stated that "aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior" and that "any younger sibling who is approaching the age at which the child was abused, may be found to be at risk of sexual abuse".
In re R.M. (7/13/09)	175 Cal. App. 4th 986 96 Cal. Rptr. 3d 655 Second Appellate Dist Division One	Was there evidence of current risk of harm by clear and convincing evidence to allow court to take jurisdiction?	The appellate court held that there was not clear and convincing evidence to declare the children dependents as the mother had taken remedial steps to make sure that one child no longer molested the other child. Although evidence of past events may have some probative value, there must be evidence of circumstances existing at the hearing that make it likely that the children will suffer the same type of harm. (FYI - Jurisdiction was taken after a submission vs. a no-contest plea)
In re Rubisela E. (2000)	85 Cal. App. 4th 177 101 Cal. Rptr. 2d 760 Second Appellate Dist Division Two	Are the male siblings at risk of sexual abuse if the abuser molested the female sibling?	The appellate court held that in light of the trial court finding that the father had molested his 13 year old daughter that it was reasonable for the court to determine that in the victim's absence, the father's sexual offenses were likely to focus on his only other daughter, and that he should not be allowed to return to the family home or regain custody of the children. However substantial evidence did not support the court's finding that the father's sexual abuse of his daughter presented a substantial risk to his minor sons. The appellate court confirmed that a male sibling could be harmed by the denial of the perpetrator, the spouse's acquiescence in the denial or the parents efforts to embrace them in a web of denial, among other things, but that no risk had been shown in this case.

In re Savannah M. (2005)	131 Cal. App. 4th 1387 32 Cal. Rptr. 526 4th Appellate District Division One	Can prior acts of neglect, w/o some reason beyond mere speculation to believe they will reoccur, establish a substantial risk of harm.	Under WIC 300, the court can only take jurisdiction when the circumstances <u>at the time of the hearing</u> subject the child to the defined risk of harm. For a WIC 300 (b) finding there must be: 1) Neglectful conduct by the parent in one of the specified forms; 2) causation and 3) serious physical harm or illness to the child, or a substantial risk of such harm or illness. The evidence must show a substantial risk that past harm will recur.
In re Silvia R. (2007)	158 Cal. App. 4th 1551 70 Cal. Rptr. 3d 746 Second Appellate Dist Division Four	Can the court order non-parties to complete programs and participate in the disposition case plan?	The appellate court held that WIC 362(c) does not authorize the juvenile court to order other relatives other than whom the child is not placed to participate in counseling or education programs. Rather, section 361(c) authorizes the court to impose *on the parent*, as a condition of the disposition plan for reunification with the child, that the parent demonstrate to the court's satisfaction that the parent can protect the child. Further, when the child has been the victim of sexual abuse by other relatives, the court has the authority to order that the parent must reside separately from the perpetrators, or must demonstrate that the perpetrators *voluntarily* participated in counseling and satisfactorily addressed the issues involved, such that the child may safely reside with them.
In re Stacey P. (2008)	162 Cal. App. 4th 1408 77 Cal. Rptr. 3d 52 Second Appellate Dist Division Eight	Can a court dismiss a petition on the initial hearing?	The appellate court held that a trial court could not summarily dismiss a petition at an initial hearing except in an exceptional case where a court at an initial hearing may be in a position to make the findings required under WIC section 390. Otherwise the remedy for the agency's failure to make a prima facie case for detention is release of the child/ren to the parents.
In re S.W. (2007)	148 Cal. App. 4th 1501 56 Cal. Rptr. 3d 665 Fifth Appellate Dist	Did trial court have subject matter jurisdiction over these children?	This case is very fact specific. However, the appellate court found that the trial court did have subject matter jurisdiction over these children. Although the children had lived with their mother in Nebraska during three of the six months prior to the detention, the court found that the mother did not live in Nebraska and were visiting in California but rather that based on the facts that they lived in Madera County and therefore the court did have subject matter jurisdiction over the children.

In re V.F. (2007)	157 Cal. App. 4th 962 69 Cal. Rptr. 3d 159 Fourth Appellate Dist Division One	At the time of disposition, what is the proper code section to proceed under when considering a previously non-custodial parent?	The appellate court held that regardless of whether a previously non-custodial parent is "offending" or "non-offending", the appropriate procedure to proceed under at disposition is WIC 361.2 and not WIC 361(c).
In re Y.G. (6/23/09)	175 Cal. App. 4th 109 95 Cal. Rptr. 3d 532 Second Appellate Dist Division Four	Does WIC 300(b) permit the court to consider parent's misconduct with unrelated child in determining risk of parent to own child?	The appellate court looked to the legislative intent under WIC 355.1 which provides that evidence of a parent's misconduct with another child is admissible at a hearing under WIC 300. "This provision is consistent with the principle that a parent's past conduct may be probative of current conditions if there is reason to believe that the conduct with continue." Factors that the court can consider, in making a determination of substantial risk: when the conduct occurred, whether the unrelated child is of the same age as the child in the petition, and the reason for the misconduct.

Legal Guardianship

Case Name	Case Cite	Issue	Holding
In re Angel S. (2007)	156 Cal. App. 4th 1202 67 Cal. Rptr. 3d 792 Third Appellate Dist	What is the proper procedure to terminate a legal guardianship in juvenile court that was created in probate court?	WIC 728(a) lays out the proper procedure for terminating or modifying a probate guardianship by the juvenile court. This includes the filing of a motion vs. a WIC 388 petition. This motion may be granted by showing only that it is in the best interests of the child. Probate Code 1511 must be followed in regards to notice and this includes noticing all persons named in the original petition for legal guardianship. In addition, the juvenile court must notify the Probate Court of the juvenile court's actions.
In re Carlos E. (2005)	129 Cal. App. 4th 1408 29 Cal. Rptr. 3d 317 First Appellate Dist Division Two	Is a guardian appointed pursuant to WIC 360 or 366.26 entitled to FR if the child is removed from the guardian?	The court held that the guardian has no right to FR and therefore cannot challenge the adequacy of those services. The court stated that there is no requirement for FR when you are terminating a guardianship. The court found that the Dept should have filed a 388 and not a 300 or 387 and the court should have determined whether it was in the child's best interest to maintain or terminate the guardianship. The court held that the right to FR discussed in WIC 361.5(a) refers to a guardian established through the probate court and not the dependency court.
In re D.R. (2007)	155 Cal. App. 4th 480 66 Cal. Rptr. 3d 151 Second Appellate Dist Division One	Can the court re-take jurisdiction of a child who is in a legal guardianship and for whom jurisdiction has been terminated after the child turns 18?	The appellate court held that the trial court could retake jurisdiction over a child in a legal guardianship after the child turns 18 on condition that the WIC 388 petition is filed before the child turns 18. The court reasoned that at the time of the filing of the 388, the guardianship was still in place and the court was not automatically precluded from jurisdiction once the child reached 18. The appellate court held that the trial court had the discretion under WIC 303 to reinstate jurisdiction where there is a showing of a reasonable foreseeable future harm to the welfare of the child.
In re Guardianship of L.V. (2005)	136 Cal. App. 4th 481 38 Cal. Rptr. 3rd 894 Third Appellate Dist	What is the test to determine whether to terminate a probate guardianship?	The court held that the test for determining whether to terminate a probate guardianship is the best interest of the child. It is not enough for the parents just to be "fit" again, it must also be in the best interest of the child to terminate the guardianship.

In re Jessica C. (2007)	151 Cal. App. 4th 474 59 Cal. Rptr. 3d 855 Fifth Appellate Dist	Under what Code Sections should a petition be initiated to terminate a legal Guardianship? Prior to terminating a legal guardianship, is the court required to consider providing services to the child and/or the legal guardian to maintain the guardianship?	The appellate court held that a WIC 387 petition is the appropriate procedural mechanism to terminate a legal guardianship if doing so will result in foster care even though the statutory scheme allows for using a WIC 388 petition. The court held that the juvenile court must evaluate whether providing services to a legal guardian would prevent the termination of the guardianship. Although WIC Section 366.3(b) provides for the termination of guardianship, the section requires the court to evaluate whether the child could safely remain in the guardian's home, without terminating the guardianship, if services were provided to the child or the legal guardian. CRC 5.740(c)(3)(A) also provides for the court to order the Agency to provide services to the guardian and child for the purpose of maintaining the guardianship consistent with WIC section 301 versus terminating the guardianship.
In re K.D. (2004)	124 Cal. App. 4th 1013 21 Cal. Rptr. 3d 711 Fourth Appellate Dist Division One	Did the court abuse its discretion in terminating juri after establishing LG to ensure parental visits?	The court held that the trial court's order to terminate jurisdiction after ordering a legal guardianship at a WIC 366.26 hearing based on the (c)(1)(A) exception was "fatally inconsistent" with the court's finding that it was in the child's best interest to maintain the parental bond through court ordered visitation (the legal guardian's were moving out of state.) The court found that the juvenile court should have maintained jurisdiction to monitor compliance with the visitation order.
In re Kenneth S. (2008)	169 Cal.App.4th 1353 87 Cal.Rptr. 3d 715 Fourth Appellate Dist Division One	Which court is appropriate to hear modification of visitation after LG?	The appellate court held that the juvenile court retains jurisdiction to hear visitation modification requests after granting of legal guardianship. The family law court is not the appropriate court to hear such requests.
In re M.R. (2005)	132 Cal. App. 4th 269 33 Cal. Rptr 3d 629 Fourth Appellate Dist Division Two	Interpretation of 366.26 (c)(4) Parental visitation after a legal guardianship	The court held that the trial court must specify the frequency and duration of the visitation by a parent when the children are in a Legal Guardianship. The court can leave to the guardian, the "time, place and manner" of visitation but must make a specific visitation order unless the court finds that visitation is not in the best interests of the children.

In re Rebecca S. (2/8/10)	181 Cal. App. 4th 1310 104 Cal. Rptr. 3d 706 Second Appellate Dist Division One	Which specifics must court delineate re: parental visitation when terminating jurisdiction with a LG?	The appellate court held that while the time, place and manner of parental visitation may be left to the legal guardian, the frequency and duration of the visitation must be delineated by the trial court to assure that visitations will actually occur.
In re S.J. (2008)	167 Cal. App. 4th 953 84 Cal. Rptr. 3d 557 Fourth Appellate Dist Division Two	Did the court improperly delegate the power of deciding visitation to the legal guardian?	The appellate court held that because the original guardianship and visitation order were made in 2000, prior to the passage of WIC 366.26(c)(4)(c), that the trial court had not improperly delegated the power of deciding visitation for a parent to the legal guardian. However, in any legal guardianship granted after the passage of WIC 366.26(c)(4)(c), in 2005, the trial court must decide whether visitation with the parent should happen and not leave that decision to the guardian.
In re Z.C. (10/2/09)	178 Cal. App. 4th 1271 101 Cal. Rptr. 3d 49 First Appellate Dist Division Two	Does the court have the authority to order an Agency to provide FR services to the LG to try and maintain the guardianship?	The appellate court held that under the plain meaning of WIC§366.26(b) when considered within the context of the juvenile dependency law, provides the juvenile court with the power to order the social services agency to provide reunification services to a legal guardian to preserve the legal guardianship. In addition, the length of time for those services is to be determined by what is in the best interests of the child.

Miscellaneous

Case Name	Case Cite	Issue	Holding
In re A.M. (2008)	164 Cal. App. 4th 914 79 Cal. Rptr. 3d 620 Fourth Appellate Dist Division Three	Discussion of the standard for denying a parent's request for self-representation.	The appellate court held that the juvenile court has discretion to deny the request for self-representation when it is reasonably probable that granting the request would impair the child's right to a prompt resolution of custody status *or* unduly disrupt the proceedings even if the parents is legally competent to represent themselves.
In re Amber R. (2006)	139 Cal. App. 4th 897 43 Cal. Rptr. 3d 297 Fourth Appellate Dist Division Three	Who has standing to be found an "important person to the child" and seek contact with a dependent child pursuant to WIC 366.3(e)?	The court held that the decision of who is important to the child is made by the court on recommendation by the agency pursuant to WIC 366.3(e)(2) and (f)(3). The Agency, not the world at large, is responsible for determining who is important to the child and reporting that information to the court. The court was concerned that biological parents whose rights had been terminated might subsequently come to court to litigate whether they are important to the child under the statute. The focus is on the best interests of the child and the child has standing to demand a review where the issue of identifying important individuals is determined and may appeal any decision with which she is dissatisfied.
In re Andrew A. (3/30/10)	Fourth Appellate Dist Division One	Did ct have authority to entertain mother's motion for reconsideration of its jurisdictional finding and dismiss petition prior to dispo?	The appellate court concluded on two separate grounds that the juvenile court lacked the authority to reconsider its jurisdictional finding: (1) Mother's plea of no contest barred her from bringing a motion for reconsideration; and (2) the juvenile court was barred from reconsidering its jurisdictional finding at the hearing on the section 342 petition because the parties were not provided with prior notice that the issue would be addressed at the hearing
In re A.R. (01/26/09)	170 Cal. App. 4th 733 88 Cal. Rptr. 3d 448 Fourth Appellate Dist Division One	Did court err in refusing to grant stay of proceedings pursuant to Servicemember Civil Relief Act?	The appellate court held that the trial court did err in refusing to grant the 90 day stay mandated by the Servicemember Civil Relief Act. The court held that the stay was mandatory and overrode the 6 month requirements under WIC 352(b).

Beltran v. Santa Clara County (1/24/2008)	514 F.3d 906 US Court of Appeals for the Ninth Circuit	Are social workers entitled to absolute immunity for verified statements in petition filed with dependency court?	The US Court of Appeals for the Ninth Circuit reversed the district court and held that social workers are not entitled to absolute immunity with respect to dependency petitions and custody petitions, as well as the statement of facts submitted with them if those statements can shown to be fabricated evidence or false statements.
In re C.C. (2008)	166 Cal. App. 4th 1019 83 Cal. Rptr. 3d 225 Fourth Appellate Dist. Division Three	Upon appellate reversal, when can a party file a CCP 170.6 affidavit?	The appellate court held that in dependency matters, if the reversal and remand is for the lower court to perform a "ministerial act", then a 170.6 is improper. However, if the remand is for the lower court to "conduct a new trial on the matter", then a 170.6 affidavit is allowed by the party who filed the appeal which resulted in the reversal.
In re Charlisse C. (2008)	45 Cal. 4th 145 CA Supreme Court	Under what circumstances, if any, may a non-profit, public interest law firm, be disqualified from the successive representation of a parent and child?	The appellate court held, in a 2-1 decision, that the trial courts should not disqualify on conflict-of-interest grounds, particularly lawyers from legal services agencies, where the lawyer has no actual or imputed conflict of interest. Absent a showing of an actual conflict, or that the current attorney has obtained material confidential information, a non-profit, public interest law firm should not be disqualified in a serial representation case. The Supreme Court held that while generally agreeing with the appellate court, that they had applied the law relating to "concurrent representation" vs. "successive representation" and that the burden of showing no actual conflict should be borne by the agency opposing the motion to recuse counsel, not the party seeking recusal.
City and County of San Francisco v. Cobra Solutions (2006)	138 Cal. 4th 839 15 P. 3d 445 California Supreme Ct	Defines the scope and need for ethical walls in separate law units under one umbrella firm	The California Supreme Court reaffirmed the findings in the Castro case when it articulated that there would be no conflict if attorneys from each unit simultaneously represent clients from a single family whose interests are divergent. In Castro, the autonomy of each law unit was ensured because the chief attorney in each unit initiated hiring, firing and salary changes for that units attorneys...
In re Claudia E. (2008)	163 Cal. App. 4th 627 77 Cal. Rptr. 3d 722 Fourth Appellate Dist Division One	Is declaratory relief available in dependency proceedings?	The court held that the juvenile court has the authority to grant declaratory relief in certain cases (such as the instant case in which the Dept. Has a policy of untimely filing supplemental petitions in contravention of statutory requirements). Moreover, declaratory relief better serves the juvenile dependency system than habeas corpus relief on a case by case basis.

Deborah M. v. Superior Court of San Diego (2005)	128 Cal. App. 4th 1181 27 Cal. Rptr. 3d 747 Fourth Appellate Dist Division One	Does FC 3041.5(a) permit drug testing by using hair follicle samples?	The court held that the only testing procedures established by the Dept. of Health and Human Services was urine testing. Family Law section 3041.5 states that the 'court shall order the least intrusive method of testing" and 'the testing shall be performed in conformance with procedures and standards established by the US Department of Health and Human Services for testing of federal employees.' Therefore, hair follicle testing is not permitted under FC 3041.5(a).
George P. v. Superior Court of San Luis Obispo (2005)	127 Cal. App. 4th 216 24 Cal. Rptr. 3d 919 Second Appellate Dist Division Six	Service members Civil Relief Act	The Service members Civil Relief Act allows a 90 day stay, plus additional stays as warranted and is discretionary. Military obligations must not adversely affect the service members ability to participate in the dependency proceeding both personally and through counsel. For the stay to be granted there must be a specific showing of inability to participate and a letter signed by the commanding officer for the service member. In this case, the court upheld a denial of a stay over nine months citing that father's non-compliance even before he was deployed shows that his military service did not adversely affect his participation in the case.
In re Jackson W. (4/29/10)	Fourth Appellate Dist Division One	Can parent who waives right to court appointed counsel trained in juvenile dependency law to retain counsel who does not meet those qualifications claim private counsel provided ineffective representation?	The appellate court held that, after proper advisement, a parent may knowingly, intelligently and voluntarily waive the statutory right to be represented by appointed counsel meeting the definition of "competent counsel" under California Rules of Court, rule 5.660(d). Once that right is waived, the parent is precluded from complaining about counsel's lack of juvenile dependency qualifications.

In re Janee W. (2006)	140 Cal. App. 4th 1444 45 Cal. Rptr. 3d 445 Second Appellate Dist Division Eight	When a child has been placed with previously non-custodial parent, what is next hearing?	The appellate court held that regardless of when a child is placed with a previously physically non-custodial parent, (whether at dispo or any later hearing), the court does so under WIC 361.2. If the court retains jurisdiction after placement, the appropriate code section to set the next hearing is WIC 366 where the court shall determine which parent, if either, shall have custody of the child. In addition, since neither 366 nor 366.21(e) requires reasonable services be offered to a previously custodial parent, DCFS does not have to provide nor does that court have to find that reasonable services have been provided to the previously custodial parent even if reunification services were ordered.
In re J.N. (2007)	156 Cal. App. 4th 523 67 Cal. Rptr. 3d 384 Fourth Appellate Dist Division One	Is the court required to conduct a full evidentiary hearing before appointing a medical Guardian? Can the Court authorize removal of a breathing tube prior to adjudging (declaring) the child to be a dependent? Does the Court have the authority to issue a "DNR order prior to adjudging the child to be a dependent?	The Court has the discretion to appoint a guardian at an informal hearing in which the parent is given an opportunity to respond and where there is an explanation of the purpose for appointing the guardian, as well as the authority that will be transferred. Prior to the disposition, the Court has the authority to order removal of the temporary feeding tube because WIC 369(b) allows the court, once a petition has been filed, to intervene when the child is in need of the performance of medical treatment (surgical or other remedial care). Prior to disposition, the Court does NOT have the authority to issue a DNR order because it is an order for non-performance of medical treatment; although permitted under WIC 362(a) (all reasonable orders for care, supervision, etc.) once the child has been adjudged (declared) a dependent. WIC 369(b) limits orders at this stage to affirmative medical treatment. The Court of Appeal also notes that the procedure had not been properly followed for live testimony of physicians, and cites the factors to be weighed from In re Christopher I (2003) 106 Cal. App. 4th 533, 551.

Jonathan L. v. Superior Court (2008)	165 Cal. App. 4th 1074 81 Cal Rptr. 3d 571 Second Appellate Dist Division Three	Do parents of dependent children have a constitutional right to home school their children?	Upon rehearing, the appellate court reversed/tailored their original ruling that enrollment and attendance in a public full-time day school is required by California law for minor children unless (1) the child is enrolled in private full-time day school and actually attends that private school, (2) the child is tutored by a person holding a valid state teaching credential for the grade being taught, or (3) one of the other few statutory exemptions to compulsory public school attendance applies to the child. The court concluded that an order requiring dependent children to attend school outside the home in order to protect that child's safety is not an unconstitutional violation of the parents' right to direct the education of their children.
In re Kristen B. (2008)	163 Cal. App. 4th 1535 78 Cal. Rptr. 3d 495 Fourth Appellate Dist Division One	Is it ineffective assistance of counsel for minor's counsel to advocate for the child's best interest vs their stated wishes?	The appellate court held that it is not ineffective assistance of minor's counsel to advocate on behalf of the child's interests vs. their stated interests. The court noted that despite the seemingly inherent conflict in all dependency cases where minor's counsel takes a position contrary to the minor's stated wishes, the Legislature has expressly provided that the best interests of the minor, not his or her wishes, determine the outcome of the case.
Manuel C. v. Superior Court of Los Angeles (1/26/10)	181 Cal. App. 4th 382 104 Cal. Rptr. 3d 787 Second Appellate Dist Division Four	Can a party to an action file a 170.6 where case had previously been in front of same bench officer?	In this case, the court had previously terminated jurisdiction on the family. A new petition with different allegations was subsequently filed. One of the parties filed a CCP §170.6. The appellate court held that the §170.6 filed by the party was timely.
In re M.L. (03/23/09)	172 Cal. App. 4th 1110 90 Cal. Rptr. 3d 920 Second Appellate Dist Division Six	Did the Court err in finding exigent circumstances allowing the agency to take newborn into custody? Does the court have to defer to mother's selection of adoptive parents?	The appellate court held that a social worker, pursuant to WIC 306 may remove a child from a parent's custody if there is reason to believe that the child is in imminent danger and therefore that the Agency did not need a warrant. In this case the mother had made a revocable plan when the Agency detained the child and therefore the child was still in imminent danger. The appellate court held that, after the court finds the allegations in the petition to be true, the trial court is not required to defer to mother's selection of adoptive parents for her child. Although the mother had a recognized constitutional right to select adoptive parents for her child, the juvenile court is charged with determining whether that plan or another is in the best interests of the child.

In re Nolan W. (03/30/09)	45 Cal. 4th 1217 203 P. 3d 454 California Supreme Ct	Can Juv. Ct. use contempt sanctions as punishment when a parent fails to satisfy conditions of reunification plan?	The California Supreme Court held that the trial court may not use its contempt power to incarcerate a parent solely for the failure to satisfy aspects of a voluntary reunification case plan. The court held that because reunification services are voluntary in nature, they cannot be forced on an unwilling or indifferent parent. The termination of parental rights is the ultimate "punishment" for failure to comply with the reunification plan, not jail. This decision was limited and left the juvenile court with its contempt power to otherwise control the proceedings.
In re Paul W. (2007)	151 Cal. App. 4th 37 60 Cal. Rptr. 3d 329 Sixth Appellate Dist	Does the parent who did not seek the Writ of Habeas Corpus have standing to appeal the orders made during that hearing?	The court of appeal held that the parent who had not sought the original Writ of Habeas Corpus had no standing to appeal the orders made at that hearing. Although that parent had standing in the entire dependency proceeding, she was not a party to the habeas corpus proceeding. That parent had never made an attempt to intervene in the habeas proceeding and the ruling did not otherwise affect her parental interests.
In re R.D. (2008)	163 Cal. App. 4th 679 77 Cal. Rptr. 3d 793 Fourth Appellate Dist Division Two	Discussion of requirements for transferring of cases between counties.	The court held that when a case is transferred out, the receiving court *shall* take jurisdiction of the case. Pursuant to Calif Rules of Court 5.612(f), if the receiving court believes that a change of circumstances or additional facts indicate that the child does not reside in the receiving county, a transfer-out hearing must be held separately. In addition, at a transfer-out hearing, the transferring court is required to make findings not only about the child's residence (case discusses 5 bases to establish residency), but also whether the transfer is in the best interest of the child.
In re R.W. (03/26/09)	172 Cal. App. 4th 1268 91 Cal. Rptr. 3d 785 Fourth Appellate Dist Division Three	Discussion of limiting educational rights of parent.	The appellate court held that the trial court did not abuse its discretion when it limited the mother's educational rights because the mother was not acting in the child's best interests. The child urgently needed emotional, behavioral and educational services and the court needed to act before the "window of opportunity" closed.
V.S. v. Allenby (2008)	169 Cal. App. 4th 665 87 Cal. Rptr. 3d 143 Second Appellate Dist Division Seven	DSS requirements for action within 180 days of Voluntary Placement.	The appellate court found that the trial court should have issued a writ of mandamus directing the Director of DSS to order his agents to comply with the mandatory requirements of federal and state law with regards to Voluntary Placements. The agents must take one of 5 actions within 180 days of the start of the voluntary placement.

In re Z.N. (12/29/09)	181 Cal. App. 4th 282 104 Cal. Rptr. 3d 247 First Appellate Dist. Division Two	Good discussion of Marsden motions	The appellate court considered (1) the timeliness of the motion, (2) the adequacy of the court's inquiry into the defendant's complaint, and (3) whether the conflict was so great that it resulted in a total lack of communication preventing an adequate defense.

Notice Issues

Case Name	Case Cite	Issue	Holding
In re Alyssa F. (2003)	112 Cal. App. 4th 846 6 Cal. Rptr. 3d 1 Fourth Appellate Dist Division One	Discussion of the notice requirements for a party living in another country under the Hague Convention.	The appellate court held failure to properly serve a party who resides outside the country under the Hague Convention renders all subsequent proceedings void as to that person. This is true even if the party indisputably had notice of the action. Specifically Article 10 of the Hague Service Convention indicates that notice must be valid under California law and in a manner not objected to by the other country. This case notes that Mexico and the United States are both signatories to the Hague Convention and that Mexico does not prohibit service by registered mail. The other means is to notice through the Central Authority.
In re Gerald J. (1992)	1 Cal. App. 4th 1180 2 Cal. Rptr. 2d 569 Fourth Appellate Dist Division One	Can the court proceed when the parents have been appropriately noticed but fail to appear? Does the WIC 366.26 report with attached adoption assessment need to be served 10 days prior to the hearing?	The court held that the trial court had not erred in failing to grant parents counsel's request for a continuance pursuant to WIC 352 because the parents had been adequately and timely noticed and counsel was present. The court found that a parent's failure to appear will not normally constitute the good cause necessary to justify a continuance because substantial importance is attached to the child's need for a prompt resolution of the matter. In addition, the court held that the fact that counsel had not received the adoption assessment prior to the court date was also not good cause for a continuance because none of the statutes requires the report to be served on the parents or their counsel.
In re Jennifer O. (5/6/10)	 Second Appellate Dist Division Four	Does the Hague Convention apply to service of notice of review hearings in Dependency?	The appellate court held that the Hague Convention does not apply to service of notice of review hearings in Dependency. The appellate court held that once the juvenile court acquires "personal jurisdiction" over the non-resident parent in this manner at the jurisdictional hearing, that subsequent notices only need to comply with California law.
In re J.H. (2007)	158 Cal. App. 4th 174 70 Cal. Rptr. 3d 1 Second Appellate Dist Division One	Is failure to notice a reason for reversal if the result would not have been any different?	This is a very fact specific case. The appellate court held that even though father had never been appropriately noticed, that he knew about the proceedings and never appeared until the 366.26 hearing. The appellate court held that the errors were "harmless beyond a reasonable doubt" because it was clear that the father could not have taken custody of the child or even participated in reunification services.

In re Jorge G. (2008)	164 Cal. App. 4th 125 78 Cal. Rptr. 3d 552 Second Appellate Dist Division One	Discussion of requirements for notice to parents who reside in Mexico.	The appellate court held that when parents reside in Mexico, the juvenile court is required to afford a reasonable time for proper service under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. (The notice must comport with notice requirements in both California and in Mexico.) [Note: In re Alyssa F. seems to imply that notice can be by international certified mail - return receipt requested; the other means is to notice through the Central Authority. The notice and pleadings/petition must be in Spanish.]
In re Justice P. (2004)	123 Cal. App. 4th 181 19 Cal. Rptr. 3d 801 Fourth Appellate Dist Division One	Does every notice violation warrant a hearing on its face under WIC 388?	The court rejected the notion that every WIC section 388 petition based on notice violations merits an evidentiary hearing as a matter or law regardless of a prima facie showing of best interests.
In re Kobe A. (2007)	146 Cal. App. 4th 1113 53 Ca. Rptr. 3d 437 Second Appellate Dist Division Four	Addresses issues of notice, ROC 1413(g) parentage, standing, appointment of counsel for inc. parents; etc	The appellate court held that the father was entitled to notice of the jurisdictional hearing by certified mail with a copy of the petition pursuant to WIC 291. The court also held that pursuant to Rule of Court 1413(h), father was entitled to be sent a JV 505 form by the clerk that would have given him the opportunity to address paternity and standing.
In re Marcos G. (2/4/10)	182 Cal. App. 4th 369 Second Appellate Dist Division Three	Good discussion of PC §2625 and notices to an incarcerated parent	This is a very fact specific case. The appellate court found that in spite of failures under PC §2625, and failure to follow certain notice provisions, the error was not prejudicial and the father had not shown that it was in his child's best interests at a WIC §388 hearing (pending a WIC §366.26 hearing) to go back to disposition in this matter.
In re P.A. (2007)	155 Cal. App. 4th 1197 66 Cal. Rptr. 3d 783 Second Appellate Dist Division Three	If the due diligence was incomplete at disposition, do the findings made at the 366.26 hearing need to be reversed?	The court held that even though the due diligence was incomplete when the court proceeded to disposition, the findings made at the 366.26 hearing did not need to be reversed because notice for the 366.26 hearing was appropriate and the father never challenged jurisdiction in the trial court. Because the father had appeared at several hearings post disposition and never asked to receive reunification services nor did he file a 388 petition challenging jurisdiction based on bad notice, the issues were waived.

In re Wilford J. (2005)	131 Cal. App. 4th 742 32 Cal. Rptr. 3d 317 Second Appellate Dist Division Seven	Notice requirements and advisements for jurisdictional hearing.	The court held that failure to "identify the nature of the proceeding" as required by WIC 291(d)(2) for the jurisdictional hearing constituted inadequate notice. The court indicates that a parent must be apprised that a jurisdictional hearing is set to adjudicate the allegations of a dependency petition and that the parent must be apprised of the consequences of their failure to appear at that hearing. The appellate court seems to misunderstand that a PRC is actually a jurisdictional hearing. Either way, the court needs to assure that the parties know that whatever they call the hearing, that it is a jurisdictional hearing and notice them of what could happen at that hearing.

Parentage Issues

Case Name	Case Cite	Issue	Holding
Adoption of Arthur M. (2007)	149 Cal. App. 4th 704 57 Cal. Rptr. 3d 259 Fourth Appellate Dist Division One	Discussion of what it means under FC 7611 to come forward promptly and assume parental responsibility.	The appellate court held that once an unwed father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and the circumstances permit. The appellate court goes into great detail about what the father did and didn't do to demonstrate his commitment to his parental responsibilities.
In re Baby Boy V. (2006)	140 Cal. App. 4th 1108 45 Cal. Rptr. 3d 198 Second Appellate Dist Division One	When does an alleged father become a presumed father?	The court held that a mother may not unilaterally preclude her child's bio father from becoming a presumed father on nothing more than a showing of the child's best interests. The court held that when an unwed father learns of a pregnancy and promptly comes forward (or as soon as he learns of the babies existence) and demonstrates a full commitment to his parental responsibilities, his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.
Charisma R. v. Cristina S. (2006)	140 Cal. App. 4th 301 44 Cal. Rptr. 3d 332 First Appellate Dist Division Five	Presumed mother	The court held that to determine whether one partner is the presumed mother of the child, the court must look at whether she actively participated in the child being conceived with the understanding that she would raise the child as her own, 2) whether she voluntarily accepted the rights and obligations of parenthood after the child's birth and 3) whether there are competing claims to being the child's second parent.
In re Cody B. (2007)	153 Cal. App. 4th 1004 63 Cal. Rptr. 3d 652 Fourth Appellate Dist Division One	Can a biological mother be declared a presumed mother after the termination of parental rights?	The court held that the biological mother could not be declared the presumed mother after termination of parental rights even if she held herself out to be the mother and openly accepted the child into her home. The court stated that even though FC 7611 allows for someone to be declared a presumed parent at any stage of the proceedings it does not apply after the termination of parental rights; 366.26(i)(1) controls.
County of Orange v. Superior Court of Orange County (2007)	155 Cal. App. 4th 1253 66 Cal. Rptr. 3d 689 Fourth Appellate Dist Division Three	Should the court have set aside the voluntary declaration of paternity based on a motion filed more than two years after the child's birth?	The court held that the trial court should not have set aside the voluntary declaration of paternity based on a motion filed more than two years after the child's birth. The court held that the because paternity had been established by a voluntary declaration, the motion was untimely under Family Code Section 7575(b) and 7646(a)(2). The trial court should not have ordered genetic testing absent extrinsic fraud being shown.

County of San Diego v. David Arzaga (2007)	152 Cal. App. 4th 1336 62 Cal. Rptr. 3d 329 Fourth Appellate Dist Division One	Discussion of doctrine of parentage by estoppel.	The court held that the doctrine of parentage by estoppel did not apply to the facts in this case because the "father" did not know all of the facts (namely that he was not the biological father) when he held himself out to be the father of the child. In general the doctrine of parentage by estoppel is "the duty of support which a husband owes to his wife's illegitimate child when the husband , from the date of birth of the child, accepts the child into his family, publicly acknowledges the child as his own and treats the child as if he were legitimate." This presupposes that the husband knows that the child is not biologically his child.
Craig L. v. Sandy S. (2004)	125 Cal. App. 4th 36 22 Cal. Rptr. 3d 606 Fourth Appellate Dist Division One	Competing paternity presumptions under FC 7611, 7612 and 7540.	The court reiterated that FC 7612(b) requires that "if two or more presumptions arise under 7611 which conflict with each other, the presumption which on the facts is founded on weightier considerations of policy and logic controls." In this case, there existed competing presumptions and the court remanded it to conduct a factual hearing on the nature of the competing relationships to the child and the impact on the child. The concept is that the child's best interests are paramount in making the paternity findings.
In re Elijah V. (2005)	127 Cal. App. 4th 576 25 Cal. Rptr. 3d 774 Fourth Appellate Dist Division One	Who was entitled to presumed father status - bio father or man married to mother at time of conception? Did court err in failing to order FR for bio father?	The court held that the trial court properly declared Jesse to be a presumed father under FC7540 (married to mother and child born during marriage- also time of conception very close to husband and wife co-habitating) even though he wasn't bio father. The court held that the trial court erred in order a paternity test because only the husband, child and presumed father may seek blood tests. The court held that the trial court wasn't required to balance bio father's interests against presumed father's interests because bio father didn't qualify for presumption under FC7611 because he never publicly ack paternity to anyone other than PGM and although child lived with him for 11 days, he was like babysitter v. parent. Finally, the court held that the trial court may not order srvs for the bio father when a conclusively presumed father exists.

Elisa B. v. The Superior Court of El Dorado County (2005)	37 Cal. 4th 108 117 P. 3d 660 CA Supreme Court	Can the two parents of a child be of the same sex?	The California Supreme Court held that a lesbian partner to the biological parent could be the other parent to a child with the ensuing obligation to support that child. The court used FC Section 7611 (d) to analyze whether the lesbian partner had openly accepted the children into her home and held them out to be her own and therefore intended the child to be her own. The court specifically found that a child was deserving of two parents (and not more) for both financial and emotional support.
In re E.O. (3/3/10)	182 Cal. App. 4th 722 First Appellate Dist Division Five	Does a paternity judgment made for purposes of child support equate to presumed father status?	The appellate court held that a paternity judgement, as the name implies, is a judicial determination that a parent child relationship exists. It is designed primarily to settle questions of biology and provides the foundation for an order that the father provide financial support. Presumed father status, by contrast, is concerned with a different issue: whether a man has promptly come forward and demonstrated his full commitment to his parental responsibilities – emotional, financial and otherwise. They do not equate.
In re Eric E. (2005)	137 Cal. App. 4th 252 39 Cal. Rptr. 3d 894 Second Appellate Dist Division Eight	What is the procedure for requesting presumed father status?	The court held that the proper procedure for requesting presumed father status was through the filing of a WIC 388 petition. If you wait to long to earn presumed father status, you must file a 388 petition which requires you to show a change of circumstances and that it is in the child's best interest to change the paternity status.
Gabriel P. v. Suedi D. (2006)	141 Cal. App. 4th 850 46 Cal. Rptr. 3d 437 Second Appellate Dist Division Four	Weighing presumed fathers	The appellate court concluded that the trial court was correct in ruling that the bio father was entitled to establish his paternity because the mother had precluded him from becoming a presumed father. In addition, the trial court was correct in ordering genetic testing and admitting the results of these tests to resolve whether the husband's voluntary declaration should be set aside. However, the trial court erred in failing to weigh the presumptions supporting the husband's status as presumed father. The trial court must weigh the competing interests of paternity for weightier considerations of policy and logic.

H.S. v. Superior Court of Riverside County (4/22/10)	Fourth Appellate Dist Division Two	Should ct have ordered genetic testing as requested by prior presumed father after declaration of paternity had been rescinded?	The appellate court held that the trial court erred when it ordered genetic testing in a paternity action when real party in interest had no standing as a presumed father other than a voluntary declaration of paternity that was executed and subsequently rescinded by a married woman. When the trial court granted the motion to set aside the declaration, it should have found that the declaration was void and had no effect.
In re J.L. (2008)	159 Cal. App. 4th 1010 72 Cal. Rptr. 3d 27 First Appellate Dist Division One	Does the juvenile court have the jurisdiction to set aside a voluntary declaration of paternity under FC 7575?	The appellate court held that the answer is yes. Family Code 7575 allows for the rescission of a voluntary declaration of paternity by either parent or where the court finds there is proof that the man signing the declaration was not the biological father unless the court finds it would not be in the child's best interests. The motion to set aside must be filed within the first 2 years after the child's birth by a local child support agency, the mother, the man who signed the declaration, "or in an action to determine the existence or nonexistence of the father and child relationship... or in any action to establish an order for child custody, visitation, or child support based upon the voluntary declaration of paternity." The appellate court found that the juvenile court had jurisdiction to hear the motion to set aside the declaration since it is a court that is charged with inquiring about a child's biological parents and establishing custody of a child.
In re J.O. (9/9/09)	178 Cal. App. 4th 139 100 Cal. Rptr. 3d 276 Second Appellate Dist Division Four	Does "failure to provide" rebut presumption under FC §7611(d)?	The appellate court found that although a FC§7611(d) presumption of paternity may be rebutted in an "appropriate action" by "clear and convincing evidence", if the result would be to leave the child without any presumed father, the court should not allow such a rebuttal. The court stated that while failure to provide might result in a failure to establish a presumption of paternity under FC §7611(d), once the presumption is established, failure to provide is not enough to rebut it.

Kevin Q. v. Lauren W. (6/19/09)	175 Cal. App. 4th 1119 Fourth Appellate Dist Division Three	Does a man's voluntary declaration of paternity rebut a rebuttable presumption of paternity under a subdivision of FC 7611?	The appellate court held that FC 7612(a) listing the section 7611 presumptions rebuttable, expressly excludes presumed father status arising from a declaration of paternity as one of the rebuttable presumptions. Even a pre-1997 voluntary declaration of paternity "overrides the rebuttable presumptions created by section 7611's subdivisions. Therefore, the appellate court held that the trial court was incorrect when it weighed and balanced the two presumptions because that is only to be done when both presumptions arise from the subdivisions of FC 7611.
In re Lisa I. (2005)	133 Cal. App. 4th 605 34 Cal. Rptr. 3d 927 Second Appellate Dist Division Eight	Paternity- Nature vs. Nurture FC 7611(d)	The court held that a protected liberty interest in establishing paternity does not arise from a biological connection alone but from the existing relationship, if any, between a biological father and a child. The court found that the presumption of paternity did not arise with the biological father because another man had established a relationship with the child. Applying the statutory presumption furthers the state's interest in preserving the familial relationship between the child and the presumed father and these relationships are not always founded in biological reality.
K.M. v. E.G. (2005)	37 Cal. 4th 130 117 P. 3d 673 CA Supreme Ct.	Is an ovum donor whose intention it was to produce a child to be raised in the joint home of the donor and donee, a parent?	The California Supreme Court found that ovum donor's status was not analogous to that of a sperm donor under FC 7613(b) which provides that a man is not a father if he provides semen to a physician to inseminate a woman who is not his wife, because the ovum donor supplied her ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home. The Supreme Court used the "intent test" to show that the couple intended to raise the child together. The Supreme Court again found that the child was entitled to two parents for financial and emotional support.
Kristine H. v. Lisa R. (2005)	37 Cal. 4th 156 117 P. 3d 690 CA Supreme Court	Challenge to validity of stipulated Existence of Parental Rights	The California Supreme Court held that given that the Superior court had subject matter jurisdiction to determine the parentage of the unborn child, and that appellant invoked that jurisdiction, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years, it would be unfair to both the other parent and the child to permit appellant to challenge the validity of that judgment. It would also contravene the public policy favoring that a child has two parents rather than one.

In re Mary G. (2007)	151 Cal. App. 4th 184 59 Cal. Rptr. 3d 703 Fourth Appellate Dist Division One	Did father's signed voluntary declaration of paternity from Michigan make him a presumed father in California?	The appellate court held that when the father signed the voluntary declaration of paternity in Michigan, it had the same force and effect as a paternity judgment. Family Code section 5604 requires California courts to give full faith and credit to paternity judgments made by any other state and those judgments shall have the same effect as a paternity determination made in this state.
Adoption of O.M. (2008)	169 Cal. App. 4th 672 87 Cal. Rptr. 3d 135 First Appellate Dist Division Four	Discussion of whether father made full commitment to parental responsibilities resulting in Kelsey S.status	The appellate court held that the biological father did not reach Kelsey S. status because he had not made a full commitment to his parental responsibilities. Although the mother did frustrate him to some extent, the father's ability to demonstrate his commitment was impeded to a far greater extent by the predictable consequences of his own criminal activity.
In re T.R. (2005)	132 Cal. App. 4th 1202 34 Cal. Rptr. 3d 215 Fourth Appellate Dist Division One	Interpretation of FC section 7611 (d) for stepfather who was convicted of sexually molesting the child who was the subject of the petition.	The court held that although a stepfather had raised a child as his own since she was age 3, he was not entitled to presumed father status under FC 7611(d). The court held that because he was convicted of molesting the child that was the subject of the dependency petition and that those actions were so contrary to a parental role that any presumption under 7611(d) either did not apply or was rebutted.
In re Vincent M. (2008)	161 Cal. App. 4th 943 74 Cal. Rptr. 3d 755 Second Appellate Dist Division Five	Does the court have to find it is in the child's best interest to place with or offer reunification services to a biological father who appears after the reunification period has ended?	The court held that a biological father seeking reunification with a child, who does not come forward in the dependency proceeding until after the reunification period has ended, must establish under WIC 388 that there are changed circumstances or new evidence demonstrating the child's best interest would be promoted by reunification services. The court also held that the rule is the same whether his paternity was concealed from him or not.

In re William K. (2008)	161 Cal. App. 4th 1 73 Cal. Rptr. 3d 737 Third Appellate Dist	Discussion of setting aside a voluntary declaration of paternity.	VDP is a conclusive presumption of paternity. The appellate court held that a motion to set aside a voluntary declaration of paternity under FC 7573 may be made by the mother, the previously established father or the child. However, even if genetic testing (which may be requested by mother, previously established father or child support agency) shows that the previously established father is not the bio father, the court may deny a motion to vacate the judgment if that is in the best interest of the child. FC 7575 discusses the ways to set aside the VDP and the factors that should be considered in determining the best interest of the child

Placement Issues

Case Name	Case Cite	Issue	Holding
In re Antonio G. (2008)	159 Cal. App. 4th 254 71 Cal. Rptr. 3d 293 Fourth Appellate Dist Division One	Even if a child has previously been removed from a relative, if the child has to be moved again, does the court have to evaluate that possible relative?	The appellate court held that even though the child had previously been removed from a relative, the trial court was obligated to look at that relative again when the child had to be moved again. The appellate court held that the agency and the court should have reevaluated that relative again pursuant to WIC 361.3 and 361.4. The court indicated that "The Legislature has determined that all the factors in 361.3(a) are important in determining whether placement with a relative is appropriate.
In re Esperanza C. (2008)	165 Cal. App. 4th 1042 81 Cal. Rptr. 3d 556 Fourth Appellate Dist Division One	May court review Agency's denial of a criminal records exemption for placement purposes?	The appellate court held that, for placement purposes, the trial court can review the Agency's denial of a "criminal records exemption" under an "abuse of discretion" standard, and if such an abuse of discretion is found, the court can ONLY order the agency to evaluate or re-evaluate a request for a criminal records exemption under the "correct legal standard, and to promptly report its decision to the court and the parties."
In re G.W. (5/19/09)	173 Cal. App. 4th 1428 94 Cal. Rptr. 3d 53 Fifth Appellate Dist	May the court use WIC 360(a) after sustaining a supplemental petition?	The appellate court held that case law as well as Rule 5.565(f) required the juvenile court to proceed directly to a WIC 366.26 hearing after the court sustained the 387 petition because the mother had already received 18 months of family reunification services. The court stated that WIC 360(a) was not the proper section to use at the disposition of a supplemental petition.
In re H.G. (2006)	146 Cal. App. 4th 1 52 Cal. Rptr. 3d 364 Fourth District Division One	When a 387 petition has been sustained against a relative, what must the court consider at dispo order to remove?	The appellate court held that when a 387 petition is sustained against a caretaker, the court must first hold a dispositional hearing regarding whether to remove from that caretaker. The appellate court held that the trial court must consider *all* of the factors set forth under WIC 361.3, when determining whether this caretaker is an appropriate caretaker or whether the child should be removed.

Hossanna Homes v. County of Alameda Social Services (2005)	129 Cal. App. 4th 1408 29 Cal. Rptr 3d 317 First Appellate Dist Division Two	Can an FFA move a child from a home they no longer wish to license if that home gets licensed by another FFA?	The court held that it is the juvenile court, not the FFA, which has the ultimate responsibility of ensuring that the placement decisions are in the children's best interests. While the certified family home is exempt from the licensing requirements otherwise applicable to a foster home, as their compliance with requirements necessary for the placement of children is monitored and assured by the FFA, the placing agency remains responsible for the care, custody and control of the children.
In re James W. (2008)	158 Cal. App 4th 1562 71 Cal. Rptr. 3d 1 Second Appellate Dist Division Three	What is the standard for appellate court review of child custody determinations?	This is a very fact specific case. However, the appellate court held that custody determinations made by a juvenile court are reviewed under the deferential abuse of discretion standard. It will not be disturbed unless the trial court exceeds the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. Here, the court held that the danger to the child in the home of the relative outweighed the benefit of placement with a relative.
In re Joseph T. (2008)	163 Cal. App. 4th 787 77 Cal. Rptr. 3d 806 Second Appellate Dist Division One	Does the relative placement preference apply after the dispositional hearing even if the child does not have to be moved?	The appellate court held the relative preference discussed in WIC 361.3(a) applies after the dispositional hearing through the reunification period and that 361.3(d) does not limit the preference to new placements once the dispo hearing in complete. This case contains a strong dissent.
In re K.C. (4/26/10)	Fifth Appellate Dist	Does father have appellate standing to contest the denial of WIC §388 by PGPs asking for placement just prior to WIC §366.26 hearing?	The appellate court held that a parent does not have appellate standing to challenge an order denying a relative placement request once a permanency planning hearing is pending unless the parent can show his or her interest in the child's companionship, custody, management and care *is*, rather than *may be* "injuriously affected" by the court's decision. A decision that has the "potential" to or "may affect" the parent's interest, even though it may be "unlikely" does not render the parent aggrieved.
In re Lauren Z. (2007)	158 Cal. App. 4th 1102 70 Cal. Rptr. 3d 583 Second Appellate Dist Division One	When the results from an ICPC are not timely in a case, does the relative preference or the child's best interest prevail?	The appellate court held that while ICPC is an unwieldy mechanism at best, it is still the law, and must be complied with. If the ICPC conflicts with the best interests of the child, the analysis remains a best interest one. The relative preference is not a license to request placement past the time it is in the interests of the child to do so. While ICPC is one factor in the equation, the relative preference is also to be determined under the usual criteria.

In re Sabrina H. (2007)	149 Cal. App. 4th 1403 57 Cal. Rptr. 3d 863 Fourth Appellate Dist Division One	Discussion of the differences in the requirements between a detention into a home and a placement Is placement of Dependent Children in Mexico contrary to the interests of Dependency Law?	The appellate court held that detention in the home of the relative in Mexico was proper because the court had a clear CLETs, a clear CACI and a favorable home evaluation by DIF. However, placement in that same home at disposition was not appropriate because the Agency had not obtained a complete criminal records check and the relatives written statement that he had no criminal convictions was not enough. The appellate court also stated that the legislature has not banned foreign placement and that in fact, case law recognizes foreign placements of dependent children. Also since Mexico is a border community, visitation would not be hindered for the parents in reunification.
Sencere P. (2005)	126 Cal. App. 4th 144 24 Cal. Rptr. 3d 256 Second Appellate Dist Division One	Does the move to a new home trigger a reassessment of the new home and the adults in the new home pursuant to WIC 361.4? Does the juvenile court have the authority to waive a disqualifying conviction under WIC 361.4?	The court held that even if a child has been with the same caretaker for an extended period of time, the caretakers move to a new residence requires a reassessment of that home under WIC 361.4 (including a state and federal criminal records check on all adults living in that home followed by a fingerprint clearance check). WIC 361.4(d)(1) indicates that if the 'fingerprint clearance check indicated that the person has been convicted of a crime that would preclude licensure under Section 1522 of the Health and Safety Code [any crime other than a minor traffic offense], the child shall not be placed in the home, unless a criminal records exemption has been granted by the county...' The Director of Social Services has exclusive authority to grant an exemption for a disqualifying conviction. The juvenile court has no authority to waive a disqualifying conviction.
In re Shirley K. (2006)	140 Cal. App. 4th 65 43 Cal. Rptr. 3d 897 Fourth Appellate Dist Division One	Should ct consider best interests of child when determining whether the agency abused its discretion when it moved child post-termination?	The appellate court found that the court erred when it did not consider the "best interest of the child" when determining whether the Agency acted arbitrarily and capriciously in moving a child from a home post-termination of parental rights. The appellate court found that the trial court underplayed its role in determining whether the Agency properly considered the child's best interest in making critical important post-termination placement decisions.

In re Summer H. (2006)	139 Cal. App. 4th 1315 43 Cal. Rptr. 3d 682 Second Appellate Dist Division Seven	Does criminal record disqualification provision of 361.4 prevent court from exercising discretion to appoint a legal guardian under WIC 360 without criminal waiver from DCFS?	DCFS refusal to waive a criminal record under WIC 361.4 does not prevent court from exercising discretion to appoint a legal guardian under WIC 360.
In re S.W. (2005)	131 Cal. App. 4th 838 32 Cal. Rptr. 3d 192 Fourth Appellate Dist Division One	May the trial court review the Dept's decision to not grant a waiver of a criminal conviction under WIC 361.4?	The court held that the trial court does not have the right to review the Agency's decision to not grant a waiver of a disqualifying conviction under WIC 361.4. The court held that the Agency's decision not to grant an exemption for a criminal conviction is an executive one subject to administrative review and that any judicial review of that denial must follow the exhaustion of the full administrative process (including an admin appeal), and that the court must give deference to the Agency's decision.

Restraining Orders

Case Name	Case Cite	Issue	Holding
Gonzalez v. Munoz (2007)	156 Cal. App. 4th 413 67 Cal. Rptr. Ed 317 Second Appellate Dist Division Seven	Did court lack authority to extend temporary custody order made when TRO was issued when permanent RO was issued?	The appellate court held that not only did the trial court have the authority to extend the temporary custody order made when it issued the original temporary custody order but it had the responsibility to do so under the Domestic Violence Prevention Act. (FC 6323). The appellate court commented that "Court procedures, however well-intentioned, should not be imposed at the expense of the parties basic right to have their matters fairly adjudicated: "That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice."
In re B.S. (03/17/09)	172 Cal. App. 4th 183 90 Cal. Rptr. 3d 810 Fourth Appellate Dist Division Two	Can the juvenile court issue a restraining order when a criminal protective order is already in effect?	The appellate court held that the issuance of a criminal protective order did not divest the juvenile the juvenile court of jurisdiction to issue its own protective order. Penal Code Section 136.2(e)(2) and CRC 5.630(1) suggest that the Legislature anticipated more than one restraining order being issued from separate courts. However, the more restrictive terms of a criminal protective order *always* have precedence in enforcement over any other civil protective order.
In re Cassandra B. (2004)	125 Cal. App. 4th 199 22 Cal. Rptr. 3d 686 Second Appellate Dist Division Two	What behaviors would constitute "molesting" or "stalking" in issuing a restraining order?	The court found that neither the term"molesting" or "stalking" necessarily involves violent behavior or the threat of violence and therefore that the court was within its rights to issue the restraining order. The court found that the term 'molest' doesn't necessarily refer to sexual misconduct but rather is synonymous with the term 'annoy' and generally refers to conduct designed to disturb, irritate, offend, injure or at least tend to injure another person and that the facts of this case fell within those definitions.
Holly Loeffler v. William Medina (6/18/09)	174 Cal. App. 4th 1495 95 Cal. Rptr. 3d 343 Fourth Appellate Dist Division One	What is the correct legal standard for deciding when to terminate a domestic violence restraining order?	The appellate court held that CCP 533 sets forth the standards for a trial court to apply when considering whether to dissolve an injunction. The court may modify or dissolve a restraining order upon a showing that there has been a material change in the facts upon which the restraining order was granted, that the law upon which the restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the restraining order.

In re Matthew F. (2005)	132 Cal. App. 4th 883 33 Cal. Rptr. 3d 909 Fourth Appellate Dist Division Two	Is court entitled to issue a restraining order for a social worker who is no longer on the case under WIC 340.5(a)?	The court held that court may issue a restraining order for a social worker who is no longer on the case because the legislative history shows that it is the intent of WIC 340.5(a) to protect social workers' who provide services to dependent children and did not intend for those protections to end when a social worker is no longer on a case.
Monterroso v. Moran (2006)	135 Cal. App. 4th 732 37 Cal. Rptr. 3d 694 Second Appellate Dist Division Two	Does a court have to make detailed findings under FC 6305 in order to issue mutual restraining orders?	A trial court has no statutory power to issue a mutual order enjoining parties from specific acts of abuse described in FC section 6320 without the required findings of fact. FC 6320 requires that both parties must personally appear and each party must present written evidence of abuse of domestic violence and the court must make detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense.
Nakamura v. Parker (2007)	156 Cal. App. 4th 327 67 Cal. Rptr. 3d 286 First Appellate Dist Division Two	Discussion of denial of TRO without hearing or reasons.	The appellate court held the trial court' failure to explain its reasons for the summary denial of the TRO, without hearing, was "highly imprudent". The court also found that the petitioner's affidavit to be facially adequate to show that she was abused and, as such, it "divested" the trial court of the discretion to deny the TRO summarily.
Tameka Ross v. Oscar Figueroa (2006)	139 Cal. App. 4th 856 43 Cal. Rptr. 3d 289 Second Appellate Dist Division Seven	Under FC 243, when is the responding party entitled to a continuance and can they present evidence without preparing a written response?	Under Family Code section 243, a party is entitled to a continuance if the original TRO was issued without notice. In addition, that section allows you to present evidence even if no written response was filed and even if it only consisted of the responding parties testimony. The court reminded the trial courts that even through restraining order hearings are informal in nature, that due process is required and the judicial officer has an even bigger responsibility "to play a more active role in developing the facts before making the decision whether or not to issue the requested permanent protective order." At the very least, the parties should have been sworn in and have been given the right to present evidence.

Review Hearings

Case Name	Case Cite	Issue	Holding
M.T. v. Superior Court of San Francisco (10/30/09)	178 Cal. App. 4th 1170 First Appellate Dist Division Three	Can court require offer of proof from parent re: not setting 366.26 hearing?	The appellate court held that since the parent has the burden to show that it is not in the child's best interest to set a 366.26 hearing, the court can require an offer of proof in order for a parent to contest the setting of that hearing.
S.T. v. Superior Court (8/28/09)	177 Cal. App. 4th 1009 99 Cal. Rptr. 3d 412 Second Appellate Dist Division One	Does ct. have discretion to continue FR at 21(e) where parent hasn't complied with 366.21(g)(1-3)?	The appellate court held that the trial court has discretion to continue reunification services to a parent at a WIC 366.21(e) hearing even if the parent has not met the requirements listed under WIC 366.21(g). WIC 366.21(e) states that if the court finds that the parent has not made substantial progress in the case plan, the court *may* set a 366.26 hearing. Therefore, the court does not have to terminate FR and set a 366.26 hearing but has the discretion to continue FR services.

Standing

Case Name	Case Cite	Issue	Holding
In re Aaron R. (2005)	130 Cal. App. 4th 697 29 Cal. Rptr. 3d 921 First Appellate Dist Division One	Did the grandmother have standing to appeal the denial of her WIC 388 petition?	The court held that the MGM did have standing to appeal the denial of her 388 petition even though she had never sought de facto parent status at the trial court level. The court found that because the 388, if granted and the child placed with her, would have given the grandmother a claim of preference under section 366.26 (k) for adoption that she had standing to appeal the denial of the 388.
In re Harmony B. (2005)	125 Cal. App. 4th 831 23 Cal. Rptr. 3d 207 Fourth Appellate Dist Division Two	Did the grandmother have standing to appeal the termination of parental rights?	The court held that the grandmother who was a proposed out of state placement did not have standing to appeal from the termination of parental rights. However, the court stated that the grandmother would have had standing to appeal the denial of her request for placement under WIC 361.3.
In re Hector A. (2005)	125 Cal. App. 4th 783 23 Cal. Rptr. 3d 104 First Appellate Dist Division Three	Do siblings of a child being considered for adoption have standing to participate in the hearing?	The court held that a proper 388 petition could allow non-adopted siblings to present evidence as to the sibling relationships for the 366.26 hearing. The court relied on WIC 388(b) which allows any person, including a dependent child, to petition for visitation, placement with, or near the child, or consideration when determining or implementing a permanent plan. The court therefore found that in order for a sibling to be heard, a 388 petition must be filed and granted.

Termination of Reunification Services/ Reasonable Efforts

Case Name	Case Cite	Issue	Holding
A.H. v. Superior Court (3/12/10)	182 Cal. App. 4th 1050 Fourth Appellate Dist Division Three	In deciding whether to terminate reunification services, how is the trial court to "harmonize" W and I Code § 361.5(a)(2) with 366.21(g)(1)?	The appellate court held that there is no reason to infer from the current statutory scheme the legislature intended to toll timelines, or automatically extend reunification services to 18 or 24 months for incarcerated parents. To the contrary, the statutory provisions calling for special considerations do not suggest the incarcerated parent should be given a free pass on compliance with his/her service plan or visits. That there are barriers unique to incarcerated parents is but one of many factors the court must take into consideration when deciding how to proceed in the best interest of the dependent child. *(Note: Suggest you read the whole decision. It is the best and most concise discussion of the reunification time frames and the effect of incarcerated parents amendments on the reunification scheme.)*
In re Alanna A. (2005)	135 Cal. App. 4th 555 37 Cal. Rptr. 3d 579 Fourth Appellate Dist Division One	Can the trial court terminate FR services to one parent while continuing FR srvs to other parent?	The court held that WIC 366.21 (h) does not bar termination of reunification services to one parent when services are extended for the other parent to the 18-month review date.
In re Amanda H. (2008)	166 Cal. App. 4th 1340 83 Cal. Rptr. 3d 229 Second Appellate Dist Division Eight	Discussion of what constitutes reasonable services.	This was a fact specific case. The appellate court held that the trial court could not find by clear and convincing evidence that reasonable services had been offered when the social worker did not inform either the mother or the court that the mother was not enrolled in the appropriate services. The appellate court found that it was the social workers job to maintain adequate contact with providers and accurately inform the court and the parent of the sufficiency of the enrolled programs.
In re Aryanna C. (2005)	132 Cal. App. 4th 1234 34 Cal. Rptr. 3d 288 First Appellate Dist Division Four	Does the juvenile court have the authority to terminate reunification services of a parent prior to the 6 month date?	The court held that the trial court has discretion to terminate reunification services **at any time** after disposition, depending on the circumstances presented. The court held that WIC 361.5(a)(2) provides that services "may not exceed" six months; it does not constitute a grant of services for a six month period. The court also held that a 388 petition was not needed to terminate reunification services.

In re David B. (2004)	123 Cal. App. 4th 768 20 Cal. Rptr. 3d 336 Fourth Appellate Dist Division Three	Do we look to return children to perfect parents?	The court reversed the termination of reunification services and remanded the case back to the trial court. The court opined "We do not get ideal parents in the dependency system. Ideal parents are a rare, if not imaginary, breed. In fact, we do not get ideal parents anywhere. Even Ozzie and Harriet weren't really Ozzie and Harriet. The goal is for our parents to overcome their problems. They won't turn into superstars, and they won't win the lottery and move into a beachfront condo two blocks from the ocean. We are looking for passing grades here, not straight A's."
In re Denny H. (2005)	131 Cal. App 4th 1501 33 Cal. Rptr. 3d 89 First Appellate Dist Division Four	Extension of reunification services past the 18 month date	The court held that 18 months from the date of detention is the cut-off for reunification services absent "extraordinary circumstances: involving some external factor which prevented the parent from participating in the case plan." The court also held that at the 366.22 hearing, the court can set a 366.26 hearing even if the court doesn't make a reasonable efforts finding at that hearing <u>if</u> that finding has been made at every previously needed hearing.
In re Derrick S. (2007)	156 Cal. App. 4th 436 67 Cal. Rptr. 3d 367 First Appellate Dist Division Two	Does the court have the authority to terminate FR to a parent or a child over three prior to the twelve month date?	The court held that the juvenile court does have the authority to terminate reunification services of a parent of a child over the age of 3 prior to the expiration of the twelve-month period from the time the child entered foster care. The court cited to WIC 361.5(a)(2) in concluding that reunification "may not exceed" six months and therefore can be less.
In re Elizabeth R. (1995)	35 Cal. App. 4th 1774 42 Cal. Rptr. 2nd 200 Third Appellate Dist	Does WIC 352, give the court the authority to extend FR past the 18 month date under special circumstances?	The appellate court held that the trial court could have used WIC 352 to continue the WIC 366.22 hearing. WIC 352 provides an emergency escape valve in those rare instances in which the juvenile court determines the best interests of the child would be served by a continuance of the 18 month hearing. The court concluded that neither the elaborate statutory scheme governing dependency nor case law strips the juvenile court of its discretion to accommodate the special needs of the family of the mentally ill in the unusual circumstances presented by this case. The unusual circumstances consisted of mother having substantially complied with the case plan, having regular visitation and having been hospitalized for a majority of the reunification period.

In re Jacob P. (2007)	157 Cal. App. 4th 819 68 Cal. Rptr. 3d 817 Second Appellate Dist Division Seven	What is standard for return when FR, which had been previously terminated, is reinstated?	The court held that when reunification services were previously terminated and are then reinstated pursuant to a 388 petition, the proper standard for possible return at the end of the new reunification services period is the best interest of the child standard under 388 vs. The substantial risk of detriment standard used at a 366.21 or 366.22 hearing.
In re Jesse W. (2007)	157 Cal. App. 4th 49 68 Cal. Rptr. 3d 435 Fourth Appellate Dist Division One	Can the court terminate FR for one parent when not setting a 366.26 hearing?	The majority of the appellate court held that the trial court can terminate reunification for one parent while still offering reunification for the other parent pursuant to WIC 366.21(e) even though CRC 5.710(F)(11) states that when no 366.26 hearing is set, FR must continue to be offered. The court does state that the trial court might want to extend FR, however, if it is in the child's best interests.
In re Jessica A. (2004)	124 Cal. App. 4th 636 21 Cal. Rptr. 3d 488 Fourth Appellate dist Division One	Does there need to be six full months between the WIC 366.21(e) and 366.21(f) hearing?	The court held that the express time frames for achieving permanence can not be thwarted by delays in holding the hearings. Even though there was a two month delay in holding the WIC 366.21(e) hearing, the 21f hearing should have been held 12 months after the child entered foster care and not six months from the date the 21e hearing was held.
In re Katie V. (2005)	130 Cal. App. 4th 586 30 Cal. Rptr. 3d 320 Fourth Appellate Dist. Division One	What standard of proof applies for the reasonable services finding at the 18-month review?	The court held that the standard of proof for reasonable services at the WIC 21e and 21f hearing is clear and convincing evidence, but the standard at the WIC 22 hearing is a preponderance of the evidence. The court found that at the 18-month review hearing, the parent already has received services beyond what the juvenile law ordinarily contemplates, and barring exceptional circumstances, the time for reunification has ended and the child's interests in stability is paramount. At that point, the heightened clear and convincing evidence standard of proof would run counter to the child's best interests.
In re M.V. (2008)	167 Cal. App. 4th 166 83 Cal. Rptr. 3d 864 Fourth Appellate Dist Division Three	May the court order additional FR at a 6 month hearing(for child under 3) even if factors of substantial probability of return do not exist?	The appellate court held that the trial court may order additional family reunification services for a child under three at the 6 month hearing even if the factors of substantial probability of return (enumerated in 366.21(g)) do not exist. The court held that the trial court can balance other relevant evidence such as extenuating circumstances excusing noncompliance with the factors enumerated under 366.21(g).

In re Olivia J (2004)	124 Cal. App. 4th 698 21 Cal. Rptr. 3d 506 Fourth Appellate Dist Division One	Can the court hold parents in contempt for failure to obey the court orders for family reunification services?	The court upheld the trial court's contempt orders and order of five days of jail time for father's failure to participate in the court ordered reunification services. The court held that a parent who agrees to the terms and conditions of family reunification services was properly held in contempt for failure to obey those orders. The court reasoned that if the father was in disagreement with the court ordered disposition orders, it was incumbent on him to appeal those orders and not just disobey them.
In re Rita L. (2005)	128 Cal. App.4th 495 27 Cal. Rptr. 3d 157 Fourth Appellate Dist Division Three	Was there substantial evidence for court to terminate FR services? Can the court consider the child's relationship with foster parents in determining risk of return?	The court held that there was insufficient evidence to show substantial risk of return based upon mother's use of Tylenol with codeine on the eve of possible return of the children since mother's drug history did not include prescription drugs and the one time use did not escalate into more significant drug use. The court stated that all relapses are not created equal and the court did not see how mother's ability to care for the child would have been impaired by her one time relapse. The court also found that the trial court improperly considered the quality of the child's relationship with the foster parents in deciding whether to return the child to her mother.
In re Sara M. (2005)	36 Cal. 4th 998 116 P. 3d 550 CA Supreme Court	Can dependency crt terminate FR at 21(e) for a child over 3 absent juri. findings of abandonment under sub 300(g)?	The court held that regardless of what subdivisions were originally sustained, the court may terminate FR and set a 366.26 hearing at the initial six-month review if the court finds by clear and convincing evidence, that the parent has not had contact with the child for six months. (Rule of Court 1460(f)(1)(B))
S.W. v. Superior Court (05/15/09)	174 Cal. App. 4th 277 94 Cal. Rptr. 3d 49 Fourth Appellate Dist Division Three	Does the parent have to fail to contact *and* visit the child in order to set a 366.26 hearing at the 366.21(e) hearing for child over 3?	The appellate court held that WIC 366.21(e) allows the court to set a WIC 366.26 hearing if the parent has failed to contact *and* visit the child. To the extent that Rule 5.710 deletes the visitation section, it is inconsistent and the statute controls. In addition, even if contact alone warranted additional services, one telephone conversation in six months is not substantial contact and that contact that is "casual or chance" or "nominal" does not preclude the application of WIC 366.21(e).

In re Tonya M. (2007)	42 Cal. 4th 836 172 P. 3d 402 CA Supreme Court	Should the court calculate the timing of the 366.21(f) hearing to be 12 months from the date the child entered foster care?	The California Supreme Court affirmed the appellate court decision that regardless of when a WIC 366.21(e) hearing is actually held, the timing of the 366.21(f) hearing is 12 months from the date the child entered foster care (which is the date the court sustained the petition or 60 days from the date the child was removed from the parents home whichever comes first). Hence when the court is determining at the 366.21(e) hearing whether there is a substantial probability that the child can be returned to the parent(s) by the 12 month date(if the child is under 3), that date has to be 12 months after the child entered foster care.
In re Victoria M. (1989)	207 Cal. App. 3d 1317 255 Cal. Rptr. 498 Fifth District	Was the trial court authorized to terminate parental rights for developmentally delayed person where services suited to appellant's needs had not been provided?	This was a case where parental rights had been terminated under WIC 232. The appellate court found that the mother, who was developmentally delayed had not been provided assistance with housing; her parenting counseling did not address her specific deficiencies, nor had she been referred to the Regional Center who might have been able to provide more appropriate services. The court held that a disabled parent is entitled to services which are responsive to the family's special needs in light of the parent's particular disabilities and that in this case, the mother's disabilities were not considered in determining what services would best suit her needs.
In re Yvonne W. (2008)	165 Cal. App. 4th 1394 81 Cal. Rptr. 3d 747 Fourth Appellate Dist Division One	Does a child's dislike of a parent's living arrangement constitute a substantial risk of detriment to return?	The appellate court held that "a child's dislike of a parent's living arrangement, without more, does not constitute a substantial risk of detriment..."

UCCJEA

Case Name	Case Cite	Issue	Holding
In re A.C. (2005)	130 Cal. App. 4th 854 30 Cal. Rptr. 3d 431 Fourth Appellate Dist Division One	Does the UCCJEA confer jurisdiction to CA when child in CA to receive medical care?	The Court held that the UCCJEA does not confer subject matter jurisdiction on CA pursuant to Family Code sections 3421 or 3424 when the child was only in CA to receive medical care. The court held that MX was the child's home state because she only came to CA to receive medical care and otherwise her legal residence was MX where her parents lived. The fact that MX did not have the facilities to treat the child did not confer jurisdiction on CA.
Grahm v. Superior Court (2005)	132 Cal. App. 4th 1193 34 Cal. Rptr. 3d 270 Second Appellate Dist Division Four	When do the Calif. Courts have continuing jurisdiction to determine issues of custody and visitation.	The court held that Family Code section 3422 provides that a California court has "exclusive, continuing jurisdiction" over the child custody determination until both of the following conditions are met: "a court of this state determines that neither the child, nor the child and one parent... have a significant connection with this state *and* that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships." Thus, only when there is both a lack of significant connection and lack of substantial evidence in this state, may California terminate exclusive jurisdiction.
In re Jaheim B. (2008)	169 Cal. App. 4th 1343 87 Cal. Rptr. 3d 504 Fourth Appellate Dist Division One	When no home state, who has jurisdiction?	The appellate court held that CA was the appropriate forum at the time the court declared the child a dependent. The child had no home state under the UCCJEA because he did not live in CA or FL for at least six consecutive months immediately before the petition was filed. Even without home state jurisdiction, CA had emergency jurisdiction because the court's action was necessary to protect the child from immediate harm. Emergency jurisdiction could properly continue beyond the detention hearing because the risk of harm was ongoing. Further, according to the minute order the mother didn't have an ongoing case in FL and therefore there was no jurisdictional conflict with another state's court and thus UCCJEA didn't restrict the juvenile court's power to proceed.

Visitation

Case Name	Case Cite	Issue	Holding
Karen Butler v. Charles Harris (2004)	34 Cal. 4th 210 96 P. 3d 141 CA Supreme Ct.	When a child is in the care of the parents, whose burden is it and what is the standard to show that a visitation decision made by the parent should be overruled?	The court held that Family Code 3104 mandated that a person seeking visitation with a child when the parents oppose visitation has to show by clear and convincing evidence that the decision to withhold visitation would be detrimental to the child. The court further found that FC section 3104 was not unconstitutional. The court determined that CA has a rebuttable presumption that the parent's decision is in the best interest of the child and that it is the burden of the person seeking visitation to show that the parent's decision to withhold visitation would be detrimental to the child.
In re C.C. (04/13/09)	172 Cal. App. 4th 1481 92 Cal. Rptr. 3d 168 Second Appellate Dist Division Seven	Discussion of the correct legal standard for denying a parent visitation during the reunification period.	The appellate court held that if a parent is going to receive or is receiving family reunification services for a child, the court can only deny (or terminate/suspend) visitation between the child and a parent IF the court finds that such visits would pose a threat to the child's safety. The court seems to imply that the threat must be to the child's physical vs. emotional safety but that is unclear. However, the frequency of the visits depends on a broader assessment by the court of the child's "well-being".
In re David P. (2006)	145 Cal. App. 4th 692 51 Cal. Rptr. 3d 811 Second Appellate Dist Division Seven	If a trial court has determined that the contact between a child and the offending parent must be monitored, may the court permit the child to return to the family home and allow the non-offending second parent to monitor?	The appellate court held that the concept of monitored visitation is fundamentally incompatible with around-the-clock in-home contact that necessarily includes periods when the designated monitor will be unavailable to perform his or her protective function.

In re Hunter S. (2006)	142 Cal. App. 4th 988 48 Cal. Rptr. 3d 823 Second Appellate Dist Division Eight	Does the court have to force a child who is unwilling to visit his parents?	The court held that a parent has a right to visitation even after the termination of FR and that it is the court's obligation to ensure visits (even if the child refuses) **absent a finding of detriment under WIC 362.** The court found that a parent who has had their visitation rights frustrated is unlawfully denied the opportunity to establish that a WIC 366.26 (c)(1)(A) exception could apply.
In re J.N. (2006)	138 Cal. App. 4th 450 41 Cal. Rptr. 3d 494 Fifth Appellate Dist	Visitation orders after denial of FR under WIC §361.5.	The court held that if the trial court denies reunification services to a parent under WIC 361.5 that they "may" order visitation for that parent unless they find that those visits would be detrimental. They do not have to find the visits detrimental prior to ordering no visits because those visits are discretionary under the law.
In re S.C. (2006)	138 Cal. App. 4th 396 41 Cal. Rptr. 3d 453 Third Appellate Dist	Good visitation language	The court upheld the following language as meaningful and enforceable: " The (parent) shall have supervised visitation with the child as frequent as is consistent with the well-being of the child. (DCFS) shall determine the time, place, and manner of visitation, including the frequency of visits, length of visits, and by whom they are supervised." "(DCFS) may consider the child's desires in its administration of the visits, but the child shall not be given the option to consent to or refuse future visits"

Warrants

Burke v. County of Alameda (11/10/09)	586 F.3d 725 United States Court of Appeals for the Ninth Circuit	Did police officer interfere with the non-custodial parent's constitutional right of familial association by removing B.F. without a protective custody warrant?	As to the biological father, the court stated that non-custodial parents have a reduced liberty interest in the companionship, care, custody and management of their children. However, he was not without an interest at all. The court extended the holding in *Wallis* to parents with legal custody, regardless of whether they possess physical custody of their child. They did note that the test in Wallis, however, must be flexible depending on the factual circumstances of the individual case. For instance, if the parent without legal custody does not reside nearby and a child is in imminent danger of harm, it is probably reasonable for a police officer to place a child in protective custody without attempting to place the child with the geographically distant parent. However, in this case, the officers made no attempt to contact the non-custodial father and did not explore the possibility of putting B.F. in his care that evening rather than placing her in government custody. Therefore that the reasonableness of the scope of the officers intrusion upon the biological father's rights was for the jury to decide.
Calabretta v. Yolo County Department of Social Services (8/26/99)	189 F.3d 808 United States Court of Appeals for the Ninth Circuit	Did social worker and the police officer violate the families 4th Amend rights when it entered a home, interrogated a child, and strip searched the child, without a search warrant and without a special exigency?	While the court recognized that there are occasions when Fourth Amendment restrictions on entry into homes are relaxed, this was not such a case. The court reiterated that a special exigency excuses a warrantless entry where the government officers have probable cause to believe that the child has been abused and that the child would be injured or could not be taken into custody if it were first necessary to obtain a court order. Given the facts of this case, there was no special exigency. In this case, based on a visual inspection of the children and their statements there was little reason to believe that children had been abused and therefore "the government may not conduct a search of a home or strip search of a person's body in the absence of consent, a valid search warrant or exigent circumstances."

Greene v. Deschutes County (12/10/09)	588 F.3d 1011 United States Court of Appeals for the Ninth Circuit	Was in-school interview of a suspected child abuse victim permissible under the 4th Amend without warrant or the equivalent of a warrant, probable cause or parental consent? Did social worker violate the Greene's 14th Amend rights by excluding mother from mi's medical exam?	The ninth circuit extended 4th amendment protections and held that applying the traditional Fourth Amendment requirements, the decision by law enforcement and the social worker to "seize and interrogate" S.G. by interviewing her at school for two hours in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional. The court held that given that law enforcement was present during the interview with the sole purpose of gathering information for a possible criminal case, this fell outside of the special needs doctrine. The court held that government officials cannot exclude parents entirely from the location of their child's physical examination absent parental consent, some legitimate basis for exclusion, or an emergency requiring immediate medical attention."

WIC 361.5 - No Reunification Services

Case Name	Case Cite	Issue	Holding
In re Albert T. (2006)	144 Cal. App. 207 50 Cal. Rptr. 3d 227 Second Appellate Dist Division Seven	Discussion of what is enough to show reasonable efforts to treat the problem that led to the original removal under 361.5(b)(10)?	This is a fact specific case. However, the court held the reasonable efforts to treat does not require success or a cure. The trial court had previously found the mother in complete compliance with the case plan and that was enough to show that she had made reasonable efforts to treat that earned her the right to try and reunify.
In re Amber K. (2006)	146 Cal. App. 4th 553 52 Cal. Rptr. 3d 701 Fourth Appellate Dist Division Two	Can a parent who is not the perpetrator be denied reunification services under 361.5(b)(6)?	A parent who is not the perpetrator of the sexual abuse can be denied family reunification services under WIC 361.5(b)(6), if the perpetrator was the other parent and this parent gave actual or implied consent (thus making that parent "offending").
In re Anthony J. (2005)	132 Cal. App. 4th 419 33 Cal. Rptr. 3d 677 Second Appellate Dist Division One	Does 361.5(b)(6) apply to a parent who is neither the parent nor guardian of the physically abused siblings of the child involved in the current proceeding.	The court found that 361.5 (b)(6) does apply to a parent who is neither the parent nor guardian of the physically abused siblings of the child involved in the current proceeding if it was that parent who abused the other siblings.
In re Cheryl P. (2006)	139 Cal. App. 4th 87 42 Cal. Rptr. 3d 504 Fourth Appellate Dist Division One	Discussion of WIC 361.5 (b)(10) and denial of FR on sibling after termination of FR on another child.	The court held that the term subsequently as used in WIC 361.5(b)(10) refers to the time since the removal from the sibling and not since the termination of reunification which might have only been a few minutes earlier. This case attempts to differentiate In re Harmony B and seems to imply that it is okay if no progress has been made as long as the parents have tried.

D.B. v. Superior Court of Humboldt County (02/18/09)	171 Cal. App. 4th 197 89 Cal. Rptr. 3d 566 First Appellate Dist. Division Five	Does a parent's resistance to treatment ordered as a condition of parole amount to resistance to "court-ordered Treatment" under SIC 361.5(b)(13)?	The appellate court construed WIC 361.5(b)(13)'s reference to "court-ordered treatment" to include treatment ordered as a condition of parole. The appellate court indicated that parole conditions, while not ordered directly by the court, are directly traceable to the court order imposing a prison sentence. The court also found that "there is no meaningful distinction between treatment ordered as a condition of probation and treatment ordered as a condition of parole for purposes of determining whether a parent's failure to comply signifies a substance abuse problem so intractable that the provision of reunification services would be a waste of time.
In re D.F. (02/20/09)	172 Cal. App. 4th 538 91 Cal. Rptr. 3d 170 Third Appellate Dist	Is WIC 361.5(b)(3) applicable if the child in the current proceeding is not the child that was previously physically abused?	The appellate court held that 361.5(b)(3) does apply even if the child in the instant proceeding was not the child physically abused in the previous proceeding. The statute states that it has to be the child *or* the sibling that was previously adjudicated a dependent for physical abuse. In addition, (b)(3) requires removal from and then return to the same parent, the second removal does not need to be from that same parent, just removal due to physical or sexual abuse.
In re Harmony B. (2005)	125 Cal. App. 4th 831 23 Cal. Rptr. 3d 207 Fourth Appellate Dist Division Two	Can the court deny FR to a parent pursuant to WIC 361.(b)(10) directly after it terminates FR to siblings?	The court held that there did not need to be a passage of time between the termination of reunification services to siblings and a denial of reunification services to a new child. The court reasoned that the statute "was not amended to create further delay so as to allow a parent, who up to that point has failed to address his or her problems, another opportunity to do so."
Jose O. v. Superior Court (2008)	169 Cal. App. 4th 703 87 Cal.Rptr. 3d 1 Fourth Appellate Dist Division One	Does WIC 361.5(b)(6) include situations where there is no physical harm to a child but there is emotional harm?	The appellate court held that in WIC 361.5(b)(6), the phrase "infliction of severe physical harm" was designed as a catchall to encompass all situations that qualify as acts or omissions that would cause serious emotional damage. Impliedly, serious emotional damage has both a psychological and physical component but physical injury is not required. Therefore, the father killingly the mother in front of the child, could qualify as a torturous act that would cause serious emotional damage.

K.C. v. Superior Court (3/18/10)	182 Cal. App. 4th 1388 Third Appellate Dist	Did court abuse discretion when it denied FR to mother pursuant to WIC 361.5(b)(10)(11)?	The appellate court held that the juvenile court did not abuse its discretion in denying services pursuant to 361.5(b)(10) and (11). In this case, the problems which led to removal of the half siblings were severe neglect resulting from mother's lack of concern about their welfare and characterized by her extreme dependence upon nicotine which she pursued to the exclusion of caring for the half siblings' needs. Mother was provided services to address her neglect and inadequate parenting, as well as her dependence upon nicotine. However, as the psychological evaluation concluded, mother resisted taking responsibility for herself or her children. One of the minors in the prior case was born dependent on nicotine and suffered withdrawal symptoms. With the new baby, mother was leaving the newborn alone several times a day in order to smoke.
In re Kenneth M. (2004)	123 Cal. App. 4th 16 19 Cal. Rptr. 3d 752 Third Appellate Dist	Does the denial of FR to a parent under WIC 361.5(b)(6) require the court to identify the offending parent?	The court held that for the trial court to deny reunification services to a parent under WIC 361.5(b)(6), requires the court to make a finding that the injuries were caused by a parent or guardian and that the court must make a factual finding that it would not benefit the child to receive services with the offending parent. Therefore, the court had to identify the perpetrator in order to deny reunification services under 361.5(b)(6). However, because the child was found to be a dependent of the court under subdivision (e), the court could have ordered no FR for the parent under 361.5(b)(5).
In re Kevin N. (2007)	148 Cal. App. 4th 1339 56 Cal. Rptr. 3d 464 Fourth Appellate Dist Division Three	Discussion of ordering no FR pursuant to WIC 361.5 (e) (1).	The court held that pursuant to WIC 361.5(e)(1) the court shall order family reunification services to the incarcerated parent unless the court finds that it would be detrimental to the child to order those services. The length of time that a parent will be incarcerated is only one of the factors to take into consideration when making that determination of detriment.
In re Mardardo F. (2008)	164 Cal. App. 4th 481 78 Cal. Rptr. 3d 884 Third Appellate Dist	Interpretation of 361.5(b)(14)	The appellate court held that in interpreting WIC 361.5(b)(14), 1) the word “parent” refers to the parent’s status in the current dependency case and that therefore, the offending parent did not have to be a parent when the child died and 2) the deceased child in this section does not need to be related to the parent.

In re Tyrone W. (2007)	151 Cal. App. 4th 839 60 Cal. Rptr. 3d 486 Fourth Appellate Dist Division One	Does WIC 361.5(b)(6) apply to a parent who "reasonably should have known" the child was being physically abused and failed to prevent the abuse? Must the court identify the offending parent?	The appellate court held that WIC 361.5(b)(6) does not allow the court to deny reunification services to a negligent parent who did not know that the child was being physically abused even though the parent should reasonably have known the child was being abused or injured. The parent must have been complicit in the deliberate abuse. The court held that the trial court is required to identify the offending parent who inflicted the severe physical harm on the child where the evidence does not show that both parents knew the child was severely injured or knew the child was being abused before denying reunification services.
In re William B. (2008)	163 Cal. App. 4th 1220 78 Cal. Rptr. 3d 91 Fourth Appellate Dist Division Three	Analysis of best interest standard when denying FR under 361.5(b).	The court held that when the trial court considered the best interest of the children in deciding whether to order reunification services, the court should have concentrated on the chances of success of reunification services and stability and permanency for the children versus the facts that the children loved their mother.

WIC 366.26 - Termination of Parental Rights

Case Name	Case Cite	Issue	Holding
In re Aaliyah R. (2005)	136 Cal. App. 4th 437 38 Cal. Rptr. 3d 876 Second Appellate Dist Division Eight	Analysis of bond needed to show WIC 366.26 (c)(1)(a) exception	The court held that a mere "affectionate closeness" during occasional visits was outweighed by the minors close bond with the primary caretaker and the need for permanence.
In re A.G. (2008)	161 Cal. App. 4th 664 74 Cal. Rptr. 3d 378 Fifth Appellate Dist	Once a finding of "no detriment" is found under 366.26(c)(3), may that issue be litigated at the continued 366.26 hearing?	The court held that once the trial court makes a finding under WIC 366.26(c)(3) that the termination of parental rights would not be detrimental to the child and continues the matter 180 days to locate an adoptive parent, the biological parent may not "re"-litigate that issue at the continued 366.26 hearing without new evidence.
In re Amy A. (2005)	132 Cal. App. 4th 63 33 Cal. Rptr. 3d 298 Fourth Appellate Dist. Division One	Family Code section 7822 - abandonment of child	In interpreting Family Code section 7822, the court held that failure to provide support or failure to communicate with the child for a period of one year or more "is presumptive evidence of the intent to abandon" and that therefore the rights of that parent could be terminated for abandonment.
In re A.S. 12/17/09	180 Cal. App. 4th 351 102 Cal. Rptr. 3d 642 Fourth Appellate Dist Division One	Can a parent who was non-offending in 300 petition have their parental rights terminated?	The appellate court held that the trial court can terminate parental rights of a parent without an express finding of detriment or a sustained petition against that parent. The appellate court noted that the father's persistent avoidance of responsibility, his failure to seek any relief in the juvenile court and lack of involvement in the child's life for an extended period constituted substantial evidence of detriment. Therefore, his parental rights could be terminated.
In re B.D. (2008)	159 Cal. App. 4th 1218 72 Cal. Rptr. 3d 153 Fourth Appellate Dist Division One	Did the trial court err in failing to continue the WIC 366.26 hearing to find an adoptive home for the 5 siblings.	This is a very fact specific case. The appellate court held that while it ended up being harmless error because an adoptive home was found for the five siblings, a better practice would have been for the trial court to continue the matter to find an adoptive home for the 5 siblings that should have been placed together. The fact that there was no adoptive home at the time of the severance of parental rights affected the child's adoptability determination and the exception under WIC 366.26(c)(1)(E) might have applied if no home was found for all 5.

In re Brian P. (2002)	99 Cal. App. 4th 616 121 Cal. Rptr. 2d 326 First Appellate Dist Division Three	Discussion of what to focus on when addressing adoptability.	The appellate court held that the issue of adoptability requires the court to focus on the child and whether the child's age, physical condition, and emotional state make it difficult to find a person willing to adopt. It is not necessary that the child already be placed in a preadoptive home, or that a proposed adoptive parent be waiting. However, there must be convincing evidence of the likelihood that adoption will take place within a reasonable time.
In re Carl R. (2005)	128 Cal. App. 4th 1051 27 Cal. Rptr.3d 612 Fourth Appellate Dist Division One	Does court need to inquire re: specific education plans in addressing adoptability? Is there a general best interest exception to TPR? Is a 388 petition the appropriate vehicle to challenge TPR?	The court held that when the trial court is determining the adoptability of a child, the court's inquiry need not include an in depth assessment of specific educational plans. The court need only determine that the prospective adoptive family would educate the child. 366.26(c)(1)(D) does not require the court to consider the relationship of a child with a non-relative or foster parent with whom the child might be removed. No general best interest exception exists. All exceptions to adoption are included in the 366.26 scheme. WIC 388 petition is not an appropriate vehicle to modify the judgment terminating parental rights. However, it may be appropriate in order to challenge a child's prospective adoptive placement.
In re Christopher L (2006)	143 Cal. App. 4th 1326 50 Cal. Rptr. 3d 57 Fourth Appellate Dist Division One	Examination of WIC 366.26(c)(1)(B) exception to adoption.	The court held that if a child 12 years old or older equivocally objects to termination of parental rights, the trial court can still terminate parental rights if, after examining the entire record, the court determines that the child's true state of mind favors TPR and adoption. The appellate court was clear to point out that it was not deciding whether an unequivocal objection by a minor 12 or over to TPR prevents TPR as a matter of law.
In re Daisy D. (2006)	144 Cal. App. 4th 287 50 Cal. Rptr. 3d 242 Third Appellate Dist	Does the trial court have the duty to consider the sibling exception where it is not raised and do these facts support finding a sibling exception?	The court held that the trial court does not have the duty to sua sponte consider the sibling exception (nor any exception) where it is not raised and that the parent has the burden to establish that an exception exists to the termination of parental rights. The court also quoted the author of the legislation (WIC 366.26(c)(1)(E) saying that "use of the new exception 'will likely be rare'" meaning "that the child's relationship with his or her siblings would rarely be sufficiently strong to outweigh the benefits of adoption."

In re Dakota H. (2005)	132 Cal. App. 4th 212 33 Cal. Rptr. 3d 337 Fourth Appellate Dist Division One	Does the court need to find "parental unfitness" at the 366.26 hearing? Interpretation of 366.26 (c)(1)(A).	The court held that even 15 months after the termination of reunification services, the court does not need to make a finding of "parental unfitness" because the mother had multiple opportunities to be heard on that issue by filing a 388 petition prior to the 366.26 hearing. In spite of the mother's constant visits to her autistic child along with the love between the two, the court upheld the termination of parental rights based on the opinion of a psychologist that the child needed a caretaker with access to specialized services to allow him to fully develop.
In re David L. (2008)	166 Cal. App. 4th 387 83 Cal. Rptr. 3d 14 Fourth Appellate Dist Division Three	Does the court need a 388 petition when it sets a new 366.26 hearing for a child already in a legal guardianship?	The appellate court held that the trial court, pursuant to WIC 366.3, does not need a 388 petition in order to set a new WIC 366.26 hearing for a child already in a legal guardianship. The agency must simply "notify" the court of changed circumstances. Since the agency must simply "notify" the court of the changed circumstances , the agency must only show a prima facie case for a change of circumstances to have the 366.26 hearing set.
In re Desiree M. (1/26/10)	181 Cal. App. 4th 329 104 Cal. Rptr. 3d 523 Fourth Appellate Dist Division One	Discussion of proper notice to children for WIC §366.26 hearing and opportunity for children to be present.	The appellate court reiterated that WIC §349(d) and §366.26(h)(2) require the Court to determine whether a child over 10 was properly noticed, inquire whether the child was given an opportunity to attend, and inquire why the child is not present (if they aren't in court).The court shall continue the hearing if the child(ren) were not properly noticed or given an opportunity to be present. The parent does not have the right to raise those issues on appeal, however.
In re Fernando M. (2006)	138 Cal. App. 4th 529 41 Cal. Rptr. 511 Second Appellate Dist Division Eight	Interpretation of WIC 366.26 (c)(1)(D).	The court held that the child's relationship with his siblings who lived in the same home was relevant in considering exceptional circumstances for purposes of the section (c)(1)(D) exception. The court concluded that all of the evidence in the record indicated that it would be detrimental to the child to remove him from his grandmother's home. The court explores what the term "exceptional circumstances" mean. The court states that "if courts never considered family preference, the term "unwilling" as used in section 366.26, subdivision (c)(1)(D) would be rendered meaningless."

In re Gabriel G. (2005)	134 Cal. App. 4th 1428 36 Cal. Rptr. 3d 847 Sixth Appellate Dist	Is the order identifying adoption as the goal under 366.26(b)(2) an appealable order?	The court held that because 366.26(c)(3) no longer allows long term foster care as an option after the court identifies adoption as the goal and continues the case 180 days, the order is directly appealable. *Practice Tip:* Instead of identifying adoption as the plan under 366.26(c)(3), just order planned permanent living arrangement and identify adoption as the goal.
In re Gladys L. (2006)	141 Cal. App. 4th 845 46 Cal. Rptr. 3d 434 Second Appellate Dist Division Eight	Can a "non-offending" parent's rights be terminated absent a previous finding of "unfitness"?	The appellate court found that before a presumed father's parental rights can be terminated, there must have been a finding by clear and convincing evidence of his "unfitness" as a parent. The court found that the father had been denied due process because he had never been noticed of or been given on opportunity to challenge what the appellate court termed an implied finding of detriment even though he appeared at detention hearing and then never reappeared.
In re G.M. (1/27/10)	181 Cal. App. 4th 552 Fifth Appellate Dist	Is a legal impediment to an adoption relevant to the finding of adoptability that must be made by the court?	The appellate court held that evidence of a legal impediment to adoption under Family Code by an identified prospective parent is relevant when a social worker's opinion that a dependent child will be adopted is based (at least in part) on the willingness or commitment of an identified prospective parent. The suitability of a prospective adoptive parent to adopt is a distinct and separate issue from whether there is a legal impediment to the adoption making her ineligible to adopt the children.
In re Gregory A. (2005)	126 Cal. App. 4th 1554 25 Cal. Rptr. 3d 134 Fourth Appellate Dist Division Three	Can appellant challenge finding of adoptability for first time on appeal? Was there sufficient evidence that child would be adopted in a reasonable time?	The court held that since the burden of proof of showing adoptability was on the department, the issue of sufficiency of the evidence could be raised for the first time on appeal. In regards to the evidence that the child was likely to be adopted in a reasonable time, the court held that the child's young age, good physical and emotional health, intellectual growth and ability to develop interpersonal relationships where attributes indicating adoptability. Also, MGM and MA had committed to adopting.

In re G.S.R. (2008)	159 Cal. App. 4th 1202 72 Cal. Rptr. 3d 398 Second Appellate Dist Division Eight	Can a "non-offending" parent's rights be terminated absent a previous finding of "unfitness"?	This is a very fact specific case. The same appellate court as in Gladys L found that before a presumed father's parental rights can be terminated, there must have been a finding by clear and convincing evidence of his "unfitness" as a parent. In this case, the father had been around for the entire case but his lack of housing rendered him unable to have the children. The appellate court found that this does not make him "unfit" and the agency should have done more to assist him with housing.
In re Helen W. (2007)	150 Cal. App. 4th 71 57 Cal. Rptr. 3d 914 Fourth Appellate Dist Division Three	Discussion of adoptability.	In discussing the adoptability of the child, the appellate court held that if a current caretaker wants to adopt the child that the analysis then shifts to whether there is any legal impediment to the adoption.
In re I.I. (2008)	168 Cal. App. 4th 857 85 Cal. Rptr. 3d 784 Fourth Appellate Dist Division Two	Discussion of whether sibling set was adoptable given special needs and placement in separate homes.	The appellate court held that while the adoption assessment done by the agency was inadequate, when all the reports were read together, there was enough information for the trial court to determine that the children were adoptable even given their special needs. In addition, there were two families willing to adopt the children which added to their adoptability. Finally, there was no chance of their becoming legal orphans since 366.26(i)(2) had been enacted and parental rights could be reinstated after three years in the children were not adopted.
In re I.W. (12/15/09)	180 Cal. App. 4th 1517 103 Cal Rptr. 3d 538 Sixth Appellate Dist	Discussion of adoptability	The appellate court stated that once the Agency is able to show by the correct standard that the child is likely to be adopted by virtue of general characteristics or a single agreeable home, they have met their burden. The burden then shifts to the parent arguing adoptability to show that the child is not adoptable.
In re Jasmine G. (2005)	127 Cal. App. 4th 1109 26 Cal. Rptr. 3d 394 Fourth Appellate Dist Division Three	Notice requirements of WIC 366.26 hearing	A due diligence will not suffice for notice at the WIC 366.26 hearing when the Department knew where the mother was and in fact spoke with her several times between the time the due diligence was done and the 26 hearing without notifying her of the hearing. The court held that the trial court denied the mother due process because of failure to properly notice her.

In re Jason J. (7/9/09)	175 Cal. App. 4th 922 96 Cal. Rptr. 3d 625 Fourth Appellate Dist Division One	Can the court terminate the parental rights of a "Kelsey S" father or a biological father without a finding of unfitness?	The appellate court held: 1) Kelsey S. in an adoption case, having no relevance in dependency. 2) Even if the analysis applied, Cynthia D. (1993) clarified that in dependency, findings of detriment made at review hearings are the equivalent of detriment. Detriment is not an issue at the .26 hearing if all findings of detriment were made at the appropriate hearings. 3) The "father" was not a father in any sense contemplated by Santosky v. Kramer (1982) where the Supreme Court determined that a termination of parental rights needed a higher standard than a preponderance of the evidence. Their use of the word "parents" is interpreted to mean legal parents and the father in this case was not a legal parent.
In re Jennilee T. (1992)	3 Cal. App. 4th 212 4 Cal. Rptr. 2d 101 Fourth Appellate Dist Division Three	Does a child have to be in an adoptive home to find the child adoptable?	The appellate court held that it is not necessary pursuant to WIC 366.26(c)(1) that a child, at the time of the termination hearing, already be in a potential adoptive home. Rather, what is required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time.
In re Joshua G. (2005)	129 Cal. App. 4th 189 28 Cal. Rptr. 3d 213 Fourth Appellate Dist Division One	Can Dept be equitably estopped to rec. Adoption after rec of LG or agreement with parents to rec less permanent plan? Do we take juri over parents or over children?	The court held that the doctrine of equitable estoppel is not applicable in dependency cases. The court found that even if the parents could have reasonably relied on CPS' recommendation, that recommendation is not binding on the Court. The court also found that the trial court has no obligation to advise parents of their trial rights and consequences of submitting at a WIC 366.21(f) or 22 hearing. (Only at juri) Also, the trial court denied that the mother's continuance request (she had transportation probs) and the appellate court found that as long as mother's counsel was present , there was no due process violation. Finally, court takes jurisdiction over children and not parents. There was no need to file a new petition against the father because the court already had jurisdiction over the child.

Kristine M. v. David P. (2005)	135 Cal. App. 4th 783 37 Cal. Rptr. 3d 748 First Appellate Dist Division Four	Can parents stipulate to terminating one parent's parental rights to avoid a continuing support obligation?	The court held that parents cannot stipulate to terminating one parent's parental rights to avoid a continuing obligation of support. The court held that public policy intervenes to protect the child's continued right to support. A judgment so terminating parental rights and the attendant obligation to support the child is void as a breach of public policy and as an act in excess of the court's jurisdiction. The court noted that the outcome might have been different if the agreement had been made prior to conception vs. Post-birth.
In re Lauren R. (2007)	148 Cal. App. 4th 841 56 Cal. Rptr. 3d 151 Fourth Appellate Dist Division Three	When does the relative preference under WIC 361.3(d) apply? When does the 366.26(k) (caretaker preference) apply?	The court held that the relative placement preference under WIC 361.3(a) did not apply to the placement order in this case because (1) no new placement was necessary and (2) it was a placement for adoption. WIC 361.3(d) (relative preference) applies to initial removal and placement and whenever a new placement MUST be made. The agency's desire to replace the child with her aunt did not constitute a necessary new placement. In fact the court found that because the placement order was for adoption that the caretaker preference under WIC 366.26(k) was applicable. 366.26(k) applies specifically to applications for adoption and its application is triggered by the INTENT to place the child for adoption and not necessarily the termination of parental rights or even termination of family reunification.
In re Marina S. (2005)	132 Cal. App. 4th 158 33 Cal. Rptr. 3d 220 Second Appellate Dist Division Two	No need for approved home study in order to terminate parental rights.	The court found that as long as substantial evidence supports that fact that the child is likely to be adopted within a reasonable time, an approved home study was not required to be able to terminate parental rights.
In re Michelle C. (2005)	130 Cal. App. 4th 664 30 Cal. Rptr. 3d 363	Did the court violate parent's due process right by terminating parental rights without parent's attorney being present? Is a parent entitled to notice of a continued 366.26 hearing?	The court held that where a parent is represented by counsel, either appointed or retained, it is error to terminate parental rights in the absence of the parent's attorney unless the parent has waived, either expressly or impliedly, the right to be represented by counsel and the right to be heard. The court also held that the parent was entitled to notice of the continued WIC 366.26 hearing. The court found that if a parent does not appear at a properly noticed 366.26 hearing, while it might be construed as an implied waiver of the parent's right to be heard and

	Fourth Appellate Dist. Division One		represented by counsel, the court could have sanctioned the attorney or relieved the attorney and appointed a new attorney.
In re Miguel A. (2007)	156 Cal. App. 4th 389 67 Cal. Rptr. 307 Fourth Appellate Dist Division One	Does the termination of parental rights render a previous sibling no longer a sibling?	The court held that the termination of parental rights is as to the rights of the parents and not the rest of the other biological relatives. Sibling relationships can be established by "blood, adoption or affinity through a common legal or biological parent." Therefore, because the children still share a biological parent, they are still siblings.
In re Naomi P. (2005)	132 Cal. App. 4th 808 34 Cal. Rptr. 3d 236 Second Appellate Dist Division One	Interpretation of 366.26 (c)(1)(E)	The court gave wide discretion to the trial court in determining the credibility of the witnesses based on the witnesses demeanor. The court also found that the testimony of the children not subject to the adoption was "powerful demonstrative evidence" that it would be in the best interest of the child who was the subject of the adoption to determine whether to apply the sibling exception under 366.26(c)(1)(E).
In re Q.D. (2007)	155 Cal. App. 4th 272 65 Cal. Rptr. 850 Fourth Appellate Dist Division Three	Addresses WIC 366.26(i).	This is a very fact specific case. The appellate court held that in spite of WIC 366.26(i) which states "the Court shall have no power to set aside, change or modify its ... order", the trial court on these facts could have readdressed the termination of parental rights order because the record in its totality could not be considered a final order terminating parental rights.
In re P.A. (2007)	155 Cal. App. 4th 1197 66 Cal. Rptr. 3d 783 Second Appellate Dist Division Three	Did the court need to find the presumed father unfit in order to terminate his parental rights.	The appellate court held that the trial court's dispositional finding by "clear and convincing evidence that there exists a substantial danger to the children and there is no reasonable means to protect them without removal from their parents custody and the custody of the children is taken from the parents and placed in the department for placement with a relative" supports the concept of detriment under dependency law, and no specific finding of unfitness of a presumed father is required.
In re P.C. (2008)	165 Cal. App. 4th 98 80 Cal. Rptr. 3d 595 Fourth Appellate Dist Division Three	Is poverty alone a sufficient ground to deprive a mother of her parental rights?	The appellate court held that poverty alone - even when it results in homelessness or less than ideal housing arrangements is not a sufficient ground to deprive a mother of parental rights to her children. The court held that the Agency was responsible to provide assistance to obtain housing.
In re Ramone R. (2005)	132 Cal. App. 4th 1339 34 Cal. Rptr. 3d 344 First Appellate Dist Division Three	Is the order identifying adoption as the goal under 366.26(b)(2) an appealable order?	The court held that because 366.26(c)(3) no longer allows long term foster care as an option after the court identifies adoption as the goal and continues the case 180 days, the order is directly appealable.

In re R.C. (2008)	169 Cal. App. 4th 486 86 Cal. Rptr. 3d 776 Fourth Appellate Dist Division One	Discussion of adoptability of child.	The appellate court agreed with the trial court that the child was generally adoptable due to his many positive characteristics. Therefore the appellate court did not have to reach the decision about whether the child was specifically adoptable or whether there were any legal impediments to the adoption.
In re R.S. (11/30/09)	179 Cal. App. 4th 1137 101 Cal. Rptr. 3d 910 First Appellate Dist Division One	Once the parents voluntary relinquish under FC 8700, does that preclude the juvenile court from terminating parental rights under WIC 366.26 and designating a prospective adoptive parent?	The appellate court held that when birth parents make a voluntary designated relinquishment to a public adoption agency under FC §8700, and the relinquishment becomes final after the WIC §366.26 hearing has been set, but before it is scheduled to commence, the relinquishment effectively precludes the need for a hearing select a permanent plan under 366.26. The juvenile court is precluded from making any order that interferes with the parents' unlimited right to make such a voluntary relinquishment to a public adoption agency. (Adoptions would not "randomly" accept a designated relinquishment, but would first need to complete an approved home study of the designated placement and determine additionally that the designated placement was in the child's best interest. – Fn #5)
In re Salvador M. (2005)	133 Cal. App. 4th 1415 35 Cal. Rptr.3d 577 Fourth Appellate Dist Division One	Should court have terminated parental rights where home study not complete in light of fact that siblings lived together pursuant to 366.26 (c)(1)(E)?	The court held that the WIC 366.26(c)(1)(E) exception should not have stopped the trial court from terminating parental rights even where the home study on the relative had not been completed and one sibling lived in that home under a legal guardianship. However, the court did find that the best practice might have been for the trial court to wait for the home study to be complete under these circumstances before terminating parental rights.
In re Sarah M. (1994)	22 Cal. App. 4th 1642 28 Cal. Rptr. 2d 82 Third Appellate Dist	Discussion of how having prospective adoptive home effects adoptability finding.	The appellate court held that a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. However, if the child is likely to be adopted based *solely* on the existence of a prospective adoptive parent who is willing to adopt the child, an inquiry may be made into whether there is any legal impediment to the adoption by that parent.

In re S.B. (2009)	46 Cal. 4th 529 CA Supreme Court	Is the order identifying adoption as the goal under 366.26(b)(2) an appealable order?	The appellate court held because 366.26(c)(3) no longer allows long term foster care as an option after the court identifies adoption as the goal (mandates either adoption or legal guardianship with a non-relative at the next hearing) and continues the case 180 days, the order is directly appealable. In addition, the court stated that although the trial court's determination of adoptability is a "finding", the court did make orders regarding the location of an adoptive home
In re Scott M. (1993)	13 Cal. App. 4th 839 16 Cal. Rptr. 2d 766 Third Appellate Dist	Is the "suitability" of a prospective adoptive family relevant to the issue of whether the minors are likely to be adopted?	The appellate court held that questions concerning the "suitability" of a prospective adoptive family are irrelevant to the issue whether the minors are likely to be adopted. General suitability to adopt is a subjective matter which does not constitute a legal impediment to adoption. If inquiry into the suitability of prospective adoptive parents were permitted in section 366.26 hearings, we envision that many hearings would degenerate into subjective attacks on all prospective adoptive families in efforts to avoid termination of parental rights. Such a result is not envisioned by the statutory scheme. Rather, the question of a family's suitability to adopt is an issue which is reserved for the subsequent adoption proceeding.
In re Sheri T. (2008)	166 Cal. App. 4th 1532 82 Cal. Rptr. 3d 410 Fourth Appellate Dist Division Three	Can the court set a WIC 366.26 hearing if the child is in a PPLA without an evidentiary hearing?	The appellate court held that the trial court can and should set a WIC 366.26 hearing for a child who is in a planned permanent living arrangement if new circumstances exist. This hearing can be set after only 6 months in the PPLA and no evidentiary hearing is necessary in order to set the 26 hearing because the party will have a full opportunity to litigate the issues at that time.
State Department of Social Services v. Superior Court of Siskiyou County (D.P.) (2008)	162 Cal. App. 4th 273 76 Cal. Rptr. 3d 112 Third Appellate Dist	When addressing the best interests of a child regarding removal from a PAP, what time frame is relevant? Does 361.4 apply?	1) The appellate court held that when the trial court is addressing the child's removal from a prospective adoptive parent (PAP), they must consider the circumstances at the time the hearing is actually held vs. the circumstances at the time the child was originally removed. 2) The requirements of WIC 361.4 do not prohibit placement back into the home of a PAP after removal because those requirements are only for the original placement.

In re Thomas R. (2006)	145 Cal. App. 4th 726 1 Cal. Rptr. 864 First Appellate Dist Division Three	Can the trial court refuse to allow parent's counsel to cross-examine the CSW on the issue of adoptability?	The appellate court held that because it is the Department of Children & Family Services burden to prove adoptability at the WIC 366.26 hearing, it is a denial of due process to deny a parent the right to test the sufficiency of the evidence supporting the social worker's position that the child is likely to be adopted. This right to test the sufficiency of the evidence includes the right to cross examine the social worker.
In re T.M. (7/20/09)	147 Cal. App. 4th 1166 96 Cal. Rptr. 3d 774 Third Appellate Dist	Can the court terminate parental rights for a parent if no FR were offered to that parent pursuant to WIC 361.5(b)(1)?	The appellate court held that the trial court could not terminate mother's parental rights at the 366.26 hearing because mother had never been offered reunification services pursuant to WIC 361.5(b)(1). The appellate court held that "because the court neither terminated services, after finding reasonable services had been provided, nor denied them pursuant to a subdivision of WIC 361.5 which would permit termination of parental rights, it should have limited the scope of the 366.26 hearing to consideration of only guardianship or long term foster care."
In re Valerie A. (2006)	139 Cal. App. 4th 1519 43 Cal. Rptr. 3d 734 Fourth Appellate Dist Division One	Is a sibling or half-sibling no longer a sibling once they have been adopted for purposes of WIC 366.26 (c)(1)(E)?	Siblings or half -siblings do not cease to be siblings even though they have been adopted for purposes of analyzing whether an exception to adoption exists pursuant to WIC 366.26(c)(1)(E). Pursuant to WIC 362.1 (c) and sibling is a child related by blood, adoption or affinity through common legal or biological parent.
In re Valerie A. (2007)	152 Cal. App. 4th 987 61 Cal. Rptr. 3d 403 Fourth Appellate Dist Division One	Discussion of WIC 366.26 (c)(1)(E)?	The appellate court discusses the factors outlined in Celine R. The appellate court clarifies that the factor the court needs to consider regarding the extent the siblings have shared experiences *or* have close and strong bonds. The court found that those prongs are disjunctive prongs and that even if the shared experiences happened in the past, if they have strong bonds, the prong will be satisfied. In addition, the court held that the trial court must consider ongoing sibling visitation subsequent to the termination of parental rights and continue that contact unless if finds the contact detrimental to one of the siblings.

In re Valerie W. (2008)	162 Cal. App. 4th 1 75 Cal. Rptr. 3d 86 Fourth Appellate Dist Division One	If the adoption assessment is insufficient, can the court find substantial evidence to find the children adoptable?	The court held that because the adoption assessment prepared by the petitioning agency under WIC 366.21(i) was not sufficient, the court did not have substantial evidence to find the children adoptable. In this case the assessment did not include an update on one child's medical condition, an assessment of one of the co-adoptive parents, whether one of the co-adoptive parents would be willing to adopt without the other co-adoptive parent or even whether the co-adoption was possible given the possible adoptive parents were mother and daughter.
Wayne F. v Superior Court of San Diego County (2006)	145 Cal. App. 4th 1331 52 Cal. Rptr. 3d 519 Fourth Appellate Dist Division One	What procedural rights do prospective adoptive parents have in a hearing brought under WIC 366.26(n)(3)(c)?	The appellate court held that both the plain language of the statute and the legislative history "make it clear that Prospective Adoptive Parents (PAPs) have standing to fully participate in any removal hearing conducted under subdivision (n). PAPs, like other litigants, may offer evidence, examine witnesses, provide the court with legal authorities and make arguments to the court.
In re Xavier G. (2007)	157 Cal. App. 4th 208 68 Cal. Rptr. 3d 478 Fourth Appellate Dist. Division One	Should the court have applied the 366.26(c)(1)(D) exception and chose guardianship vs. adoption given GM's preference for LG?	The appellate court held that the court did not err when it chose adoption over guardianship even though the grandmother preferred guardianship. It reasoned that the grandparents were not unwilling to adopt, they just preferred guardianship. Adoption is the permanent plan preferred by the legislature. The court reiterated that "family preference is insufficient" to trigger the application of WIC 366.26(c)(1)(D).

In re Amber M. (2002)	103 Cal. App. 4th 681 127 Cal. Rptr. 2d 19 Fourth Appellate Dist Division One	Considerations in granting WIC 388 petition	Before a juvenile court may modify an order pursuant to a 388, the party must show, by a preponderance of the evidence, changed circumstances or new evidence and that the modification would promote the best interests of the child. The court held that this is determined by the seriousness of the reason for the dependency and the reason the problem was not overcome; the relative strength of the parent-child and child-caretaker bonds and the length of time the child has been in the system; and the nature of the change in circumstance, the ease by which the change could be achieved; and the reason the change was not made sooner.
In re A.S. (6/19/09)	174 Cal. App. 4th 1511 95 Cal. Rptr. 3d 363 Fourth Appellate Dist Division Two	Does the trial court retain jurisdiction to rule on WIC 388 petitions once the court has terminated jurisdiction?	No. The appellate court held the trial court retains jurisdiction to rule on a WIC 388 petition only when it has jurisdiction. Section 388 states: "Any parent... having an interest in a child *who is a dependent child of the juvenile court*...may...petition the court..." (Remember, however, that when the court terminates jurisdiction with a guardianship in place, it retains residual jurisdiction over that child until the child turns 18.)
In re C.J.W. (2007)	157 Cal. App. 4th 1075 69 Cal. Rptr. 3d 197 Fourth Appellate Dist Division Two	Does the court have to have a full evidentiary hearing when granting a 388 petition?	This is a very fact specific case. The appellate court held that the fact that the trial court heard the matter on the paperwork with counsel present to argue did not violate due process. However, the court also stated that the 388 form was internally inconsistent by having boxes that both grant a hearing and deny a hearing. The court suggests that the 388 petition be redrafted to be more clear.
In re Daniel C. (2006)	141 Cal. App. 4th 1438 47 Cal. Rptr. 3d 137 Fourth Appellate Dist Division One	Is the denial of a WIC 388 petition an appealable order or must a party file a writ?	The denial of a WIC 388 petition is an appealable order.
In re D.S. (2007)	156 Cal. App. 4th 671 67 Cal. Rptr. 3d 450 Third Appellate Dist	Does the father have standing to challenge the denial of mother's 388?	The court held that the father does not have standing to challenge the denial of mother's 388 because he was not aggrieved by the order from which he appeals. Since the mother's petition did not relate to the father, his personal rights were not involved.

In re Holly B. (04/08/09)	172 Cal. App. 4th 1261 92 Cal. Rptr. 3d 80 Third Appellate Dist	Does father have standing to appeal granting of 388 where issue is rescinding psych eval ordered for minor?	The appellate court found that the father did not have standing to appeal the granting of 388 where issue is rescinding psych eval ordered for the minor. The court held that the father would have to have had *his own rights affected* by the courts decision to have standing to appeal. The 388 decision did not affect any "legally cognizable issue personal to appellant."
In re Jackson W. (4/29/10)	Fourth Appellate Dist Division One	Is a section 388 petition the proper mechanism by which to raise a claim of ineffective assistance of counsel?	The appellate court held that a parent who has a due process right to competent counsel can seek to change a prior court order on the ground of ineffective assistance of counsel by filing a section 388 petition, although the customary and better practice is to file a petition for writ of habeas corpus in the juvenile court
In re Jacob P. (2007)	157 Cal. App. 4th 819 68 Cal. Rptr. 3d 817 Second Appellate Dist Division Seven	What is standard for return when FR, which had been previously terminated, is reinstated?	The court held that when reunification services were previously terminated and are then reinstated pursuant to a 388 petition, the proper standard for possible return at the end of the new reunification services period is the best interest of the child standard under 388 vs. The substantial risk of detriment standard used at a 366.21 or 366.22 hearing.
In re Kenneth S. (2008)	169 Cal. App. 4th 1353 87 Cal. Rptr. 3d 715 Fourth Appellate Dist Division One	Does the court have to hold a hearing after granting a 388 petition?	The appellate court held that once the court found a prima facie case sufficient to warrant a hearing on a 388, it is required to hold an evidentiary hearing of some kind.
In re Lesley G. (2008)	162 Cal. App. 4th 904 76 Cal. Rptr. 3d 361 Second Appellate Dist Division Four	Once a WIC 388 petition is granted, must the court hold a hearing on that petition?	The appellate court held that once the court checked the box indicating that it would hold a hearing on the 388, it had to hold the hearing. The court did note that the 388 form was internally inconsistent by having boxes that both grant a hearing and deny a hearing. The court suggests that the 388 petition be redrafted to be more clear. However, in this case the appellate court held once the court checked the box indicating that a hearing would be granted, it needed to hold some kind of hearing and couldn't summarily deny the 388 at that juncture.
In re Mary G. (2007)	151 Cal. App. 4th 184 59 Cal. Rptr. 3d 703 Fourth Appellate Dist Division One	Is "changing" circumstances enough to grant 388 petition?	The appellate court held that a petition which alleges merely changing circumstances would mean delaying the selection of a permanent home for a child to see if a parent might be able to reunify at some point does not promote the stability for the child or the child's best interests.

In re M.V. (2006)	146 Cal. App. 4th 1048 53 Cal. Rptr. 3d 324 First Appellate Dist Division Two	What is the standard of proof at a 388 when the issue is removal from the foster parents?	The appellate court held that the agency's burden of proof on a WIC 388 petition to remove a child from de facto parents was to establish its case by a preponderance of the evidence because a de facto parent does not have the same rights as a parent or legal guardian.
In re R.N. (10/20/09)	178 Cal. App. 4th 557 100 Cal. Rptr. 3d 524 Second Appellate Dist Division Seven	Does court need to consider whether FR services should be reinstated to a parent when considering termination of or modification of an existing guardianship?	The appellate court held that when a petition is filed under WIC§388 to terminate a legal guardianship or appoint a successor guardian, a trial court must consider under WIC§366.3(f) whether the child should be returned to the parent or whether FR services should be reinstated. The parent would need to show by a preponderance of the evidence that FR services are in the child's best interests and those services may be provided for up to six months. The parent does not have to file his/her own WIC§388 petition for the court to consider these options but must do so under WIC§366.3(b).
In re S.R. (05/01/09)	173 Cal. App.4th 864 92 Cal. Rptr. 3d 838 Third Appellate Dist	Did court err in granting WIC 388 petition to vacate order for bonding study based solely on Agency's inability to find a Spanish speaking evaluator?	The appellate court held that "not every change in circumstances can justify modifications of a prior order". In spite of the fact that a bonding study is not statutorily mandated in a dependency proceeding, once ordered, the court has necessarily found it is required by the court or a party. In such a circumstance, the court is without discretion to modify, or, more correctly, vacate the order, without substantial evidence on the record that the bonding study is no longer necessary or appropriate for legitimate reasons other than difficulty by the Agency in complying with the order.

*** Please note - This case law index does not purport to be an absolutely accurate rendition of all the facts in all cases. This index was compiled using the briefs of many people. Please review the entire decision before citing to a case.

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In re Cole C. (06/03/09)	174 Cal. App. 4th 900	Evidence
In re Corrine W. (01/22/09)	49 Cal. 2d 112	Funding Issues
County of Orange v. Superior Court of Orange County (2007)	155 Cal. App. 4th 1253	Parentage
County of San Diego v. David Arzaga (2007)	152 Cal. App. 4th 1336	Parentage
Craig L. v. Sandy S. (2004)	125 Cal. App. 4th 36	Parentage
In re C.S.W. (2007)	157 Cal. App. 4th 1075	WIC 388
In re Daisy D. (2006)	144 Cal. App. 4th 287	WIC 366.26 - Termination of Parental Rights
In re Dakota H. (2005)	132 Cal. App. 4th 212	WIC 366.26 - Termination of Parental Rights
In re Damian C. (9/17/09)	178 Cal. App. 4th 192	Indian Child Welfare Act
In re Daniel C. (2006)	141 Cal. App. 4th 1438	WIC 388
In re Darlene T. (2008)	163 Cal. App. 4th 929	Funding Issues
In re David B. (2005)	123 Cal. App. 4th 768	Termination of Reunification Services/ Reasonable Efforts
In re David B. (2006)	140 Cal. App. 4th 772	Evidence
In re David L. (2008)	166 Cal. App. 4th 387	WIC 366.26 - Termination of Parental Rights
In re David M. (2005)	134 Cal. App. 4th 822	Jurisdictional/Disposition Issues
In re David P. (2006)	145 Cal. App. 4th 692	Visitation
In re D.B. (02/18/09)	171 Cal. App. 4th 197	WIC 361.5 (No Reunification)/ICWA
In re D.D. (2006)	144 Cal. App. 4th 646	Guardian ad Litem
Deborah M. v. Superior Court (2005)	128 Cal. App. 4th 1181	Miscellaneous

In re Denny H. (2005)	131 Cal. App 4th 1501	Termination of Reunification Services/ Reasonable Efforts
In re Derrick S. (2007)	156 Cal. App. 4th 436	Termination of Reunification Services/ Reasonable Efforts
In re Desiree M. (01/26/10)	181 Cal. App. 4th 329	WIC 366.26- Termination of Parental Rights
In re D.F. (02/20/09)	172 Cal. App. 4th 538	WIC 361.5 - No Reunification Services
D.M. v. Superior Court (4/13/09)	173 Cal. App. 4th 1117	Jurisdiction/Disposition Issues & Delinquency Issues
In re D.R. (2007)	155 Cal. App. 4th 480	Legal Guardianship
In re D.S. (2007)	156 Cal. App. 4th 671	WIC 388
In re E.B.(4/9/10)		Jurisdiction/Disposition Issues
In re E.G. (02/10/09)	170 Cal. App. 4th 1530	Indian Child Welfare Act
In re E. H. (2003)	108 Cal. App. 4th 659	Jurisdiction/Disposition Issues
In re E.H. (2006)	141 Cal. App. 4th 1330	Indian Child Welfare Act
In re Elijah S. (2005)	12 Cal. App. 4th 1532	Confidentiality
In re Elijah V. (2005)	127 Cal. App. 4th 576	Parentage
Elisa B. v. Superior Court (2005)	37 Cal. 4th 108	Parentage
In re Elizabeth M. (2007)	158 Cal. App. 4th 1551	Family Law Issues
In re Enrique G. (2006)	140 Cal. App. 4th 676	Guardian ad Litem
In re E.O. (02/05/10)	182 Cal. App. 4th 722	Parentage
In re Eric E. (2005)	137 Cal. App. 4th 252	Parentage
In re Esmeralda S. (2008)	165 Cal. App. 4th 84	Guardian ad Litem
In re Esperanza C. (2008)	165 Cal. App. 4th 1042	Placement Issues
In re Fernando M. (2006)	138 Cal. App. 4th 529	WIC 366.26
In re Francisco W. (2006)	139 Cal. App. 4th 695	Indian Child Welfare Act
In re Gabriel G. (2005)	134 Cal. App. 4th 1428	WIC 366.26 - Termination of Parental Rights
In re Gabriel L. (02/27/09)	172 Cal. App. 4th 644	Court Ordered Services
In re Gabriel P. (2006)	141 Cal. App. 4th 850	Parentage
George P. v. Superior Court (2005)	127 Cal. App. 4th 216	Miscellaneous
In re Gerald J. (1992)	1 Cal. App. 4th 1180	Notice Issues
In re Gina S. (2005)	133 Cal. App. 4th 1074	Confidentiality
In re G.L. (9/9/09)	177 Cal. App. 4th 683	Indian Child Welfare Act
In re Gladys L. (2006)	141 Cal. App. 4th 845	WIC 366.26- Termination of Parental Rights
In re Glorianna K. (2005)	125 Cal. App. 4th 1443	Indian Child Welfare Act
In re G.M. (1/27/10)	181 Cal. App. 4th 552	WIC 366.26 – Termination of Parental Rights
Gonzalez v. Munoz (2007)	156 Cal. App. 4th 413	Restraining Orders
Grahm v. Superior Court (2005)	132 Cal. App. 4th 1193	UCCJEA
Greene v. Deschutes County (12/10/09)	588 F.3d 1011	Warrants

In re Gregory A. (2005)	126 Cal. App. 4th 1554	WIC 366.26 - Termination of Parental Rights
In re G.S.R. (2008)	159 Cal. App. 4th 1202	WIC 366.26 - Termination of Parental Rights
In re Guardianship of L.V. (2005)	136 Cal. App. 4th 481	Legal Guardianship
In re G.W. (5/19/09)	173 Cal. App. 4th 1428	Placement Issues
In re Hadley B. (2007)	148 Cal. App. 4th 1041	Jurisdiction/Disposition Issues
Adoption of Hannah S. (2006)	142 Cal. App. 4th 988	Indian Child Welfare Act
In re Harmony B. (2005)	125 Cal. App. 4th 831	Restraining Orders, WIC 361.5 - No Reunification Services
In re H.B. (2008)	161 Cal. App. 4th 115	Indian Child Welfare Act
In re H.E. (2008)	169 Cal. App. 4th 710	Jurisdiction/Disposition
In re Hector A. (2005)	125 Cal. App. 4th 783	Restraining Orders
In re Helen W. (2007)	150 Cal. App. 4th 71	Appellate Issues & WIC 366.26 - Termination of Parental Rights
In re Henry S. (2006)	140 Cal. App. 4th 248	Delinquency Issues
In re H.G. (2006)	146 Cal. App. 4th 1	Placement
In re Holly B. (04/08/09)	172 Cal. App. 4th 1261	WIC 388 & Indian Child Welfare Act
Holly Loeffler v. William Medina (6/18/09)	174 Cal. App. 4th 1495	Restraining Orders
Hossanna Homes v. County of Alameda (2005)	129 Cal. App. 4th 1408	Placement
H.S. v. Superior Court of Riverside County (4/22/10)		Parentage
In re Hunter S. (2006)	142 Cal. App. 4th 988	Visitation
In re I.G. (2005)	133 Cal. App. 4th 1246	Indian Child Welfare Act
In re I.I. (2008)	168 Cal. App. 4th 857	WIC 366.26 - Termination of Parental Rights
In re Iris R. (2005)	131 Cal. App. 4th 337	Incarcerated Parents
In re I.W. (12/15/09)	180 Cal. App. 4th 1517	WIC 366.26 - Termination of Parental Rights
In re Jacob P. (2007)	151 Cal. App. 4th 819	Termination of Reunification Services/ Reasonable Efforts also in WIC 388
In re Jaheim B.(2008)	169 Cal. App. 4th 1343	UCCJEA
In re James F. (2007)	42 Cal. 4th 901	Guardian ad Litem
In re James R. (7/15/09)	176 Cal. App. 4th 129	Jurisdictional/Dispositional Issues
In re James W. (2008)	158 Cal. App 4th 1562	Placement Issues
In re Janee W. (2006)	140 Cal. App. 4th 1444	Miscellaneous
In re Jasmine G. (2005)	127 Cal. App. 4th 1109	WIC 366.26 - Termination of Parental Rights
In re Jason J. (7/9/09)	175 Cal. App. 4th 922	WIC 366.26- Termination of Parental Rights
In re Javier G. (2005)	130 Cal. App. 4th 1195	Jurisdictional/Disposition Issues
In re J.B. (7/20/09)	178 Cal. App. 4th 751	Indian Child Welfare Act

In re Jennifer O. (5/6/10)		Notice Issues
In re Jennifer T. (2007)	159 Cal. App. 4th 254	Appellate Issues
In re Jennilee T. (1992)	3 Cal. App. 4th 212	WIC 366.26 - Termination of Parental Rights
In re Jeremiah G. (04/14/09)	172 Cal. App. 4th 1514	Indian Child Welfare Act
In re Jesse W. (2007)	157 Cal. App. 4th 49	WIC 366.26 - Termination of Parental Rights
In re Jessica A. (2004)	124 Cal. App. 4th 636	Termination of Reunification Services/ Reasonable Efforts
In re Jessica C. (2007)	151 Cal. App. 4th 474	Legal Guardianship
In re Jesusa V. (2004)	32 Cal. 4th 588	Incarcerated Parents
In re J.H. (2007)	158 Cal. App. 4th 174	Notice Issues
In re J.K. (6/17/09)	174 Cal. App. 4th 1426	Jurisdictional/Dispositional Issues
In re J.L. (2008)	159 Cal. App. 4th 1010	Parentage Issues
In re J.N. (2007)	156 Cal. App. 4th 523 156	Miscellaneous
In re J.N. (2006)	138 Cal. App. 4th 450	Visitation and Indian Child Welfare Act
In re J.N. (1/6/10)	181 Cal. App. 4th 1010	Jurisdiction/Disposition Issues
In re J.O. (9/9/09)	178 Cal. App. 4th 139	Parentage
In re Joanna Y. (1992)	8. Cal. App. 4th 433	Evidence
In re Joel T. (1999)	70 Cal. App. 4th 263	Emancipation/Terminating Jurisdiction/ Court Ordered Services
In re John M. (2006)	141 Cal. App. 4th 1564	Jurisdictional/Disposition Issues
Jonathan L. v. Superior Court (2008)	165 Cal. App. 4th 1074S	Miscellaneous
In re Jonathan S. (2005)	129 Cal. App. 4th 334	Indian Child Welfare Act
In re Jorge G. (2008)	164 Cal. App. 4th 125	Notice Issues
In re Jose C. (2007)	155 Cal. App. 4th 844	Indian Child Welfare Act
Jose O. v. Superior Court (2008)	169 Cal. App. 4th 703	WIC 361.5 (No Reunification)
In re Joseph P. (2006)	140 Cal. App. 4th 1524	Indian Child Welfare Act
In re Joseph T. (2008)	163 Cal. App. 4th 787	Placement
In re Joshua G. (2005)	129 Cal. App. 4th 189	WIC 366.26 - Termination of Parental Rights
In re Joshua S. (2007)	41 Cal. 4th 261	Funding Issues
In re Josiah Z. (2005)	36 Cal. 4th 664	Appellate Issues
In re J.T. (2007)	154 Cal. App. 4th 986	Indian Child Welfare Act
In re Justice P. (2004)	123 Cal. App. 4th 181	Notice
In re Justin L. (2008)	165 Cal. App. 4th 1406	Indian Child Welfare Act
In re Justin S. (2007)	150 Cal. App. 4th 1426	Indian Child Welfare Act
In re Karen R. (2001)	95 Cal. App. 4th 84	Jurisdictional/Dispositional Issues
In re Katie V. (2005)	130 Cal. App. 4th 586	Termination of Reunification Services/ Reasonable Efforts

In re K.B. (5/13/09)	173 Cal. App. 4th 1275	Indian Child Welfare Act
In re K.C. (4/26/10)		Placement Issues
K.C. v. Superior Court (3/18/10)	182 Cal. App. 4th 1388	WIC 361.5 - No Reunification Services
In re K.D. (2004)	124 Cal. App. 4th 1013	Legal Guardianship
In re Kenneth M. (2004)	123 Cal. App. 4th 16	WIC 361.5 - No Reunification Services
In re Kenneth S. (2008)	169 Cal. App. 4th 1353	Legal Guardianship/ WIC 388
In re Kevin N. (2007)	148 Cal. App. 4th 1339	WIC 361.5 No Reunification Services
Kevin Q. v. Lauren W. (6/19/09)	175 Cal. App. 4th 1119	Parentage
K.M. v. E.G. (2005)	37 Cal. 4th 130	Parentage
In re K.M. (03/16/09)	172 Cal. App. 4th 115	Indian Child Welfare Act
In re Kobe A. (2007)	146 Cal. App. 4th 1048	Notice
In re K.P. (6/22/09)	175 Cal. App. 4th 1	Indian Child Welfare Act
In re Kristen B. (2008)	163 Cal. App. 4th 1535	Miscellaneous
Kristine H. v. Lisa R. (2005)	37 Cal. 4th 156	Parentage
Kristine M. v. David P. (2005)	135 Cal. App. 4th 783	WIC 366.26 - Termination of Parental Rights
In re L.A. (12/18/09)	180 Cal. App. 4th 413	Jurisdiction/Disposition
In re Lauren R. (2007)	148 Cal. App. 4th 841	WIC 366.26 - Termination of Parental Rights
In re Lauren Z. (2007)	158 Cal. App. 4th 1102	Placement Issues
In re L.B. (04/28/09)	173 Cal. App. 4th 562	Appellate Issues
In re Lesley G. (2008)	162 Cal. App. 4th 904	WIC 388
In re Lisa I. (2005)	133 Cal. App. 4th 605	Parentage
In re Madison W. (2006)	141 Cal. App. 4th 1447	Appellate Issues
Mira Manela v. LA Superior Court (9/22/09)	177 Cal. App. 4th 1139	Evidence
Manuel C. v. Superior Court (01/26/10)	181 Cal. App. 4th 382	Miscellaneous
In re Marcos G. (2/4/10)	182 Cal. App. 4th 369	Notice Provisions
In re Mardardo F. (2008)	164 Cal. App. 4th 481	WIC 361.5 - No Reunification Services
In re Mark A. (2007)	156 Cal. App. 4th 1124	Jurisdiction/Disposition
In re Mark B. (2007)	149 Cal. App. 4th 61	Appellate Issues
In re Mariah T. (2008)	159 Cal. App. 4th 428	Jurisdiction/Disposition
In re Marina S. (2005)	132 Cal. App. 4th 158	WIC 366.26 - Termination of Parental Rights
In re Marriage of Brown & Yana (2005)	37 Cal. 4th 947	Family Law Issues
In re Marriage of David & Martha M. (2006)	140 Cal. App. 4th 96	Family Law Issues
In re Mary G. (2007)	151 Cal. App. 4th 184	Parentage/ WIC 366.26 - Termination of Parental Rights
In re Matthew F. (2005)	132 Cal. App. 4th 883	Restraining Orders
In re M.B. (3/22/10)	182 Cal. App. 4th 1496	Indian Child Welfare Act

In re Melissa R. (8/28/09)	177 Cal. App. 4th 24	Indian Child Welfare Act
In re M.F. (2008)	161 Cal. App. 4th 673	Guardian ad Litem
In re Michelle C. (2005)	130 Cal. App. 4th 664	WIC 366.26 - Termination of Parental Rights
In re Miguel A. (2007)	156 Cal. App. 4th 389	WIC 366.26 - Termination of Parental Rights
In re Miracle M. (2008)	160 Cal. App. 4th 834	Indian Child Welfare Act
In re M.L. (03/23/09)	172 Cal. App. 4th 1110	Miscellaneous
In re M. M. (2007)	154 Cal. App. 4th 897	Indian Child Welfare Act
Monteroso v. Moran (2006)	135 Cal. App. 4th 732	Restraining Orders
In re M.R. (2005)	132 Cal. App. 4th 269	Legal Guardianship
M.T. v. Superior Court (10/30/09)	178 Cal. App. 4th 1170	Review Hearings
In re M.V. (2006)	146 Cal. App. 4th 1048	WIC 388
In re M.V. (2008)	167 Cal. App. 4th 166	Termination of Reunification Services/ Reasonable Efforts
Nakamura v. Parker (2007)	156 Cal. App. 4th 327	Restraining Orders
In re Naomi P. (2005)	132 Cal. App. 4th 808	WIC 366.26 - Termination of Parental Rights
In re N.E. (2008)	160 Cal. App. 4th 766	Indian Child Welfare Act
In re Neil D. (2007)	155 Cal. App. 4th 282	Jurisdictional/Disposition Issues
In re Nicole K. (2006)	146 Cal. App. 4th 779	Indian Child Welfare Act
In re N.M. (05/27/09)	174 Cal. App. 4th 329	Indian Child Welfare Act
In re N.M. (2008)	161 Cal. App. 4th 253	Indian Child Welfare Act
In re N.M. (2003)	108 Cal. App. 4th 845	Court Ordered Services
In re Nolan W. (03/30/09)	45 Cal. 4th 1217	Miscellaneous
In re Olivia J. (2004)	124 Cal. App. 4th 698	Termination of Reunification Services/ Reasonable Efforts
Adoption of O.M. (2008)	169 Cal. App. 4th 672	Parentage Issues
In re P.A. (2006)	144 Cal. App. 4th 1339	Jurisdictional/Disposition Issues
In re P.A. (2007)	155 Cal. App. 4th 1197	Notice & WIC 366.26 - Termination of Parental Rights
In re Patricia L. (1992)	9 Cal. App. 4th 61	Defacto Parents
In re Paul W. (2007)	151 Cal. App. 4th 37	Miscellaneous
In re P.C. (2008)	165 Cal. App. 4th 98	WIC 366.26 - Termination of Parental Rights
In re Phoenix H. (12/21/09)	47 Cal. 4th 835	Appellate Issues
In re P.L. (2005)	134 Cal. App. 4th 1357	DeFacto Parents
In re Q.D. (2007)	155 Cal. App. 4th 272	WIC 366.26 - Termination of Parental Rights
In re Ramone R. (2005)	132 Cal. App. 4th 1339	WIC 366.26 - Termination of Parental Rights
In re Rayna N.(2008)	163 Cal. App. 4th 262	Indian Child Welfare Act
In re R.C. (2008)	169 Cal. App. 4th 486	WIC 366.26 - Termination of Parental Rights
In re R.D. (2008)	163 Cal. App. 4th 679	Miscellaneous

In re Rebecca R. (2006)	143 Cal. App. 4th 1426	Indian Child Welfare Act
In re Rebecca S. (2/810)	181 Cal. App. 4th 1310	Legal Guardianship
In re Ricardo V. (2007)	147 Cal. App. 4th 419	Appellate Issues
In re Rita L. (2005)	128 Cal. App.4th 495	Termination of Reunification Services/ Reasonable Efforts
In re R.J. (05/23/08)	164 Cal. App. 4th 219	Defacto Parents
In re R.M. ((7/13/09)	175 Cal. App. 4th 986	Jurisdictional/Dispositional Issues
In re R.N. (10/20/09)	178 Cal. App. 4th 557	WIC 388
In re Robert A. (2007)	147 Cal. App. 4th 982	Indian Child Welfare Act
In re Rosa S. (2002)	100 Cal. App. 4th 1181	Court Ordered Services
In re R.S. (2007)	154 Cal. App. 4th 1262	Court Ordered Services
In re R.S. (03/03/09)	172 Cal. App. 4th 1049	Confidentiality
In re R.S. (11/30/09)	179 Cal. App. 4th 1137	WIC 366.26- Termination of Parental Rights
In re Rubisela E.(2000)	85 Cal. App. 4th 177	Jurisdictional/Dispositional Issues
In re R.W. (03/26/09)	172 Cal. App. 4th 1268	Miscellaneous
In re S.A. ((3/15/10)	182 Cal. App. 4th 1128	Appellate Issues/ Evidence
In re Sabrina H. (2007)	149 Cal. App. 4th 1403	Placement
In re Salvador M. (2005)	133 Cal. App. 4th 1415	WIC 366.26 - Termination of Parental Rights
In re Samuel G. (05/28/09)	174 Cal. App. 4th 502	Funding Issues
In re Sara M. (2005)	36 Cal. 4th 998	Termination of Reunification Services/ Reasonable Efforts
In re Sarah M. (1994)	22 Cal. App. 4th 1642	Termination of Parental Rights
In re Savannah M. (2005)	131 Cal. App. 4th 1387	Jurisdictional/Disposition Issues
In re S.B. (2005)	130 Cal. App. 4th 1148	Indian Child Welfare Act
In re S.B. (05/28/09)	46 Cal. 4th 529	WIC 366.26 - Termination of Parental Rights/ICWA
In re S.B. (6/3/09)	174 Cal. App. 4th 808	Indian Child Welfare Act
In re S.C. (2006)	138 Cal. App. 4th 396	Evidence, ICWA, Visitation
In re Scott M. (1993)	13 Cal. App. 4th 839	WIC 366.26 - Termination of Parental Rights
In re Sencere P. (2005)	126 Cal. App. 4th 144	Placement
In re Shane G. (2008)	166 Cal. App. 4th 1532	Indian Child Welfare Act
In re Sheri T. (2008)	166 Cal. App. 4th 334	WIC 366.26 - Termination of Parental Rights
In re Shirley K. (2006)	140 Cal. App. 4th 65	Placement
In re Silvia R. (2007)	159 Cal. App. 4th 337	Jurisdiction/Disposition Issues
In re S.J. (2008)	167 Cal. App. 4th 953	Legal Guardianship
In re S.R. (5/1/09)	173 Cal. App.4th 864	WIC 388
S.T. v. Superior Court (8/28/09)	177 Cal. App. 4th 1009	Review Hearings
In re Stacey P. (2008)	162 Cal. App. 4th 1408	Miscellaneous

State Department of Social Services v. Superior Court of Siskiyou County (D.P.) (2008)	162 Cal. App. 4th 273	WIC 366.26 - Termination of Parental Rights
In re Summer H. (2006)	139 Cal. App. 4th 1315	Placement
In re S.W. (2005)	131 Cal. App. 4th 838	Placement
In re S.W. (2007)	148 Cal. App. 4th 1501	Jurisdiction/Disposition Issues
S.W. v. Superior Court (5/15/09)	174 Cal. App. 4th 277	Termination of Family Reunification Services
In re Tabitha W. (2006)	143 Cal. App. 4th 811	Appellate Issues
Tameka Ross v. Oscar Figueroa (2006)	139 Cal. App. 4th 856	Restraining Orders
In re Tamika C. (2005)	131 Cal. App. 4th 1153	Emancipation/Terminating Jurisdiction
In re Terrance B. (2006)	144 Cal. App. 4th 965	Indian Child Welfare Act
In re Thomas R. (2006)	145 Cal. App. 4th 726	WIC 366.26 - Termination of Parental Rights
In re Tiffany A. (2007)	150 Cal. App. 4th 1344	Delinquency Issues
In re T.M. (7/20/09)	147 Cal. App. 4th 1166	WIC 366.26 - Termination of Parental Rights
In re Tonya M. (2007)	42 Cal. 4th 836	Termination of Reunification Services/ Reasonable Efforts
In re T.R. (2005)	132 Cal. App. 4th 1202	Parentage
In re T.S. (7/14/09)	175 Cal. App. 4th 1031	Indian Child Welfare Act
In re Tyrone W. (2007)	151 Cal. App. 4th 839	WIC 361.5 (No Reunification)
In re Valerie A. (2006)	139 Cal. App. 4th, 1519	WIC 366.26 - Termination of Parental Rights
In re Valerie A. (2007)	152 Cal. App. 4th 987	WIC 366.26 - Termination of Parental Rights
In re Valerie W. (2008)	162 Cal. App. 4th 1	WIC 366.26 - Termination of Parental Rights
In re Vanessa M. (2006)	138 Cal. App. 4th 1121	Evidence
In re Veronica G. (2007)	157 Cal. App. 4th 179	Indian Child Welfare Act
In re V.F. (2007)	157 Cal. App. 4th 962	Jurisdiction/Disposition
In re Victoria M. (1989)	207 Cal. App. 3d 1317	Termination of Reunification Services/ Reasonable Efforts
In re Vincent M. (2007)	150 Cal. App. 4th 1247	Indian Child Welfare Act
In re Vincent M. (2008)	161 Cal. App. 4th 943	Parentage
V.S. v. Allenby (12/22/08)	169 Cal. App. 4th 665	Miscellaneous
Wayne F. v. San Diego County (2006)	145 Cal. App. 4th 1331	WIC 366.26 - Termination of Parental Rights
In re Wilford J. (2005)	131 Cal. App. 4th 742	Notice
In re William B. (2008)	163 Cal. App. 4th 1220	WIC 361.5 (No Reunification)
In re William K. (2008)	161 Cal. App. 4th 1	Parentage
In re Xavier G. (2007)	157 Cal. App. 4th 208	WIC 366.26 - Termination of Parental Rights
In re X.V. (2005)	132 Cal. App. 4th 794	Indian Child Welfare Act
In re Y.G. (6/23/09)	175 Cal. App. 4th 109	Jurisdictional/Dispositional Issues
In re Yvonne W. (2008)	165 Cal. App. 4th 1394	Termination of Reunification Services/ Reasonable Efforts

In re Z.C. (10/2/09)	178 Cal. App. 4th 1271	Legal Guardianship
In re Z.N. ((12/29/09)	181 Cal. App. 4th 282	Miscellaneous

Not Citable - On Review

LAST UPDATED 05/06/10

In re A.R. (01/26/09)
170 Cal. App. 4th 773; 88 Cal. Rptr. 3d 448
Fourth Appellate District; Division One

Facts

On 11/1/2007, A.R. was detained from his parents based on new and old subdural hemorrhages. Both parents appeared at the initial hearing. The trial was continued a number of times due to the need for more medical testing of the child. During the course of these continuances, the father, Robert L. was deployed to Iraq. On April 17th , father's counsel filed a motion to stay the proceeding pursuant to the Servicemembers Civil Relief Act (hereafter SCRA). A letter from the Navy was attached indicating the Robert would be deployed in Iraq from March 17 until November. The letter did not fully comply with the SCRA. On April 23rd, A.R. was detained with his mother. On May 19th, father's attorney filed a letter from the Navy that did comply with SCRA and again requested a stay of the proceeding. The trial court denied the request for the stay citing the time constraints that apply in Juvenile Dependency and indicating that the stay under the SCRA was discretionary. The court sustained the petition, removed the child from the father and placed the child with his mother. This appeal ensued.

Issue

Did the trial court err when it refused to stay the proceedings pursuant to the Servicemembers Civil Relief Act and proceeded to disposition?

Holding

The appellate court held that the trial court did err in refusing to grant the stay requested by the father under the SCRA. The court held that the stay requirements under the SCRA are mandatory and override the 6 month requirement of WIC 352(b). The court must allow for at least a 90 day continuance pursuant to the SCRA.

Query

What if the child had not been released to the mother? Is the other parent not entitled to a timely trial?

In re A.S. (6/19/09)
174 Cal. App. 4th 1511; 95 Cal. Rptr. 3d 36
Fourth Appellate Dist, Division Two

Issue:

Does the trial court retain jurisdiction to rule on WIC § 388 petitions once the court has terminated jurisdiction?

Facts:

In 2000, the child welfare agency filed 300 petition after the father admitted he had hit A.S., then eight-months old to get her to stop crying and tied the baby's arms down to keep her from putting her hands in her mouth. Father submitted on the jurisdiction/disposition reports and the court sustained the petition, declared A.S. a dependent and gave reunification services.

Eventually, the child was returned to the mother and in August, 2002, the case was terminated by stipulation with a family law order giving full legal and physical custody to the mother and visitation to the father.

The father filed a 388 petition in December, 2002 seeking to set aside all orders going back to jurisdiction alleging an improper relationship between the trial judge and the agency attorney. The petition was dismissed for lack of jurisdiction and affirmed on appeal.

In May, 2008, father filed a new 388 seeking reversal of all orders back to jurisdiction, citing as new evidence 1) that the trial judge had made inappropriate romantic advances towards the agency attorney, and 2) that the agency had granted father's request for administrative review, changed the "substantiated allegation conclusion" to "unfounded" and removed his name from the CACI. The trial court summarily denied the 388 due to lack of jurisdiction, the case having been terminated with the family law order.

Father appealed

Holding:

Dismissed for lack of jurisdiction.

Section 388(a) states "Any parent . . . having an interest in a child *who is a dependent child of the juvenile* court . . . may . . . petition the court. . ." The child is not currently a dependent and neither the trial court nor the appellate court cannot enlarge its jurisdiction beyond what the legislature has granted.

(Note, the outcome would be different where the court retains residual jurisdiction after termination, such as in cases where the child remains in a dependency court created legal guardianship. Section 366.4 provides in pertinent part: "(a) Any minor for whom a guardianship has been established resulting from the selection or implementation of a permanency plan pursuant to Section 366.26 is within the jurisdiction of the juvenile court." Section 366.3, subdivision (b) sets forth the procedure for terminating a legal guardianship, except for termination by emancipation; and, if the guardianship is

terminated, the dependency court may reassert jurisdiction and develop a new permanent plan for the child. (See *In re Carlos E.* (2005) 129 Cal.App.4th 1408, 1418.)

In re A.S. (12/17/09)
180 Cal. App. 4th 351
Fourth Appellate District, Division One

Issue

A parent who was non–offending in the original 300 petition can have parental rights terminated under 366.26.

Facts

A petition was filed in April 2006 because of mother's drug arrest. Although the mother said Joseph was the father, the mother's husband was found to be presumed. Joseph did not appear at detention, although he had verbal notice. He didn't give the CSW his phone number or address, and said he was in no position to take the children. Only the mother was given FR. After detention, Joseph visited twice, but made no contact with CSW. The children were later placed with mother. A 387 was filed in August 2007 after mother's second relapse.

Joseph first appeared in February 2008, after being located in custody. After HLA testing, Joseph was found to be the presumed father of A.S. and biological father of the sibling. At disposition of the 387, FR was terminated. The contested .26 hearing was held one year later. Joseph filed a 388 on the same day seeking FR, or a continuance of the .26.

Joseph argued that once he was found to be the presumed (and biological) father, he should have been given services and/or custody. However, at disposition of the 387 held three months after that finding, the court found by clear and convincing evidence that return of the children to mother and Joseph would create a substantial risk of detriment.

His 388 was denied without a hearing. Subsequently, at the .26 hearing, the court found adoption to be in the best interest of the children and no exception applied. The court then terminated parental rights. Joseph appealed.

Holding

Affirmed. The court held that the father's due process rights were not violated when the juvenile court terminated his parental rights.
WIC 366.26(c)1 identifies what circumstances constitute sufficient basis for terminating parental rights. It does not require an initial finding of unfitness as to each parent. If the court finds the child adoptable, and no exception applies, the court is required to terminate parental rights, if the court has made any one of the following findings: (1) That FR was not offered under 361.5(b) or (e)1; (2) the whereabouts of the parent have been unknown for six months or the parent has not visited or contacted the children for six months; (3) the parent is convicted of a felony indicating parental unfitness; or (4) the court has continued to remove the child from parental custody and has terminated reunification services.

The trial court had made an adequate finding of detriment since Joseph initially refused to participate in dependency proceedings, his whereabouts were unknown, and he did not visit the children for more than six months. Joseph's showing of changed circumstances was insufficient because he did not state

he was able to provide a safe home for the children, and he did not demonstrate why it would be in the children's best interest to grant his §388.

In re B.R. (8/13/09)
176 Cal. App. 4th 773; 97 Cal. Rptr. 3d 890
First Appellate District, Division One

Issue:

Do ICWA notice provisions apply when the presumed father alleges his own *adoptive* father has one-quarter ancestry in a federally recognized Indian tribe?

Facts:

Based on information provided by father's biological sister, the Department noticed the Seneca and Delaware tribes. At a subsequent hearing, father's mother reported that father was adopted and his adoptive father was one-fourth Apache Indian. Minors' counsel suggested notice might not be required because father was not the biological child of the parent reported to have Apache Indian ancestry. The court indicated the Apache tribes "will be noticed if required by law." The Department apparently decided no notice was required because the children were not biological descendants of an ancestor with Apache heritage. No notices were mailed to the Apache tribes. When the Seneca and Delaware tribes stated the children were not members or eligible for membership, the court made a finding that ICWA did not apply. Mother (not the parent with alleged Indian heritage) raised the issue of ICWA compliance for the first time on appeal after parental rights were terminated.

Holding:

Reversed. The question of whether a minor is an Indian child is for the tribe to determine. As a matter of law under ICWA, that decision is not to be made by the state court or a social worker. The court erred by allowing the Department to determine whether the minors were Indian children for purposes of ICWA. In fact, the definition of "Indian child" under ICWA does not by its terms automatically exclude minors who are grandchildren by adoption of an ancestor with Indian blood. The court should have ordered notice be sent to the Apache tribes to determine whether the minors qualified. Mother had standing to raise the issue even after failing to do so via an earlier writ.

In re B.S. (3/17/09)
172 Cal.App. 4th 183; 90 Cal.Rptr.3d 810
Fourth Appellate District, Division Two

Issue

Can the juvenile court issue a restraining order when a criminal protective order is already in effect?

Facts

The criminal court issued a criminal protective order against the father in this case naming the mother and the child, B.S. as protected persons based on allegations of spousal battery. Three days later the juvenile court also issued a temporary restraining order against the father also protecting the mother and the child, B.S., but also including the maternal grandmother with whom the mother was then living. The juvenile court did add the order "If a criminal restraining order conflicts with a juvenile restraining order, a law enforcement agency must enforce the criminal order… Any non conflicting terms of the juvenile custody or visitation order remain in full force." Father appealed .

Holding

The appellate court held that the issuance of criminal protective order by the criminal court did not divest the juvenile court of jurisdiction to issue its own protective order.

The rule of exclusive concurrent jurisdiction does not prevail because the parties in the two actions are different (ie. – the Agency and in this case, the grandmother).

CRC 5.630(l) provides: "If a restraining order has been issued by the juvenile court under WIC 213.5, no court other than a criminal court may issue any order contrary to the juvenile court's restraining order."

Penal Code Section 136.2(e)(2) indicates that a restraining order issued by a criminal court against a defendant charged with domestic violence "has precedence in enforcement over any civil court order against the defendant…"

Both of these code sections suggest that the Legislature anticipated more than one restraining order being issued from separate courts.

Penal Code Section 136.2(f) directs the Judicial Council to "promulgate a protocol … for the timely coordination of all orders against the same defendant and in favor of the same named victim or victims" and indicates that any such protocol must "permit a family or juvenile court order to coexist with a criminal court protective order …". This code section along with the CRC 5.450(c) again show the Legislature's intent to have coexisting protective orders.

In this case, there are no actual conflicts between the two orders even if the juvenile order is slightly more restrictive than the criminal court order. It is possible for the father to comply with both orders. In any event the juvenile order provided that any conflict between the orders resolved in favor of the criminal order making any actual conflict impossible.

Burke v. County of Alameda (11/10/09)
586 F. 3d 725
United States Court of Appeals for the Ninth Circuit

Issue

Did the police officer interfere with the family's constitutional right of familial association by removing B.F. without a protective custody warrant?

Facts

On June 21, 2005, the fourteen year old, B.F., ran away from her mother and step-father. Two weeks later, she returned home. When the police officer interviewed B.F. about the circumstances surrounding her runaway, she disclosed that when she returned from her runaway (9 days earlier at this point) that her stepfather physically abused her and that her mother indicated that she deserved the beating. She also indicated that her step-father had not hit her since that day but previously beat up her stepsister and stepbrother. In addition, B.F. stated that she feared that it would "be worse for her" when she arrived home from this interview because her parents would know that she had talked to the police and her stepfather would "go off". B.F. also disclosed sexual touching that occurred "every couple of days". B.F.'s mother had physical custody and joint legal custody with B.F.'s father. B.F. disclosed no abuse by her biological father but indicated that she felt unwelcome in his home. Immediately after the interview, B.F. was removed and placed in protective custody, without a warrant. Both mother and biological father subsequently sued under 42 U.S.C. §1983 claiming that removing B.F. without a warrant interfered with their constitutional right of familial association.

Holding

The court held that the officer had not violated the parents' right by the removal of B.F. from there home without a warrant. The court looked at the claims by the mother and father individually. As to the mother, who had physical custody of B.F., the court found that the officer acted reasonably in determining that the risk to B.F. was imminent allowing him to take her into custody without a warrant. Based on the child's statements that the sexual abuse happened "every couple of days" (and it hadn't happened since she had run away) and didn't indicate that it would happen at a specific time of day etc, it was reasonable for the officer to believe that the stepfather might engage in inappropriate and abusive sexual conduct during the time it would take to procure a warrant and remove B.F. The additional risk of beatings also tipped the scale in favor of imminent risk and allowed the warrantless removal.

As to the biological father, the court stated that non-custodial parents have a reduced liberty interest in the companionship, care, custody and management of their children. However, he was not without an interest at all. The court extended the holding in *Wallis* to parents with legal custody, regardless of whether they possess physical custody of their child. They did note that the test in Wallis, however, must be flexible depending on the factual circumstances of the individual case. For instance, if the parent without legal custody does not reside nearby and a child is in imminent danger of harm, it is probably reasonable for a police officer to place a child in protective custody without attempting to place the child with the geographically distant parent. However, in this case, the officers made no attempt to contact the non-custodial father and did not explore the possibility of putting B.F. in his care

that evening rather than placing her in government custody. Therefore the reasonableness of the scope of the officers' intrusion upon the biological father's rights was for the jury to decide.

In re Calvin P. (10/08/09)
178 Cal. App. 4th 958
Fourth Appellate District, Division One

Facts:

Children were removed from their mother and ultimately placed with their father. The Court ordered family maintenance services for the father and no services for the mother. After mother appealed the no services order, the appellate court reversed and ordered the trial court to determine whether offering services to the mother was in the childrens' best interest (Section 361.5(c). The Department was then ordered to provide family reunification services. Despite being ordered to do so, the Department did not provide services to the mother who was incarcerated. (Services were available to the mother at her place of incarceration.) Additionally, Mother had no visits with the children.
At the six month review date the court ordered family maintenance services for the father and indicated mother was not provided with reasonable services but it was moot because the children were with their father. The next six month review was set.
The mother and the children appealed contending the court should have ordered family reunification services for the mother along with the family maintenance services for the father.

Issue:

May the trial court provide family reunification services to the parent who had custody of the children when they removed when the children have been placed with the previously non-custodial parent and family maintenance services have been ordered?

Holding:

The Appellate Court held that this may be appropriate in certain circumstances and this case was one of them. The Court discusses the differences between family maintenance and family reunification services citing section 361.2.
The crux of this case was that the Department conceded that they did not provide ANY services for the mother despite the family reunification services order.

In re Carlos T. (6/3/09)
174 Cal. App. 4th 795
Second Appellate Dist., Division

Issues:

1. Father and Mother appeal court's order sustaining a subsequent petition filed under WIC section 342.
2. Parents contend that there was insufficient evidence of substantial risk of harm to children at the time of the jurisdictional hearing.

Facts:

Parents initially came within the juvenile court's jurisdiction in 2005 based upon sustained allegations that father sexually abused daughter Linsey, eleven years old at the time, and that mother failed to protect her. Linsey and her brother Carlos were removed from parents' custody and declared dependents. Linsey subsequently recanted, the children returned to parents, and jurisdiction terminated in January 2006. In May 2006, mandated reporters informed the Department that Linsey was pregnant, and the child revealed that father had raped her in December 2005. Mother knew about the rape, as she had walked in on Father with Linsey in bed. But she failed to call the police or DCFS. Again, the children were removed and the children declared dependents. Neither parent was given FR services. Neither parent visited either child after the contested disposition in October 2006.

In the summer of 2007, Carlos disclosed that Father had sexually abused him as well, and the Department filed a subsequent petition under WIC section 342 with allegations under sections 300 (b), (d), and (j). Father denied abuse of Carlos, although he acknowledged having sex with Linsey "one time." Mother denied knowledge of the abuse of Carlos. The trial court sustained the petition, and both parents appealed.

Holding:

1. The appellate court held that there was substantial evidence to support sustaining the petition. The Court rejected parents' argument that because father had been incarcerated at the time of the jurisdictional hearing and was convicted on criminal charges, there was no current substantial risk to the children.

With respect to the (d) count, the appellate court found that the language of the statute did not require that the trial court find *a current* substantial risk of detriment. It held that there was substantial evidence that Carlos "has been sexually abused." WIC section 300 (d). With respect to the (b) and (j) counts, the appellate court found that under the language of the statute, substantial evidence of a *current* risk at the time of the jurisdictional hearing was required. However, the Court found that because father could still appeal his convictions, with reversal possible, the children both remained at risk. According to the Court, mother's continued inability or unwillingness to accept responsibility for her complicity in the abuse also constituted a current risk to the children.

In re C.C. (4/13/09)

172 Cal. App. 4th 1481; 92 Cal. Rptr. 3d 168

Second Appellate Dist, Division Seven

Issue

What is the correct legal standard for denying a parent visitation to his/her child during the family reunification period, including disposition?

Facts

In July, 2007, a 300 petition was filed against mother under subsection (a) and (b) in connection with her then-10 year old son ("CC"). In short, it was alleged that mother was physically abusing CC, and that she had serious mental health and anger management issues. Monitored visits were ordered at detention. These visits did not go well for several reasons, including the fact that CC did not want to visit with his mother at all, and he refused to engage with her at any of these visits. As such, the court initially suspended any and all visits (based on a "detriment" finding) and at a subsequent hearing it ordered visits to occur in a therapeutic setting. This all occurred prior to the jurisdiction hearing. While the jurisdiction hearing was ongoing, the DCFS filed a 388 petition requesting that any and all visits be suspended again, based upon the child's therapist's opinion that visits were not in the "best interests" of CC (because the child had threatened to harm himself and his mother if he was forced to visit, he sat on the floor and banged his head against the wall crying during a forced visit), and upon the fact that CC did not want to have any visits with his mother. That petition was denied and visits were allowed in a "neutral" setting, under the direction of the therapist. Those visits did not go well, mainly due to the anger and the unwillingness of CC to visit with his mother, and due to the confrontations at such visits between the mother and CC. At the disposition hearing in June, 2008, the court ordered no visitation at all between mother and CC (despite the fact that mother was to receive reunification services). The court denied such visitation based upon a "detriment" finding, and it stated that the visitation issue could be revisited at the subsequent review hearings.

Holding

If a parent is to receive (or is receiving) family reunification services for a child, the court can only deny (or terminate/suspend) visitation between that parent and child IF the court finds that such visits would "pose a threat to the child's *safety*." [As will be explained, *infra.*, this is not a finding of "detriment."] The key in determining what test to use regarding whether to allow any visits between parent and child is based upon whether the parent is in reunification mode or not. IF the parent is in reunification, the test is whether such visits "pose a threat to the child's *safety*."

Visitation is a critical component to reunification. Hence, it can only be denied during the reunification process based upon the *safety* of the child, not the "best interest" or "detriment" of the child. [*See*, section 362.1 (a)(1)(B)] In this case the court indicated that there was no evidence in the record that the mother posed a threat to the child's *physical* safety during monitored visitation in a therapeutic setting.

However, if the parent is not in a reunification mode, then visits are determined by the "best interests" of the child, and whether such visits are "detrimental" to the child. [*Compare*, sections 361.2 (a); 361 (c)(1); 366.21(h); 366.22(a); and 366.26 – these sections essentially utilize a "best interest"and/or "detriment" approach for determining whether visits should be allowed.]

NOTE: The court did state, though, that the "frequency" of such visits during the reunification period can be based upon the child's "well-being," which could include the *emotional* well-being of the child. [*See*, section 362.1 (a)(1)(A); *but see also, In re: Christopher H* (1996) 50 Cal.App.4th 1001, 1008 – court may deny visitation if "visitation would be harmful to the child's emotional well-being."] So, does "safety" include "emotional well-being"?

In re Cole C. (6/3/09)
174 Cal. App. 4th 900
Fourth Appellate District, Division One

Issues:

1) Can the psychotherapist-patient privilege be asserted by counsel for the children even when the therapy occurred before the children entered care, was waived by the mother, and the information may be exculpatory for Father?

2) Is due process violated if a petition concerning abuse of sisters is found true before the trial on whether that abuse places a half-sibling at substantial risk of harm under WIC 300(j)? Is due process violated due to social worker bias and destruction of evidence?

3) Is evidence of abuse of half-siblings sufficient to find that a child was in sufficient risk of harm under WIC 300(j) and remove child from Father's care?

Facts: Allegations arose that Father physically and sexually abused two sisters. A half-brother was also living in the home. Allegations included that father disciplined the girls through the use of cold showers and ice packs as well as spraying them with the water hose. There were also allegations that he sexually abused the girls. The mother had been confronted with these allegations and denied them. After a contested jurisdiction and disposition hearing, Father and Mother reached partial settlement and submitted on reports on WIC 300(b) allegations of physical abuse of the two girls. WIC 300(d) charge of sexual abuse was dismissed. Mother also submitted on WIC 300(j) petition for half-brother, but father did not. The court then proceeded with the father's trial on the WIC 300(j) petition for the half-brother.

The sisters had been receiving therapy from a doctor before dependency case to discuss mother's divorce and to integrate Father into the girls' life. Mother submitted a letter from doctor which provided details about therapy sessions in her motion to have girls returned to her care and custody and DCFS later included the doctor's information in a report without an objection. Father then includes the letter in his motion to dismiss and the doctor in his witness list for trial. The girls' attorney then asserts the privilege before trial and the court finds the privilege applied, however, allowed the doctor to testify as to therapy provided to mother, not the girls.

After the trial, the court found the petition true and declared the half-brother a dependent removing him from Father's care after finding there had been reasonable efforts to prevent the need for removal.

Holding: **Affirmed.**

1) Once minor's counsel is appointed to represent a minor in a dependency case, they hold the psychotherapist-patient privilege. The holder of the privilege is determined at the time the

disclosure of confidential communications is sought to be introduced into evidence. Otherwise, all discussions that happen before the dependency proceedings would be unprotected.

The privilege was not waived if minor's counsel raised it before the doctor was called to testify but months after given notice of the intent to call him as a witness. However, the privilege is not absolute and the court erred by preserving the privilege and disallowing the doctor's statements. However, here allowing the doctor to testify as to the girls would not have impacted the outcome.

2) The court's finding that the sisters' petition for WIC 300(b) was true before the trial for the half-brother's WIC 300(j) petition does not deprive the Father of a fair hearing or violate his due process rights. The Father had the opportunity to disprove that the half-brother was at risk of suffering the same type of harm and the court heard ample evidence on this issue.

   Father's additional allegations of social worker bias and discovery abuses also are not due process violations because the court heard evidence and argument on these issues and the court disallowed DCFS from raising erased voice mail messages in its case.

3) There was substantial evidence to support the finding that the half-brother was at substantial risk under WIC 300(j). The evidence presented demonstrated that Father utilized excessive disciplinary methods on the sisters including ice packs, cold showers, hosing them down, and locking them in the garage or outside in the dark and there were allegations of sexual abuse. In addition, Father had stated that he would utilize harsher techniques on the half-brother because he was a boy. He also never acknowledged the excessive nature of the discipline techniques.

   These harsh discipline techniques and danger of potential sexual abuse also justified removing the half-brother from the father's care due to the social worker's belief that the child remained at risk. In addition, Father had not participated in services including voluntary service referrals and visits with the half-brother. These services and attempts at visitation amounted to reasonable efforts to prevent the need from removing the half-brother from his care.

In re Corrine W. (1/22/2009)
49 Cal. 2d 112; 315 P. 2d 317
CA Supreme Court

Facts:

The child Corrine was 17 years old and in foster care. She had completed driver's education, passed the written driving test, received a provisional driver's permit and begun supervising driving practice. However, she couldn't get her driver's license because no one would provide proof of financial responsibility and the Agency in Contra Costa would not pay for her liability insurance. The child's attorney asked the court to order the Agency to pay for the insurance under WIC 11460. The court declined. An appeal was taken and the appellate court affirmed. The matter was then accepted by the CA Supreme Court

Issue

Did the trial court err refusing to order the agency to pay for the child's automobile liability insurance?

Law

WIC 11460 provides that "[f]oster care providers shall be paid a per child per month rate in return for the care and supervision of [each foster child] placed with them" (*id.*, subd. (a)), and which defines "care and supervision" as including "food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, *liability insurance with respect to a child*, and reasonable travel to the child's home for visitation"

Holding

The CA Supreme Court affirmed the appellate court and the trial court. The Supreme Court indicated that "we do not understand Welfare and Institutions Code section 11460 as requiring the DSS to pay for automobile liability insurance. The section does not authorize direct claims against the state or the counties for particular expenditures by foster children or foster care providers. Instead, the statute directs the DSS "*to administer a state system for establishing rates in the AFDC-FC program*." Federal and state appropriations for foster care are finite and must be shared by all foster care providers in the state. The statute thus necessarily calls upon the DSS to exercise judgment in the use of limited resources. The statutory term "liability insurance" (Welf. & Inst. Code, § 11460, subd. (b); see 42 U.S.C. § 675(4)(A)) might well be sufficiently broad to *permit* the DSS to choose to fund automobile liability insurance for minors in foster care. No such question is before us. The term "liability insurance" is not sufficiently precise, however, in the context of a statute directing a state agency to make the best use of limited funds, to *compel* payment for everything that might conceivably bear that label, any more than the terms "shelter" or "school supplies" (§ 11460, subd. (b)) compel payment for everything that might conceivably bear those labels, however extravagant in the context of a public assistance program.

Therefore, the court held that while the Agency could use its finds to pay for automobile liability insurance, it was not compelled to do so.

In Re Damian C. (9/17/09)
178 Cal App 192, 100 Cal Rptr. 3d 110
4th App District - Division One

ISSUE:

Whether sufficient information to ***suggest*** child ***may*** be an Indian child, such that ICWA notice is required.

FACTS:

MO said may have Indian ancestry.
MGF said heard MGGF was either Yaqui or Navajo. He also heard that family did not have Indian heritage. Family attempted to research/inquire, but never successful.

HOLDING:

ICWA notice must be given.

Although MGF had been unsuccessful in establishing family=s Indian heritage, the question of membership in tribe rests with the tribe.

MGF=s lack of sufficient info did not release the agency from its obligation to provide notice.

Here the info constituted a **reason to know** that an Indian child **is** or **may** be involved, thus triggering requirement to give notice.

NOTE: App Court did not reverse Juris/Dispo.
If ICWA is found to apply, Court may be asked to invalidate its Juris/Dispo orders.

NOTE: App Court did not reverse Juris/Dispo.
If ICWA is found to apply, Court may be asked to invalidate its Juris/Dispo orders.

D.B. v. Superior Court of Humboldt County (2/18/09)

171 Cal. App. 4th 197; 89 Cal. Rptr. 3d 566

First Appellate Dist., Division Five

Facts

A.H. was born prematurely and positive for amphetamines. His mother died just days after his birth. D.B. was granted presumed father status. Father had been using drugs since his teenage years and had a lengthy criminal history. After serving four years on a 2003 conviction, father was paroled. Father twice violated the conditions of his parole by continuing his drug use and he was ordered by the parole authorities to complete a residential drug treatment program. While he completed that program, he was arrested six months later for possession and use of methamphetamine and was ordered by the parole authorities to complete another 90 days of drug rehab when he was released from jail. He did not report to the drug treatment facility and was again arrested. He was then released again and ordered to attend a drug treatment facility and again he failed to do so and continued to use drugs. He finally got into a drug treatment facility. At the contested disposition, the court denied the father reunification services under WIC 361.5(b)(13) based on father's history of drug use and his failure to comply with court-ordered treatment. Father claimed some possible American Indian heritage as well. This appeal ensued.

Issue

Does a parent's resistance to treatment ordered as a condition of parole amount to resistance to "court-ordered treatment" under WIC 361.5(b)(13)?

Did the Agency comply with the requirements of ICWA?

Holding

The appellate court construed WIC 361.5(b)(13)'s reference to "court-ordered treatment" to include treatment ordered as a condition of parole. The appellate court indicated that parole conditions, while not ordered directly by the court, are directly traceable to the court order imposing a prison sentence. The court also found that "there is no meaningful distinction between treatment ordered as a condition of probation and treatment ordered as a condition of parole for purposes of determining whether a parent's failure to comply signifies a substance abuse problem so intractable that the provision of reunification services would be a waste of time. In both situations, the parent faces incarceration as a consequence and has ample incentive to comply with the treatment condition imposed."

In addition, in accepting the concession of the Agency to remand the case based on inadequate ICWA notices, the court noted that: "The court appears to have relied on A.H.'s and father's lack of enrollment in any tribe to conclude that neither A.H. nor father were tribal "members" as necessary for Indian child status under the ICWA. Lack of enrollment is not dispositive of tribal membership: "Each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria. Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership. "*In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1300 [112 Cal. Rptr. 2d 692].) "Enrollment is not required…to be considered a member of the tribe; many tribes do not have written rolls. [Citations.] While enrollment can be one means of establishing membership, it is not the only means, nor is it determinative. [Citation.] … . Moreover, a child may qualify as an

Indian child within the meaning of the ICWA even if neither of the child's parents is enrolled in the tribe. [*Dwayne P. v. Superior Court* (2002) 103 Cal.App4th 247, 254 [126 Cal. Rptr. 2d 639].) As the court acknowledged, A.H. was potentially eligible for membership in an Indian tribe. That neither he nor father were currently enrolled did not resolve the issue. § 224.3 subd. (e)(1) ["Information that the child is not enrolled or eligible for enrollment in the tribe is not determinative of the child's membership status unless the tribe also confirms in writing that enrollment is a prerequisite for membership under tribal law or custom"].)"

In re D. F. (2/20/09)
172 Cal. App. 4th 538; 91 Cal. Rptr. 3d 170
Third Appellate District

Issue

Whether WIC 361.5(b)(3) is applicable because DF was not the child who was physically abused in the 1st Dependency proceeding?

Facts

As an infant, DF was a suitably placed dependent of the court because parents severely physically abused his older sibling. DF was later placed with father who was eventually granted sole physical custody. Later mother obtained full custody in Family Court. Later still, DF disclosed father had physically abused him. Petition filed & sustained. At Disposition Trial Ct ordered reunification services. At rehearing, Court denied reunification services.

Holding

361.5(b)(3) does apply.

Reunification services need not be ordered if Court finds the child *or* sibling was previously adjudicated a dependent for physical abuse and the child (DF) was removed from the parent's custody and later returned AND removed again due to additional physical abuse.

The victim of the initial physical abuse may be this child (DF) *or* a sibling of DF.

D.M. v. Superior Court (4/13/09)

173 Cal. App. 4th 1117; 93 Cal. Rptr. 3d 418

Fourth Appellate District, Division Three

Issue

1) Does the court need to find "bad faith" in order to sustain WIC 300(g)?

2) Does a WIC 241.1 assessment have to be prepared by both the Child Welfare Agency and Probation?

Facts

Adoptive parents sought writ relief (Mandate/Prohibition) challenging dependency jurisdiction. Parents argued that the child should have been made a ward of the juvenile delinquency court instead of a dependent child so that the parents would be spared the stigma of dependency proceedings.

Child was adopted at age 9 after two prior adoptive placements had failed because of divorce. Child was prenatally exposed to drugs, had experienced years of abuse and neglect from her birth mother, and was sexually abused at age 4 by a maternal uncle. Needless to say she was a troubled child. Child is now 15.

The adoptive parents had the child arrested for animal cruelty after she had given the family dogs her adult sister=s medication causing their deaths. She spent two months in juvenile hall awaiting a hearing on criminal charges of animal cruelty filed by the DA=s office. In addition, parents complained that she was harassing her half siblings, lying, stealing, was being defiant and truant from school, and otherwise acting like any other normal adolescent child.

Eventually the animal cruelty charges were sustained and a probation report was ordered. The probation report recommended WIC 725 informal supervision while noting that the parents did not want reunification and wanted to reverse the adoption. CPS then filed a 300(a) and (g) Petition. The WIC 241.1 joint report recommended that dependency status was more appropriate than wardship for this child. The court then sustained dependency jurisdiction over the child which then led to the writ petition.

Holding**:** **Writ denied**.

1. Substantial evidence supported the sustaining of a 300(g) because the child was left without any provision for support. Petitioner's= actions left the child with no home and nowhere to go. The court rejected the argument that 300(g) requires a finding that the parents acted in bad faith. Parents argued that 361.5(b)(9) authorizes the denial of FR services under 300(g) if the actions taken by the parents were taken in bad faith. Parents here claimed that they had acted in good faith without the intent of placing the child in serious danger because they were protecting their other children in the home. The Appellate Court held that bad faith is not an element of 300(g) because the focus of the dependency system is on the child, not the parents, and that the parents= perception that they will be stigmatized and punished by the dependency findings is irrelevant. They still are afforded the dependency protections of privacy and confidentiality.

2. The parents also attacked the dependency finding claiming that the process provided in 241.1 was improperly complied with by Probation and CPS; that the recommendations in the report were made by the CSW without input from Probation, and that the Delinquency Court should have, at least, sustained a 601 Petition. The arguments were rejected as not being supported by the facts or the law. The Appellate Court held that a 241.1 report was not even required since the delinquency court had already decided that wardship was not appropriate before dependency proceedings were even initiated. If any error was made in the way the 241.1 report was prepared, it was harmless error because the appellate court held that the requirement under WIC 241.1 for the child welfare agency and probation to do a "joint assessment" for the child could be satisfied with one agency consulting the other even over the phone. Moreover, the Appellate Court held that the trial court was without jurisdiction to sustain a 601 Petition because it would be a separation of powers violation. Only executive branch employees (C.S.Ws, P.O.s, and D.A.s) have the discretion to file 601 Petitions, not the Juvenile Court.

In re E.G. (02/10/09)
170 Cal. App. 4th 1530; 88 Cal. Rptr. 3d 871
Third Appellate District

Facts

Children were detained due to mother's substance abuse. The mother alleged two possible fathers. One of the alleged fathers, A.J., claimed possible American Indian heritage. A later paternity finding showed that A.J. was not the biological father of E.G. The trial court eventually terminated parental rights to E.G. Mother filed this appeal claiming that the trial court did not give adequate notice to the Indian tribes identified by A.J.

Issue

Did the trial court have to notice the possible Indian tribes identified by the child's non-biological father?

Holding

The appellate court held that until biological parentage is established, an alleged father's claim of Indian heritage does not trigger the requirement of ICWA notice because absent a biological connection, the minor cannot claim Indian heritage through the alleged father. Since the paternity test showed that A.G. was not E.G.'s biological father, ICWA notice was not required.

In re Gabriel L (2/27/09)
172 Cal.App. 4th 644; 91 Cal.Rptr.3d 193
Fourth Appellate District, Division One

Issue

If, after a period during which both parents were offered reunification services, the child is then placed with one parent, what is the extent of the court's discretion to decide whether to continue to offer services to the noncustodial parent.

Facts

The child Gabriel was detained based on his parents drug use for the most part. The child was suitably placed in foster care at the disposition. At the WIC 366.21(e) hearing services were continued to both parents until the WIC 366.21(f) date. At the 366.21(f) date, the child was returned to his mother's care and custody and family reunification services to the father were terminated. Father appealed.

Holding

The appellate court held that the court may, but is not required to, continue services for the noncustodial parent.

The appellate court explained that the court's discretion should be examined under WIC 364 (which governs hearings concerning dependent children who are not removed from their parents' physical custody, rather than under WIC 366 and 366.21, which govern hearings concerning dependant children in foster care.) and is similar to the court's broad discretion as to whether to offer services under WIC 361.2 because in both situations the child is not in out-of-home placement, but in placement with a parent.

The court stated that the trial court's discretion to order services is the same whether the child is placed with a previously noncustodial parent or is returned to one parent after a period of offering reunification services to both parents. Like 361.2, the court can provide services to the previously custodial parent, to the parent who is assuming custody, to both parents, or it may instead bypass the provision of services and terminate jurisdiction.

The court has discretion to provide services for the non-reunifying parent if the court determines that doing so will serve the child's best interests. The court also has discretion to find that ordering of such services to the non-reunifying parent is not in the child's interest and to not order services for that parent.

"Resources available to the juvenile court are not unlimited." In this case the appellate court held that the trial court did not abuse its discretion when it terminated the father's reunification services because the father had made no progress in resolving the problems that led to the child's removal after 12 months.

In re G.L. (9/9/09)
177 Cal. App. 4th 683; 99 Cal. Rptr. 3d 356
Fourth Appellate District, Division One

Issue

Does lack of compliance with notice provisions of the ICWA require reversal of the jurisdictional and dispositional orders? Did the court err in failing to provide appropriate notice to the Indian custodian? Did deviation from ICWA placement preferences constitute error by the trial court?

Facts

On 5/28/08 a petition was filed in the juvenile court alleging that GL was at risk of harm because her parents had a history of substance abuse and DV. At the detention hearing, the parents and GL's whereabouts were unknown. Fa was an enrolled member of the Viejas tribe and GL was eligible for enrollment. The court found ICWA applied.
At the Jurisdictional hearing, the parents' whereabouts were still unknown, however, GL was present along with her PGM. The court sustained the allegations and ordered all relatives evaluated for placement. PGM gave the SW a signed form designating her as GL's Indian custodian (signed 6 days before the detention hearing)

For the dispositional hearing on 7/10/09 PGM's Indian custodian status was discussed by the court. The Department did not want to place GL with PGM because she did not pass the background checks and there was concern regarding her ability to protect GL because she failed to acknowledge the DV by Fa. A 342 petition was filed to remove GL from PGM. But then Mo filed a document revoking PGM's Indian custodian status. The 342 petition was dismissed because PGM was no longer the Indian custodian.
No relatives were appropriate for placement and GL was placed in an Indian foster home.

Holding

PGM was temporarily designated as the Indian custodian by Mo from 5/22 to 8/19 (when Mo revoked it). PGM was aware of the Jurisdictional hearing because she attended it. She did not inform the court or Department that she was Indian custodian until after the hearing. Since the court/department was not aware of her status, they are not at fault since this was under control of PGM. Although ICWA notice was never effectuated, her status as Indian custodian was revoked on 8/19 and no hearing occurred prior to that date that adversely impacted her status.

However, the appellate court indicated that "like parents, Indian custodians are entitled to ICWA's protections, including notice of the pending proceedings and the right to intervene". The court states that because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family member on an informal basis, often for extended periods of time and at great distances from the parents. The designation of an Indian custodian by a parent does not require a writing but can be done informally.

Any error regarding lack of notice was harmless with respect to Michael. Court intervention was necessary to protect GL in this case and reversal would not lead to a change in outcome for Michael. ICWA's substantive provisions were properly applied by the court.

Furthermore, the court had good cause to bypass ICWA's placement preferences. There was substantial evidence supporting the trial court's determination that PGM was unable to provide GL with a safe and secure home and there were no other appropriate relatives to care for her. There were no Indian foster homes approved by the tribe available, so placement in an Indian foster home approved by a non-Indian licensing authority satisfied the requirements of ICWA.

Greene v. Camreta (12/10/09)
588 F.3d 1011
United States Court of Appeals for the Ninth Circuit

Issue

Whether an in-school seizure and interrogation of a suspected child abuse victim is always permissible under the Fourth Amendment without a warrant or the equivalent of a warrant, probable cause or parental consent?

Did the social worker violated the Greene's Fourteenth Amendment rights by unreasonably interfering with Sarah's right to be with her children and the children's rights to have their mother present during an intrusive medical examination?

Facts

Nimrod Green was arrested on 2/12/03 for suspected child abuse of F.S., a seven year old boy. The boys' mother told law enforcement that Nimrod's wife had talked to her about the fact that the wife didn't like the way Nimrod had their daughters S.G. and K.G. sleep in his bed when he was intoxicated among other things. The Oregon Department of Human Services heard about these allegations about a week after Nimrod's arrest and the next day they found out that Nimrod had been released and was having unsupervised contact with his daughters. Two days later, the social worker along with a deputy sheriff showed up to S.G.'s school to interview her. The social worker interviewed her for two hours. The deputy sheriff did not ask any questions but remained in the room with his gun visible although S.G. indicated that he did not scare her. The facts disclosed in the interview are in dispute. However, based on the interview of S.G. and a subsequent interview of mother and Nimrod, a safety plan was developed where Nimrod would not have unsupervised contact with his two daughters and S.G. would undergo a sexual abuse examination. Nimrod was subsequently indicted on six counts of felony sexual assault. Upon his release the social worker indicated that the mother had violated the Safety Plan and requested the Juvenile Court to issue a protective custody order which they did. Once the girls were in custody, the social worker arranged a sexual abuse exam for S.G. and refused to allow the mother to be in the room or even in the facility where the exam happened. This appeal followed.

Holding

The ninth Circuit had previously held that warrantless, non-emergency search and seizure of an alleged victim or child sexual abuse at her home violated the Fourth Amendment. (Calabretta v. Floyd) Now the ninth circuit extended those protections and held that applying the traditional Fourth Amendment requirements, the decision by law enforcement and the social worker to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional. The court also held that in the context of the seizure of a child pursuant to a child abuse investigation, a court order permitting the seizure of the child is the equivalent of a warrant.

The query was whether interviews done at school for purposes of a child abuse allegation fell within the special needs doctrine where the Supreme Court has lowered traditional Fourth Amendment protections "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable". The argument is that the 'special needs' doctrine should be applied to searches or seizures of children during a child abuse investigation because of the

governments “special need” to protect children from sexual abuse and therefore justifies a departure from both the warrant and probable cause requirements in a case such as this one. The court held that given that law enforcement was present during the interview with the sole purpose of gathering information for a possible criminal case, this fell outside of the special needs doctrine. The court distinguished the Supreme Court case of New Jersey v. T.L.O. 469 U.S. 325 where the court made a point of distinguishing searches ‘carried out by school authorities acting alone and on their own authority’ from those conducted ‘in conjunction with, or at the behest of law enforcement agencies’”

The court stated that “We hold, as we did in Calabretta, that “the general law of search warrants applies to child abuse investigations. Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context. At least where there is, as here, direct involvement of law enforcement in an in-school seizure and interrogation of a suspected child abuse victim, we simply cannot say, as a matter of law, that she was seized for some ‘special need, beyond the normal need for law enforcement’.”

For the first time the ninth circuit extended the Fourth Amendment protections to include interviews by law enforcement or where law enforcement is present of potential child abuse victims at their school without parental consent or a warrant or the equivalent of a warrant. Because this was the first time that the court had extended those protections, the court found that the officer in this case had qualified immunity because he had no previous knowledge that his conduct was unlawful.

In regards to the exclusion of their mother from the sexual abuse exam, the court held that “the language of Wallis is clear and unambiguous; government officials cannot exclude parents entirely from the location of their child’s physical examination absent parental consent, some legitimate basis for exclusion, or an emergency requiring immediate medical attention.” Therefore, the court stated that the social workers decision to exclude the child’s mother not just from the examination but from the entire facility where her daughter was being examined violated the Greenes’ clearly established rights under the Fourteenth Amendment.

In re G.W. (5/19/09)
173 Cal.App. 4th 1428; 94 Cal. Rptr. 3d 53
Fifth Appellate District

Issue :May the court use WIC 360(a) after sustaining a supplemental petition?

Facts

The children were first declared dependents of the court in June 2006. At the 18 month review hearing, the children were returned to their mother. Less than one month later, the children were detained from their mother and a WIC 387 petition was filed. Four months later the court sustained the 387 petition. The court ordered that the maternal step grandmother be assessed for placement. The grandmother was assessed and found to have a criminal record (misdemeanor willful cruelty to a child) for which the agency refused to grant an exemption . At the disposition hearing on the 387 petition, the court appointed the step grandmother as legal guardian over 5 of the 6 siblings over the agency's objection citing to WIC 360(a) and the case of In re Summer H. (2006) 139 Cal.App.4th 1315. The agency appealed.

Holding

The appellate court held that case law as well as rule 5.565(f) required the juvenile court, on the facts before it to proceed directly to a section 366.26 planning and implementation hearing. Rule 5.565(f) states, "If a dependent child was returned to the custody of a parent or guardian at the 12-month review or the 18-month review or at an interim review between 12 and 18 months and a [section] 387 petition is sustained and the child removed once again, the court must set a hearing under section 366.26 unless the court finds there is a substantial probability of return within the next 6 months or, if more than 12 months had expired at the time of the prior return, within whatever time remains before the expiration of the maximum 18-month period."
The court stated that WIC 360(a) was not the proper section to use at the disposition of a supplemental petition and therefore that In re Summer H. was inapplicable to these facts. " The court in Summer H. found compelling the ability of a parent to decide at the earliest stage of the dependency proceeding, when it became clear that intervention was inevitable, to recognize his or her inability to parent a child successfully, give up that right, and assist in choosing a legal guardian for that child." That situation in not present in this case as these were the late stages of the proceedings and mother had already been given 18 months to reunify.

The court summarized the principles applicable to a disposition after a supplemental petition has been sustained. "When a juvenile court sustains a supplemental petition pursuant to section 387, the case does not return to "square one" with regard to reunification efforts. Instead, the question becomes whether reunification efforts should resume. The answer is yes if: the parent has received less than 12 months of child welfare services (366.5(a), 366.21(e); the parent did not receive reasonable child welfare services (366.21(g)(1), 366.22(a); or the case has passed the 12-month mark but there is a substantial probability the child will be returned within 18 months of the date the child was originally removed from the parent's physical custody (366.21(g)(1). Simply put, the court determines at what chronological stage of the 12-18 month period the cases is for reunification purposes and then proceeds pursuant to section 366.21 or section 366.22 as appropriate. Failure to order additional reunification services when a court removes a child from parental custody incident to a section 387 petition is reversible error only if under the particular facts of the case the juvenile court abuses its discretion in failing to order such services." (Carolyn R. 41 Cal.App. 4th at 166)

In re Holly B. (4/8/09)
172 Cal. App. 4th 1261; 92 Cal. Rptr. 3d 80
Third Appellate Dist.

Issues:

1. Father appeals court's grant of petition under WIC section 388 rescinding previous order that child have psychological examination.

2. Father also contends that court failed to comply with ICWA notification procedures.

Facts:

After either parent failed to reunify with the child, she child experienced multiple placements and AWOL episodes during the year following the termination of services to father. While the child was whereabouts unknown, the court ordered that she have a psychological examination once she was located and returned to child protective custody. The child, age 15, returned to foster care, and she objected to having a psychological evaluation. She had previously had three such evaluations, and she felt they labeled her. She felt good in her current placement, and she stabilized there over a period of months. Thus, the social worker filed a WIC 388 petition requesting that the court rescind its order for the psychological examination. Father did not appear at the hearing at which the court considered the 388, which was also a review hearing under WIC 366.3. The court granted the 388 petition, and found the social worker provided reasonable services to the minor.

Father appealed, arguing that the requirements under section 388 were not met, that the department failed to provide reasonable services, and that substantial evidence did not support the court's finding.

Father also appealed on the basis that the social worker failed to comply with ICWA despite being on notice that it might apply due to mother's claiming Indian heritage when she filed petitions under section 388 in 2007.

Holding:

2. With respect to father's appeal of the granting of the 388, the appellate court found that father did not have standing to appeal. It held that father's taking an adverse position on the issue was not enough to create standing; father would have to have had *his own rights affected* by the court's decision. The 388 decision did not affect any "legally cognizable issue personal to appellant."
3. With respect to the ICWA issue, the court held that the law was not "implicated in the orders appealed from." Rather, ICWA applied to hearings that "affected the minor's status," such as placement in foster care and adoption. The court stated ICWA did not apply to "related issues affecting the minor such as paternity, child support or, as in this case, a ruling on a petition for modification which affects only the information available to the department in making its decisions." And, thus, "any failure to comply with the ICWA is not cognizable in this appeal . . . ."

In re I.W. (12/15/09)
180 Cal. App. 4th 1517
Sixth District

Issue

Defining adoptability and ICWA forms.

Facts

Mother was a long time drug user. Given the ages and natures of the children, it took some time to find an adoptive family for all 3 siblings. A family was found and a 366.26 hearing set. Mother argued that at least one child (I.W.) was not adoptable by virtue of the fact that he had serious emotional issues, and that the home study of the only likely adoptive family had not been finally approved. She argued that the parental relationship exception should apply. She argued that the ICWA forms sent were wrong.

Holding

This court analyzed in full the specifics of adoptability, in terms of age, relationships and only one possible adopting family. The court reasoned that once the department is able to show by the correct standard that the child(ren) are likely to be adopted by virtue of general characteristics, or a single agreeable home, they have met their burden. The burden then shifts to the parent arguing either the adoptability, or the exception(s) to argue some affirmative defense. The parent's argument cannot only be a failure of the Department to meet its burden, but some effective evidence that says either the child(ren) is not adoptable, or the parent's relationship with the child outweighs the need for a permanent home. The court, once it has determined that the Department has met its burden, now weighs the parent's evidence separately. The Court found the sibling group (including I.W.) likely to be adopted, that no "backup plan" needed to be in place, and the mother's relationship with the children over the long history of the case was not enough to outweigh the need for permanency. Court terminated parental rights, with an ICWA caveat. Mother argued that the second set of possible Indian heritage notices had two boxes checked which were in opposition to each other. Court found normal person would get it. They opined that "it is not their function to retry the case". Affirmed.

In re James R. (7/15/09)
176 Cal.App.4th 129, 97 Cal. Rptr. 3d 310
Fourth Appellate District, Division One

Issue:

Was there substantial evidence to support the juvenile court's finding that mother's mental illness and substance abuse and father's inability to protect the children place the children at risk of suffering serious physical harm or illness?

Facts:

The San Diego CPS filed a petition under WIC §300(b) against the mother Violet and father James Sr. alleging that 4 year-old James, Jr., 3 year-old Wesley, and 1 year-old Violet III were at substantial risk of harm because of Violet's mental illness, developmental disability and/or substance abuse problems, and that James Sr. was unable to protect them. In July 2008, Violet was hospitalized after she drank a few beers and took eight prescription ibuprofen.

In the jurisdiction/disposition report, Violet told the SW that she had built up a tolerance to Tylenol and needed to take up to 8 pills at a time for relief. She thought she could take 8 ibuprofen but then had an adverse reaction and called for help. Violet had a history of hospitalizations. The report indicated the parents did not believe Violet's mental health or possible substance abuse problem hindered her ability to care for the children. The report also stated that both parents were devoted to the children, were bonded with them and were meeting their needs. The family had stable income and housing.

At the contested jurisdiction/disposition hearing, Violet's psychologist testified that although Violet had an attention deficit disorder, mixed type, she was not suicidal and did not pose a risk to the children, to herself, or to others. Two social workers testified that the children were well cared for and had family support, but that both parents minimized Violet's condition and they were concerned for the children's safety. One SW testified that she was concerned James Sr. might leave the children with Violet while he worked and Violet might drink alcohol or use drugs while caring for the children. The juvenile court sustained a §300(b) count against the parents, essentially stating that Violet's mental illness and alcohol consumption rendered her incapable of providing regular care for the children and that James Sr. failed or was unable to protect and supervise the children. The juvenile court also ordered the children placed with the parents but Violet was not to be left alone with the children.

The parents appealed the juvenile court's jurisdictional findings and disposition orders.

Holding:

Reversed. There is no evidence of actual harm to the children from the parents' conduct and no showing the parents' conduct created a substantial risk of serious harm to the children. Any causal link between Violet's mental condition and future harm to the children was speculative. The Department also failed to show with specificity how Violet's drinking harmed or would harm the children. Also, the evidence showed that James Sr. was able to protect and supervise the children.

In re Jason J. (07/09/09)
175 Cal. App. 4th 922, 96 Cal. Rptr. 3d 625
Fourth Appellate District, Division One

ISSUE:

Willie argues that he is "Kelsey S.'" father and the court could not terminate his parental rights without a finding of unfitness. In the alternative, the court could not terminate his rights, even as a "mere biological father" without a finding of unfitness. He also argued the beneficial relationship exception.

FACTS:

Child removed from mother pursuant to drug use by the mother and attempted murder of Jason by mother's boyfriend. (Jason apparently had broken cigarettes of boyfriend.) There was also extensive domestic violence in the home. Mother named Willie as Jason's father. Willie said he loved Jason, wanted him with his mother, and could not provide a home for him. He signed the paternity declaration, and in it he catalogued all the things he didn't do, including refusing to have his name on the birth certificate, and not providing a home or support. He requested a paternity test. The test was done, he was the father, and a judgment of paternity was entered. He then proceeded to do nothing, as did mother. Case went to WIC 366.26 hearing. The Court terminated parental rights. Willie appealed.

HOLDING:

Affirmed on all counts. 1. Kelsey S. is an adoption case, having no relevance in dependency. 2. Even if the analysis applied, Cynthia D. v Superior Court (1993) clarified that in dependency, findings of detriment made at review hearings are the equivalent of detriment. Detriment is not an issue at the .26 if all findings of detriment were made at the appropriate hearings. Willie is also not a father in any sense contemplated by the seminal case of Santosky v Kramer (1982) where the Supreme Court determined that a termination of parental rights needed a higher standard than preponderance of the evidence. Their use of the word "parents" is interpreted to mean legal parents. In the context of this case, Willie was never a legal parent within dependency statutory authority. 3. His relationship with his child wasn't even close to the required relationship for the exception.

In re J.B. (7/20/09)
178 Cal. App. 4th 751
Fifth Appellate District

Issue

Is the requirement under ICWA for expert testimony before removal from a parent waived when the placement is with another parent?

Facts

Mother was a habitual drug user, providing minimal, if any appropriate parenting. She provided a completely unsafe environment for her children who were unschooled, unkempt, unfed, unclothed and unhappy. They were removed, and in its investigation, the Department found that one of the children was American Indian, and that father was appropriate. At the dispositional hearing, mother argued that no expert was presented before the Court removed the child from her and placed with the father. The Court disagreed and removed from mother without an expert witness. She appealed all rulings.

Holding

Affirmed as to all issues. The jurisdiction was appropriate, the removals were appropriate, and the change from one parent to another is deemed to be "custodial" under ICWA and no expert is required.

In re Jeremiah G. (4/14/09)
172 Cal. App. 4th 1514; 92 Cal. Rptr. 3d 203
Third Appellate District

Issue

Do ICWA notice requirements arise when a parent indicates possible Indian ancestry and fills out the JV-130 form indicating he might have such ancestry but later retracts this claim?

Facts

When asked whether he had Native American heritage, Father replied, "That's a possibility. That needs to be researched. . . . My great grandfather was Indian. I don't know if he was part of a tribe or not." Father completed the JV-130, indicating he might have Indian ancestry. The court ordered the Department to notify the BIA. Three weeks later at a hearing also attended by Mother, Father completed a second JV-130 form indicating he had NO Native American heritage. The court found ICWA did not apply. At a subsequent hearing also attended by Mother, Father's counsel explained that while Father at first claimed there was a possibility of Indian ancestry, he had retracted that claim. At that point everyone agreed Father had no Native American heritage. Mother appealed the court's dispositional orders, contending the court erred by not providing notice of the hearing to the appropriate Indian authorities as required by ICWA.

Holding

Affirmed. Both the federal regs and WIC require more than a bare suggestion that a child might be an Indian child. The claim must be accompanied by other information that would reasonably suggest the child has Indian heritage. Here there was no information that would reasonably suggest Jeremiah had Indian heritage. Father provided no tribe name and did not even know if his great-grandfather had actually been a member of a tribe. Because Father retracted his claim of Indian heritage and there was no other basis for suspecting Jeremiah to be an Indian child, ICWA notice was not required. The assertion of a "possibility" that Father's great-grandfather was Indian, without more, was too vague and speculative to require ICWA notice to the BIA.

In re J.K. – (5/18/09)
174 Cal App 4th 1426, 95 Cal Rptr 3rd 235
Second Appellate District – Division Seven

FACTS:

FA raped daughter when she was age 9.
FA dislocated her shoulder when she was age 13.
- at medical appt. MO lied saying it was an accident.
At age 15 - daughter made the disclosure of FA=s abuses.

ISSUE:

Whether FA=s abuse was **so remote in time** as to negate finding substantial risk of harm?

DECISION:

NO - given the totality of facts in this case, it was not an unreasonable finding.

HOLDING:

Prior acts may be sufficient to sustain & remove from custody. Here acts of harm were sufficiently serious. FA=s abuse and MO=s failure to protect placed child at substantial risk of physical and emotional harm.

Further, no evidence that FA took any steps to address his behaviors which led to the abuse.

In re J.O. (10/07/09)
178 Cal. App. 4th 139
Second Appellate District, Division Four

ISSUE:

Did father=s failure to care for or to provide financial support to his children warrant rebuttal of the presumption of paternity that arises under *Family Code* ∋ 7611(d)?

HOLDING:

Although a section 7611(d) presumption may be rebutted in an Aappropriate action≅ by Aclear and convincing evidence,≅ IF the result would be to leave the child *without* a presumed father, the court should not allowed such a rebuttal.

FACTS:

At detention, mother identified appellant as the father of the children. Father resided in Mexico, and had not seen nor talked to the children for many years. He had provided no financial support since 2000. Mother and Father were never married. However, they had been living together at the time of the children=s birth and Father had always held himself out as their father and he had accepted the children openly in his open since their births (1 year for the youngest, 3 years to the middle child, and 4 years to the oldest). Father=s name appeared on all of the children=s birth certificates. Through counsel, he requested Apresumed father≅ status. The juvenile court denied that request, relying on *In re A.A.* for the proposition that Aeven if someone has held himself out as the father, and openly accepted the children into his home,≅ his presumed father status could Afall away.≅ The juvenile court ruled that father was alleged only because he had not had contact with the children or provided financial support for many years.

ANALYSIS:

A man claiming entitlement to presumed father status has the burden of proof by a Apreponderance of evidence.≅ Although more than one person may fulfill the statutory requirements for presumed status, there can be only *one* presumed father. A section 7611(d) presumption may be rebutted in an Aappropriate action≅ by Aclear and convincing evidence,≅ per ∋7612, subd. (a). The key factor in this case is what is an Aappropriate action.≅ If the result of such an action would result in the child having no presumed father, then such an Aaction≅ is not Aappropriate≅ for public policy reasons. To wit, we do not want to leave a child Afatherless.≅ As such, such an action to rebut a presumed father status must have a competing father, who is vying for such rights. The court noted that a failure to provide might effect a parent's ability to attain "presumed" status but once attained, that failure to provide cannot rebut that presumption.

In re K.B. (5/13/09)
173 Cal. App. 4th 1275; 93 Cal. Rptr. 3d 751
Fourth Appellate District, Division Two

Issue:

Parents appealed the order terminating their parental rights and placing the children for adoption. They argue that as to the remand in a prior appeal from termination [12/7/06 nonpub. opn.] for noncompliance with ICWA, **the juvenile court (Riverside County) erred by failing to vacate the disposition order and by finding "active efforts" were made to prevent the breakup of the family. They also contend there was insufficient evidence to support the adoptability finding.**

Facts

In 2001 a petition was filed that alleged mother left children with an unrelated caretaker for an extended period and mother and father had a history of criminal behavior. In December 2003 the children were returned to mother and the petition was dismissed. Father was out on parole at this time and due to a prior conviction of lewd acts on a child under 14, parole conditions prohibited contact with minors including his own children. On March 9, 2004 another petition was filed alleging father was living with the family and molested Ke (age 14) and the court determined mother knew or should have known and failed to protect the child. Also, there were allegations that the parents had engaged in DV and mother had failed to benefit from the earlier services. The allegations were found true and services were then provided again to mother, but not to father. Subsequently parental rights were terminated.

During the 2001 proceedings, father told DPSS about his Indian ancestry, but notice was not provided and was ignored again in 2004. In the appeal after the 2004 proceeding, the appellate court affirmed the finding of adoptability, but reversed termination and remanded for the narrow purpose of notifying tribal authorities with instructions that if ICWA applied, the juvenile court was to proceed in compliance with ICWA. The Choctaw Nation of Oklahoma found the children had Choctaw heritage, but the tribe did not assert jurisdiction and only made recommendations. The tribe agreed with the termination of parental rights and the adoption plan.

Holding**:** The juvenile court was affirmed.

1. Failure to comply with ICWA does not deprive the court of jurisdiction to enter disposition orders.
ICWA and WIC require that "active efforts" be made to provide services to prevent the breakup of the Indian family and that the efforts were unsuccessful. See 25 USC § 1912(d), WIC 361.7(a) and CRC 5.484(c). Parents may petition the court to invalidate the order for foster care/TPR if the order violated ICWA. The parents claim the court lacked jurisdiction to terminate parental rights due to not ordering "active efforts" and placing the children in foster care when the disposition order was not supported by an Indian tribal expert. The court declined to vacate past orders because there was no reasonable likelihood that had ICWA provisions been applied, either parent would have had more favorable results.

2. "Active efforts" to prevent the breakup of a family were not required before the disposition hearing.

Under WIC 361(d) when there is a non-Indian child involved, the court must determine if "reasonable efforts" were made to prevent/eliminate detention, or if removed, whether it was reasonable not to make those efforts. However, in an ICWA case the court must determine if "active efforts" under WIC 361.7 were made and proved unsuccessful. At the disposition hearing, the court was on notice that ICWA may apply and it found reasonable efforts had been made to prevent/eliminate removal. The parents argue this is a lower standard than "active efforts" and that the notice error was prejudicial because "active efforts" would have resulted in a different finding had father not been denied services. However, the appellate court points to *Leticia V. v Superior Court* (2000) 81 Cal. App. 4th 1009, where the court held ICWA does not require services to a parent who failed in prior proceedings to reunify despite "active efforts." The court reasoned that where a parent's history demonstrates the futility of offering services, no further services must be offered. Here the father is a sex offender and was convicted for lewd acts on one child and the molestation of another. Father did not submit evidence to show that further services would have helped him to reunify with his children. Thus, the court held that the disposition order for further services for mother complied with ICWA.

3. The court correctly found that the active efforts requirement of WIC 366.26 was satisfied.

WIC § 366.26(c)(2)(B) provides that parental rights can't be terminated on an ICWA case if the court finds no active efforts have been made or does not determine beyond a reasonable doubt that the continued custody by the parent is likely to result in serious emotional or physical damage to the child. The opinion states that expert testimony indicated that the Choctaw Nation relies on the local jurisdiction to provide services, thus it shows the outcome would not have differed, if the tribe had been involved earlier. The court determined that "active efforts" include a caseworker taking the client through the steps of the plan and helping with finding a job, housing, a rehabilitation program, etc., which was done for the mother. As to father, active efforts were not required due to the sex offense convictions. Thus, the requirement was met.

4. Active efforts were made to find appropriate family members for placement.

ICWA requires that as to the adoptive placement of an Indian child, preference be given to a member of the child's extended family, other tribe members, or other Indian families. See 25 USC 1915(a), WIC § 361.31(c). DPSS tried to place the children with maternal aunts and grandmother, but efforts were unsuccessful due to a failed ICPC, forms not being returned, criminal convictions and mother living with grandmother. Prospective adoptive father is a member of another Indian tribe and the court found the placement complied with ICWA.

5. Substantial evidence supports the finding that the children are adoptable.

Before parental rights are terminated the court must find by clear and convincing evidence that the child is likely to be adopted within a reasonable time. Because ICWA was found to apply, a new termination hearing was required, which included the need for a new adoptability finding under the current circumstances. While the parents argued that the children were not adoptable due to their special needs and being a part of a sibling group, the court found substantial evidence existed to support adoptability. Despite the special needs and sibling group issues the prospective adoptive family remained committed to adopt the children. Given that the prospective adoptive family had been identified and was willing to adopt, the court found the children to be adoptable and that it was likely the children would be adopted within a reasonable time.

Kevin Q. v. Lauren W. (6/19/09)
175 Cal. App. 4th 1119
Fourth Appellate District, Division Three

Issue

Does a man's voluntary declaration of paternity – if properly signed and filed after 1996 and never rescinded or set aside – rebut a rebuttable presumption of paternity under a subdivision of section 7611?

Facts

In 2005, the mother moved in with Kevin when she was pregnant with Matthew. Kevin was not the biological father of Matthew. Mother and Matthew lived with Kevin until Matthew was 20 months old. One month later, Kevin petitioned under FC 7630 to establish paternity and sought legal and physical custody. (Kevin was basically alleging that the mother was unfit). Multiple facts seem to support that Kevin held Matthew out to be his child and openly accepted the child into his home. In April 2007, the mother filed a response to Kevin's petition to establish a parental relationship, stating that the child's biological father (DNA test proved), Brent, had filed a declaration of paternity. Attached to mother's response was a copy of a April 25, 2007 voluntary declaration of paternity signed by Brent, the mother and a witness at the Department of Child Support Services. In June 2007, mother indicated that she and Brent had entered into a Stipulated Judgment with Brent regarding custody and visitation. In January 2008, Brent's counsel asked to be relieved because he had not communicated with his lawyer for several months. The trial court weighed Kevin's presumption under FC 7611(d) with Brent's presumption under FC 7573 and found that the weightier considerations of policy and logic dictated that Kevin was Matthew's legal father. This appeal ensued.

Holding

The appellate court reversed the trial court after looking at the plain language of the statutes. Family Code § 7570 et seq., govern voluntary declarations of paternity. Although hospitals must try to obtain signed declarations soon after the birth of infants to unwed mothers, (FC §7571(a)) parents can mail a notarized declaration to the Department of Child Support Services *at any time* after the child's birth. (FC§ 7571(d)). Under specified circumstances, a voluntary declaration may be rescinded or set aside. (This may only be done if blood tests prove that another man is the biological father amongst other factors) That was not done in this case and unless this is done that voluntary declaration (signed on or after 1/1/97) is treated as a judgment of paternity.

FC§7612(a) listing the section 7611 presumptions are rebuttable, expressly excludes presumed father status arising from a declaration of paternity as one of the rebuttable presumptions. Even a pre-1997 voluntary declaration of paternity "override[s] the rebuttable presumptions created by section 7611's subdivisions. Therefore, the appellate court held that the trial court was incorrect when it weighed and balanced the two presumptions because that is only to be done when both presumptions arise from the subdivisions of FC§7611. In sum, Brent signed and filed a valid declaration of paternity that has the force of a judgment under section 7573 and trumps Kevin's presumption under section 7611(d) (regardless of the motivations of Brent in signing the declaration or his continuing contact with the child).

In re K.M. (3/16/09)
172 Cal. App. 4th 115, 90 Cal. Rptr. 3rd 692
Second Appellate District, Division Six

Issue

How much is required for "affirmative steps" to gather information for ICWA notice?

Facts

Mother named "Cherakia" tribe at detention. Agency noticed all Cherokee Tribes. Maternal grandmother indicated Choctaw and Cherokee heritage, but refused to assist in locating great-grandparents to complete interviews to re-notice.

Holding

ICWA does not require further inquiry based on mere supposition. Citing In re Levi U (2000) 78 Cal. App. 4th 191,199, they added "the agency is not required to conduct an extensive independent investigation, or cast about, attempting to learn the names of possible Tribal units to which to send notices. Parents unable to reunify with their children have already caused the children considerable harm; the rules do not permit them to cause unwarranted delay and hardship without any showing whatsoever that the interests protected by ICWA are implicated in any way."

In re K.P. (6/22/09)
175 Cal. App. 4th 1, 95 Cal. Rptr. 3d 524
Third Appellate District

Issue:

Whether the Court had a duty to comply with ICWA notice and extend the Act to cover an allegation of mother's membership in a tribe not recognized by the federal government.

Facts:

Three separate petitions were filed against the mother by the Placer County Department of Health and Human Services (HHS). The first dependency proceeding was brought in November of 2002. At that time mother told HHS that she was a member of the Colfax/Todd's Valley Consolidated Tribe. HHS determined that the Tribe was not federally recognized and did not notify it of the proceeding. The first proceeding was terminated in 2003 after mother completed the reunification plan.

The second petition was filed in May 2005. The children were initially detained but returned to the mother in January 2006 and jurisdiction was terminated in August 2006. In September 2007, the third petition was filed and sustained under 300 (b)& (c). At this time the Court allowed the Tribe (pursuant to 306.6) to participate in the proceedings. The tribal representative expressed a preference of placement with an Indian family. The petition was sustained in December 2007. The minors continued in their foster care placement. FR was ordered for the mother. The father was denied FR pursuant to 361.5(e)(2).

In April 2008, a 388 petition was filed to limit parents' ed rights. The Court appointed a tribal representative as the surrogate ed rights holder. That surrogate failed to enroll KP in school. The Court then vacated that appointment and appointed the minor's CASA as the surrogate.

In May 2008, the Court terminated mother's FR. In October 2008, mother's parental rights were terminated. She appealed based on improper ICWA notice.

On appeal, the Appellate attorney argued that the Tribe may be affiliated with a federally recognized Tribe. The attorney had found that information on the internet. The information from the website was submitted to the Appellate Court to show that the information is easily obtainable.

Holding:
There was no evidence before the Juvenile Court that the mother's Tribe was a federally recognized Tribe. The Court had "no reason to know of any other affiliation". The information based on the internet was offered for the first time on appeal and was not known by the Juvenile Court.

The Court distinguished this case from Louis S. where the Tribe may have been consolidated with a federally recognized Tribe. "Neither HHS nor the Juvenile Court was under a duty to comply with the notice provisions of the ICWA." **"We decline to extend ICWA to cover an allegation of membership in a tribe not recognized by the federal government."**

In re L.A. (12/18/09)
180 Cal. App. 4th 413
Sixth Appellate District

Issue

Can the Court order a legal guardianship under WIC §0 360(a) without a parent explicitly waiving their right to reunification?

Facts

Children were removed from the father and the mother's whereabouts were unknown. At the jurisdictional hearing, the mother had been located, given notice but failed to appear. The department was seeking family reunification services for the parents. The father requested that the court follow Section 360(a) and appoint the paternal grandparents (caretakers) the legal guardians of the children. The Court ordered family reunification services and the father appealed.

Holding

The appellate court can order a legal guardianship under 360(a) without a parent explicitly waiving their right to reunification. As long as the Court finds proper notice (Section 291), the court reads and considers evidence on the proper disposition of the case, the court finds guardianship to be in the best interests of the child(ren), the parents waives reunification services and the parent agrees to the guardianship.

Reasoning

The appellate court found that the father was the custodial parent. The mother had been properly noticed for the jurisdiction and disposition hearings. The children had been in the home of the paternal grandparents for twenty (20) months. The appellate court found that after reading the "assessment report", the court could exercise its discretion and order a legal guardianship without the mother explicitly waiving reunification services and without the mother's agreement to the guardianship.

In re L.B. (04/28/09)
173 Cal.App.4th 562; 92 Cal. Rptr. 3d 773
Second Appellate District, Division Five

Issue:

Did the court err in finding that the time in which parents can receive reunification services begins to run at the detention hearing rather than when the children are placed in foster care, thereby denying Father six months of services?

Facts:

Mother was evicted from drug treatment program after testing positive for drugs. Mother left the program with the youngest two of her three kids. A petition was filed on November 8, 2007 for all three children (the oldest was found at her elementary school), but the two youngest children had yet to be located. On May 7, 2008, Mother and Father each made their first court appearance, and the 9-month-old was placed in foster care. The two-year-old was located five days later.

On July 11th, DCFS filed a first amended petition. The court sustained the petition and ordered family reunification services. The next hearing was set for December 17, 2008 as a .21(f) hearing. The court stated that this would be a 12-month review hearing because the timeframe for ordering reunification services ran from November 2007, when the court found a prima facie case. Father appeals the orders made at this hearing.

Holding:

The court order setting the review hearing was not appealable. Father was not aggrieved at the time of the appeal given that "the court did not order fewer or different reunification services." And, as of the date of the order from which father appeals, the court had not decided to terminate father's reunification services.

Holly Loeffler v. William Medina (6/18/09)
174 Cal. App. 4th 1495; 95 Cal. Rptr. 3d 343
Fourth Appellate District, Division One

Issue

What is the correct legal standard for deciding when to terminate a domestic violence restraining order?

Facts

For the most part, the facts in this case are irrelevant to the specific holding because they are so case specific. A restraining order was issued against William Medina to protect Holly Loeffler (and her teenage daughter) in 2001 pursuant to FC 6340. That restraining order expired in April 2004. In April 2004, Holly Loeffler filed for an extension of the restraining order. On June 23, 2004, the trial court extended that restraining order indefinitely. In August 2004, William Medina filed an application for an order terminating the permanent restraining order. The trial court denied that application after a hearing. This appeal followed.

Law

"In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order." (Code Civ. Proc., § 533)

Holding

The appellate court affirmed the trial court's denial of the application to terminate the restraining order. The appellate court indicated that the trial court incorrectly used CCP 1008 in determining whether to terminate the restraining order and that CCP 533 sets forth the standards for a trial court to apply when considering whether to dissolve an injunction. In this case, the appellate court found that there had not been a material change in the facts of the case, that the law upon which the injunction was based had not changed and that finally the "ends of justice" would not be served by terminating the restraining order. In this case the court found that Mr. Medina's claim that some day he might volunteer with a law enforcement agency was not enough to satisfy the "ends of justice" argument. In addition, Mr. Medina did not meet his burden in showing that the restraining order had inhibited him from finding work in the construction industry.

The appellate court also mentioned that it was the appellant's burden to show changed circumstances under CCP 533. This differs from the case where the protected person is seeking to renew a protective order. In that case, it is the protected person's burden to show by a preponderance of the evidence that the protected party entertains a 'reasonable apprehension' of future abuse. (Ritchie v. Konrad (2004) 115 Cal. App. 4th 1275). In this case, the renewal had already been granted and therefore, it was the appellant's burden.

Mira Manela v. LA Superior Court (9/22/09)
177 Cal. App. 4th 1139; 99 Cal. Rptr. 3d 736
Second Appellate District; Division Three

Facts

During the course of a family law case, the mother raised the father's possible seizure disorder as a reason that she should have sole custody of the child and the father shouldn't be able to drive him. During the course of the proceedings, the mother subpoenaed medical records from two of father's physicians. Mother was in attendance for one of the doctor's appointments but the other doctor saw the father as a teen-ager. The father asserted the patient-physician privilege and the trial court quashed the subpoenas. This appeal ensued.

Issue

Did the patient-physician privilege or the constitutional right to privacy support the trial court's quashing of the two subpoenas.

Holding

The appellate court held that the physician-patient privilege did apply for the doctor who treated father when he was a teen-ager because there was no waiver.

The appellate court held that the trial court abused its discretion by quashing the subpoena as to the physician where mother was present. The appellate court noted that the father had waived the patient-physician privilege when he allowed the mother to be present during the doctor's appointment where the doctor had discussed father's condition. The appellate court also rejected the father's claim that his medical records as to that Dr. were protected by his constitutional right to privacy. The court indicated that the father's right to privacy was not absolute and, in this case, father's privacy interest was outweighed by the state's compelling interest in protecting the child's best interests. Therefore the appellate court indicated that the mother had shown good cause to obtain the non-privileged documents relating to the father's tic/seizure disorder.

In re Melissa R. (8/27/09)
177 Cal.App.4th 24, 98 Cal. Rptr. 3d 794
First Appellate District, Division Three

Issue:

While ICWA notices were not complied with, issue was moot and reversal and remand to require ICWA notices is futile given the dependent youth is now 20 years old.

Facts:

Melissa, at age 16, was made a dependent of the court for the third time in April 2006 as a result of her mother's drug problems. Melissa was born with a congenital chromosomal anomaly that severely retarded her development. She was a regional center client. At the contested .22 hearing, Melissa's attorney, regional center worker and counselor opposed returning Melissa to her mother. By then, Melissa was 18 years old and a plan was put in place to transition Melissa from a group home to a regional center adult-assisted placement. The juvenile court found substantial risk of detriment to Melissa if she were to return to her mother's care. The court also found that there was an emancipation plan in place for Melissa and "dismissed" the dependency case.

Holding:

While the Agency did fail to send ICWA notices even though it knew Melissa might be of Indian heritage, the error is moot. Reversal to direct ICWA compliance is pointless given that ICWA applies only when an Indian child is the subject of a child custody proceeding. An Indian child is "any unmarried person who is under age eighteen …." Since Melissa is now 20 years old at the time of the appeal, she cannot be considered an Indian "child."

In re M.L. (3/23/09)
172 Cal. App. 4th 1110; 90 Cal. Rptr. 3d 920
Second Appellate Dist., Division Six

Issue

Whether the court erred in finding exigent circumstances allowing Ventura County Human Services Agency (HSA) to take the newborn into protective custody? Does the court have to defer to mother's selection of adoptive parents?

Facts

Mother gives birth to newborn. Prior to delivery, Mother contacted Family Connections (FC) seeking adoptive parents for the unborn child. Her preference is for agency to select appropriate family and she rejects efforts to obtain prenatal care. Mother has executed a release of newborn to FC.

Mother has long history of substance abuse and has six older children who were dependents in 2006 and 2007 with whom she did not reunify. The following day, Mother comes to hospital to revoke her consent to release to FC. Hospital staff say she appears "flighty" and "hyper" when she seeks to provide adoption papers for new prospective adoptive parents. The hospital refuses to accept the documents.

That same evening, HSA hotline receives a report from hospital employees stating that mother and the newborn had positive toxicology tests for amphetamine and that mother discharged herself shortly after giving birth. Now, mother and her attorney were attempting to take the child from the hospital.

The social worker arrives. Inspects newborn's medical records, notes the release, sees a prior positive toxicology test for mother and is advised that mother has revoked the release for FC. The social worker tries to call mom to no avail. Seeing no documents pertaining to a successor plan and fearing that mother would return to remove the baby, the social worker detains the baby. A dependency petition is filed.

The juvenile court conducts a detention hearing, a contested jurisdiction and disposition hearing. The court took jurisdiction, bypassed reunification services and set the matter for a permanent plan hearing pursuant to 366.26. Mother seeks extraordinary writ.

Holding

Writ denied. A social worker may remove a child from a mother's custody because there is reasonable cause to believe that a child is in imminent danger. Court found that social workers had authority to detain without a warrant with reasonable cause to believe that a child is in imminent danger.

Here is newborn, 24 hours old, who has been exposed to drugs during gestation. Mother received little prenatal care and one year earlier, had exposed another child to drugs during gestation. She discharged herself from the hospital within an hour of giving birth and could not be reached by phone or a visit to her home. The following evening, she appeared at the hospital in an agitated condition revoking the release in favor of FC. The social worker reasonably concluded that mother might return to the hospital and remove the infant thereby endangering her.

In addition, the appellate court held that once the juvenile court sustained the allegations in the petition, that it had an independent obligation to determine the best interests of the child and therefore the court was not required to defer to mother's selection of adoptive parents for her child. The appellate court stated that "although mother has a recognized constitutional right to select adoptive parents for her child, the juvenile court is charged with determining whether that plan or another is in the best interests of the child."

M.T. v. Superior Court of San Francisco County (10/30/09)
178 Cal. App. 4th 1170
First District, Division Three

Issue:

When the children are in long-term foster care, the Court can require a parent to provide an offer of proof before setting a contested RPP on the issue of whether to set a new 366.26 hearing.

Facts:

The three children were in long-term foster care, and the parents had not been visiting for quite some time. At an RPP, the agency recommended setting a new 366.26 hearing for two of the children. The father asked to set a contest on the issue. The Court required the parties to brief the issue of whether the Court could require the father to provide an offer of proof. At the next hearing, father's counsel conceded that Sheri T. v. Superior Court (2008), 166 Cal.App.4th 334, allowed the Court to require an offer of proof to set a contested RPP, indicated he could not make the necessary showing, and withdrew his request. The Court set a new 366.26 hearing and the father filed a writ.

Holding:

Writ denied. The withdrawal of the objection does not make the issue moot; it would have been futile for the attorney to argue because the trial court was bound by Sheri T. While Sheri T. was not controlling for the First District, the Appellate Court seems to concur with the holding. At an RPP, once the agency has shown the possibility of guardianship or adoption, the burden shifts to the parent to show by clear and convincing evidence a compelling reason why a new 366.26 hearing should not be set (usually the issue would be that the child could be returned home); thus an offer of proof can be required. Also, parents' strong due process right to call witnesses while still in FR do not necessarily apply after FR has been terminated. "Due process requires a balance. … The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." Even if there were such a right here, the father has not shown he suffered any prejudice, so it would have been harmless error.

In re N.M. (5/27/09)
174 Cal. App. 4th 329; 94 Cal. Rptr. 3d 220
Third Appellate District

Issue:

What constitutes Agood cause≅ to go outside ICWA preference? What is the Court=s jurisdiction concerning placement pursuant to A fit and willing≅ exception?

Facts:

On 4/05 N.M. and J.S. Jr. removed from mother, and fathers. Second time for J. S., Jr.. Mother said no ICWA. Court found ICWA did not apply. Detained children in foster care. At first jurisdictional hearing, father of N.M. stated Indian membership. Tribe noticed. Child eligible, ICWA applies .Expert letter received.

10/05- Second jurisdictional/dispositional hearing. Parents pled, and no reunification services were offered to mother or either father. WIC 366.26 hearing was set.

2/06- Only placement issues determined. Former foster parent of J.S., Jr. (in Arkansas) wanted both children placed with her. PGM of N.M.(In Oregon) only wanted her grandchild. ICPC negative for PGM, as her husband had an unwaivable offense. ICWA expert said children should remain together, even if in a non-Indian home. They declined to intervene, and agreed with the plan of adoption.

9/14/06- Hearing- PGM stated she had divorced her husband, and wanted both children placed with her.

10/19/06- Termination of parental rights.

11/06- Motion for reconsideration by minor=s counsel, requesting reinstatement of parental rights, with legal guardianship as plan. (At some point, it appears J.S., Sr. had filed a successful WIC 388, and regained custody of his child, J.S., Jr.)

11/30/06-Court heard motion. Department argued to maintain termination of parental rights, but move N.M. to the PGM in Oregon.

1/11/07- Court reinstated parental rights.

2/21/07- ICPC for PGM in Oregon. PGM visiting regularly. Recommendation- terminate parental rights again, place with PGM. If the new ICPC is negative- adoption by the foster parent, Y.C.

3/19/07- ICPC for PGM in Oregon is approved. Recommendation is to move N.M. to PGM. PGM said she would facilitate visits in Sacramento with sibling. PGM preferred ICWA placement, even though it is in Oregon.

4/30/07 (6th addendum) ICWA expert. Legal Guardianship with the PGM now the plan proposed by the Tribe.

7/22/07- (8th addendum)- Y.C. can no longer adopt. Her son was accused of sexually molesting a child in her home. Department determined N.M. safe there anyway, until Y. C. loses her license.

8/16/07-WIC366.26. Recommendation is legal guardianship with PGM. Minor=s counsel argues for legal guardianship with Y.C. Tribe, and expert want PGM. Court finds for legal guardianship with Y.C., and good cause to go outside ICWA.

Holding and Analysis:

Legal guardianship with foster mother. PGM not well known. Home study was cursory. She did not come forward for 2 years, and then only to visit at court hearings. She never called independently to ask about the well-being of her grandson. She had no plan for sibling contact. She was not, in fact, divorced from her husband, and had not even started proceedings. Y.C. had a strong parental bond with the child. She had regular contact with the sibling and his father, and they got along well. Her son was not going to return to her home; he was to be sent to relatives away from Sacramento. Father also argues that A fit and willing relative≅ means that if the Court has a relative to look at, there is no comparison with other prospective caretakers, only an analysis as to the fitness and willingness of that relative alone. Court did not agree, and said that section applies only to Along term foster care≅.

In re Nolan W. (3/30/09)
45 Cal. 4th 1217; 203 P. 3d 454
California Supreme Court

Issue

Can the juvenile court use contempt sanctions as punishment when a parent fails to satisfy the conditions of the reunification plan?

Facts

This is a case in which the mother and minor tested positive for drugs at birth. The minor was suitably placed and the San Diego Dependency Court, as part of the reunification plan for mother, ordered her to an intensive substance abuse program. The San Diego Dependency Court had in place a local rule that authorized contempt proceedings to punish a parent who failed to comply with the reunification plan, and allowed the imposition of a sentence of up to five days in jail for each violation. In this case, mother was sentenced to a combined total of 300 days in jail for failing to enter drug treatment and test. The decision was affirmed by the Court of Appeal, but the California Supreme Court granted mother's petition for review to address the following issue: Does WIC Section 213 give the court the power to impose contempt sanctions as punishment for a parent's failure to comply with reunification orders?

Holding

NO. Reunification services are voluntary in nature and cannot be forced on an unwilling or indifferent parent (citations omitted). Parents can waive their right to reunification services. Under our statutory scheme, if a parent fails to comply with the reunification plan, the parent then faces the risk (and penalty) of losing further reunification services and the loss of parental rights. In dependency proceedings, the court's jurisdiction is over the child not the parents. The court is intervening to protect the child, not to punish the parents.

This decision is limited to the use of contempt solely to punish a parent's failure to comply with conditions of a reunification case plan. Contempt is still available to control the proceedings before it and protect the dignity of its exercise of jurisdiction. Likewise, contempt proceedings are also available to punish extreme parental misconduct that jeopardizes the child's safety, such as taking the child without permission, or engaging in dangerous acts during visitation.

In re R.M. (7/13/09)
175 Cal. App. 4th 986; 96 Cal. Rptr. 3d 655
Second Appellate District, Division One

Issue

Was there evidence of current risk of harm by clear and convincing evidence to allow court to take jurisdiction?

Facts:

There was a previous family law order awarding custody to Mother and visitation to Father. DCFS filed a petition under WIC 300(b) alleging that RM and SM had suffered and were at substantial risk of suffering serious physical harm as a result of the parents inability to adequately supervise them. The parents submitted on amended language and the court sustained language stating that the parents' divergent approaches to parenting resulted in SM's exposure to inappropriate sexual conduct by her brother.

The court further found that Mother's physical and emotional problems periodically rendered her unable to provide adequate care and supervision for the children, thereby placing them at risk …. Mother appealed and claimed the evidence was insufficient.

Holding

The appellate court reversed the Juvenile Court's order taking Jurisdiction and removing them from Mother's custody. The AC agreed with Mother, noting that a juvenile dependency petition must be "reasonable, credible, and of such solid value" such that the court could find the child to be dependent of the court by CLEAR AND CONVINCING EVIDENCE (caps added).

The AC further noted that WIC 300b requires that the child will suffer, serious physical harm or illness as a result of the failure of his parent… to adequately supervise or protect the child. Most of the evidence in this case concerned acts that RM committed, but did not pose a threat of serious physical harm to SM.

The AC did acknowledge that some of the behavior consisted of acts of sexual acting out, but found that there was no evidence supporting the conclusion that Mother failed to recognize the inappropriate conduct or failed to supervise the children once she found out.

The AC found that Mother had taken remedial steps to prevent further incidences such as admonishing the children and locking SMs bedroom door. After these remedial steps had been taken, there was no evidence of further inappropriate conduct occurring between RM and SM. Although evidence of past events may have some probative value, there must be evidence of circumstances existing at the hearing that make it likely that the children will suffer the same type of harm or illness.

Subsequent information that the parent's ongoing custody battle endangered the children's emotional health did not confer a basis for jurisdiction under subsection(b).

Jurisdictional and dispositional findings reversed.

In re R.M. and S.M. (5/5/09)
173 Cal. App. 4th 950; 93 Cal. Rptr. 3d 316
Second Appellate District, Division One

Issue:

Whether evidence was sufficient to sustain a petition and remove children from Mother's home where children engaged in "inappropriate sexual conduct" and mother was alleged to inadequately supervise and failed to protect.

Facts:

A 2004 Family Law order awarded custody of RM and sister SM to Mother and visitation rights to Father. In June 2008, DCFS filed a petition under 300 (b) alleging failure to protect and adequately supervise or protect the children from engaging in inappropriate sexual conduct. The parents **waived** their rights to a trial and **submitted** on the reports presented by DCFS.

The evidence of "inappropriate sexual conduct consisted of "watching adult films on parent's computers and TV's". The children also admitted to rubbing each other's private parts either with or without clothing. There was no evidence that the Mother condoned or facilitated the conduct. The evidence did show that once the Mother was aware of the conduct, she took steps to prevent it, including admonishing the children and locking SM's door while she slept. Further, there was no evidence that the conduct continued once Mother took these steps. The Appellate Court also found that "None of the behavior posed a threat of serious physical harm" to RM or SM.

There was also evidence presented that mother had physical and emotional problems. But, a 2003 psychological evaluation for the Family Court concluded that Mother's depression and physical disabilities did not have any adverse effects on her parenting abilities. The report also stated *"the data does not reveal any significant parenting deficits"*. (Italics added by Appellate Court).

The Juvenile Court found that "periodic episodes of inadequate supervision of the children" caused by Mother& Father's "divergent approaches to parenting" resulted in the "inappropriate sexual conduct". The Court further found that Mother's "physical and emotional problems [and depression]…periodically render her unable to provide adequate care and supervision for the children "thereby placing them at risk of physical and emotional harm and damage

Holding:

The orders of the Juvenile Court are reversed. The court is ordered to dismiss the petition and return the children to the Mother "**unless new circumstances would justify a new finding of jurisdiction. "** The Court concluded that the evidence was insufficient to support the petition as to the Mother.

In re R.N. , (10/20/09)
178 Cal. App. 4th 557
Second District, Division Seven

Issue:

Court must consider, under the provisions of 366.3, whether family reunification services should be reinstated to a parent when considering termination or modification of an existing guardianship.

Facts:

Paternal grandparents were appointed R.N.'s legal guardians in April of 1996. Family reunification services had been terminated for both parents in October of 1995 on a petition that had been filed April 1994 immediately after R.N. was born. Both parents had been drug abusers and did not comply with the reunification plan.

The grandfather died in 2006, and the grandmother in February of 2008. In April of 2008, R.N.'s paternal aunt D filed a petition seeking to become a successor Guardian. The petition had been filed in Ventura County (where the grandparents had lived) and was transferred to Los Angeles County which was the county of original jurisdiction.
Father opposed the appointment of D as guardian of RN. He contended that the grandmother's nomination of D was "misguided" because only a parent could nominate a guardian of the minor.

He further sought termination of the dependency proceedings. In his motion to the opposition to the guardianship, he also stated he had turned his life around and was an elder of his church. A report prepared by DCFS stated that father's house was unkempt, that he did not get along with other family members. He had angry outbursts and was accusatory with the aunt. Also, RN stated that when she stayed with her father she was often left alone and had to fend for herself. The Department recommended that a 366.26 hearing be set and D (paternal aunt) be appointed the guardian.

Father opposed this recommendation and a contested hearing was held July11, 2008. After the hearing, the court granted D's 388 petition and appointed D as the legal guardian. Jurisdiction was again terminated. The court noted that if the father was now asking for return of RN, he needed to file his own 388 petition.

On September 26, 2008, the father filed a 388 petition asking for reinstatement of reunification with RN. The court denied the motion on the basis that it was not in the best interest of the child to reinstate jurisdiction and grant the petition.

Holding:

Reversed and remanded for further proceedings consistent with 366.3 (366.3(f) provides that parents whose rights have not been terminated may participate in a guardianship termination hearing and may be considered as custodians and the child returned if they establish by a preponderance that reunification is in the child's best interest. If such a finding is made reunification services may be provided for up to six months.

In re R.S. (3/3/09)
172 Cal. App. 4th 1049; 91 Cal. Rptr. 3d 546
Fourth Appellate District, Division Three

Issue

Should the Court have ordered the disclosure and release of a taped interview with a 7 year old victim to the victim's father when no other proceedings were pending against the perpetrator?

Facts

The victim's father retained an attorney to pursue monetary damages against R.S.'s parents. The victim's attorney contended that he attempted to negotiate a settlement with the insurance company but claimed that the insurance company would not pursue negotiations until it saw a copy of the victim's tape.

Victim's father filed a Section 827 motion to seek disclosure of the tape and a copy of the police report. R.S. opposed. The trial court ordered the disclosure of the tape but not the police report. The court also imposed protective conditions that the tape was not to be copied in any way and only disclosed to counsel and parents. The court authorized the insurance company to view the tape but the tape had to remain in the custody of the attorney and returned to the court at the conclusion of any litigation.

Holding

The order was upheld. The trial court struggled with keeping the tape away from the parents of the child who was interviewed in the tape. The court discusses the balancing of the interests of the parties involved as required in Section 827 and Rule 5.552. The court found the rights of the parents to the tape of their child's interview outweighed the rights of R.S. and his parent's privacy concerns.

The case covers in detail the statutory scheme and the balancing of interests the court must do to determine when to disclose all or any portion of juvenile court files.

In re R.S., (11/30/09)
179 Cal. App. 4th 1137
First Appellate District, Division One

Issue:

Whether a voluntary relinquishment by parents in conformance with Family Code Sec. 8700, which becomes final before a 366.26 hearing is scheduled to commence, precludes the juvenile court from making any order that interferes with the parents' unlimited right to make such a relinquishment to a public adoption agency.

Facts:

Birth parents made a voluntary designated relinquishment of their parental rights and named an aunt and her husband as the intended adoptive placement. The 366.26 hearing date had already been set but had not yet been heard when the relinquishment was made.

Subsequently the 366.26 hearing took place. At that hearing the court terminated parental rights and designated the foster parents as the prospective adoptive parents. The birth parents appealed the juvenile court orders.

Holding:

The Appellate Court reversed. The appellate court held that when birth parents make a voluntary designated relinquishment to a public adoption agency under FC §8700, and the relinquishment becomes final after the WIC §366.26 hearing has been set, but before it is scheduled to commence, the relinquishment effectively precludes the need for a hearing select a permanent plan under 366.26. The juvenile court is precluded from making any order that interferes with the parents' unlimited right to make such a voluntary relinquishment to a public adoption agency. (Adoptions would not "randomly" accept a designated relinquishment, but would first need to complete an approved home study of the designated placement and determine additionally that the designated placement was in the child's best interest. – Fn #5)

In re R.W. (3/26/09)
172 Cal. App. 4th 1268; 91 Cal. Rptr. 3d 785
Fourth Appellate District, Division Three

Issue

Order limiting mother's educational rights was not an abuse of the juvenile court's discretion where child urgently needed emotional, behavioral and educational services.

Facts

RW had been in the dependency system for seven years and was sixteen years old, when the court limited Mother's educational rights. She had been in eighteen placements during that time including a return to mother for 60 days before reunification was terminated in 2002.
She was terminated from all of these placements because of her severe emotional and behavioral problems. A CASA and an educational attorney were appointed in an effort to stabilize her situation and find the right placement for her. During the time RW remained in placement, the mother was "inconsistent" in her cooperation in "matters relating to the minor's educational needs".

In February 2008, her educational attorney requested an "emergency, expanded IEP" to assure that RW was receiving appropriate services. The social worker reported in March 2008 that RW's behavior makes her impossible to place. In April, the educational attorney reported that Mother agreed with the decision to conduct a mental health assessment to determine if a residential treatment center placement was appropriate. The IEP team met again after looking into several possible placements and a recommendation was made to place RW in a residential placement in Laramie, Wyoming. It was after getting this information that mother suddenly became active in her daughters case and opposed the placement. As a result the Educational Attorney expressed to the court that mother's "recent activism" was not in RW's best interest and asked that mother's educational rights be limited and a surrogate right's holder be appointed.

Holding

The Juvenile Court did not abuse it's discretion in limiting Mother's educational rights. The Mother was not acting in the minor's Best Interest. The motion to limit those rights was based on the urgent need to address the minor's behavioral, emotional & educational needs before the "window of opportunity" closed. The order limiting parents' educational rights and the "Consent Order" consenting to the IEP recommendation for placement are **affirmed.**

In re Samuel G.(5/18/09)
174 Cal. App. 4th 502; 94 Cal. Rptr. 3d 237
Fourth District, Division One

Issue:

The Juvenile Court may order the agency to pay for the travel of a dependent child's education representative to visit the child in an out-of-county placement.

Facts:

Samuel was in a planned permanent living arrangement. He had numerous failed placements and at least two involuntary hospitalizations. The mother had moved out-of-state, and the Court appointed his CASA (Ms. So) as the responsible adult for educational decision making, using the appropriate JV-535 form. Ms. So was actively involved, and attended all of Samuel's IEP meetings. The San Diego County Health and Human Service Agency (Agency) eventually placed Samuel in a group home in Redding, and he was making progress.

After exploring funding sources and learning that the CASA program had limited funding, the Court granted Samuel's attorney's request that Agency be ordered to pay for quarterly visits to Redding by Ms. So, in her capacity as his educational representative. Agency appealed on the grounds that the order violated the separation of powers doctrine and amounted to an improper gift of public funds.

Holding:

Affirmed. (See detailed discussion of education issues below.) Ordering the agency to pay for the CASA's travel expenses would be inappropriate (without an MOU), but in this case, the order was made regarding Ms. So in her separate capacity as the educational decision maker. According to the case law, "if appropriated funds are reasonably available for the expenditure in question, the separation of powers doctrine poses no barrier to a judicial order directing the payment of funds. (Note: In this case, the educational representative had been involved for three years, so ensuring continuity may have been a major factor in determining that the Court properly exercised its discretion.)

(Education is a fundamental interest that must be made available to all on an equal basis. The Juvenile Court may limit a parent's right to determine how their children are educated, but the Court is also responsible for ensuring that a dependent child's educational needs are met, and must provide oversight of the agency to ensure that the child's educational rights are investigated, reported, and monitored. In doing so, the Court may issue reasonable orders for the child's care, supervision, custody, etc., including the child's education. All educational decisions must be based on the best interest of the child. The Rules of Court require the educational representative to participate in and make all decisions regarding all matters affecting the child's educational needs, acting as the parent in all educational matters. The agency is required to provide child welfare services to children and families who need them, including transportation.)

In re S.B. (5/28/09)
174 Cal. 4th 529
Calif. Supreme Court

Issue

The only issue before the Supreme Court was whether a trial court's finding of adoptability under W & I § 366.26(c)(3) is appealable.

Facts

Then underlying facts in this case were not articulated by the Court in its decision, because the issue is a pure matter of law. However, it appears in this case the trial court applied 366.26(c)(3) to the subject child: that termination of parental rights would not be detrimental; that the child has the probability of adoption; but, there is no identified or available prospective adoptive parent. Under such circumstances, the agency is mandated to make efforts to locate a prospective adoptive home and the 366.26 hearing continued for up to 180 days.

Mother appealed the finding of adoptability. The Court of Appeal dismissed the appeal as premature. The Supreme Court took the case because there is a split of authority among the various appellate courts on the issue.

Holding

Reversed. The Supreme Court held that 366.26(c)(3)orders are appealable. Although the trial court's determination of adoptability is a "finding" the court did make orders regarding the location of an adoptive home. Additionally, the Court noted that the recent amendments to 366.26(c)(3) make the 180 period not a mere continuance of the 366.26 hearing, but mandates either adoption or legal guardianship *with a non-relative* at the next hearing (removing the third option of "long-term foster care"). Thus, the trial court's orders are not idle gestures, noting that in those situations where a trial court in similar circumstances does not apply (c)(3), the agency may have the basis for an appeal.[1]

[1] The court did note an anomaly in the recent amendments to 366.26(c)(3) that if adoption is not the ultimate plan, the language of (c)(3) provides only for "nonrelative" legal guardianship, even though the statutory scheme calls for relative guardianship as preference before nonrelatives. The Supreme Court urged the legislature to fix this problem.

In re S.B. (6/3/09)
174 Cal. App. 4th 808; 94 Cal. Rptr. 3d 645
Second Appellate District, Division Four

Issue

Are only the Agency's counsel and minor's counsel responsible to advise the trial court of any problems with notices issued under the Indian Child Welfare Act?

Facts

This case was back in the trial court for the third time after being reversed on inadequate ICWA notices twice before. The court looked at the new notices provided by the Agency to the Indian tribes but asked counsel for the parents whether they had any objections with regard to ICWA compliance. Father's counsel had none. Mother's counsel indicated that she had not had the opportunity to look through them yet. The court granted the mother's counsel what amounted to a two month continuance. Two months later, upon another inquiry the mother's counsel replied that she had looked at the record and had not seen anything wrong but said that she was not an expert on ICWA and did not feel competent to make that assessment. When further queried about any legal objection, she replied, "Not that I know of, no." The court found that the notices were good and that the child didn't fall under the ICWA. This third appeal followed claiming inadequate notices to the Indian tribes.

Holding

The appellate court affirmed the trial court and held that counsel for the parents share responsibility with the Agency and minor's counsel to advise the trial court of any infirmities in these notices in order to allow for prompt correction and avoid unnecessary delay in the progress of the dependency case.

The court stated "An attorney practicing dependency law in the juvenile court should be sufficiently familiar with ICWA notice requirements to point out a flaw in notice if the record shows that there is one – especially when specifically asked to do so. One court has observed that 'trial counsel for a parent in dependency proceedings rarely brings ICWA notice deficiencies to the attention of the juvenile court. That job, it seems is routinely left to appellate counsel for the parent.' (In re Justin S. (2007) 150 Cal.App.4th 1426,1436)"

The court added that counsel for parents bear a responsibility to raise prompt objections in the juvenile court to any deficiency in notice so that it can be corrected in a timely fashion. This will best serve the interests of the dependent children, the Indian tribes, and the efficient administration of justice.

In re S.R. (5/1/ 2009)
173 Cal.App.4th 864; 92 Cal. Rptr. 3d 838
3rd Appellate District

Issue:

The granting of a WIC §388 petition to vacate a court-ordered EC §730 evaluation for a bonding study was abuse of discretion where there had been no change in circumstance and was not in the best interest of the children.

Facts:

The Sacramento DHHS removed three children, all 6 years and younger, from the parents due to domestic violence and failure to protect charges. The parents are Spanish-speaking and required interpreters. The parents failed to reunify with the children by the 18-month date. The juvenile court terminated reunification services, set a §366.26 hearing and ordered a bonding study.

Two months later, DHHS filed a §388 petition to modify the bonding study order. DHHS indicated that it had contacted Dr. Jayson Wilkenfield, who declined to do the bonding study because he did not speak Spanish and would not be able to "detect and appreciate the significance" of the subtleties of the parent-child interaction which he felt was necessary. At the first hearing on the §388 petition, the juvenile court ordered DHHS to try again to locate a Spanish-speaking psychologist, or to provide specific information that it had attempted to find one at nearby hospitals and universities.

At the second hearing on the §388 petition, DHHS told the juvenile court it had contacted Dr. Blake Carmichael at UC Davis Medical Center and was told there was no Spanish-speaking professional who could do a bonding study. DHHS also contacted CSU Sacramento and found it was closed for the summer. The juvenile court suggested a Dr. Anthony Urquiza, who apparently is a clinical psychologist at UC Davis Medical Center and is familiar to the court since he has testified before.

At the third hearing on the §388 petition, DHHS reported it had contacted 6 Spanish-speaking clinical licensees in the area and none could do the bonding study. DHHS had not been able to contact Dr. Urquiza. The juvenile court accepted DHHS's representation, noted that there is a no statutory right to a bonding study, indicated it would be futile to continue the order for such a study, and granted DHHS' §388 petition. The juvenile court held the §366.26 hearing, found no exception to TPR and terminated parental rights. The parents appealed.

Holding:

Reversed. The Court of Appeal held that not every change of circumstance warrants a modification of a court order. The change must relate to the purpose of the order. Here, the purpose of the bonding study was to determine the degree of attachment between the parents and the children. The fact that DHHS cannot find a Spanish-speaking psychologist is not a change of circumstance. Also, there is no evidence that the change is in the children's best interest. The juvenile court does not have the discretion to modify, or vacate the order without substantial evidence that the bonding study is no longer necessary or appropriate for legitimate reasons other than DHHS not being able to comply with the court's order.

S.T. v. Superior Court (8/28/09)
177 Cal. App. 4th 1009, 99 Cal. Rptr. 3d 412
Second Appellate District, Division One

Issue:

Does the trial court have discretion to continue reunification services at a 366.21(e) review where the court cannot find the parent has complied with the requirements of 366.21(g)(A-C). (Maintained regular and consistent contact; made substantial progress in completing the case plan; and, demonstrated the capacity and ability to complete the case plan and provide for the children.)

Facts:

Child was born with methamphetamine in her system. Both parents were incarcerated. The petition was adjudicated and father was provided with reunification services. Due to the age of the child, no visits were ordered for father while incarcerated and monitored when released. The child was placed with the paternal grandparents.

While in local custody, father wrote to the social worker advising that he was only allowed to attend NA meetings but was willing to do anything to comply with the case plan. Father was transferred to state prison and the social worker was informed by the prison counselor that none of the court ordered services were available.

At the 366.21(e) hearing, the agency recommended continued reunification services. The court found that father had not met any of the three criteria set forth in 366.21(g), terminated reunification, finding that it did not have discretion to extend reunification under those circumstances. A 366.26 permanency planning hearing was set.

Father appealed and the agency did not oppose the extension of services.

Holding: Reversed.

The Court of Appeal found that the trial court abused its discretion in terminating reunification. 36621(e) states that if the court finds that the parent has not made substantial progress in the case plan, the court *may set* a 366.26 hearing. Pursuant to M.V. v. S.C. (167 Cal App.4th 166) the court is not required to set the 366.26. If the court does not set the permanency hearing, the court shall direct that any services previously ordered *shall* continue. Failure of the court to excercise its discretion was error.

In this case, the court noted that the mitigating factors for discretion included: the 1/1/09 amendments set forth in AB 2070 regarding the obligation of the court and agency to identify the barriers to reunification of incarcerated parents; the fact that father was willing to comply; his imminent release date; the fact that the child was with relatives; and, that the agency was not opposed.

S. W. v. Superior Court (5/15/09)
174 Cal. App. 4th 277; 94 Cal. Rptr. 3d 49
Fourth Appellate District, Division Three

Issue:

WIC 366.21e, allowing the Court to terminate reunification services at a 6-month review hearing if the parent fails to contact and visit the child, requires that a parent both visit and have contact.

Facts:

The father moved out of state. After disposition, the father spoke to the child on the telephone once and left one phone message. The social worker repeatedly called the father, left a message, and the father never called back. At the 6 month review hearing, the Court terminated the father's reunification services and set a selection and implementation hearing. The father filed a writ, contending that either contact or visitation would be sufficient for further FR, and citing Rule of Court 5.710.

Holding:

Writ denied. 366.21e allows the Court to set a 26 hearing if the parent has failed to contact and visit the child. Since the parent must both contact and visit the child to receive additional services, the failure to either contact or visit the child allows the Court to terminate services. Rule of Court 5.710 is inconsistent with statue insofar as it deletes the visitation requirement. Even if contact alone were enough, one telephone conversation in six months is not substantial contact; contact that is casual, chance or nominal is not enough to warrant further FR. Extenuating circumstances might be just cause for further FR, but the father voluntarily moving out of state doesn't qualify.

In re T.M. (7/20/2009)
147 Cal. App. 4th 1166; 96 Cal. Rptr. 3d 774
Third Appellate District

Issue

Can the court terminate a parent's parental rights if no reunification services was offered to that parent pursuant to WIC§ 361.5(b)(1)?

Facts

The baby was detained from the mother's custody in 8/07 when the mother was placed on a psychiatric hold. At the jurisdictional hearing, the mother's whereabouts were unknown and so no reunification services were offered to her pursuant to WIC 361.5(b)(1). The court set a six month review hearing. Over the next several months, the social worker was apprised of sightings of the mother. In November the social worker found the mother in a locked psychiatric facility. A conservator had been appointed. The social worker did not develop a case plan with the mother because the worker felt that the mother was being provided all the necessary services at her facility. The mother's counselor at the facility said that mother had made no progress in treatment since she had refused to participate and address her treatment goals. The mother's conservator told the social worker that the mother had been diagnosed with a psychotic disorder and that visitation with the minor would not be constructive and appellant's anger issues might make visits harmful for the minor. . The social worker never informed the court that the mother had been located until the six month review hearing. At the six month hearing, the court set a 366.26 hearing over mother's attorney's objection. The court terminated mother's parental rights at the 366.26 hearing. This appeal ensued.

Holding

The appellate court held that the trial court could not terminate mother's parental rights at the 366.26 hearing because mother had never been offered reunification services pursuant to WIC 361.5(b)(1). The appellate court held that "because the court neither terminated services, after finding reasonable services had been provided, nor denied them pursuant to a subdivision of section 361.5 which would permit termination of parental rights, it should have limited the scope of the section 366.26 hearing to consideration of only guardianship or long term foster care."

The appellate court found that when the Legislature in 1991 deleted that provision of section 366.22 and added subdivision (c)(2)(A) to section 366.26, which barred termination of parental rights, but not other permanent plans, when reasonable efforts were not made or reasonable services were not offered. (Stats. 1991, ch. 820, § 5, p. 3648.) Section 361.5, which permits denial of services under subdivisions (b) and (e), states that "[i]f the court, pursuant to paragraph (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), or (15) of subdivision (b) or paragraph (1) of subdivision (e), does not order reunification services, it shall … determine if a hearing under Section 366.26 shall be set in order to determine whether adoption, guardianship, or long-term foster care is the most appropriate plan for the child … ." (§ 361.5, subd. (f).) This subdivision of section 361.5 has not significantly changed (see Stats. 1990, ch. 1530, § 6, p. 7176) since before subdivision (c)(2)(A) was added to section 366.26, and the Legislature is presumed to have been aware of it when amending section 366.26, subdivision (c)(2)(A). However, section 361.5, subdivision (b)(1), the basis for the denial of services to appellant, is not listed in section 361.5, subdivision (f) as one of the circumstances which can directly lead to setting a section 366.26 hearing at which adoption may be considered.

In re T. S. ,(7/14/09)
175 Cal. App. 4th 1031, 96 Cal. Rptr. 3d 706
Third Appellate District

Issue:

Is the court obligated to adopt the permanent plan identified by the tribe?

Facts:

The dependency petition alleged substance abuse by the minor's parents. The minor's mother had Indian heritage. Her tribe informed the juvenile court that the minor was an Indian child and that the tribe was appearing in the proceedings. The allegations in the petition were sustained. The father declined to participate in further reunification services. The tribe indicated that it wanted the minor placed in a guardianship with maternal cousins. The cousins had criminal histories, however, and placement with them was not approved. An adoptive placement was identified in which one of the parents was a member of the tribe.

Holding:

The court held that the juvenile court did not abuse its discretion when it declined to apply an exception to adoption under Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(vi)(II). ***Although the minor's tribe had identified guardianship as the permanent plan for the minor, the juvenile court was not obligated to adopt the permanent plan designated by the tribe without conducting an independent assessment of detriment. Because there were no appropriate family or tribal members who were willing to assume guardianship of the minor, the juvenile court did not err.***

OUTCOME: The court affirmed the order terminating parental rights.

In re Y.G.(6/23/2009)
175 Cal. App. 4th 109, 95 Cal. Rptr. 3d 532
Second Appellate District, Division Four

ISSUE:

Whether the statutory language of WIC 300, subdivision (b) permits the juvenile court to consider a parent's misconduct with an unrelated child in determining a substantial risk of serious physical harm by the parent to their own child.

FACTS;

Jocelyn G. a child of 18 months was under the care of Y.G.'s grandmother. Mother and Y.G. were at the grandmother's home on the day Jocelyn G. was injured. Y.G. and Jocelyn G. were approximately the same age. Jocelyn G. sustained significant swelling and bruising to her face and head. Jocelyn G's mother took her to the hospital, photos clearly showed a hand print on her face. Police were called when it was determined she was a victim of physical abuse.

Mother and grandmother of Y.G. gave false explanations for the injuries. After failing a lie detector test mother admitted to hitting Jocelyn in the face because she would not stop crying. Mother later recanted her confession saying she made the statements because of police threats to take Y.G.

At the jurisdictional hearing, the Police detective and the CSW testified as to mother's inconsistent statements. The police detective also denied any threats were made. The court explicitly found the mother not credible. The court rejected mother's contention that it could not consider her misconduct in determining whether it should sustain the petition. This contention was brought up at Detention and during the Jurisdictional hearing by an oral motion to dismiss the petition . The court asked mother's counsel if they had any authority on this issue. They did not and the court took the matter under submission to do its own research. The next day the court, after a hearing, sustained the (b).

HOLDING:

A. **Mother did not need to file a demurrer to raise the same points that were raised orally.** By raising the contention at Detention & Jurisdiction, the record had been preserved for appellate review.

B. Subdivision (B) permits consideration of a parent's actions with an unrelated child. The appellate court looked to the legislative intent under 355.1(b) which provides that evidence of a parent's misconduct with another child is admissible at a hearing under WIC 300. "This provision is consistent with the principle that a parent's past conduct may be probative of current conditions if there is reason to believe that the conduct will continue. "
Factors that the court can consider, in making a determination of substantial risk: when the conduct occurred, whether the unrelated child is of the same age as the child in the petition, and the reason for the misconduct.

In re Z.C. (10/02/09)
178 Cal. App. 4th 1271
First Appellate District, Division Two

ISSUE:

Whether the court had the authority, pursuant to WIC 366.3(b), to order a county to provide reunification services to a legal guardian when deciding if it was in the best interests of the child to maintain the existing legal guardianship.

FACTS:

In 1992, Z.C. was removed from mother's custody just after birth and Z.G., maternal aunt, was appointed legal guardian pursuant to WIC 366.26. Eventually Z.C. developed behavior problems and in 2004 was placed in foster care. Her behavior improved and she was placed back with legal guardian under informal supervision.

In 2008, due to the child's behavioral problems and the legal guardian's poor health, Alameda County Social Services filed a WIC 387 petition seeking a more restrictive placement and recommended six months of reunification for the legal guardian. The child was detained. On November 6, 2008, the agency filed a WIC 388 petition, requesting the court to terminate the legal guardianship and that it would be in the best interests of the child to attempt to return the child to the home of the legal guardian with six months of services. A hearing was granted.

At the hearing, the agency argued that reunification services should be limited to six months. Moreover, the agency argued that the court had no authority to order the agency to provide services to the legal guardian, that the court could only recommend to the agency to provide services. Therefore, the agency had the discretion to provide services and also had the discretion when to terminate them. Z.C. and Z.G. contended that reunifications services to the legal guardian under WIC 366.3 were not subject to a time limit of six months. The court found that WIC 366.3 did not contain a maximum length of time that services should be offered to maintain a legal guardianship but rather, the length of time should be in the best interests of the child. The court dismissed the WIC 388 petition, sustained the WIC 387 allegations and ordered the agency to "provided services under WIC 366.3 in the best interests of the minor."

HOLDING:

Under the plain meaning of the statute WIC 366.3(b) when considered within the context of juvenile dependency law, WIC 366.3(b) provides the juvenile court with the power to order the social services agency to provide reunification services to a legal guardian when deciding whether it is in the best interests of the child to maintain the existing legal guardianship.

The court observed that the dependency scheme presumptively favors guardianship over long-term foster care. The court opined that requiring the dependency court under WIC366.3(b) to consider the county's report regarding the necessity of reunification services to maintain the legal guardianship without providing it with the concomitant power to order reunification services would result in an absurdity

Further, the court concluded that the dependency court did not violate the separation of powers doctrine when it ordered the county to provide reunification services to the legal guardian.

THURSDAY – JUNE 3, 2010

3:30 pm – 4:45

Workshop Session IV

IV.C.

education credit:
MCLE

target audience:
attorneys
court administrators
probation officers
self-help staff
social workers

Expanding Self-Help Centers to Assist Victims of Crime

Self-help centers are affiliated with courts in every county in California. They are a powerful resource that can be tapped to help victims of crime. While District Attorney based Victim Advocate programs are currently available to assist victims, limited resources for these programs generally limit victim advocates to only helping the victims of violent crime. In order to reach a wider group of crime victims, self-help materials for victims have been developed by the AOC with an eye towards explaining the criminal and juvenile delinquency court system and restitution recovery. A training manual for self help center staff to guide them in assisting crime victims has also been created. These materials as well as ways that self-help centers can be expanded to help crime victims will be discussed.

Learning Objectives:

- Gain an understanding of the challenges that victims of crime can encounter when trying to seek and obtain restitution.
- Understand the basic process of obtaining victim restitution.
- Appreciate the need to use the judicial council form for restitution judgments.
- Become familiar with the materials that have been developed to assist victims of crime receive their restitution.

Faculty:

- **Julise Johanson**
  Family Law Facilitator and Self Help Center Attorney, Superior Court of Yolo County
- **Hon. Edward Lee**
  Judge, Superior Court of Santa Clara County

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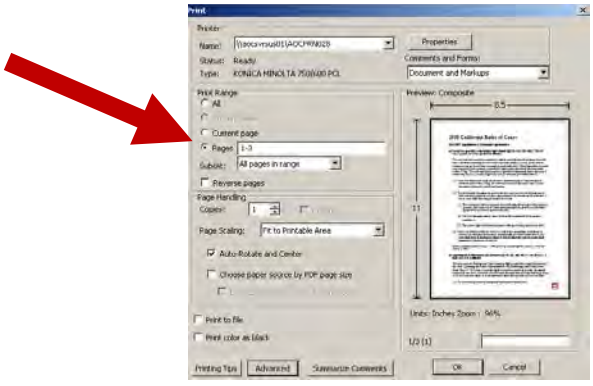

"Show Me the Money!"

Effective Self-Help Centers
That Actually Work

Victim Based Systems

- Starts with LEOs/DDAs/DPOs
  - Refer to VWAC!
    - Outreach Materials
      - Publicity / Websites

Judicial Officers

- Consistently Order Restitution in EVERY CASE
- Systemic Approach
  - Felonies
    - Probation Reports / Hearings
  - Misdemeanors – Problematic
    - Volume / Resource Issues
      - Amount TBD / "General Orders"

Judicial Officers - II

- Make the Darn Order in Every Single Case!!
  - (It's Free)
  - Order Must be Complete, Advises of Hearing, Order 10% Interest

Enforcement

- Probation – "Willful Failure to Pay" = VOP
  - Petition / Vickers Letter / Oral Advice
  - Summary Review & Possible Revocation/ Custody Status?
  - Formal Hearing - Preponderance of Evidence
  - Resentencing
    - Jail / Prison
    - Restitution Centers (Currently Closed)

Enforcement - II

- Civil Enforcement of Criminal Restitution Order
  - Enforceable as a civil judgment
    - ("Now What??)
      - Liens / Garnishment / Levys / Attachments
    - VWAC "Best Practices"
      - Advice and Education
      - Attorney Referral

Self Help Centers

- Accessible
  - Web Resources
  - Physical Facilities
  - Staffing
  - Materials
- Funding – The Challenge Ahead

Best Practices Colloquy

- Horror Stories
- Success Stories
- Networking

YOLO SUPERIOR COURT RESTITUTION GUIDE

Yolo County Superior Court
725 Court St.
Woodland, CA 95695
Family Law Facilitator's Office and
Self-Help Center

RESTITUTION ORDERS

- VICTIM'S RIGHT
- VICTIM SATISFACTION
- FOCUS OF GUIDE
  - HOW TO OBTAIN ORDER AND JUDGMENT
  - HOW TO COLLECT ON THE JUDGMENT

DIFFERENCE IN RESTITUTION TYPES

- RESTITUTION FINE
  - PENALTY ASSESSMENT
  - FUNDS VICTIMS COMPENSATION PROGRAM
  - SET AMOUNTS PRESCRIBED BY STATUTE- CA $200 - $10,000
- RESTITUTION ORDER
  - REIMBURSES ECONOMIC LOSS (PRIMARILY)
  - JUDGE MUST ORDER, if conviction and prove amount
  - FILE CR110 TO OBTAIN ABSTRACT OF JUDGMENT
  - NOT DISCHARGEABLE
  - NO NEED TO RENEW – good forever

HOW TO OBTAIN RESTITUTION ORDER

- PROBATION OBLIGATION TO NOTIFY VICTIM
- HAPPENS AT SENTENCING OR PLEA
- AVOID MINUTE ORDERS AND TO BE DETERMINED (TBD) ORDERS
- CR-110

Date Filed : 12/14/99

District Attorney : D.BOUSER — Continuances: 2P
Defense Attorney : CDF-REGINA FILIPPONE BY FISHER — Age in Days: 116
Custody Status : N/A - Bail: — Next Trial : 12/16/00

Charge Information

Ct.	Type	Charge	Description	Plea	Status Rsv
001	ASSAULT	459 PC	Burglary	None	P
001	INFOR	459 PC (1st)	Burglary	G	Convict F

Case Action Information

Action	Dty	Description	Status
12/13/00	S4	Relationship (SENT)	Active

Honorable HOWARD D. WEBSTER Presiding
People Represented by D.BOUSER, DDA
Defendant Represented by CDF-REGINA FILIPPONE BY FISHER
Clerk: P. Gravdy
Court Reporter: S Lash
Defendant Present
PROBATION ORDERED TERMINATED EARLY.
FURTHER ORDER: Pay restitution pursuant to Section 1202.4 PC directly to the victim(s).
DEPT OF CORRECTIONS TO COLLECT VICTIM REST IN THE AMT OF 250.00 PAYABLE TO NANCY [redacted]
Defendant Released.
DEFT SENTENCED TO PRISON IN EXP001981
Minute Order printed to Robert Presley Detention Center.
MINUTE ORDER OF COURT PROCEEDING

**** END OF CASE PRINT ****
"This must be in red to be a "CERTIFIED COPY"

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT

WWW.COURTINFO.CA.GOV/FORMS

Legal Solutions, Essential Forms, &

Other Various Form Programs
CR110/JV790

INSTRUCTIONS – CR112

DEFENDANT'S STATEMENT OF ASSETS

WWW.COURTINFO.CA.GOV/FORMS

CR115

INSTRUCTIONS – CR117

•DEFENDANT REQUIRED TO DISCLOSE ALL ASSETS

•MUST BE COMPLETED PRIOR TO SENTENCING

•VICTIM SHOULD RREQUEST THROUGH SELF-HELP CENTER

CRIME VICTIM INTERROGATORIES

CR200

- USE AS FOLLOW-UP TO DEFENDANT'S STATEMENT OF ASSETS
- MAY BE USED ONCE EACH CALENDAR YEAR

COLLECTION FROM ADULT OFFENDER

- INCARCERATION
  - CDCR MUST COLLECT IF IN STATE PRISON
  - 50% FROM TRUST ACCOUNT
  - 50% OF WAGES – (inmates earn less than $1/hr.)
  - CDC 1707 – WRITTEN REQUEST REQUIRED
- PAROLE
  - CDCR HAS JURISDICTION, BUT PAROLE AGENTS ONLY COLLECT FROM VOLUNTEERS
  - TO MOVE OUT OF STATE, PAROLEE MUST PAY

PROBATION

- MISDEMEANORS – INFORMAL PROB.
- FELONY – FORMAL PROB, UP TO 5 YRS
- PROBATION REPORT SHOULD INCLUDE REQUEST THAT PAYMENT OF RESTITUTION IS A CONDITION OF PROBATION
- YOLO SUPERIOR COURT PAYMENT CENTER COLLECTS - continues collection after probation ends – 20% Admin. Fee

COLLECTION FROM JUVENILE OFFENDER

- PARENTAL LIABILITY
  - $25,000 OR $60,000
- CYA
  - CERTIFIED ORDER
  - 50% OF TRUST ACCOUNT
  - RESTORATIVE JUSTICE
- PAROLE
  - PAROLE AGENTS DEVELOP PAYMENT PLANS
- COUNTY SUPERVISION
  - MAKE A CONDITION OF PROBATION
  - Yolo Superior Court Payment Center

COLLECTION AS A CIVIL JUDGMENT

- DEBTOR'S EXAM (AT-138/EJ-125)
- INCOME DEDUCTION ORDER (CR-118)
- LIEN ON PROPERTY
  - NOTICE OF LIEN (AT-180/EJ-185)
- LEVYING PROPERTY
  - WRIT OF EXECUTION (EJ-130)
  - NOTICE OF LEVY (EJ-150)
- MAY NEED COLLECTION ATTORNEY

CALIFORNIA JUDGES BENCHGUIDES

Benchguide 83

RESTITUTION

[REVISED 2009]

ADMINISTRATIVE OFFICE OF THE COURTS

EDUCATION DIVISION/CENTER FOR JUDICIAL EDUCATION AND RESEARCH

ABOUT CJER

The California Center for Judicial Education and Research (CJER), as the Education Division of the Administrative Office of the Courts (AOC), is responsible for developing and maintaining a comprehensive and quality educational program for the California judicial branch. Formed in 1973 as a joint enterprise of the Judicial Council and the California Judges Association, CJER supports the Chief Justice, the Judicial Council, and the courts by providing an extensive statewide educational program for judicial officers and court staff at both the trial and appellate levels. It includes orientation programs for new judicial officers, court clerks, and administrative officers; continuing education programs for judicial officers, court administrators, and managers; an annual statewide conference for judicial officers and court administrators; video and audiotapes; and judicial benchbooks, benchguides, and practice aids.

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Published April 2009; covers case law through 44 C4th, 169 CA4th, and all legislation to 1/1/2009.

Benchguide 83

RESTITUTION

I. [§83.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of the law and procedure relating to restitution fines, fees, and orders in adult, juvenile, and diversion matters. Sections 83.2–83.3 contain procedural checklists. Sections 83.4–83.90 summarize the applicable law. Sections 83.91–83.97 contain forms. Sections 83.98–83.99 provide information about California's program to compensate victims of crime for unreimbursed losses and the California Department of Corrections and Rehabilitation (CDCR) restitution collection program.

II. PROCEDURAL CHECKLISTS

A. [§83.2] Restitution Fines

(1) *Before accepting a plea of guilty or no contest:*

(a) *Advise defendant that the sentence will include a restitution fine of $200 to $10,000 for a felony conviction, and $100 to $1000 for a misdemeanor conviction, in addition to any other fine the court may impose.* For discussion, see §83.11.

☛ JUDICIAL TIPS: The admonition may be, and often is, part of a written form. Defendant should be advised of the range of the fine and not merely the possible maximum. The admonition should also cover the probation revocation and parole revocation restitution fines. For discussion, see §83.11; for script and form, see §§83.91–83.92.

(b) *Determine whether the disposition is part of a plea bargain.*

- *If so, ascertain on the record whether the bargain limits the court's discretion with respect to the restitution fine.*

☛ JUDICIAL TIP: Proposed dispositions that purport to waive the fine or set it below the statutory minimum should be rejected. Pen C §1202.4(b); see §83.5.

(2) *Before sentencing:*

(a) *Preliminarily determine the amount of the restitution fine by considering*

- *Any limitation imposed by a negotiated plea.* Illustrations: fine to be in amount of statutory minimum; "wobbler" to be sentenced as misdemeanor.

☛ JUDICIAL TIP: In the aftermath of a plea bargain that failed to address the restitution fine, which was not mentioned in the court's advisements of the consequences of the plea, the court must either impose the minimum fine or give defendant an

opportunity to withdraw the plea. But if the court, in accepting the plea, advises the defendant that a restitution fine at or above the minimum will be imposed, the court is not precluded from imposing a fine above the statutory minimum. For discussion, see §83.12.

- *The statutory range:*

	Minimum	*Maximum*
Misdemeanor	$100	$1,000
Felony	$200	$10,000

For juvenile offenders, see §83.9.

- *Seriousness and circumstances of the offense.* Pen C §1202.4(b)(1), (d).
- *Inability to pay*. Pen C §1202.4(d).

☛ JUDICIAL TIPS: (1) Defendant has the burden of showing inability to pay. Pen C §1202.4(d). (2) Inability to pay only affects the amount of the fine above the statutory minimum. Pen C §1202.4(c). (3) The California Department of Corrections and Rehabilitation (CDCR) collects restitution fines from the wages and trust account deposits of prisoners. See §§83.5, 83.15, 83.23.

- *Defendant's economic gains, if any, from the crime; losses suffered by others; the number of victims, and any other relevant factors.* Pen C §1202.4(d); for discussion, see §83.14.

☛ JUDICIAL TIP: Judges often consider the amount of restitution to victims and other fines defendant will be ordered to pay. Again, these considerations only affect the amount of the restitution fine in excess of the statutory minimum.

- *The formula set out in Pen C §1202.4(b)(2) permits, but does not require, the court to set a restitution fine in a felony case as follows:* $200 x number of years to be served x number of felony counts of which defendant was convicted.

☛ JUDICIAL TIP: Some judges simplify the formula to $200 x number of counts. In the view of some judges, a life sentence calls for the maximum fine.

(b) *Determine whether an additional probation revocation restitution fine must be imposed and suspended under Pen C §1202.44.* Such a fine is mandatory whenever a defendant receives a conditional sentence or a sentence that includes a period of probation. For discussion, see §83.6.

(c) *In a felony case determine whether an additional parole revocation restitution fine must be imposed and suspended under Pen C §1202.45*. Such a fine is mandatory whenever defendant will be sentenced to state prison and will be eligible for parole. For discussion, see §83.7.

(d) *Consider whether there are compelling and extraordinary reasons not to impose a restitution fine.* Pen C §1202.4(c); for discussion, see §83.20. If yes, make notes for statement of reasons and proceed to (e); if no, proceed to (f).

☛ JUDICIAL TIPS: Inability to pay is not an adequate reason. Pen C §1202.4(c). Nor, in the view of most judges, is a prison sentence. See §§83.5, 83.15.

(e) *Determine either (i) how much community service to require of defendant instead of the restitution fine or (ii) whether there are compelling and extraordinary reasons to waive the requirement.* Pen C §1202.4(n). In the event of (ii), make notes for a second statement of reasons at sentencing.

(f) *Determine whether the offense is one for which an additional restitution fine may be imposed under Pen C §294 for specified acts of misconduct against children and for child pornography*. (Note: The CDCR does not have the authority to collect restitution fines under Pen C §294.) For discussion, see §83.8. If yes, proceed to (g); if no, proceed to 3.

(g) *Consider whether to impose an additional restitution fine, and if so, in what amount.* Pen C §294. See §83.8.

(3) *At sentencing:*

(a) *Consider matters raised by counsel and make final decision concerning the restitution fine.*

☛ JUDICIAL TIPS: (1) Restitution fines are normally imposed at the sentencing hearing; defendant is not entitled to a separate hearing. See §83.13. (2) A judge who is inclined to impose an additional restitution fine under Pen C §294 should so inform defendant at the outset of the sentencing hearing and give defendant an opportunity to be heard.

To impose a restitution fine proceed to (b); to waive the fine proceed to (f).

(b) *Impose a restitution fine (Pen C §1202.4).*

☛ JUDICIAL TIPS:

- No portion of this fine may be stayed, suspended, or offset by the amount of victim restitution defendant is ordered to pay. See §83.21.
- As long as the fine is imposed, findings are unnecessary (Pen C §1202.4(d)) and usually not made. See §83.18.
- The court should not enter a separate money judgment. Although restitution fines are enforceable in the manner of money judgments, the court may not actually enter a money judgment against a defendant for these amounts. See §83.25.

(c) *If defendant is granted probation:*

- *Make payment of the fine a condition of probation.* Pen C §1202.4(m).
- *Impose an additional fine in the same amount as the restitution fine and order it suspended unless probation is revoked.* Pen C §1202.44. The court cannot waive or reduce this fine absent compelling and extraordinary reasons, which must be stated on the record. See §83.6.

(d) *If defendant is sentenced to prison, impose an additional fine in the same amount as the restitution fine and order it suspended unless parole is revoked.* Pen C §1202.45.

☛ JUDICIAL TIP: It is unnecessary to order this fine when defendant is ineligible for parole. See §83.7.

(e) *Impose any additional discretionary restitution fine.* Pen C §294. See §83.8.

(f) *When no restitution fine is imposed:*

(i) *State compelling and extraordinary reasons for this action on the record and*

(ii) *Order defendant, as a condition of probation, to perform community service as specified by the court instead of the fine, or state on the record compelling and extraordinary reasons for not ordering community service.* Pen C §1202.4(n). See §83.20.

☛ JUDICIAL TIP: This statement should be in addition to the statement of reasons for not imposing a restitution fine. Pen C §1202.4(n).

B. [§83.3] Victim Restitution

(1) *Before accepting a plea of guilty or no contest:*

(a) *Advise defendant that the sentence may include an order to pay restitution to the victim in an amount to be determined by the court.* For discussion, see §83.31; for form, see §83.92.

☛ JUDICIAL TIPS: (1) When it is clear that the court will order restitution, many judges say so at this point. (2) The admonition can be incorporated into a written form.

(b) *Advise defendant that he or she is entitled to a hearing in court to dispute the amount of restitution but not the actual order to make restitution.* See §83.41.

☛ JUDICIAL TIP: Many judges prefer to give this advice at the time of sentencing.

(c) *When there is a* Harvey *waiver that will give the court authority to consider dismissed counts for restitution purposes, make sure that the waiver is stated clearly on the record, that its scope is clear, and that defendant understands it.* For discussion, see §83.87.

(2) *Before sentencing consider the probation report, when available, and*

(a) *Whether restitution should be ordered*

- Because one or more victims suffered or will suffer an economic loss as a result of the crime(s) of which defendant was convicted (Pen C §1202.4(a)(1); for discussion, see §§83.39–83.83; or
- For other reasons (*e.g.*, *Harvey* waiver; hit-run victim; see §§83.84–83.90).

☛ JUDICIAL TIP: Judges may order victim restitution, if appropriate, for infractions. Although restitution *fines* are expressly limited to felonies and misdemeanors, there is no such express limitation with respect to victim restitution. See Pen C §§19.7 (statutes relating to misdemeanors generally applicable to infractions), 1202.4(a)(1) (legislative intent that crime victims who suffer economic loss receive restitution), 1202.4(f) (restitution required in every case in which victim suffered economic loss as result of defendant's crime), and 1203b (courts may grant probation in infraction cases).

(b) *Whether the report includes detailed loss figures for each victim and whether they appear to be reasonable.*

(3) *At sentencing*

(a) *Announce either:*

(i) *The court's preliminary views on restitution and inquire whether the victim or the defendant wishes to be heard.* If yes, proceed to (c); if no, proceed to (d) to order restitution.

Or

(ii) *That the probation report does not contain (sufficient) restitution information and proceed to (b).*

(b) *When the probation report lacks restitution data:*

(i) *Ascertain whether the victim is present.* If yes, receive the victim's loss information; permit defendant to challenge it; upon request continue to give defendant time to rebut it. If no, proceed to (ii).

Or

(ii) *When the victim is not present and the report recommends a continuance, grant a reasonable continuance as to restitution issues.*

☛ JUDICIAL TIPS:

- Judges usually sentence the defendant even though restitution will be determined later. In such cases, the judge should include in the sentence an order for the defendant to pay restitution in an amount to be determined by the court. The court retains jurisdiction for the purpose of imposing restitution until the losses are determined.
- Judges often seek a waiver of defendant's presence at the subsequent restitution hearing. This is particularly important when the defendant is sentenced to prison. See §83.69.

Or

(iii) *When the victim is not present, was notified, has not made a claim, and the report does not request a continuance, do not order restitution, except for any benefits that the victim received from the Restitution Fund.* Some judges reserve jurisdiction to order restitution unless the prosecutor states that none is due. See §83.69.

☛ JUDICIAL TIP: In many cases, the victim is not notified, and the prosecutor may not have any information regarding losses. In these situations, the court should order restitution for benefits that the victim received from the Restitution Fund and reserve jurisdiction to order any additional restitution.

(c) *Conduct a hearing when the victim or defendant requests one.*

☛ JUDICIAL TIP: The hearing does not have the formality of a trial. Hearsay is admissible. For discussion, see §83.44.

(d) *Order defendant to pay restitution* (for discussion, see §§83.68–83.73):

Use a separate order for each victim. For form, see §83.93.

- *Identify each loss separately by name of victim and amount; do not merely order a lump sum payment.*
- *Specify whether interest (at 10 percent) will accrue from the date of the order or of the loss.* Pen C §1202.4(f)(3)(G).
- *Specify whether codefendants are jointly and severally responsible for restitution.*
- *Do not delegate determination of restitution amount unless the defendant consents to a determination by the probation officer; determination of the number and dollar amounts of installment payments is often delegated to the probation department or other county agency.* For discussion, see §83.70.
- *When the sentence includes probation, make payment of the restitution order a condition of probation.* Pen C §1202.4(m).
- *Order defendant to pay restitution to the California Victim Compensation and Government Claims Board to reimburse payments to the victim from the Restitution Fund.* Pen C §1202.4(f)(2).

☛ JUDICIAL TIP: The court should not enter a separate money judgment. Although restitution orders are enforceable in the manner of money judgments, the court may not actually enter a money judgment against a defendant based on an order to pay restitution. See §83.35.

(e) *Make and stay a separate income deduction order upon determining that defendant has the ability to pay restitution.* Pen C §1202.42; for discussion, see §83.76. For sample income deduction order and related forms, see §§83.95–83.97.

☛ JUDICIAL TIP: Penal Code §1202.42 does not apply to juvenile court restitution or to any restitution order not made under Pen C §1202.4. For discussion of orders to apply a specified portion of earnings to restitution, see §83.77.

III. APPLICABLE LAW

A. Restitution Fine

1. [§83.4] Purpose of Fine

Restitution fines are a major source of financing the state Restitution Fund (see Pen C §§1202.4(e), 1202.44, 1202.45); penalty assessments on

other fines provide additional financing. See Pen C §1464. Eligible victims of criminal acts may obtain restitution from the Restitution Fund, which is administered by the California Victim Compensation and Government Claims Board. For detailed information about the Board's Victim Compensation Program, see §83.98.

2. Major Statutory Requirements

a. [§83.5] Restitution Fine (Pen C §1202.4)

The principal statutes that govern the imposition of restitution fines on adult offenders are Pen C §§1202.4, 1202.44, and 1202.45. For discussion of Pen C §§1202.44 and 1202.45, see §83.6–83.7; for juvenile offenders, see §§83.9–83.10. Key features of Pen C §1202.4 include:

- *Mandatory nature of fine.* Imposition of the fine is mandatory except for compelling and extraordinary reasons stated on the record. See §83.20.
- *Statutory minimums and maximums:*

Felonies:	$200–$10,000
Misdemeanors:	$100–$1,000

- *Limited effect of inability to pay.* Defendant's lack of ability to pay does not justify waiver of the fine. It may be considered only in setting the amount above the statutory minimum. For discussion, see §83.15; for discussion of other factors the court should consider in setting the fine, see §83.14.
- *Hearing.* Defendant is not entitled to a separate hearing for determining the amount of the fine. See §83.13.
- *Community service.* When the court does not impose a restitution fine, defendant must be ordered to perform community service except for compelling and extraordinary reasons stated on the record. See. §83.20.
- *Probation.* Grants of probation must include payment of the restitution fine as a condition.

b. [§83.6] Probation Revocation Restitution Fine (Pen C §1202.44)

When a defendant receives a conditional sentence or a sentence that includes a period of probation, the court must impose an additional restitution fine. Pen C §1202.44. In felony cases, the fine applies to both defendants who are placed on probation after the court has suspended imposition of sentence and to defendants who are placed on probation after the court has suspended execution of sentence. *People v Taylor*

(2007) 157 CA4th 433, 436–439, 68 CR3d 682. The probation revocation restitution fine has the following features (Pen C §1202.44):

- It must be imposed in addition to, not instead of, the restitution fine required by Pen C §1202.4;
- The amount of the fine is the same as the amount imposed under Pen C §1202.4;
- The fine does not become effective unless and until the probation or conditional sentence is revoked; and
- The court may not waive or reduce the fine, absent compelling and extraordinary reasons stated on the record.

c. [§83.7] Parole Revocation Restitution Fine (Pen C §1202.45)

When a defendant is sentenced for one or more felonies and will be statutorily eligible for parole, the court must impose an additional restitution fine. Pen C §1202.45. The parole revocation restitution fine has the following features (Pen C §1202.45):

- It must be imposed in addition to, not instead of, the restitution fine required by Pen C §1202.4.
- The amount of the fine is the same as the amount imposed under Pen C §1202.4.
- The fine shall be suspended unless and until parole is revoked.

The parole revocation restitution fine cannot be imposed unless the defendant is eligible for parole. Pen C §1202.45; see *People v Oganesyan* (1999) 70 CA4th 1178, 1183, 83 CR2d 157 (defendant sentenced to life in prison without possibility of parole not subject to fine); *People v Brasure* (2008) 42 C4th 1037, 1074, 71 CR3d 675 (defendant who is sentenced to death for capital murder and sentenced to determinate prison term under Pen C §1170 for several other offenses is subject to fine).

d. [§83.8] Discretion To Impose Additional Restitution Fine (Pen C §294)

Penal Code §294 permits the court to impose an additional restitution fine on defendants convicted of specified offenses. Although labeled a restitution fine, it goes to the Restitution Fund only for the purpose of being transferred to the county children's trust fund for child abuse prevention.

Offenses. The court may impose the added fine upon conviction of any of the following offenses (Pen C §294(a)):

- Pen C §273a (child abuse);

- Pen C §273d (inflicting corporal injury on child);
- Pen C §288.5 (multiple sexual conduct with child under 14);
- Pen C §§311.2–311.3 (obscene depiction of minor);
- Pen C §647.6 (child molestation);

as well as for any of the violations listed below when the victim was under the age of 14 at the time of the offense (Pen C §294(b)):

- Pen C §261 (rape);
- Pen C §264.1 (rape in concert with others);
- Pen C §285 (incest);
- Pen C §286 (sodomy);
- Pen C §288a (oral copulation);
- Pen C §289 (sexual penetration by foreign or unknown object).

Amount. The maximum is $5000 for a felony and $1000 for a misdemeanor, in addition to the mandatory restitution fine.

Ability to pay. Defendant's ability to pay *is* a factor in deciding whether to impose the fine and in what amount.

Hardship on victim. When the defendant is a member of the victim's immediate family, the court is to consider whether the added fine would result in hardship for the victim. Pen C §294(c).

☛ JUDICIAL TIP: When the court is considering a fine under Pen C §294, it should so advise the defendant and afford an opportunity for a hearing on ability to pay, victim hardship, and other relevant matters.

The California Department of Corrections and Rehabilitation (CDCR) does not have the authority to collect restitution fines under Pen C §294.

e. [§83.9] Juvenile Offenders (Welf & I C §730.6)

Juvenile offenders are also subject to mandatory restitution fines. Welf & I C §730.6. The principal features of the provisions governing juveniles are:

- The felony fine range is $100 to $1000; the misdemeanor fine cannot exceed $100. There is no prescribed minimum misdemeanor fine. Welf & I C §730.6(b)(1).
- The factors that the court should consider in setting the fine are essentially the same as for adult offenders. See Welf & I C

§730.6(d)(1). See also chart in §83.10. Express findings are unnecessary and usually not made. See Welf & I C §730.6(e).

- Imposition of the fine is mandatory, except for compelling and extraordinary reasons in felony cases. The reasons must be stated on the record. Welf & I C §730.6(g). The restitution fine cannot be waived for misdemeanors, probably because there is no statutory minimum fine with respect to them.
- When the fine is waived, the minor must be required to perform community service except for compelling and extraordinary reasons stated on the record. Welf & I C §730.6(n), (o).
- Inability to pay does not justify failure to impose a restitution fine. Welf & I C §730.6(c). It is a factor in setting the amount of the fine. The offender has the burden of showing inability, but is not entitled to a separate hearing. Welf & I C §730.6(b), (d)(2). In determining a juvenile offender's ability to pay, the court may consider the juvenile's future earning capacity. Welf & I C §730.6(d)(2).
- Payment of the fine must be a condition of probation. Welf & I C §730.6(*l*).
- Parents and guardians may be jointly and severally liable. Welf & I C §730.7.

f. [§83.10] Chart: Comparison of Restitution Fine Provisions for Adult and Juvenile Offenders (Pen C §§1202.4, 1202.44, 1202.45; Welf & I C §730.6)

	Adult	*Juvenile*
Amount of fine		
Misdemeanor	$100–$1000	Not more than $100
Felony	$200–$10,000	$100–$1000
Factors to consider when setting fine above statutory minimum	All relevant factors including but not limited to: • Inability to pay • Seriousness of offense • Circumstances of commission • Economic gain by offender • Losses to others from offense	

	Adult	*Juvenile*
	Number of victims Optional formula for multiple felonies	
Burden of showing inability to pay when court sets fine above statutory minimum	Offender	
Waiver	Only for compelling and extraordinary reasons stated on record; inability to pay not adequate reason	
		No waiver when offense is a misdemeanor
Community service	Mandatory when fine waived except for compelling and extraordinary reasons stated on record	
Effect of restitution to victim	Cannot be offset against fine	
Relation to probation	Payment must be condition of probation	
Probation revocation fine	Must be imposed separately in same amount as restitution fine and becomes effective on revocation of probation or of a conditional sentence	Inapplicable
Parole revocation fine	Must be imposed separately in same amount as restitution fine and suspended unless and until parole is revoked	Inapplicable

3. Procedure at Time of Guilty Plea

a. [§83.11] Advisement When Taking Plea

A restitution fine is a direct consequence of a guilty or no contest plea. Accordingly, the court must advise defendant of the minimum and maximum fines. *People v Walker* (1991) 54 C3d 1013, 1022, 1 CR2d 902. For script and form, see §§83.91–83.92.

Error that results from not giving this advice is waived unless called to the attention of the trial court at or before sentencing. *People v Walker, supra.* Upon timely objection, the court must determine whether the error was prejudicial, and if so, either impose only the minimum fine or permit defendant to withdraw the plea. *People v Walker, supra,* 54 C3d at 1023–1024. The major factor in determining prejudice is the size of the fine that the court imposed. *People v Walker, supra.*

The *Walker* case should not be understood as finding that the restitution fine has been and will be subject of plea negotiations in every case. The parties are free to make any lawful bargain they choose, including leaving the imposition of fines to the discretion of the sentencing court. *People v Dickerson* (2004) 122 CA4th 1374, 1384–1385, 22 CR2d 854.

b. [§83.12] Silent Plea Bargain

When a plea bargain fails to address the restitution fine, the court must either reduce the fine to the minimum or allow defendant to withdraw the plea. *People v Walker* (1991) 54 C3d 1013, 1028–1029, 1 CR2d 902. Defendant does not waive this issue by failing to raise it at the time of sentencing; it may be raised on appeal. If the issue is raised after sentencing, the proper remedy generally is to reduce the fine to the statutory minimum and to leave the plea bargain intact. *People v Walker, supra.*

When a defendant enters a plea bargain that makes no mention of the imposition of a restitution fine, but the court, in accepting the plea, accurately advises the defendant that it will impose a restitution fine, and that the amount may be anywhere in the statutory range, the court is not thereafter precluded from imposing a restitution fine above the statutory minimum. *People v Crandell* (2007) 40 C4th 1301, 1307–1310, 57 CR3d 349. The court in *Crandell* stated that the lack of an agreement on the restitution fine demonstrates that the parties intend to leave the amount of the fine to the discretion of the court. 40 C4th 1309–1310. *Crandell* distinguished *People v Walker, supra,* in which the restitution fine was neither an element of the plea bargain nor mentioned in the court's advisements of the consequences of the plea. 40 C4th at 1307–1310.

☛ JUDICIAL TIPS:

- Counsel should be asked to state any agreement with respect to the fine when putting the proposed terms of negotiated plea on the record.
- When the negotiations leave the fine open, the court should explain to the defendant the minimum and maximum fines or have counsel do so and obtain defendant's oral assent.
- The court should give the Pen C §1192.5 admonition (relating to the defendant's right to withdraw the plea) whenever required by that statute. See *People v Walker*, *supra*, 54 C3d at 1030; *People v Crandell*, *supra*, 40 C4th at 1310.

4. Determination of Fine

a. [§83.13] No Separate Hearing

The defendant is not entitled to a hearing apart from the sentencing hearing with respect to the restitution fine. Pen C §1202.4(d).

☛ JUDICIAL TIP: Both sides should be given an opportunity to address the matter at the sentencing hearing, because, inter alia, defendant has the burden of demonstrating inability to pay. Pen C §1202.4(d).

b. [§83.14] Factors

Statutory factors. In determining the amount of the fine, the court should consider any relevant factor (Pen C §1202.4(d)), including:

- Inability to pay (for discussion, see §83.15);
- Seriousness of the offense;
- Circumstances of the offense;
- Defendant's economic gain, if any, from the crime;
- Pecuniary and intangible losses of victims or dependents of victims;
- Number of victims.

Criminal record. Defendant's criminal record is a relevant factor. *People v Griffin* (1987) 193 CA3d 739, 741–742, 238 CR 371; Cal Rules of Ct 4.411.5, 4.414.

Optional formula. In multicount felony cases the court may set the fine by using the formula stated in Pen C §1202.4(b)(2). See §83.16.

Juveniles. Factors to consider in juvenile cases are virtually the same as in cases involving adult offenders. See chart in §83.10.

c. [§83.15] Ability To Pay

Defendant is presumed to be able to pay the restitution fine and has the burden of demonstrating inability. Pen C §1202.4(d); *People v Romero* (1996) 43 CA4th 440, 448–449, 51 CR2d 26.

The court may consider future earning capacity. Pen C §1202.4(d); *People v Gentry* (1994) 28 CA4th 1374, 1376–1377, 34 CR2d 37 (court may consider defendant's future prison wages as well as possibility of employment when defendant is released from prison).

The court must impose the minimum fine even when defendant is unable to pay it. Pen C §1202.4(c); Welf & I C §730.6(b); *People v Draut* (1999) 73 CA4th 577, 582, 86 CR2d 469. The court may consider inability to pay only when increasing the amount of the restitution fine in excess of the $200 or $100 minimum. Pen C §1202.4(c). Such a mandate is not constitutionally infirm; however, imprisonment of an indigent defendant for nonpayment violates equal protection. *People v Long* (1985) 164 CA3d 820, 826–827, 210 CR 745.

d. [§83.16] Multiple Counts

Discretionary formula. For defendants convicted of several felony counts the court may calculate the fine by the following formula (Pen C §1202.4(b)(2)):

> $200 x number of years of sentence x number of counts of which defendant was convicted.

☛ JUDICIAL TIP: Some judges simplify the formula to $200 x number of counts. In the view of some judges, a life sentence calls for the maximum fine.

Limitation of maximum. The total fine may not exceed the statutory maximum, regardless of the number of victims and counts. *People v Blackburn* (1999) 72 CA4th 1520, 1534, 86 CR2d 134. See also *People v Ivans* (1992) 2 CA4th 1654, 1667, 4 CR2d 66 (decided under former Govt C §13967).

Resolution of multiple cases under negotiated plea bargain. A defendant, who enters a guilty plea in more than one separate case and is sentenced on all the cases at the same time, may be subject to a separate restitution fine in each case as long as the aggregate total of the restitution fines does not exceed the statutory maximum. *People v Schoeb* (2005) 132 CA4th 861, 864–865, 33 CR3d 889; *People v Enos* (2005) 128 CA4th 1046, 1048–1050, 27 CR3d 610.

Resolution of multiple cases in joint trial. When a defendant is convicted of crimes in two cases that are consolidated for trial, the court may not impose restitution fines in both cases, even if the cases involve

charges in separately filed informations. *People v Ferris* (2000) 82 CA4th 1272, 1275–1278, 99 CR2d 180.

Conviction of felony and misdemeanor in same proceeding. When a defendant is convicted of both a felony and misdemeanor in the same proceeding, the court must impose a separate restitution fine for each so long as the total of the restitution fines does not exceed the statutory maximum. *People v Holmes* (2007) 153 CA4th 539, 546–548, 63 CR3d 150.

Counts stayed under Pen C §654. The trial court may not consider a felony conviction for which the sentence is stayed under Pen C §654 as part of the court's calculation of the restitution fine under the formula provided in Pen C §1202.4(b)(2). *People v Le* (2006) 136 CA4th 925, 932–934, 39 CR3d 146.

e. [§83.17] No Joint and Several Liability for Restitution Fines

Restitution fines (Pen C §1202.4(b)), probation revocation fines (Pen C §1202.44), and parole revocation fines (Pen C §1202.45) may not be imposed as payable jointly and severally by multiple defendants. *People v Kunitz* (2004) 122 CA4th 652, 655–658, 18 CR3d 843 (although court addressed only Pen C §§1202.4(b) and 1202.45 fines, reasoning applicable to Pen C §1202.44 fine).

Direct victim restitution is not punishment, and it may be imposed jointly and severally. 122 CA4th at 657. For discussion, see §83.72.

f. [§83.18] Findings

The court need not specify reasons for setting the fine in any particular amount; only when the court waives the fine must reasons be stated. Pen C §1202.4(b), (d); *People v Urbano* (2005) 128 CA4th 396, 405, 26 CR3d 871; *People v Romero* (1996) 43 CA4th 440, 448, 51 CR2d 26 (court not required to make findings on ability to pay); for discussion of fine waiver, see §83.20.

☛ JUDICIAL TIP: Some judges state reasons when they set the fine at a level that departs from their usual practice.

The amount of the fine is reviewed only for abuse of discretion and upheld when supported by the record. *People v McGhee* (1988) 197 CA3d 710, 716–717, 243 CR 46 (maximum restitution fine justified when court properly imposed upper prison term); *People v Griffin* (1987) 193 CA3d 739, 740–742, 238 CR 371 (record of recidivist thief convicted of petty theft with prior supports $2000 restitution fine).

g. [§83.19] Retrial or Remand for Resentencing

The court may not increase the restitution fine after a retrial that followed defendant's successful appeal (*People v Thompson* (1998) 61 CA4th 1269, 1276, 71 CR2d 586; *People v Jones* (1994) 24 CA4th 1780, 1785, 30 CR2d 238), or after remand for resentencing following the defendant's partially successful appeal (*People v Hanson* (2000) 23 C4th 355, 366–367, 97 CR2d 58). Such an increase in the restitution fine is precluded by the state constitutional prohibition against double jeopardy (Cal Const art I, §15). 23 C4th at 366–367.

5. [§83.20] Waiver of Fine

The court must impose a restitution fine unless it finds "compelling and extraordinary reasons" for not doing so and states them on the record. Pen C §1202.4(b), (c); *People v Tillman* (2000) 22 C4th 300, 302, 92 CR2d 741.

Inability to pay is not an adequate reason for waiving the fine. Pen C §1202.4(c). There is no judicial guidance on what constitutes compelling and extraordinary reasons. Sentencing a defendant to prison is not a sufficient reason because the fine can be collected from prison wages and trust account deposits. See §83.23.

☛ JUDICIAL TIP: Some judges waive the fine in the case of street people who suffer from mental or other disabilities. Others excuse payment when the defendant is on SSI or receives General Assistance. Most judges do not regard being jobless or homeless standing alone a sufficient reason.

When the court waives the fine, it must order the defendant to perform community service instead, unless it finds additional compelling and extraordinary reasons stated on the record. Pen C §1202.4(n).

☛ JUDICIAL TIP: This statement should be in addition to the statement of reasons for not imposing a restitution fine. Pen C §1202.4(n).

The prosecution waives any objection to the trial court's failure to impose a restitution fine under Pen C §1202.4 by failing to object to the omission at the time of sentencing; in such event, the appellate court may not modify the judgment to add a restitution fine. *People v Tillman, supra*, 22 C4th at 302–303. However, when the trial court imposes a restitution fine under Pen C §1202.4, but omits or imposes an erroneous parole revocation restitution fine under Pen C §1202.45 (see §83.7) and the prosecution does not object to this omission, an appellate court has the authority to modify the judgment to impose or correct the fine. *People v Smith* (2001) 24 C4th 849, 102 CR2d 731 (trial court imposed $5000

restitution fine but only a $200 parole revocation fine); *People v Rodriguez* (2000) 80 CA4th 372, 375–379, 95 CR2d 299 (trial court imposed $200 restitution fine and no parole revocation fine).

6. [§83.21] No Crediting Amount of Restitution Against Restitution Fine

The court may not offset the amount of direct victim restitution against a Pen C §1202.4 restitution fine. *People v Blackburn* (1999) 72 CA4th 1520, 1534, 86 CR2d 134.

7. [§83.22] Penalty Assessments; Administrative Fees

Restitution fines, probation revocation restitution fines, and parole revocation restitution fines are exempt from the penalty assessments of Pen C §1464 and Govt C §76000, the state surcharge of Pen C §1465.7, and the state court construction penalty of Govt C §70372(a). Pen C §§1202.4(e), 1202.45, 1464(a)(3)(A), 1465.7(a); Govt C §§70372(a)(3)(A), 76000 (a)(3)(A).

Counties may impose a fee to cover the administrative costs of collecting the restitution fine. The fee may not exceed 10 percent of the fine. Pen C §1202.4(*l*).

☛ JUDICIAL TIP: In counties that charge this fee the sentence should include an order to pay it.

8. [§83.23] Collection of Fine by CDCR and DJJ

The California Department of Corrections and Rehabilitation (CDCR) deducts restitution fines from prisoners wages and trust account deposits, transmits the moneys to the California Victim Compensation and Government Claims Board. Pen C §2085.5; see, *e.g.*, *People v Gentry* (1994) 28 CA4th 1374, 1377–1378, 34 CR2d 37.

☛ JUDICIAL TIPS:

- Penal Code §2085.5 is self-executing and it is *not* necessary to refer to it when imposing sentence. If the judge chooses to make a reference, the judge should make it clear that the fine is *imposed* under Pen C §1202.4 and shall be *collected* under Pen C §2085.5. Court documents should not state that the fine is imposed under Pen C §2085.5. See *People v Rowland* (1988) 206 CA3d 119, 124, 253 CR 190.
- Courts should make sure that the abstract of judgment reflects the restitution fine because the CDCR relies on the abstract. See *People v Hong* (1998) 64 CA4th 1071, 1080, 76 CR2d 23.

The CDCR's Division of Juvenile Justice (DJJ) (formerly California Youth Authority) also collects restitution fines from wards' wages and trust account deposits and transfers the moneys to the California Victim Compensation and Government Claims Board. The DJJ must provide the sentencing court with a record of payments. Welf & I C §§1752.81–1752.82.

9. [§83.24] Applying Seized Funds to Restitution Fine

The court may apply funds confiscated from the defendant at the time of the defendant's arrest, except for funds confiscated under Health & S C §11469 (illegal drug funds), to the restitution fine if the funds are not exempt for spousal or child support or subject to any other legal exemption. Pen C §1202.4(c).

The common law rule that money belonging to an arrestee and held for safekeeping is exempt from execution does not apply to funds sought for payment of a restitution fine, a debt that was created after the defendant's conviction. *People v Willie* (2005) 133 CA4th 43, 49–50, 34 CR3d 532. Further, this exemption has been superseded by CCP §704.090, which effectively limits the exemption to $300 for a restitution fine. 133 CA4th at 50–52.

10. [§83.25] Fine Enforceable as Civil Judgment

An order to pay a Pen C §1202.4, §1202.44, or §1202.45 restitution fine is enforceable as if it were a civil judgment. Pen C §1214(a). Restitution fines derived from misdemeanor cases, cases involving a violation of a city or town ordinance, and noncapital cases with a plea of guilty or no contest, are enforceable in the same manner as a money judgment in a *limited* civil case. Pen C §1214(c); CCP §582.5.

A restitution fine is enforceable immediately and continues to be enforceable by the California Victim Compensation and Government Claims Board after termination of probation or parole. Pen C §1214(a).

☛ JUDICIAL TIP: The court should *not* enter a separate money judgment. Execution can issue on the order to pay the fine. *People v Hart* (1998) 65 CA4th 902, 906, 76 CR2d 837. See also *People v Willie* (2005) 133 CA4th 43, 47–49, 34 CR3d 532 (district attorney's motion for release of funds taken from defendant on his arrest for payment of restitution fine, and court's nunc pro tunc order for their release, were not appropriate methods for enforcing the restitution fine).

11. [§83.26] Restitution Fine in Bribery Cases

The court must impose restitution fines that exceed those required under Pen C §1202.4 on defendants convicted of specified bribery offenses.

Offenses: The court must impose the fine on conviction of any of the following offenses:

- Pen C §68 (asking for, receiving, or agreeing to receive, bribe by officer, employee, or appointee of state or local government);
- Pen C §86 (asking for, receiving, or agreeing to receive, bribe by member of state legislature or local legislative body);
- Pen C §93 (asking for, receiving, or agreeing to receive, bribe by judicial officer or other person authorized to determine matters in controversy).

Amount. In cases in which no bribe was received, the minimum fine is $2000 up to a maximum of $10,000. When a bribe has been received, the minimum fine is $2000 or the amount of the bribe, whichever is greater, and not more than $10,000 or double the amount of the bribe, whichever is greater. Pen C §§68(a), 86, 93(a).

Ability to pay. Defendant's ability to pay *is* a factor in deciding whether to impose the fine and in what amount. Pen C §§68(b), 86, 93(b).

B. Restitution Fee in Diversion Matters

1. [§83.27] Mandatory Fee; Amount

In diversion and deferred entry of judgment cases the counterpart to the restitution *fine* is the restitution *fee* required by Pen C §1001.90. Imposition is mandatory (Pen C §1001.90(a), (c)), subject to exceptions discussed in §83.28.

The minimum fee is $100; the maximum, $1000. Pen C §1001.90(b). The factors that should guide the court in setting the amount of the fee are essentially the same as apply to restitution fines. Pen C §1001.90(d); for discussion, see §83.14. The court may not modify the amount of the fee except to correct an error in setting the amount. Pen C §1001.90(e).

☛ JUDICIAL TIP: Modification is probably warranted only when the fee was erroneously omitted, set below the statutory minimum or above the maximum, and to correct ministerial errors. Forgiveness of the fee upon successful completion of diversion is probably precluded.

Counties may add a collection fee not to exceed 10 percent of the restitution fee. Pen C §1001.90(g).

Like restitution fines, the fee goes to the state Restitution Fund. Pen C §1001.90(f).

2. [§83.28] Exceptions

As with restitution fines, the court may waive the fee when it finds that there are compelling and extraordinary reasons and states them on the record. Pen C §1001.90(c). The fee must be imposed regardless of defendant's ability to pay it; ability to pay is, however, a factor to be considered in setting the amount. Pen C §1001.90(c), (d).

Additionally, Pen C §1001.90 does not apply to diversion of defendants with cognitive developmental disabilities. Pen C §1001.90(a).

3. [§83.29] Fee Enforceable as Civil Judgment

An order to pay a diversion restitution fee is enforceable as if it were a civil judgment. Pen C §1214(a). A diversion restitution fee is enforceable immediately and continues to be enforceable by the California Victim Compensation and Government Claims Board after the defendant has completed diversion. Pen C §1214(a).

☛ JUDICIAL TIP: The court should *not* enter a separate money judgment. Execution can issue on the order to pay the fine. *People v Hart* (1998) 65 CA4th 902, 906, 76 CR2d 837.

C. [§83.30] Victim Restitution

The court must order payment of restitution when the crime of which defendant was convicted resulted in economic loss to the victim. Pen C §1202.4; Welf & I C §730.6; see Cal Const art I, §28(b)(13)(A). A sentence without a restitution award to a victim, as mandated by Cal Const art I, §28(b) and Pen C §1202.4 is invalid; the only discretion retained by the court is that of fixing the amount of the award. *People v Rowland* (1997) 51 CA4th 1745, 1751–1752, 60 CR2d 351. For discussion, see §§83.39–83.83.

Under some circumstances California courts may order restitution when the losses are not the result of the crime underlying the defendant's conviction. For example, in probation cases, the courts have broad discretion to order restitution that is reasonably related to the defendant's crime. See §§83.84–83.86. And courts often order a defendant to make restitution to a victim of offenses that underlie dismissed counts. For discussion, see §§83.87–83.90.

1. Principles Applicable to Restitution Generally

a. Procedure at Time of Guilty Plea

(1) [§83.31] Advisement When Taking Plea

Restitution is a direct consequence of a guilty or no contest plea of which defendant must be advised. *People v Rowland* (1997) 51 CA4th 1745, 1752–1753, 60 CR2d 351; *People v Valdez* (1994) 24 CA4th 1194, 1203, 30 CR2d 4. For form, see §83.92.

Failure to so advise is fatal only if it prejudices the defendant. *People v Rowland, supra* 51 CA4th at 1753 (no prejudice because, inter alia, amount of restitution ordered matched defendant's civil liability).

(2) [§83.32] Silent Plea Bargain

A silent plea bargain does not circumscribe the mandatory duty of the trial court to order the payment of restitution. *People v Valdez* (1994) 24 CA4th 1194, 1203, 30 CR2d 4; see *People v Campbell* (1994) 21 CA4th 825, 829, 26 CR2d 433 (silent plea agreement did not nullify restitution order as condition of probation).

When a defendant enters into a plea bargain in which the defendant reasonably believes he or she will be ordered to pay a small amount of restitution, and thereafter at sentencing is ordered to pay a much larger amount, the defendant is entitled to withdraw his or her plea. *People v Brown* (2007) 147 CA4th 1213, 1221–1228, 54 CR3d 887. The court in *Brown* stated that an award of victim restitution constitutes punishment for purposes of determining whether there is a violation of a plea agreement when the sentencing court imposes a larger restitution amount than that specified in the plea agreement. 147 CA4th 1221–1223. In this case the victim restitution order imposed was a significant deviation from the terms of the plea agreement. Specific performance was not an available remedy because full victim restitution is mandated by Cal Const art 1, §28.5 and Pen C §1202.4(f), and the court has no discretion or authority to impose a negotiated sentence that provides for an award of less than full restitution. 147 CA4th at 1224–1228.

In *People v Rowland* (1997) 51 CA4th 1745, 60 CR2d 351, the plea agreement made no mention of victim restitution, and the trial court resentenced the defendant to include a substantial award of victim restitution. The First District Court of Appeal upheld the trial court's conclusion that absent a showing of prejudice, the defendant was not entitled to withdraw his plea. 51 CA4th at 1750–1754. The court in *People v Brown, supra*, distinguished *Rowland*, by pointing out that because restitution was not mentioned in the plea agreement in that case, the trial court's restitution order did not violate an express term of the agreement. 147 CA4th at 1223 n6.

b. [§83.33] Right to Notice and Hearing

Victims and defendants have a right to a hearing and to notice. For discussion, see §§83.41–83.45.

c. [§83.34] Restitution Not Affected by Bankruptcy

Defendant's bankruptcy. The Bankruptcy Code does not apply to restitution orders. *People v Washburn* (1979) 97 CA3d 621, 158 CR 822. A restitution obligation imposed as a condition of probation is not dischargeable in a liquidation or "straight bankruptcy" proceeding under Chapter 7 (11 USC §§701 et seq). *Kelly v Robinson* (1986) 479 US 36, 50–53, 107 S Ct 353, 93 L Ed 2d 216; 11 USC §523(a)(7). See also *Warfel v City of Saratoga* (In re Warfel) (9th Cir BAP 2001) 268 BR 205, 209–213 (civil restitution judgment originally imposed as a condition of debtor's probation not dischargeable under Chapter 7). Nor is a restitution obligation dischargeable under Chapter 13 (11 USC §§1301 et seq). 11 USC §1328(a)(3).

Bankruptcy does not block restitution even when defendant's civil obligations to the victim were discharged by bankruptcy *before* criminal charges were filed. *People v Moser* (1996) 50 CA4th 130, 136, 57 CR2d 647.

Because collection of restitution is a continuation of a criminal action, the automatic stay provisions of bankruptcy law do not apply. See *In re Gruntz* (9th Cir 2000) 202 F3d 1074, 1084–1087 (automatic stay did not enjoin state court criminal proceedings against debtor for failure to pay child support); 11 USC §362(b)(1).

Victim's bankruptcy. When the victim incurred an obligation to a third party as a result of defendant's conduct, the bankruptcy discharge of the victim's obligation does not preclude a restitution order. *People v Dalvito* (1997) 56 CA4th 557, 560–562, 65 CR2d 679 (bankruptcy is economic loss despite discharge; no explanation why loss is equal to amount of obligation).

d. [§83.35] Order Enforceable as Civil Judgment

An order to pay restitution is deemed a money judgment and enforceable as if it were a civil judgment. Pen C §§1202.4(i), 1214(b); Welf & I C §730.6(r). Restitution orders derived from misdemeanor cases, cases involving a violation of a city or town ordinance, and noncapital cases with a plea of guilty or no contest, are enforceable in the same manner as a money judgment in a *limited* civil case. Pen C §1214(c); CCP §582.5.

The following conditions must be met before a restitution order may be enforced as if it were a civil judgment (Pen C §1214(b)):

(1) The defendant was informed of the right to have a judicial determination of the amount, and

(2) the defendant was

- Provided with a hearing,
- Waived a hearing, or
- Stipulated to the amount of restitution.

In addition, Pen C §1214(b) gives victims and the California Victim Compensation and Government Claims Board the right to receive on request a certified copy of the restitution order and the defendant's financial disclosure (see §83.80). See also Welf & I C §730.7(c) (victims of juvenile offenses entitled to certified copy of restitution order). If requested, the court must provide the financial disclosure to the district attorney in connection with an investigation or prosecution involving perjury or the veracity of the information contained in the disclosure. Pen C §1214(b).

Penal Code §1214(b) also gives victims "access to all resources available under the law to enforce the restitution order," including, inter alia, wage garnishment and lien procedures.

A restitution order is enforceable immediately and continues to be enforceable by the victim after termination of defendant's probation or parole. Pen C §§1214(b), 1202.4(m); Welf & I C §730.6(*l*).

☛ JUDICIAL TIP: Enforcement, like a judgment, should not be confused with the actual entry of a civil judgment based on the order to pay restitution. Judges should not at any time order the entry of such a judgment. However, it is entirely proper for the judge to order the appropriate civil clerk to issue enforcement of judgment orders, such as writs of execution, to victims with a restitution order. See *People v Hart* (1998) 65 CA4th 902, 906, 76 CR2d 837. But see *People v Farael* (1999) 70 CA4th 864, 866–867, 83 CR2d 16 (on conviction of insurance fraud, court properly required defendant as condition of probation to sign confession of judgment in insurer's favor in amount of its investigation costs; appellate court found "no practical or legal difference between a restitution order and a confession of judgment for the purpose of restitution").

e. [§83.36] Penalty Assessments; Administrative Fees

Restitution orders are not subject to the penalty assessments of Pen C §1464 or Govt C §76000. Unlike penalty assessments, restitution is not collected by the courts, but is ordered payable directly to the victim.

People v Dorsey (1999) 75 CA4th 729, 734–737, 89 CR2d 498; *People v Martinez* (1999) 73 CA4th 265, 267–268, 86 CR2d 346.

Statutory penalties may not be included in a victim restitution order. *People v Boudames* (2006) 146 CA4th 45, 49–53, 52 CR3d 629.

Counties may impose a fee to cover the administrative costs of collecting restitution when the restitution is paid to the victim. The fee may not exceed 10 percent of the total amount of restitution ordered to be paid. Pen C §1203.1(l); *People v Eddards* (2008) 162 CA4th 712, 716, 75 CR3d 924. Administrative fees may not be imposed, however, when restitution is paid to the State Restitution Fund. 162 CA4th at 716–717.

f. [§83.37] Persons Found Not Guilty by Reason of Insanity

Article I, §28(b)(13), of the California Constitution, and Pen C §1202.4(a) refer to restitution from the persons *convicted* of crimes. A person found not guilty by reason of insanity (NGI) is not a convicted person. *People v Morrison* (1984) 162 CA3d 995, 998, 208 CR 800; *Newman v Newman* (1987) 196 CA3d 255, 259, 241 CR 712 (defendant found NGI is not "convicted" within meaning of CCP §340.3). Although there is no California case on point dealing with restitution in NGI cases, other states have ruled on the issue and concluded that there is no authority to order restitution in these cases. See *State v Heartfield* (Ariz 2000) 998 P2d 1080; *State v Gile* (Or App 1999) 985 P2d 199 (defendant found NGI not subject to assessment similar to Pen C §1202.4 restitution fine).

g. [§83.38] Effect of Acquittal

In a nonprobation context, a restitution order may not be imposed for a crime of which the defendant has been acquitted. *People v Percelle* (2005) 126 CA4th 164, 178–180, 23 CR3d 731. However, the court may impose a restitution order as a condition of probation, regardless of whether the defendant has been convicted of the underlying crime. 126 CA4th at 169. See also §83.84.

2. [§83.39] Restitution Under Pen C §1202.4 and Welf & I C §730.6

Penal Code §1202.4 or its counterpart for juvenile offenders, Welf & I C §730.6, apply when all four of the following conditions are present:

(1) a claim by a victim (see §§83.47–83.50.)

(2) who suffered an economic loss (see §§83.51–83.61) victim of felony violation of Pen C §288 entitled to restitution for noneconomic losses (Pen C §1202.4(f)(3)(F))

(3) as a result of the commission of a crime

(4) of which the defendant was convicted (Pen C §1202.4(a)(1); see *People v Carbajal* (1995) 10 C4th 1114, 43 CR2d 681; *People v Woods* (2008) 161 CA4th 1045, 1049–1053, 74 CR3d 786; *People v Lai* (2006) 138 CA4th 1227, 1246–1249, 42 CR3d 444).

When some of these conditions are not met, the court may have discretion to order restitution. For discussion, see §§83.84–83.90.

a. [§83.40] Presentence Investigation Report

A probation officer's presentence investigation report must include information and recommendations pertaining to restitution fines and victim restitution. Pen C §1203(b)(2)(C), (d), (g). Specifically, the report must include:

- Information concerning the victim of the crime, including the victim's statement, the amount of the victim's loss, and whether that loss is covered by the victim's or defendant's insurance (Cal Rules of Ct 4.411.5(a)(5); for discussion of the effect of insurance on restitution awards, see §§83.62–83.63);
- A statement of mandatory and recommended restitution, restitution fines, and other fines and costs to be assessed against the defendant (Cal Rules of Ct 4.411.5(a)(11)); and
- Findings concerning a defendant's ability to make restitution and pay any fine (Cal Rules of Ct 4.411.5(a)(8), (11)).

If, as is typical in misdemeanor cases, no probation report is prepared for sentencing, the court may consider any information that could have been included in a probation report. Pen C §1203(d).

Financial evaluation. The court may order the defendant to appear before a county financial evaluation officer, if available, for an evaluation of the defendant's ability to make restitution. Pen C §1203(j). The county officer must report findings regarding restitution and other court-related costs to the probation officer on the question of the defendant's ability to pay those costs. Pen C §1203(j).

b. Hearing

(1) [§83.41] Right to Hearing

Defendant. The defendant has the right to a court hearing to dispute the amount of restitution or the manner in which it is to be made. Pen C §§1202.4(f)(1), 1203(d), 1203.1k; *People v Carbajal* (1995) 10 C4th 1114, 1125, 43 CR2d 681. Juvenile offenders have the same right. Welf & I C §730.6(h)(1). Advisement of this right is a precondition to enforcement of the restitution order by a victim. Pen C §1214(b); for more on notice, see §83.42.

Victim. A victim has a right to appear at sentencing personally or by counsel to express his or her views regarding restitution. Pen C §1191.1. This right also extends to:

- The victim's spouse, parents, children, or guardian (Cal Const art I, §28(e); Pen C §1191.1);
- The lawful representative of the victim who is deceased, a minor, or physically or psychologically incapacitated (Cal Const art I, §28(e));
- The next of kin of a deceased victim (Pen C §1191.1);
- An insurer or employer victimized by workers' compensation fraud (Pen C §1191.10);
- The California Victim Compensation and Government Claims Board when enforcing its subrogation rights (Pen C §1202.4(f)(2); see §83.72).

(2) [§83.42] Notice

Defendant. The court should inform the defendant of the right to a hearing to contest restitution. See Pen C §§1202.4(f)(1) (right to hearing), 1214(b); *People v Carbajal* (1995) 10 C4th 1114, 1125, 43 CR2d 681. The consequences of failing to provide this information differ depending on whether the court follows the recommendations of the probation report:

- If the court does not order more restitution than the report recommends, failure to request a hearing waives any error. *People v Foster* (1993) 14 CA4th 939, 949, 18 CR2d 1; *People v Blankenship* (1989) 213 CA3d 992, 997, 262 CR 141.

☛ JUDICIAL TIP: Some judges obtain an express waiver of hearing when the defendant does not contest restitution. This forestalls later objections to civil enforcement of the restitution order based on a lack of hearing.

- However, when the court exceeds the recommendations without first bringing that prospect to the defendant's attention and affording the defendant an opportunity to contest it, the defendant has been deprived of any meaningful opportunity to be heard. See *People v Sandoval* (1989) 206 CA3d 1544, 1550, 254 CR 674. See also *People v Thygesen* (1999) 69 CA4th 988, 993, 81 CR2d 886.

☛ JUDICIAL TIP: When the judge contemplates ordering more restitution than the probation officer recommended, the judge should indicate this before making an order and should inquire whether the defendant desires a hearing.

Victim. The probation officer has the duty to notify the victim of

- All sentencing proceedings or juvenile disposition hearings,
- The right to appear, and
- The right to express his or her views. Pen C §§679.02(a)(3), 1191.1.

The probation officer must also provide the victim with timely written information concerning the court's duty to order restitution and the victim's

- Right to civil recovery against the defendant;
- Right to a copy of the restitution order from the court;
- Right to enforce the restitution order as a civil judgment;
- Responsibility to provide information about losses to the probation department, district attorney, and court; and
- Opportunity to be compensated from the Restitution Fund. Pen C §§679.02(a)(8), 1191.2.

☛ JUDICIAL TIP: When there is no probation referral, as is often the case with misdemeanors, the prosecutor should notify the victim unless the county has another agency in charge of victim restitution that notifies victims.

In cases of juvenile offenders the obligation to notify is limited to offenses that would have been felonies if committed by an adult. Pen C §679.02(a)(4).

Designated agencies are required to develop and make available a "notification of eligibility" card for victims and derivative victims that includes specified information about eligibility to receive payment from the Restitution Fund for losses resulting from the crime. Pen C §1191.21(a). The law enforcement officer with primary responsibility for investigating the crime and the district attorney may provide this card to the victim and any derivative victims. Pen C §1191.21(b).

☛ JUDICIAL TIP: To spare victims court appearances that are unnecessary because defendant does not contest restitution, some judges initially make only uncontested orders. They continue the case when the defendant plans to challenge restitution; the victim is invited to attend the continued hearing.

(3) [§83.43] Attendance of Prosecutor

The prosecutor must be present at the restitution hearing to advocate on the People's behalf and be heard on issues that affect a fair and just result on the question of victim restitution. *People v Dehle* (2008) 166

CA4th 1380, 1386–1389, 83 CR3d 461 (trial court erred in allowing hearing to go forward without the prosecutor; victim's private attorney did not appear on behalf of the People, but solely on behalf of the victim). Although private counsel may assist a district attorney, the district attorney may not delegate a restitution hearing entirely to a private attorney. 166 CA4th at 1389–1390.

(4) [§83.44] Nature of Restitution Hearing

A restitution hearing does not require the formalities of a trial. *People v Hartley* (1984) 163 CA3d 126, 130, 209 CR 131. Thus

- Defendant has no right to a jury trial on restitution issues (*People v Rivera* (1989) 212 CA3d 1153, 1161, 261 CR 93).
- Defendant has no right to confront and cross-examine witnesses, including the probation officer who prepared the probation report. *People v Cain* (2000) 82 CA4th 81, 86–88, 97 CR2d 836 (no right to cross-examine psychotherapist whose fees defendant was ordered to reimburse under Pen C §273.5(h)(2)).
- Victims have a right to express their views (Pen C §1191.1).
- The court may consider the recommendations in the presentence report despite their hearsay character (*People v Cain*, *supra*, 82 CA4th at 87–88; Pen C §§1203(b)(2)(C)(ii), 1203.1k), as long as the court independently determines the amount of restitution (*People v Hartley*, *supra*).
- The evidentiary requirements for establishing a victim's economic losses are minimal. The court must base its determination on the "amount of loss claimed by the victim or victims or any other showing to the court." Pen C §1202.4(f). A victim may submit estimates of losses. *People v Goulart* (1990) 224 CA3d 71, 82–83, 273 CR 477. An owner of property is always entitled to give an opinion of its value. Evid C §813. See *People v Prosser* (2007) 157 CA4th 682, 690–692, 68 CR3d 808 (in determining value of stolen property, court may consider testimony of victim as to its value, even though testimony was unsupported by receipts or appraisals, or a detailed description of each individual stolen piece); *People v Gemelli* (2008) 161 CA4th 1539, 1542–1544, 74 CR3d 901 (court may rely on victim's unverified statement of losses that is detailed and facially credible, and explains how the claimed losses relate to the crime).
- Documentary evidence such as bills, receipts, repair estimates, insurance payment statements, payroll stubs, business records, and similar documents relevant to the value of stolen or damaged

property, medical expenses, and wages and profits lost may not be excluded as hearsay evidence. Pen C §1203.1d(d).

☛ JUDICIAL TIP: Restitution hearings should not further victimize victims by long courtroom waits or multiple hearings. This problem often arises in misdemeanor cases that involve long calendars and that lack probation reports. To minimize delays for victims some judges

- Instruct courtroom clerks to ascertain cases in which victims are present and call these cases first; and
- Permit victims to present restitution information without delay when an out-of-custody defendant is absent, on a determination and finding that defendant's absence is voluntary and with knowledge of the hearing. See Pen C §1043 for a similar procedure at trial. Merely asking the victim to hand papers to the clerk and deferring the restitution determination may create confusion and an inadequate record.

(5) [§83.45] Burden of Proof

The victim must present evidence showing that there were losses and that the losses were caused by the crime committed by the defendant. *People v Fulton* (2003) 109 CA4th 876, 885–886, 135 CR2d 466. The amount of restitution must be proved by a preponderance of the evidence. *People v Gemelli* (2008) 161 CA4th 1539, 1542–1543, 74 CR3d 901. Once the victim makes a prima facie showing of economic losses, the burden shifts to the defendant to disprove the amount of the claimed losses. 161 CA4th at 1543. The defendant has the burden of showing that the restitution recommendation in the probation report or the victims' estimates are inaccurate. *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1; *People v Hartley* (1984) 163 CA3d 126, 130, 209 CR 131.

c. [§83.46] Ability To Pay

Defendant's inability to pay cannot be considered in determining the amount of restitution. Pen C §1202.4(g).

However, ability to pay is vital in two other respects:

(1) At the time of making the restitution order the court needs to make an ability-to-pay determination in order to decide whether to make an income deduction order. Pen C §1202.42(a); for discussion, see §83.76.

(2) Ability to pay becomes important if the defendant fails to pay restitution; it is a precondition to revoking probation or imprisoning defendant for failure to pay. See, *e.g.*, *People v Whisenand* (1995) 37 CA4th 1383, 1393, 44 CR2d 501. See §83.71.

d. Persons Entitled to Restitution

(1) Victims

(a) [§83.47] Constitutional Definition of Victim

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), which added Cal Const art I, §28(e), providing a constitutional definition of a victim, including for purposes of restitution. Under the constitutional definition, a "victim" is:

- A person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act.
- The person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated.

The term "victim" does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.

(b) [§83.48] Statutory Definition under Pen C §1202.4

A "victim" under Pen C §1202.4 is any individual who has suffered economic loss as a result of the commission of a crime of which the defendant was convicted. Pen C §1202.4(a)(1). Other individuals entitled to restitution under Pen C §1202.4 include:

- The immediate surviving family of the actual victim. Pen C §1202.4(k)(1).
- Parents and guardians of a victim who is a minor. Pen C §1202.4(f)(3)(D) and (E); for discussion, see §83.55.
- Any person who has sustained economic loss as the result of a crime and who satisfies any of the following conditions (Pen C §1202.4(k)(3)):
  - — At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim.
  - — At the time of the crime was living in the victim's household.
  - — At the time of the crime was a person who had previously lived in the victim's household for at least two years in a relationship substantially similar to that of a parent, grandparent, sibling, spouse, child, or grandchild.

— Is another family member of the victim, including, but not limited to, the victim's fiancé or fiancée, and who witnessed the crime.

— Is the primary caretaker of a minor victim.

• Any person who is eligible to receive assistance from the Restitution Fund under the California Victim Compensation Program (Govt C §§13950–13969.7). Pen C §1202.4(k)(4).

For discussion of restitution payments to the state Restitution Fund, see §83.72.

A victim of crime does not have to be an individual. A corporation, business trust, estate, trust, partnership, association, joint venture, government and governmental agency, or any other legal or commercial entity may be entitled to restitution under Pen C §1202.4 if it is a "direct victim" of a crime, *i.e.*, it is the immediate object of the offense or it is an entity against which the crime has been committed. Pen C §1202.4(k)(2); *People v Martinez* (2005) 36 C4th 384, 393, 30 CR3d 779; *People v Slattery* (2008) 167 CA4th 1091, 1096–1097, 84 CR3d 672. See, *e.g.*, *People v Saint-Amans* (2005) 131 CA4th 1076, 1084–1087, 32 CR3d 518 (restitution properly ordered for a bank for its losses from a defendant whose fraudulent transactions affected a deposit holder's account; the bank was a direct victim because the bank did not act as an indemnitor, the bank was the object of the crime, and the defendant pleaded guilty to "commercial" burglary); *People v Ortiz* (1997) 53 CA4th 791, 795–799, 62 CR2d 66 (defendant convicted of selling counterfeit tapes; trial court properly found record company trade association was a direct victim and was entitled to restitution for both investigation expenses and lost sales). Compare *People v Slattery*, *supra*, (2008) 167 CA4th at 1095–1097 (hospital that treated victim injured by criminal conduct is not a direct victim).

☛ JUDICIAL TIP: Caution is advisable when counsel refers to statutes other than Pen C §1202.4 for the purpose of defining who is a victim. See, *e.g.*, a narrower definition in Govt C §§13951(c), (g), 13955, dealing with persons entitled to compensation from the Restitution Fund, and Pen C §1191.10. These definitions do not limit who qualifies as a victim under Pen C §1202.4. See, *e.g.*, *People v Broussard* (1993) 5 C4th 1067, 1077, 22 CR2d 1078 (persons entitled to restitution not limited to those who qualify for assistance from Restitution Fund); *People v Valdez*, *supra*, 24 CA4th at 1199.

(2) [§83.49] Governmental Agencies

A governmental agency may be a direct victim of the defendant's crime under Pen C §1202.4(k). For example, a defrauded governmental agency is a direct victim entitled to restitution for its losses. See *People v Crow* (1993) 6 C4th 952, 957, 26 CR2d 1 (welfare fraud); *People v Akins* (2005) 128 CA4th 1376, 1385–1389, 27 CR3d 815 (welfare fraud); *People v Hudson* (2003) 113 CA4th 924, 927–930, 7 CR3d 114 (discussion of how to calculate restitution to defrauded government agency). See also *In re Johnny M.* (2002) 100 CA4th 1128, 123 CR2d 316 (school district is direct victim entitled to restitution from minor who vandalized school property in amount that included reimbursement for property damage and labor costs of salaried employees who repaired the damage).

Governmental units are often indirect victims, not entitled to restitution. For example:

- A law enforcement agency that bought illicit drugs from the defendant does not qualify for restitution for the funds expended. *People v Torres* (1997) 59 CA4th 1, 5, 68 CR2d 644 (overhead expenses costs incurred in the course of regular investigatory duties not recoverable).
- A public agency may not be awarded restitution for cleanup costs incurred in removing hazardous waste from a defendant's illegal drug lab. *People v Martinez* (2005) 36 C4th 384, 391–394, 30 CR3d 779 (Health & S C §§11470.1 and 11470.2 provide exclusive means by which Department of Toxic Substances Control can recover costs).
- A city may not be awarded restitution for workers' compensation payments to a police officer who was injured by defendant's criminal act. *People v Franco* (1993) 19 CA4th 175, 183–186, 23 CR2d 475 (city may pursue civil action under Lab C §3852 to collect restitution).
- A public agency may not be awarded restitution under Pen C §1202.4 for costs to investigate crimes or apprehend criminals. *People v Ozkan* (2004) 124 CA4th 1072, 1076–1077, 21 CR3d 854 (Board of Equalization entitled to recover costs under Bus & P C §12015.5).

As illustrated in some of the above cases, statutes often give governmental agencies other remedies to obtain reimbursement for expenditures attributable to defendant's conduct. Other examples include:

- *Emergency response to DUI auto accident*. The court may, as a condition of probation, order restitution to a public agency for

expenses incurred in its emergency response to a DUI auto accident. Govt C §53150; Pen C §§1203.1(e), 1203.1*l*. See *California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 38 CR3d 16 (discussion of recoverable emergency response costs under Govt C §53150).

- *Fire suppression*. Fire departments can receive restitution expenses incurred in putting out a fire that was negligently or unlawfully set. Related rescue and emergency medical costs are also recoverable. Health & S C §13009.
- *Medical examination*. The court may order restitution to a law enforcement agency for the cost of a medical examination conducted in child abuse or neglect cases and in sexual assault cases. Pen C §1203.1h.
- *Emergency response*. The court may, as a condition of probation, order restitution to a public agency for costs incurred due to their response to an emergency. Pen C §1203.1*l*
- *Child stealing cases*. The court must order the payment of restitution to the district attorney for any costs incurred in locating and returning a child to the custodial parent. Pen C §278.6(c); Fam C §3134.
- *Criminal threat cases*. The court must order payment to a public or private entity for costs incurred stemming from an emergency response to a false bomb threat or to a false threat to use a weapon of mass destruction. Pen C §422.1.
- *Damage to public property*. The court must order payment of restitution to a public entity for costs of cleanup, repair, replacement, or restoration of public property damaged by parties who refused to comply with an order to disperse. Pen C §416(b).

A governmental agency may be the beneficiary of restitution under Pen C §1203.1 (restitution imposed as condition of probation) for losses resulting from unusual expenses directly incurred because of defendant's criminal conduct. *People v Rugamas* (2001) 93 CA4th 518, 521–523, 113 CR2d 271 (court upheld restitution order requiring defendant to reimburse police department for medical expenses incurred to treat defendant after police shot him with rubber bullets). See §83.84.

(3) [§83.50] Insurance Companies

An insurance company that has paid the crime losses of its insured under the terms of an insurance policy is not a direct victim of crime and has no right to restitution. *People v Birkett* (1999) 21 C4th 226, 231, 245, 87 CR2d 205 (court also lacks discretion to divide restitution between

victim and insurer). However, when the defendant is convicted of submitting false claims to an insurance company, the insurance company is considered to be a direct victim of the defendant's crime and thus entitled to restitution. *People v O'Casey* (2001) 88 CA4th 967, 106 CR2d 263 (workers compensation fraud); *People v Moloy* (2000) 84 CA4th 257, 100 CR2d 676.

e. Losses Subject to Restitution; Amount

(1) [§83.51] Full Restitution for Economic Losses

Penal Code §1202.4 requires

(a) *full* restitution

(b) for *economic* losses determined by the court. Pen C §1202.4(a)(1), (f)(3).

Two kinds of losses not covered by Pen C §1202.4 are:

- Noneconomic losses (*e.g.*, psychological harm) except those suffered by victims of felony violations of Pen C §288; and
- Losses that did not result from the crime of which defendant was convicted. Pen C §1202.4(a)(1), (f)(3)(F); for basis of restitution other than Pen C §1202.4, see §§83.84–83.90.

(2) [§83.52] Components of Economic Loss

Penal Code §1202.4(f)(3) lists a number of losses and expenditures that qualify as recoverable economic losses. The list is not inclusive; the statute provides broad discretion with respect to the type of losses subject to a restitution order. Pen C §1202.4(f)(3) ("losses . . . including, but not limited to . . ."); *In re Johnny M.* (2002) 100 CA4th 1128, 1135–1136, 123 CR2d 316; *In re M. W.* (2008) 169 CA4th 1, 5–6, 86 CR3d 545 (list of losses enumerated in Welf & I C §730.6(h) is not inclusive). See, *e.g.*, *People v Keichler* (2005) 129 CA4th 1039, 1046–1047, 29 CR3d 120 (trial court properly ordered restitution for the cost of a traditional Hmong healing ceremony and herbal medicines to victims of a fight). See also §83.58 (support to victims' children).

(a) [§83.53] Property Damages or Loss

Victims have a right to restitution "for the value of stolen or damaged property," defined as the replacement cost of like property or the cost of repairing it when repair is possible. Pen C §1202.4(f)(3)(A).

The Fourth District Court of Appeal held in *People v Yanez* (1995) 38 CA4th 1622, 1627, 46 CR2d 1, that the restitution for damaged but reparable property is limited to the amount of damages recoverable in a

civil action. That is, the restitution for such property is the lesser of the following:

- Market value before the crime minus market value after it; or
- The reasonable cost of repairing the property to its condition before defendant damaged it.

However, the First District Court of Appeal in *In re Dina V.* (2007) 151 CA4th 486, 488–489, 59 CR3d 862, disagreed with the holding in *Yanez* and held that in imposing restitution in a juvenile wardship case when property has been damaged, the court has discretion to impose the actual cost of repairing the property, even if that amount exceeds the replacement cost. The Court stated that neither Welf & I C §730.6 nor Pen C §1202.4 limits victim restitution to that amount recoverable in a civil action.

Restitution may be ordered for cleanup, repair, or replacement of property damaged by parties who refused to comply with order to disperse. Pen C §416(b).

Stolen property. For most types of stolen property, original cost is a fair approximation of replacement cost. *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1. Accordingly, the court may consider a victim's statement of what the property cost, as set out in the probation report. It is up to the defendant to contest the valuation. *People v Foster, supra.*

Appreciated property. When the value of stolen property appreciates after the theft, as may happen with securities, the court may order restitution in the amount of the appreciated value. See *People v Tucker* (1995) 37 CA4th 1, 4–6, 44 CR2d 1 (embezzled mutual fund shares; decision based on former Pen C §1203.04).

☛ JUDICIAL TIP: The converse is not true in the view of most judges. When shares decline in value after defendant embezzled them, defendant should not get a windfall; defendant's crime deprived the victim of the opportunity to sell the shares before their value dropped.

Application of other statute to determine loss. In *People v Baker* (2005) 126 CA4th 463, 468–470, 23 CR3d 871, a defendant was convicted of cattle theft and was ordered to make restitution for the stolen cows and for the calves that were born while the cows were misappropriated. In calculating the restitution owed, the trial court properly applied Food & A C §21855 in quadrupling the restitution amount. 126 CA4th at 469–470.

(b) [§83.54] Medical and Counseling Expenses

Medical expenses are a proper item of restitution (Pen C §1202.4(f)(3)(B)) and include future expenses. *People v Phelps* (1996) 41 CA4th 946, 949–951, 48 CR2d 855. Victims also have a right to restitution for mental health counseling expenses. Pen C §1202.4(f)(3)(C). See *People v O'Neal* (2004) 122 CA4th 817, 820–821, 19 CR3d 202 (defendant convicted of sexual molestation ordered to pay restitution for psychological counseling expenses incurred by victim's brother); *In re M. W.* (2008) 169 CA4th 1, 4–7, 86 CR3d 545 (cost of mental health services incurred by victim of crime committed by a juvenile is a recoverable loss under Welf & I C §730.6(h)).

Other statutes provide for restitution of medical and counseling expenses in specific situations. For example:

- Defendants convicted of the following offenses may be ordered to reimburse a victim for reasonable costs of counseling and other reasonable expenses as condition of probation:
  - Domestic battery (see Pen C §243(e)(2)(B)),
  - Spousal rape (see Pen C §262(d)(2)),
  - Spousal abuse (see Pen C §273.5(h)(2)), and
  - Violation of protective order (see Pen C §273.6(h)(2)).
- Defendants convicted of the sexual assault on a minor are required to make restitution for the victim's medical or psychological treatment expenses. Pen C §1203.1g.
- Defendants convicted of the sexual assault on an elderly person are required to make restitution for the victim's medical or psychological treatment expenses. Pen C §1203.1j.

For a discussion of restitution for medical expenses when the victim is covered by Medi-Cal, see §83.64,

(c) [§83.55] Lost Wages and Profits; Out-of-Pocket Expenses

Wages or profits lost by the victim as a result of the crime are a proper item of restitution. Pen C §1202.4(f)(3)(D)–(E); see, *e.g.*, *People v Ortiz* (1997) 53 CA4th 791, 798, 62 CR2d 66 (sales lost as result of counterfeited cassette tapes).

Restitution should include:

- Future lost wages. See *People v Fulton* (2003) 109 CA4th 876, 880 n2, 887, 135 CR2d 466 (lost wages associated with future post-surgery recovery).

- Profits or wages lost because of time spent as a witness. Pen C §1202.4(f)(3)(E); *People v Nguyen* (1994) 23 CA4th 32, 42, 28 CR2d 140; see *People v Ryan* (1988) 203 CA3d 189, 192, 249 CR 750.
- Out-of-pocket expenses assisting the authorities in the investigation and prosecution of the case. Pen C §1202.4(f)(3)(E); *People v Ortiz, supra,* 53 CA4th at 797; see *People v Rowland* (1997) 51 CA4th 1745, 1749–1750, 60 CR2d 351.
- Wages or profits lost by the parents or guardian of a victim who is a minor. Pen C §§1202.4(f)(3)(D) (loss while caring for injured minor), 1202.4(f)(3)(E) (loss because of time spent as witness or assisting prosecution).
- Wages lost because of psychological injury. *People v Brasure* (2008) 42 C4th 1037, 1074–1075, 71 CR3d 675 (Pen C §1202.4(f)(3) applied to compensate a murder victim's mother for two years' lost wages due to the trauma of her son's death; the statute does not distinguish between economic losses covered by physical injuries and those caused by psychological trauma).
- Lost wages, mileage expenses, and parking fees incurred by parents of victim while attending defendant's trial. *People v Crisler* (2008) 165 CA4th 1503, 1507–1509, 81 CR3d 887 (trial court ordered restitution for time spent by mother, father, and stepfather of a minor murder victim to attend the defendant's murder trial).

Lost wages include any commission income as well as any base wages. Commission income must be established by evidence of this income during the 12-month period before the date of the crime for which the court is ordering restitution, unless good cause for a shorter time period is shown. Pen C §1202.4(f)(3)(D)–(E).

☛ JUDICIAL TIP: If a victim is unable to go to work because of injuries inflicted by the defendant, and he or she used hours of sick leave in order to be paid, the victim should be reimbursed for the economic value of the hours of depletion of his or her accrued sick leave.

(d) [§83.56] Lost Work Product

A restitution award may include the reasonable value of employee work product lost as a result of the crime. *In re Johnny M.* (2002) 100 CA4th 1128, 1134, 123 CR2d 316. In *In re Johnny M.*, a minor admitted to vandalizing school property. Several salaried school employees were required to spend time repairing the damage to the classrooms. The juven-

ile court held that the school district incurred an economic loss because the district was deprived of the work product the salaried employees would have generated if they had not been obliged to repair school property. The court reasonably valued the lost work product at the salary rate of the district employees, including benefits, for the lost time. *In re Johnny M.*, *supra*.

(e) [§83.57] Future Economic Losses of Spouse of Deceased Victim

The court may order the defendant to pay restitution to compensate the spouse of a deceased victim for the spouse's future economic losses attributable to the deceased victim's death. *People v Giordano* (2007) 42 C4th 644, 68 CR3d 51. In support of its decision, the Supreme Court looked to the state's wrongful death statutes that allow a spouse of a person wrongfully killed to seek compensation for the loss of financial benefits the decedent was contributing to support his or her family at the time of the decedent's death and the loss of that that support that was reasonably expected in the future. The Court stated that when the Legislature enacted Pen C §1202.4, "it did so with the presumed knowledge that courts have long understood that a surviving spouse incur an economic loss upon the death of his or her spouse." 42 C4th at 659.

In calculating the loss of support, the trial court should consider the earning history of the deceased spouse, the age of the survivor and decedent, and the degree to which the decedent's income provided support to the survivor's household. These factors are not an exhaustive list; the trial court has discretion to be guided by the particular factors in each individual claim. 42 C4th at 665.

(f) [§83.58] Child Support to Victims' Children

The children of a homicide victim are entitled to restitution for the loss of support. *People v Harvest* (2000) 84 CA4th 641, 652–653, 101 CR2d 135 (defendant ordered to pay child support for murder victim's children). See also *People v Clark* (1982) 130 CA3d 371, 384, 181 CR 682 (court ordered defendant to make monthly support payments to the children of a manslaughter victim as condition or probation). The court may also order restitution to the Restitution Fund for support to widows and children paid by the Fund. See Govt C §13957.5(a)(4).

(g) [§83.59] Interest

The court must award interest on a restitution order under Pen C §1202.4 at the rate of 10 percent per year. Pen C §§1202.4(f)(3)(G),

1214.5. The court has the option of awarding interest from the date of sentencing or loss. Pen C §1202.4(f)(3)(G).

☛ JUDICIAL TIPS: The latter is most workable when there was a single loss. Many judges leave it to the probation officer or other county agency to factor interest into a payment schedule.

(h) [§83.60] Attorneys' Fees

Penal Code §1202.4(f)(3)(H) mandates restitution for actual and reasonable attorneys' fees "and other costs of collection accrued by a private entity on behalf of the victim." See *People v Maheshwari* (2003) 107 CA4th 1406, 1409–1411, 132 CR2d 903 (defendant convicted of embezzlement ordered to pay victim's attorneys' fees and private investigator fees incurred in civil action to determine the amount of and recover embezzled funds). Only those attorneys' fees attributable to the victim's recovery of economic damages are allowed under Pen C §1202.4(f)(3)(H). The victim, however, is entitled to full reimbursement for attorneys' fees incurred to recover both economic and noneconomic losses when the fees cannot be reasonably divided. *People v Fulton* (2003) 109 CA4th 876, 882–885, 135 CR2d 466.

People v Fulton, *supra*, sets out the procedure for determining the proper amount of attorney's fees as restitution. Once evidence is introduced that the victim suffered economic losses and incurred reasonable attorney fees to recover those losses, this showing establishes the amount or restitution the victim is entitled to receive, unless challenged by the defendant. In that event, the burden shifts to the defendant to show, by a preponderance of the evidence, the portion of the attorney fees that are not recoverable because those fees are attributable solely to noneconomic losses. 109 CA4th at 886.

A contingent fee paid by the victim to an attorney to pursue civil liability is recoverable under Pen C §1202.4(f)(3)(H). *People v Pinedo* (1998) 60 CA4th 1403, 1405–1406, 71 CR2d 151. Restitution is also proper for attorneys' fees incurred to prevent a dispersal of assets by defendant. *People v Lyon* (1996) 49 CA4th 1521, 57 CR2d 415. However, legal expenses related to opposing discovery in the criminal case are not allowable. *People v Lyon*, *supra.*

Although Welf & I C §730.6 does not include legal fees and costs in its list of compensable economic losses, the Second District Court of Appeal has held that a juvenile offender can be ordered to pay restitution for the legal fees and costs that the victim incurred to collect restitution. *In re Imran Q.* (2008) 158 CA4th 1316, 1319–1321, 71 CR3d 121 (Welf & I C §730.6's silence on attorney's fees and costs is a mere legislative

oversight; trial court should utilize procedure discussed in *People v Fulton*, *supra*, for allocating fees).

(i) [§83.61] Other Expenses

Relocation expenses. Adult victims have a right to restitution for expenses in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, and expenses for clothing and personal items. Pen C §1202.4(f)(3)(I). These expenses must be verified by law enforcement to be necessary for the victim's personal safety or by a mental health treatment provider to be necessary for the victim's emotional well-being. Pen C §1202.4(f)(3)(I). See *People v Mearns* (2002) 97 CA4th 493, 501–502, 118 CR2d 511 (court properly ordered relocation expenses to rape victim in the amount of difference between the sale price of the victim's original mobilehome where the rape occurred and the purchase price of a new one).

Residential security expenses. Penal Code §1202.4(f)(3)(J) mandates restitution for expenses to install or increase residential security related to any violent felony (as defined in Pen C §667.5(c)), including, but not limited to, a home security device or system, or replacing or increasing the number of locks.

Residence and/or vehicle retrofitting expenses. Penal Code §1202.4(f)(3)(K) requires restitution for expenses to retrofit a residence or vehicle, or both, to make the residence accessible to, or the vehicle operational by, the victim, if the victim is permanently disabled, whether the disability is partial or total, as a direct result of the crime.

(3) [§83.62] Matters That Do Not Affect Amount of Restitution

Inability to pay. See §83.46.

Victim's insurance. A victim is entitled to restitution regardless of whether the victim has submitted an insurance claim or has been partially or fully reimbursed by his or her insurer. *People v Birkett* (1999) 21 C4th 226, 245–247, 87 CR2d 205. The amount that a victim paid as a deductible under his or her insurance contract is not the measure of restitution. Rather, it is the full amount of loss, including the total amount that the victim's insurance company paid out plus the victim's deductible payments, and any other amounts not covered by the victim's insurance. See *In re Brittany L.* (2002) 99 CA4th 1381, 1386–1390, 122 CR2d 376.

Bankruptcy. See §83.34.

Third party rights. Third party indemnification or subrogation rights do not affect the amount of restitution that is to be ordered. Pen C §1202.4(f)(2); *People v Hove* (1999) 76 CA4th 1266, 1272–1273, 91 CR2d 128 (court properly ordered restitution in full amount of medical expenses even though victim had not incurred any actual economic losses because of coverage by Medicare and/or Medi-Cal benefits).

Victim's release of liability. A victim's release of liability to the defendant's insurance company as part of a settlement does not release the defendant from his or her restitution obligation. A release cannot waive the People's right to have a defendant pay restitution ordered as part of the sentence. The victim would be in an untenable position if he or she had to reject a settlement offer from the defendant's insurance company that covers only a portion of the victim's losses in order to preserve the uncertain possibility that the full amount might be recovered. *People v Bernal*, *supra*, 101 CA4th at 160–161. See also *In re Tommy A.* (2005) 131 CA4th 1580, 1592, 33 CR3d 103 (minor defendant's restitution order based on a plea agreement created an implied agreement between the minor and the state obligating the minor to satisfy a "rehabilitative and deterrent debt to society" by paying restitution; the victim, not being a party to the implied agreement, could not release the minor from court-ordered restitution under Welf & I C §730.6(a)(1)). However, a victim's release of claims against the parent or guardian of a minor for damages inflicted during the minor's commission of a crime releases the parent or guardian. *In re Michael S.* (2007) 147 CA4th 1443, 1451–1455, 54 CR3d 920.

Prison sentence. See §83.78.

(4) [§83.63] Payment by Defendant's Insurer

If the defendant's insurer has made payments to the victim for losses subject to a Pen C §1202.4 restitution order, those payments must be offset against the defendant's restitution obligation. *People v Bernal* (2002) 101 CA4th 155, 165–168, 123 CR2d 622.

An insurer's payment to the victim must be made on behalf of the defendant as a result of the defendant's status as an insured under the policy. *People v Short* (2008) 160 CA4th 899, 903–905, 73 CR3d 154 (defendant was entitled to an offset for a settlement payment made by defendant's employer's liability insurer to victim of defendant's DUI accident involving company vehicle; even though defendant did not procure policy or make premium payments, he was member of class of insureds covered under the policy); *People v Jennings* (2005) 128 CA4th 42, 53–58, 26 CR3d 709 (defendant was entitled to an offset for an insurance settlement payment when both defendant and a parent were named on policy; irrelevant whether defendant or parent paid the

premiums). Compare *People v Hamilton* (2004) 114 CA4th 932, 941–943, 8 CR3d 190 (payments made by insurer of defendant's parent to settle victim's civil action against both the defendant and parent may not offset defendant's restitution obligation when payments are made on parent's behalf and not directly on behalf of defendant); *In re Tommy A.* (2005) 131 CA4th 1580, 1590–1592, 33 CR3d 103 (juvenile committed hit-and-run accident while driving another person's car without permission; settlement payment by owner's insurer was "completely distinct and independent from the minor" and therefore could not be offset against minor's restitution obligation).

When offsetting a defendant's restitution obligations by the amount of a civil settlement, the court must determine what portion of the settlement payment is directed to cover economic losses outlined in the restitution order. Only that portion of settlement may be used to reduce the defendant's obligations. *People v Short*, *supra*, 160 CA4th at 905; *People v Jennings*, *supra*, 128 CA4th at 58–59.

(5) [§83.64] Medi-Cal Payments

When the victim is covered by Medi-Cal, victim restitution for medical expenses is based on the amount actually paid by Medi-Cal and not the amount charged by the medical provider. *In re Anthony M.* (2007) 156 CA4th 1010, 1015–1019, 67 CR3d 734 (juvenile court erred in imposing restitution based on the amount charged by the medical provider). If the medical provider accepts payment from Medi-Cal for medical services rendered, that payment constitutes payment in full, and it is barred from seeking any unpaid balance from the patient. 42 CFR §447.15; Welf & I C §§14019.3(d), 14019.4(a). Under certain circumstances, Medi-Cal, on the other hand, may seek reimbursement from the patient or other responsible party for the amount it paid to the provider. 42 USC §§1396a(a)(25)(B), (a)(45), 1396k(a)(1)(A), (b). The court in *In re Anthony M.* distinguished *People v Hove* (1999) 76 CA4th 1266, 91 CR2d 128, in which the trial court ordered restitution in an amount in excess of that paid by Med-Cal to cover continuing care costs beyond the date of the award. No finding of ongoing medical care was made in *In re Anthony M.*, 156 CA4th at 1019. See also *People v Bergin* (2008) 167 CA4th 1166, 1169–1172, 84 CR3d 700 (private insurance case; trial court properly ordered victim restitution for medical expenses in the amount that the victim's medical provider accepted from victim's insurer as full payment for their services, plus the deductible paid by victim, rather than the amount billed by the medical provider).

(6) [§83.65] No Waiver of Full Restitution

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), which amended Cal Const art I, §28(b), removing language allowing the waiver of a portion or all victim restitution if there are compelling and extraordinary reasons for not ordering full restitution. Proposition 9 effectively negates provisions in Pen C §§1203.3(b)(4), 1202.4(f), (g) and (n) authorizing the reduction of restitution for compelling and extraordinary reasons.

(7) [§83.66] Audio-Video Hearing To Impose or Amend Restitution Order

Where such technology exists, the court may conduct a hearing to impose or amend a restitution order by two-way electronic audio-video communication between a defendant incarcerated in state prison and the courtroom in place of defendant's appearance in the courtroom. Pen C §1202.41(a)(1). The hearing is allowed only in those cases when the victim has received assistance from the Restitution Fund. Pen C §1202.41(a)(1). The hearing must be initiated through a request of the California Victim Compensation and Government Claims Board to the California Department of Corrections and Rehabilitation (CDCR), to collaborate with the court to arrange the hearing. Pen C §1202.41(a)(1).

If the defendant is represented by counsel, the attorney may be present with the defendant during the hearing, or may be present in the courtroom if the CDCR establishes a confidential telephone and facsimile transmission link between the defendant and the attorney. Pen C §1202.41(a)(3).

The determination to hold a two-way audio-video hearing lies within the discretion of the court. The court has the authority to issue an order requiring the defendant to be physically present in those cases where circumstances warrant. Pen C §1202.41(a)(2).

If a defendant is incarcerated in a prison without two-way audio-video communication capability, and does not waive his or her right to be present at a hearing to amend a restitution order, the California Victim Compensation and Government Claims Board must determine whether the cost of holding the hearing is justified. If the Board determines that the cost of holding the hearing is not justified, the Board may not pursue the amendment of the restitution order. Pen C §1202.41(b).

(8) [§83.67] Restitution and Civil Actions

A victim may be planning civil litigation or may have civil litigation pending. Until there is a civil settlement or judgment, the civil litigation should not be considered when determining restitution. However, once

there has been a settlement or judgment involving a victim and the defendant, the court must consider the civil award. The civil award must be allocated toward any restitution to the extent those payments cover economic losses for which restitution is being awarded. *People v. Short* (2008) 160 CA4th 899, 905, 73 CR3d 154; *People v Bernal* (2002) 101 CA4th 155, 165–166, 123 CR2d 622.

f. Order

(1) [§83.68] Specificity and Form

Specificity. The court's restitution order must be specific and detailed, identifying each victim and each loss to the extent possible. Pen C §1202.4(f)(3); see *People v Blankenship* (1989) 213 CA3d 992, 998, 262 CR 141. An order for restitution is unenforceable if it does not specify the losses to which it pertains. *People v Guardado* (1995) 40 CA4th 757, 762–763, 47 CR2d 81. Because a restitution order is enforceable by the victim as if it were a civil judgment (see §83.35), it must have the same degree of specificity as a civil judgment. 40 CA4th at 762. For discussion of procedure when the amount of restitution is uncertain at the time of sentencing, see §83.69.

☛ JUDICIAL TIP: Courts are encouraged to use Judicial Council form CR–110/JV–790 when making restitution orders. For form, see §83.93.

Separate form. Many judges issue a separate copy of the restitution order for each victim because victims often need a certified copy of the order for enforcement purposes and are entitled to one on request. Pen C §1214(b); see discussion in §83.35. The California Victim Compensation and Government Claims Board is also entitled to a copy on request. Pen C §1214(b). Penal Code §1202.4(f)(3) also seems to contemplate separate orders.

Notice to Board. The court clerk must notify the California Victim Compensation and Government Claims Board within 90 days of the court's imposition of a restitution order if the defendant is ordered to pay restitution to the Board because of the victim receiving compensation from the Restitution Fund. Pen C §1202.4(p).

(2) [§83.69] Amount Initially Uncertain

At the time of sentencing, the amount of restitution often cannot be fixed because necessary information is lacking or a subsequent hearing is needed to resolve a dispute about the amount. In these situations the court may order that it will determine the amount later. Pen C §1202.4(f); See *People v Amin* (2000) 85 CA4th 58, 62, 101 CR2d 756 (as part of plea

bargain defendant agreed to pay restitution, and decision on amount reserved by court for later hearing). The court retains jurisdiction over the defendant for purposes of imposing or modifying restitution until the losses are determined. Pen C §1202.46. There is no limitation on when the court must set the restitution hearing. See *People v Bufford* (2007) 146 CA4th 966, 969–972, 53 CR3d 273 (trial court did not lose jurisdiction to order restitution, notwithstanding that defendant had fully served her prison sentence before the final restitution hearing was held).

☛ JUDICIAL TIPS:

- Judges often seek a waiver of defendant's presence at the future restitution hearing. For judicial economy, judges will often set the date for the restitution hearing at the time of sentencing.
- When the defendant is sentenced to prison, it is highly advisable to address restitution prior to the defendant being transported to the prison. If the defendant is transported to prison with a "to be determined" order, it is highly unlikely that the victim will ever be able to obtain a restitution order unless the defendant waives his or her personal appearance at any future hearing. Counties typically cannot afford to bring a prisoner back to the local area for a restitution hearing. If the total amount of losses cannot be determined prior to the defendant being transported, the court should (1) order the amount that can be determined so that the California Department of Corrections and Rehabilitation (CDCR) can start the collection, (2) include an order in the sentence for the defendant to pay any additional restitution in an amount to be determined by the court, and (3) seek a waiver of the defendant's presence at any future restitution hearings.
- There is a prevailing misperception that when a "to be determined order" is issued, the CDCR will subsequently set the amount of restitution. CDCR can collect on restitution orders, but CDCR cannot set or order the amount.

(3) [§83.70] Delegating Restitution Determination

General rule. The court may not delegate to the probation officer the duty to determine the amount of restitution. *People v Cervantes* (1984) 154 CA3d 353, 358, 201 CR 187; see Pen C §1202.4(f) (court shall require restitution in amount to be established by court order). But see *People v Lunsford* (1998) 67 CA4th 901, 79 CR2d 363 (restitution order directing county agency to determine amount at later time enforceable). As to minors, see *In re Karen A.* (2004) 115 CA4th 504, 507–511, 9 CR3d 369, which holds that Welf & I C §730.6(h) allows the juvenile court to

delegate to the probation officer the tasks of identifying losses and specifying the amount of restitution. Minors are entitled to a court hearing to dispute the probation officer's determination of the restitution amount. Welf & I C §730.6(h).

Delegation with consent. The court with the defendant's consent may order the probation officer to set the amount of restitution. Pen C §1203.1k; see *People v DiMora* (1992) 10 CA4th 1545, 1549, 13 CR2d 616. The defendant can contest the probation officer's determination in court. Pen C §1203.1k.

Delegation when amount uncertain at sentencing. When the extent of a victim's loss cannot be ascertained at the time of sentencing, *People v Lunsford, supra,* permits the court to order the defendant to pay restitution in an amount to be determined by the local agency that administers the victim restitution program; the defendant has a right to a court hearing in accordance with Pen C §1202.4(f)(1).

☛ JUDICIAL TIPS:

- Most judges seek defendant's consent or proceed as discussed in §83.69.
- The California Department of Corrections and Rehabilitation (CDCR) is not authorized to initiate collection of restitution based on determinations by probation officers or other county agencies. CDCR must have a signed, sealed, and certified court order reflecting specific amounts and names of victims.

Setting payment schedule. Courts often delegate the task of setting up the defendant's payment schedule to the probation department or another county agency. See *People v Ryan* (1988) 203 CA3d 189, 198, 249 CR 750. Payment schedules are not necessary for adults committed to the CDCR or youthful offenders committed to the CDCR's Division of Juvenile Justice (DJJ) (formerly California Youth Authority). Under statute, a specified percentage will be deducted from prison wages and trust account deposits. Pen C §2085.5; Welf & I C §§1752.81–1752.82.

☛ JUDICIAL TIP: The defendant should be given an opportunity to challenge the determination.

Relying on probation report. The court may rely on the probation report in setting the amount of restitution. *People v Campbell* (1994) 21 CA4th 825, 830–832, 26 CR2d 433; *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1; see §83.44.

(4) [§83.71] Relation of Restitution Order to Probation

Penal Code §1202.4 applies whether or not the court grants probation. Pen C §1202.4(a)(1), (f).

☛ JUDICIAL TIP: When defendant is sentenced to prison, an order for full restitution is as mandatory as in cases of probation.

When the court grants probation, payment of restitution must be made a condition of probation. Pen C §1202.4(m)–(n). Termination of probation does not affect the victim's right to enforce the order. Pen C §1202.4(m).

☛ JUDICIAL TIP: When probation is revoked or terminated, and the defendant is sentenced to CDCR, the initial order reflecting the restitution must be included in the legal documents accompanying the inmate to CDCR. In order for the restitution to continue to be collected, the victim must submit a request to CDCR.

The court may revoke a defendant's probation based on the defendant's willful failure to pay restitution when the defendant has the ability to do so. Pen C §1203.2(a); *People v Lawson* (1999) 69 CA4th 29, 81 CR2d 283.

If the defendant is unable to pay full restitution within the initial term of probation, the court may modify and extend the period of probation to allow the defendant to pay off all restitution within the probation term. Pen C §1203.3(b)(4); *People v Cookson* (1991) 54 C3d 1091, 1097, 2 CR2d 176. Generally, the probation term may be extended up to but not beyond the maximum probation period allowed for the offense. *People v Medeiros* (1994) 25 CA4th 1260, 1267–1268, 31 CR2d 83. However, Pen C §1203.2(e) provides an exception, allowing probation to be extended past the maximum period if probation is revoked based on a violation of probation and the revocation has been set aside. *In re Hamm* (1982) 133 CA3d 60, 67, 183 CR 626; *People v Carter* (1965) 233 CA2d 260, 268, 43 CR 440.

A defendant is not entitled to have his or her conviction expunged under Pen C §1203.4 following termination of the defendant's probation when the defendant has not paid the full amount of the restitution. For purposes of Pen C §1203.4, a defendant has not fulfilled a restitution condition of probation unless the defendant has made all court-ordered payments for the entire period of probation and has paid the obligation in full. *People v Covington* (2000) 82 CA4th 1263, 1271, 98 CR2d 852.

For a discussion of the court's broad discretion under Pen C §1203.1 to order restitution as a condition of probation, see §83.84.

(5) [§83.72] Relation of Restitution Order to Restitution Fund

Victims of criminal acts may recover compensation from the state Restitution Fund under specified circumstances; the Fund is administered by the California Victim Compensation and Government Claims Board. Govt C §§13950–13969.7.

A restitution order does not preclude a victim's right to financial assistance from the Fund, but the amount of such assistance is reduced by the amount the victim actually receives for the same loss under the restitution order. Pen C §1202.4(j).

Restitution payments are made to the Fund to the extent that it provided compensation to the victim. Pen C §1202.4(f)(2). More broadly, when the Fund pays a victim, it is subrogated to the victim's rights against persons liable for restitution. Pen C §1202.4(f)(2); Govt C §13963(a).

Assistance from the Fund as a result of the defendant's conduct is presumed to be a direct result of the defendant's crime and must be included in the amount of restitution ordered by the court. Pen C §1202.4(f)(4)(A). The amount of assistance provided by the Fund may be established by copies of bills submitted to the Board reflecting the amount paid by the Board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Pen C §1202.4(f)(4)(B). Certified copies of these bills provided by the Board and redacted to protect the victim's privacy and safety or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that the bills were submitted to and paid by the Board, are sufficient to meet this requirement. Pen C §1202.4(f)(4)(B); see *People v Cain* (2000) 82 CA4th 81, 87–88, 97 CR2d 836 (Board's statement of claims paid on victim's behalf is inherently reliable document). If the defendant offers evidence to rebut this presumption, the court may release additional information contained in the Board's records to the defendant *only after* (1) reviewing the information in camera, and (2) finding that the information is necessary for the defendant to dispute the amount of the restitution order. Pen C §1202.4(f)(4)(C).

(6) [§83.73] Order Imposing Joint and Several Liability

A restitution order under Pen C §1202.4 may require codefendants to pay restitution jointly and severally. *People v Blackburn* (1999) 72 CA4th 1520, 1535, 86 CR2d 134; *People v Madrana* (1997) 55 CA4th 1044, 1049, 64 CR2d 518. Courts frequently make such orders. Under such an order, each defendant is entitled to a credit for any actual payments made by the other. *People v Blackburn*, *supra*, 72 CA4th at 1535. But a defendant cannot be jointly and severally liable with a codefendant for

restitution if the defendant did not participate in the crime causing the victim's loss. See *People v Leon* (2004) 124 CA4th 620, 21 CR3d 394 (defendant convicted of passing one forged check for $2450, and codefendant convicted of passing three forged checks totaling $11,000; trial court erred in ordering defendant to pay victim restitution of $13,450 jointly and severally with codefendant).

As to joint and several liability of the parents or guardians of a juvenile offender, see §83.82.

(7) [§83.74] Correction, Modification, and Amendment of Restitution Orders

Correcting failure to order restitution. A sentence without a restitution award to a victim within Pen C §1202.4 is invalid; the trial court may properly add a restitution order later. Pen C §1202.46; *People v Rowland* (1997) 51 CA4th 1745, 1750–1752, 60 CR2d 351. See also *People v Moreno* (2003) 108 CA4th 1, 132 CR2d 918 (correction of sentence under Pen C §1202.46 not limited to situations where restitution amount is not ascertainable at the time of sentencing).

Modification. Penal Code §1202.4(f)(1) authorizes courts to modify restitution on motion of the prosecutor, victim, defendant, or court. See also Pen C §1203.2(b) (modification of probation). Penal Code §1203.3(b)(5) additionally provides that nothing in Pen C §1203.3 prohibits the court from modifying the dollar amount of a restitution order under Pen C §1202.4(f) at any time during the term of the probation. Both the prosecutor and the victim have a right to notice and a hearing before a restitution order may be modified or terminated. Pen C §§679.02(a)(3), 1191.1, 1202.4(f)(1); 1203.3(b)(1). See *Melissa J. v Superior Court* (1987) 190 CA3d 476, 237 CR 5 (court set aside termination of restitution order made without notice to the victim or an opportunity for the victim to object). For modification of probation generally, see 3 Witkin and Epstein, California Criminal Law, *Punishment* §§573–576 (3d ed 2000).

☛ JUDICIAL TIP: When the court revokes probation and commits defendant to prison, it should modify the original judgment by ordering defendant to pay restitution because the probation condition that requires such payment no longer exists. See *People v Young* (1995) 38 CA4th 560, 567, 45 CR2d 177. Some judges believe that this is unnecessary because in their view a restitution obligation, like a restitution fine, survives a revocation of probation. See *People v Arata* (2004) 118 CA4th 195, 201–203, 12 CR3d 757; *People v Chambers* (1998) 65 CA4th 819, 821–823, 76 CR2d 732; Pen C §1202.4(m) (restitution unpaid, when defendant no longer on probation, enforceable like a civil judgment).

g. Enforcement

(1) [§83.75] Satisfaction of Victim Restitution Before Other Court-Ordered Debt

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), which added Cal Const art I, §28(b)(13)(C) to require that any funds collected by a court or law enforcement agencies from a person ordered to pay restitution must go to pay the restitution before being used to pay any other fines, penalties, assessments, or obligations that an offender may legally owe.

☛ JUDICIAL TIP: A fine or assessment ordered at the time of sentencing, but before a restitution order is imposed, may be paid, even though it is collected before restitution.

See also Pen C §1203.1d (allocation of restitution payments) and Pen C §2085.5(e), (g) (collection of monies from prisoners first distributed to victims).

(2) [§83.76] Income Deduction Orders

On entry of a restitution order under Pen C §1202.4, the court must enter a separate order for income deduction on determination of the defendant's ability to pay, regardless of probation status, in accordance with Pen C §1203. Pen C §1202.42(a). The court may consider future earning capacity when determining the defendant's ability to pay. The defendant bears the burden of demonstrating an inability to pay. Pen C §1202.42(a). Express findings by the court as to the factors bearing on the amount of the deduction are not required. Pen C §1202.42(a).

The order is stayed as long as defendant pays restitution. Pen C §1202.42(b)(1). Penal Code §1202.42 includes detailed provisions for enforcing the order by service on defendant's employer if defendant fails to meet the restitution obligation. Defendant has a right to notice and a hearing before the income deduction order is enforced. Pen C §1202.42(b)(2), (f).

By its terms, Pen C §1202.42 applies only to restitution orders made under Pen C §1202.4 or its predecessors.

☛ JUDICIAL TIP: The court should *not* consider making an income deduction order in the following situations:

- A restitution order directed to a juvenile offender under Welf & I C §730.6.
- An order to pay restitution for losses from conduct other than the commission of a crime of which defendant was convicted. See §§83.84–83.90.

County retirement benefits exemption. The court may not order a county retirement system to deduct restitution payments from a disability allowance owed to a defendant who is a retired county employee. Government Code §31452 provides an exemption from execution or other court process for benefits under county retirement systems. *Board of Retirement v Superior Court* (2002) 101 CA4th 1062, 124 CR2d 850 (court found that neither Proposition 8 nor former Govt C §13967.2 (recast as Pen C §1202.42) has impliedly repealed the exemption).

See the Judicial Council income deduction form and related forms in §§83.95–83.97.

(3) [§83.77] Order To Apply Specified Portion of Income to Restitution

In two situations the court must order probationers to seek and maintain employment and apply a portion of earnings specified by the court to make restitution for the victim's medical and psychological treatment expenses:

(1) Conviction of sexual assault on a minor. Pen C §1203.1g.

(2) Conviction of assault, battery, or assault with a deadly weapon on a senior. Pen C §1203.1j.

In all cases of probation, the court may require as a condition of probation that the probationer go to work and earn money to pay any reparation condition and apply those earnings as directed by the court. Pen C §1203.1(d).

(4) [§83.78] Collection of Restitution by CDCR and DJJ

The California Department of Corrections and Rehabilitation (CDCR) and the CDCR's Division of Juvenile Justice (DJJ) (formerly California Youth Authority) collect restitution from the funds of inmates and wards in the same manner as restitution fines. Pen C §2085.5; Welf & I C §§730.6(p), 1752.81; for discussion, see §83.23. Victim restitution is collected before the restitution fine. Pen C §2085.5(g); Welf & I C §§730.6(p), 1752.81(f).

☛ JUDICIAL TIPS:

- Courts should make sure that the CDCR and the DJJ are given restitution information that includes *specific amounts and names of victims.*
- Courts should not direct the correctional institutions to collect restitution; their obligation to do so rests on statute, not court order.

The CDCR provides a form CDCR 1707 (Request for Victim Services) that a victim may complete and send to the CDCR to notify the CDCR of a restitution order. Completion of the form is not required for the CDCR to collect restitution on the victim's behalf, but it greatly assists the CDCR in disbursing funds to victims, because it requests the victim's address of where to send the money. Frequently, CDCR does not have this information, and therefore, disbursement of collections is thwarted. The victim may use form CDCR 1707 to request notification of the inmate's status in prison or to request special conditions of parole on the inmate's release. The form can be obtained at the CDCR Office of Victim and Survivor Rights and Services Web site: www.cdcr.ca.gov/victim_services/application.html.

(5) [§83.79] Restitution Centers

The Secretary of the California Department of Corrections and Rehabilitation (CDCR) may establish and operate restitution centers, which are facilities that house nonviolent defendants who are required to work outside the facilities during the day to pay off restitution owing to their victims. Pen C §§6220–6236. Of the wages earned by a defendant while housed at a restitution center, one-third is given to the victim, one-third to the Department of Corrections and Rehabilitation to pay for the operation costs of the center, and one-third to the defendant's savings account. Pen C §6231. To participate in the restitution center, defendants must be employable, provide no risk to the community, and have no prior convictions of crimes involving violence, sex, or the sale of narcotics. See Pen C §6228 for discussion of eligibility requirements.

At present, there are no restitution centers in operation in California.

(6) [§83.80] Financial Disclosure

A restitution order under Pen C §1202.4 subjects the defendant to detailed financial disclosure requirements in aid of enforcement. Pen C §1202.4(f)(5)–(11).

The defendant must disclose all assets, income, and liabilities in which the defendant held or controlled a present or future interest as of the date of the defendant's arrest. Pen C §1202.4(f)(5). See the Judicial Council asset disclosure form CR–115 in §83.94. The disclosure must be filed with the clerk of the court no later than the defendant's sentencing date unless otherwise directed by the court under Pen C §1202.4(f)(8). Pen C §1202.4(f)(7).

The court may consider a defendant's unreasonable failure to make a complete disclosure as (1) a circumstance in aggravation of the crime in imposing a term under Pen C §1170(b), or (2) a factor indicating that the interests of justice would not be served by admitting the defendant to

probation, by conditionally sentencing the defendant, or by imposing less than the maximum fine and sentence fixed by law for the case. Pen C §1202.4(f)(9). A defendant's failure or refusal to file a disclosure statement does not delay the entry of an order of restitution or pronouncement of sentence. Pen C §1202.4(f)(10). A defendant who willfully states as true on the disclosure any material matter that the defendant knows to be false is guilty of a misdemeanor, unless this conduct is punishable as perjury or another provision of law provides for a greater penalty. Pen C §1202.4(f)(5), (11).

Financial information filed by the defendant under Pen C §987(c) to help the court determine the defendant's ability to employ counsel may be used instead of the required financial disclosure when the defendant fails to file the disclosure. Pen C §1202.4(f)(6). In such an event, the defendant shall be deemed to have waived confidentiality of the information. Pen C §1202.4(f)(6).

Filing of updated financial disclosure. If a defendant has a remaining unpaid balance on a restitution order or fine 120 days before the defendant's scheduled release from probation or completion of a conditional sentence, the defendant must prepare and file a new and updated financial disclosure identifying all assets, income, and liabilities. Pen C §1202.4(f)(11). The defendant must file this updated financial disclosure with the court clerk no later than 90 days before the defendant's scheduled release from probation or completion of the defendant's conditional sentence. Pen C §1202.4(f)(11).

Use of interrogatories. A crime victim who has not received complete payment of restitution may serve Judicial Council Form CR–200 interrogatories on the defendant once a year to discover information about the defendant's assets, income, and liabilities. CCP §2033.720(b).

For enforcement of restitution orders as civil judgments, see §83.35.

(7) [§83.81] Applying Seized Assets to Restitution

The court may apply funds confiscated from the defendant at the time of the defendant's arrest, except for funds confiscated under Health & S C §11469 (illegal drug funds), to the restitution order if the funds are not exempt for spousal or child support or subject to any other legal exemption. Pen C §1202.4(f).

The common law rule that money belonging to an arrestee and held for safekeeping is exempt from execution does not apply to funds sought for payment of a restitution order, a debt that was created after the defendant's conviction. *People v Willie* (2005) 133 CA4th 43, 49–50, 34 CR3d 532. Further, this exemption has been superseded by CCP §704.090, which effectively limits the exemption to $300 for a restitution order. 133 CA4th at 50–52.

If a complaint alleges facts to support an aggravated white collar enhancement under Pen C §186.11, the prosecution may act to preserve the defendant's assets for the payment of restitution. Pen C §186.11(e); see, *e.g.*, *People v Semaan* (2007) 42 C4th 79, 64 CR3d 1; *Q-Soft, Inc. v Superior Court* (2007) 157 CA4th 441, 68 CR3d 687. The assets of the defendant that may be frozen are not limited to assets involved in the crime with which the defendant is charged, because the obligation to pay restitution is a general obligation. *People v Semaan*, *supra*, 42 C4th at 86–87.

Before the court may release seized assets to a victim, it must afford the defendant notice and opportunity to be heard in opposition to the victim's claim. *People v Chabeear* (1984) 163 CA3d 153, 155, 209 CR 218 (due process violation to deny defendant the right to challenge robbery victim's claim of money seized during search of defendant's residence). However, in *People v Nystrom* (1992) 7 CA4th 1177, 1181–1182, 10 CR2d 94, the court held, in contrast to *Chabeear*, that a defendant was not entitled to notice and hearing before money seized at the time of arrest was released to the victim because the trial court had already entered a valid restitution order as part of a negotiated plea, and thus there was no question that the victim was entitled to the money. 7 CA4th at 1181–1182.

i. [§83.82] Juvenile Offenders

Juvenile restitution law under Welf & I C §730.6 parallels Pen C §1202.4. The more extensive case law on adult restitution can therefore be used by a juvenile court for guidance on most restitution issues. See *In re Johnny M.* (2002) 100 CA4th 1128, 1132–1133, 123 CR2d 316. Although there is a substantial similarity between juvenile and adult restitution law, there are the following exceptions:

- *Ability to pay.* For minors, as for adults, ability to pay is not a consideration in making restitution orders (Welf & I C §730.6(h)), subject to an exception in Welf & I C §742.16 (when minor is unable to repair damage caused by vandalism or graffiti offense, order for monetary restitution depends on ability to pay).
- *Liability of parents.* Parents and guardians with joint or sole legal and physical custody and control of the minor are rebuttably presumed to be jointly and severally liable for a minor's restitution obligation. Welf & I C §730.7(a). The amount of their liability is limited by statute and is subject to the court's consideration of their inability to pay. Welf & I C §730.7(a); CC §§1714.1, 1714.3. The parents or guardians have the burden of showing inability to pay and the burden of showing by a preponderance of the evidence

that they were either not given notice of potential liability for payment of restitution before the wardship petition was sustained or that they were not present during the proceedings when the petition was sustained and during any subsequent hearing addressing restitution. Welf & I C §730.7(a). A child's age at the time of the offense, and not his or her age on the date the restitution order is imposed, determines whether parents may be held jointly and severally liable. *In re Jeffrey M.* (2006) 141 CA4th 1017, 1022–1027, 46 CR3d 533 (defendant was age 17 when offense was committed but had reached majority at time of disposition order; trial court properly held parent liable for son's restitution obligation).

- *Economic losses.* Penal Code §1202.4(f)(3) includes interest, attorneys' fees, and collection costs in the definition of economic losses; Welf & I C §730.6 does not. However, the Second District Court of Appeal has held that a juvenile offender can be ordered to pay restitution for the victim's legal fees and costs that the victim incurred to collect restitution. *In re Imran Q.* (2008) 158 CA4th 1316, 1319–1321, 71 CR3d 121 (Welf & I C §730.6's silence on attorney's fees and costs is a mere legislative oversight). See also *In re M. W.* (2008) 169 CA4th 1, 4–7, 86 CR3d 545 (cost of mental health services incurred by victim of crime committed by a juvenile is a recoverable loss even though not specifically enumerated in Welf & I C §730.6(h)).
- *Financial disclosure.* Welfare and Institutions Code §730.6 does not impose financial disclosure requirements on juvenile offenders.
- *Wage deduction order.* Juvenile offenders are not subject to such orders. See Pen C §1202.42.
- *Identification of victims.* The restitution order, to the extent possible, must identify each victim, unless the court for good cause finds that the order should not identify the victim(s). Welf & I C §730.6(h).
- *Retention of jurisdiction to determine restitution amount.* If the amount of restitution cannot be ascertained at the time of sentencing, the court retains jurisdiction to determine restitution only during the minor's term of commitment or probation. Welf & I C §730.6(h). The restitution obligation of the minor may extend beyond expiration of wardship and into adulthood. *In re Michael S.* (2007) 147 CA4th 1443, 1456–1457, 54 CR3d 920.

j. [§83.83] Remand for Resentencing

A restitution order may be increased or imposed for the first time after a remand for resentencing following the defendant's partially successful appeal. *People v Harvest* (2000) 84 CA4th 641, 646–650, 101 CR2d 135 (no double jeopardy bar because victim restitution is civil remedy).

Restitution fines may *not* be increased after remand for resentencing following a successful appeal. See §83.19.

3. [§83.84] Restitution as Condition of Probation

The court has broad discretion to order restitution as a condition of probation consistent with the ends of fostering rehabilitation and protecting public safety. Pen C §1203.1(a)(3), (j); *People v Carbajal* (1995) 10 C4th 1114, 1120, 43 CR2d 681. Under Pen C §1203.1(j), the court can order restitution when the losses are not the result of the crime underlying the defendant's conviction. However, the restitution condition must be reasonably related either to the crime of which the defendant was convicted or to the goal of deterring future criminality. 10 C4th at 1121–1124. In *People v Rugamas* (2001) 93 CA4th 518, 521, 113 CR2d 271, the court upheld, as a condition of probation, restitution for the cost of medical treatment received by the defendant and paid for by the police department, and administered as a result of injuries sustained by the defendant when the police shot him with rubber bullets. Even though the police department was not a victim entitled to restitution under the mandatory restitution provisions of Pen C §1202.4, the restitution order was proper under Pen C §1203.1. The restitution was reasonably related to both the crime of which the defendant was convicted (brandishing weapon to avoid arrest) and the goal of deterring future criminality. See also *In re I. M.* (2005) 125 CA4th 1195, 1208–1211, 23 CR3d 375 (restitution for funeral expenses of murder victim's family was properly imposed, as a condition of probation, against a juvenile offender who was found to have acted as an accessory after the fact in connection with the murder; order was reasonably related to the crime of which defendant was convicted and was calculated to deter defendant's gang involvement). Compare *People v Woods* (2008) 161 CA4th 1045, 1049–1053, 74 CR3d 786 (defendant who is convicted of acting as accessory after the fact of murder and *sentenced to prison* could not be required to pay restitution for economic losses resulting from the murder).

A similar provision to Pen C §1203.1j is found in Welf & I C §730(b). It states that when a ward is placed under the supervision of the probation officer or committed to the care, custody, and control of the probation officer, the court may make any and all reasonable orders for the conduct of the ward, including the imposition of any reasonable conditions

that it may determine fitting and proper to the ends that justice may be done and the reformation and rehabilitation of the ward enhanced. See *In re G. V.* (2008) 167 CA4th 1244, 1248–1251, 84 CR3d 809.

a. [§83.85] Accidents Related to Hit-and-Run or DUI Offenses

Conviction of a hit-and-run or misdemeanor DUI offense does not establish responsibility for the accident in which defendant was involved. See *People v Braz* (1998) 65 CA4th 425, 432, 76 CR2d 531 (in a hit-and-run case the crime is the running, not the hitting). However, even though the crime did not cause the loss, the court may order restitution as a condition of probation, at least when "there is no question as to defendant's responsibility for the loss." *People v Carbajal* (1995) 10 C4th 1114, 1124, 43 CR2d 681 (defendant conceded liability in hit-and-run accident); *People v Kleinman* (2004) 123 CA4th 1476, 1479–1481, 20 CR3d 885 (hit-and-run); *People v Phillips* (1985) 168 CA3d 642, 650, 214 CR 417 (DUI).

Restitution is appropriate in these cases because it is reasonably related to the crime of which defendant was convicted and to the goal of probation to deter future criminality. *People v Carbajal*, *supra*, 10 C4th at 1123. It is particularly important for the court to

- Notify defendant that the court may consider requiring restitution as a condition of probation; and
- Give defendant "a meaningful opportunity to controvert the information" that the court considers. 10 C4th at 1125.

The Fourth District of the Court of Appeal has applied the reasoning of *Carbajal* in a nonprobation case. See *People v Rubics* (2006) 136 CA4th 452, 456–461, 38 CR3d 886 (defendant was convicted of felony hit-and-run resulting in death, sentenced to prison, and ordered to pay funeral expenses as direct restitution to victim's family).

☛ JUDICIAL TIPS:

- In the absence of a plea agreement, restitution in a hit-and-run case (Veh C §§20001, 20002) or misdemeanor DUI case (Veh C §23152) should probably be ordered only when it is obvious or undisputed that defendant caused the accident.
- Convictions of *felony* DUI causing injury (Veh C §23153) pose no causation problems and should be handled as mandatory restitution cases. See *People v Pinedo* (1998) 60 CA4th 1403, 71 CR2d 151.

b. [§83.86] Receiving Stolen Property

A receiving conviction does not by itself permit a conclusion that the defendant was responsible for the underlying theft; such a conviction is not a basis for ordering restitution to the theft victim as a condition of probation. *People v Scroggins* (1987) 191 CA3d 502, 506, 236 CR 569; *In re Maxwell C.* (1984) 159 CA3d 263, 266, 205 CR 310.

4. Restitution Based on Dismissed and Uncharged Counts: *Harvey* Waivers

a. [§83.87] General Principles

The court may order restitution on dismissed counts when the negotiated disposition includes a *Harvey* waiver. Pen C §1192.3. See, *e.g.*, *People v Campbell* (1994) 21 CA4th 825, 26 CR2d 433; *People v Beck* (1993) 17 CA4th 209, 21 CR2d 250. *Harvey* waivers derive their name from *People v Harvey* (1979) 25 C3d 754, 758, 159 CR 696 (defendant to suffer no adverse sentencing consequences from dismissed count in absence of contrary agreement); see *People v Dalvito* (1997) 56 CA4th 557, 559 n2, 65 CR2d 679; *People v Moser* (1996) 50 CA4th 130, 132, 57 CR2d 647.

The waiver may also encompass unfiled charges; when it does, the court may base a restitution order on defendant's uncharged offenses. See, *e.g.*, *People v Goulart* (1990) 224 CA3d 71, 273 CR 477; *People v Baumann* (1985) 176 CA3d 67, 222 CR 32.

The *Harvey* waiver suffices; the plea agreement need not specifically refer to restitution on dismissed counts. *People v Campbell, supra.*

b. [§83.88] Burden of Proof

The prosecution has the burden of proving defendant's culpability for uncharged or dismissed offenses by a preponderance of the evidence when the defendant denies having committed them. *People v Baumann* (1985) 176 CA3d 67, 80, 222 CR 32.

☛ JUDICIAL TIP: Disputes concerning this culpability can be avoided by having the plea agreement pinpoint the matters on which the court may order restitution. See, *e.g.*, *People v Moser* (1996) 50 CA4th 130, 133, 57 CR2d 647.

For the amount of restitution, the rule is the same as for orders under Pen C §1202.4: defendant has the task of showing that the recommendation of the probation officer or the figures of the victims are inaccurate. *People v Baumann, supra*; see §83.45.

c. [§83.89] Relation to Probation

The court may make a valid restitution order under a *Harvey* waiver even when it does not place defendant on probation. See *People v Beck* (1993) 17 CA4th 209, 21 CR2d 250 (defendant sentenced to prison); but see *People v Carbajal* (1995) 10 C4th 1114, 1120–1123, 43 CR2d 681 (dicta that authority to order restitution in situations not covered by Pen C §1202.4 derives from court's discretion to impose probation conditions); *People v Lai* (2006) 138 CA4th 1227, 1246–1249, 42 CR3d 444. See also *People v Percelle* (2005) 126 CA4th 164, 178–180, 23 CR3d 731, discussed in §83.38.

5. [§83.90] Restitution in Bad Check Diversion Cases

In counties with a bad check diversion program, the district attorney may enter an agreement with the offender not to prosecute on the condition, inter alia, of full restitution to the victim of the bad check. Pen C §1001.64.

IV. SCRIPT AND FORMS

A. [§83.91] Sample Script: Admonition Concerning Restitution Fine

Misdemeanor case:

Do you understand that in this case the court must impose a restitution fine of at least $100 and no more than $1000? Do you further understand that if you are granted probation, the sentencing judge will also impose an additional probation revocation restitution fine in the same amount, but this fine will be suspended unless your probation is revoked? If probation is revoked, the fine will be reinstated against you. Do you have any questions regarding these restitution fines?

Felony case:

Do you understand that in this case the court must impose a restitution fine of at least $200 and no more than $10,000? Do you further understand that if you are granted probation or sentenced to state prison, in addition to the restitution fine the court determines to be appropriate in your case, the court must impose an *additional* fine in the same amount? This additional fine will be suspended and not imposed *unless* [*probation is revoked/after being paroled, your parole is revoked*]. Do you have any questions regarding these restitution fines?

B. [§83.92] Sample Written Form: Admonition Concerning Restitution Fine and Restitution

Misdemeanor case:

I understand that I must pay a restitution fine of no less than $100 and up to $1000. If I am placed on probation, the court will impose an additional probation revocation restitution fine in the same amount that will be collected only if my probation is revoked. I also understand that I must pay full restitution to all victims for any losses suffered as a result of the crime(s). ☐ Initials

Felony case:

I understand that I must pay a restitution fine of no less than $200 and up to $10,000. If I am placed on probation, the court will impose an additional probation revocation restitution fine in the same amount that will be collected only if my probation is revoked. If I am sentenced to state prison, the court will impose an additional parole revocation restitution fine in the same amount that will be collected only if my parole is revoked. I also understand that I must pay full restitution to all victims for any losses suffered as a result of the crime(s). ☐ Initials

C. [§83.93] Judicial Council Form: Order for Restitution and Abstract of Judgment

ATTORNEY OR PERSON WITHOUT ATTORNEY (*Name, State Bar number, and address*):

☐ rding requested by and return to:

TELEPHONE NO.: FAX NO. (*Optional*):

E-MAIL ADDRESS (*Optional*):

☐ ORNEY FOR ☐ GMENT CREDITOR ☐ GNEE OF RECORD

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

FOR RECORDER'S USE ONLY

CASE NUMBER:

CASE NAME:

FOR COURT USE ONLY

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT
(Penal Code, §§ 1202.4(f), 1203.1(*l*), 1214;
Welfare and Institutions Code, § 730.6(h) and (i))

ORDER FOR RESTITUTION

1. a. ☐ On *(date)*: defendant *(name)*:
was convicted of a crime that entitles the victim to restitution.

b. ☐ *(date)*: child *(name)*:
was found to be a person described in Welfare and Institutions Code section 602, which entitles the victim to restitution. Wardshi ☐ terminated.

c. ☐ ents or guardians jointly and severally liable *(name each):*

d. ☐ offenders found jointly and severally liable *(name each):*

2. Evidence was presented that the victim named below suffered losses as a result of defendant's/child's conduct. Defendant/child was informed of his or her right to a judicial determination of the amount of restitution and
a. ☐ earing was conducted.
b. sti ☐ d to the amount of restitution to be ordered.
c. wa ☐ a hearing.

3. **THE COURT ORDERS** defendant/child to pay restitution to
a. ☐ victim *(name)* : in the amount of: $
b. ☐ State Victim Compensation Board, to reimburse payments to the victim from the Restitution Fund, in the amount of: $
c. ☐ s interest at 10 percent per year from the date of loss **or** sentencing ☐ ☐
d. ☐ s attorney fees and collection costs in the sum of $
e. ☐ s an administrative fee at 10 percent of the restitution owed (Pen. Code, § 1203.1(*l*))

4. The amount of restitution includes
a. ☐ e of property stolen or damaged
b. ☐ dical expenses
c. ☐ wages or profits
(1) i ☐ ed by victim due to injury
(2) c ☐ im's parent(s) or guardian(s) (if victim is a child) incurred while caring for the injured child
(3) i ☐ ed by victim due to time spent as a witness or in assisting police or prosecution
(4) ☐ ctim's parent(s) or guardian(s) (if victim is a child) due to time spent as a witness or in assisting police or prosecution
d. ☐ economic losses (felony violations of Pen. Code, § 288 only)
e. ☐ er *(specify)*:

Date:

JUDICIAL OFFICER

VICTIM TO RECEIVE CERTIFIED COPY FOR FILING WITH COUNTY RECORDER

Form Approved for Optional Use
Judicial Council of California
CR-110/JV-790 [Rev. January 1, 2008]

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT

Penal Code, §§ 1202.4(f), 1203.1(*l*), 1214
Welfare and Institutions Code, § 730.6(h), (i), (q)
Civil Code, § 1714.1
Code of Civil Procedure, § 674(a)(7)

CASE NAME:	CASE NUMBER

NOTICE TO VICTIMS

PENAL CODE SECTION 1214 PROVIDES THAT ONCE A DOLLAR AMOUNT OF RESTITUTION HAS BEEN ORDERED, THE ORDER IS THEN ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT. ALTHOUGH THE CLERK OF THE COURT IS NOT ALLOWED TO GIVE LEGAL ADVICE, YOU ARE ENTITLED TO ALL RESOURCES AVAILABLE UNDER THE LAW TO OBTAIN OTHER INFORMATION TO ASSIST IN ENFORCING THE ORDER.

THIS ORDER DOES NOT EXPIRE UNDER PENAL CODE SECTION 1214(d).

THE VICTIM SHALL FILE A SATISFACTION OF JUDGMENT WITH THE COURT WHENEVER AN ORDER TO PAY RESTITUTION IS SATISFIED, PURSUANT TO PENAL CODE SECTION 1214(d).

APPLICATION FOR ABSTRACT OF JUDGMENT

5. The ju☐t creditor ☐hee of record ☐ *(specify)*:
applies for an abstract of judgment and represents the following:
a. Judgment debtor's
Name and last known address

b. ☐ Driver's license no. [last 4 digits] and state: ☐ Unknown

c. ☐ Social security no. [last 4 digits]: ☐ Unknown

d. ☐ Date of birth: ☐ Unknown

Date:

_____ ▸ _____
(TYPE OR PRINT NAME) (SIGNATURE OF APPLICANT OR ATORNEY)

☐NFORMATION AND BELIEF

ABSTRACT OF JUDGMENT

6. I certify that the following is a true and correct judgment entered in this action.

[SEAL]

7. Judgment creditor *(name)*:
☐ whose address or whose attorney's address appears on this form above the court's name.

8. Judgment debtor *(full name as it appears in judgment)*:

9. Judgment entered on *(date)*:

10. Total amount of judgment as entered or last renewed: $

11. ☐ A stay of enforcement was ordered on _____ and is effective until _____.
☐ A stay of enforcement was not ordered.

This abstract of judgment issued on *(date)*:

Clerk, by _____, Deputy

NOTICE TO COUNTY RECORDER

THIS ORDER IS ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT, PURSUANT TO PENAL CODE SECTION 1202.4(l) AND (m), PENAL CODE SECTION 1214, AND WELFARE AND INSTITUTIONS CODE SECTION 730.6(i) AND (r), AND FUNCTIONS AS AN ABSTRACT OF JUDGMENT.

D. [§83.94] Judicial Council Form: Defendant's Statement of Assets

NAME OF VICTIM ON WHOSE BEHALF RESTITUTION IS ORDERED:	*FOR COURT USE ONLY*
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT:	
DEFENDANT'S STATEMENT OF ASSETS	CASE NUMBER:
It is a misdemeanor to make any willful misstatement of material fact in completing this form (Pen. Code, § 1202.4(f)(4)).	

(*Attach additional sheets if the space provided below for any item is not sufficient*.)

PERSONAL INFORMATION

1. a. Name:
   b. AKA:
   c. Date of birth:
   d. Social security number:
   e. Marital status:
   f. Driver license number:
      State of issuance:
   g. Home address:
   h. Home telephone no.:
   i. Employer's telephone no.:

EMPLOYMENT

2. What are your sources of income and occupation? (*Provide job title and name of division or office in which you work.*)

3. a. Name and address of your business or employer (*include address of your payroll or human resources department, if different*):

   b. If not employed, names and addresses of all sources of income (*specify*):

4. How often are you paid (for example, daily, weekly, biweekly, monthly)? (*specify*):

5. What is your gross pay each pay period? $

6. What is your take-home pay each pay period? $

7. If your spouse earns any income, give the name of your spouse, the name and address of the business or employer, job title, and division or office (*specify*):

8. Other sources of income (*specify*):

CASH, BANK DEPOSITS

9. How much money do you have in cash? $

10. How much other money do you have in banks, savings and loans, credit unions, and other financial institutions either in your own name or jointly *(list)*:

	Name and address of financial institution	Account number	Individual or joint	Balance
a.				$
b.				$
c.				$

PROPERTY

11. List all automobiles, other vehicles, and boats owned in your name or jointly:

	Make and year	Value	Legal owner if different from registered owner	Amount owed
a.		$		$
b		$		$
c.		$		$

(Continued on reverse)

CR-115 [New July 1, 2000]

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT	CASE NUMBER:

12. List all real estate owned in your name or jointly:

	Address of real estate	Fair market value	Amount owed
a.		$	$
b.		$	$

OTHER PERSONAL PROPERTY *(Do noted list household furniture and furnishings, appliances, or clothing.*)

13. List anything of value not listed above owned in your name or jointly (*continue on attached sheet if necessary*):

	Description	Value	Address where property is located
a.		$	
b.		$	
c.		$	

ASSETS

14. List all other assets, including stocks, bonds, mutual funds, and other securities *(specify)*:

15. Is anyone holding assets for you? Yes☐ If yes, d☐be the assets and give the name and address of the person or entity holding each asset (*specify*):

16, Except for attorney fees in this matter and ordinary and routine household expenses, have you disposed of or transferred any assets since your arrest on this matter? Y☐o. If yes, gi☐e name and address of each person or entity who received any asset and describe each asset (*specify*):

DEBTS

17. Loans (*give details*):

18. Taxes (*give details*):

19. Support arrearages (*attach copies of orders and statements*):

20 Credit cards (*give creditor's name and address and the account number*):

21. Other debts (*specify*):

Date:

_____ ▸ _____
(TYPE OR PRINT NAME) _ (SIGNATURE)

I, (*name*): , a certified interpreter, having been duly sworn, truly translated this form to the defendant in the (*specify language*): language. The defendant indicated that he/she understood the contents of the form and he/she completed the form.

Date:

_____ ▸ _____
(TYPE OR PRINT NAME) _ (SIGNATURE)

E. [§83.95] Judicial Council Form: Information Regarding Income Deduction Order

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
INFORMATION REGARDING INCOME DEDUCTION ORDER (Pen. Code, § 1202.42)	CASE NUMBER:

1. The court has found that you have the ability to pay restitution and has ordered you to pay restitution in the amount of

   a. $ plus percent interest from the date of the order and fees of $ to all victims

   b. ☐ as listed in the probation report, dated *(specify)*:

   c. ☐ listed in the sentencing minute order, dated *(specify)*:

   Payment must be made as ordered at the hearing.

2. The court has entered an income deduction order for your employer to deduct: $ from your pay each pay period.

   a. The order applies to current and subsequent employers and all periods of employment.

   b. A copy of the income deduction order will be served on each of your employers and payers.

   c. Enforcement of the income deduction order may only be contested on the ground of mistake of fact regarding the amount owed or a showing of good cause for nonpayment.

   d. You are required to notify the Clerk of the Court *within 7 days* of a change in your address, a change in any of your employers, or a change in the address in any of your employers.

   e. **This income deduction order will be enforced under Penal Code section 1202.42(b) only if you fail to pay the restitution as ordered at the hearing.**

   f. Upon receipt of notice that you have failed to pay the restitution ordered at the hearing:

      (1) The court or its agent will request that you provide evidence that timely payments have been made or provide information establishing good cause for the failure. *If you fail to provide the evidence or fail to establish good cause within 5 days of the request*, you will receive notice that the order will be enforced, and the court will serve the income deduction order on each of your employers.

      (2) *Within 15 days* of being informed that the stay will be lifted, you may apply for a hearing to contest enforcement of the income deduction order on the ground of mistake of fact regarding the amount of restitution owed or on the ground that you have good cause for the nonpayment. Upon the timely request for a hearing, the income deduction order will not be enforced until the hearing is held and a determination is made on whether the enforcement of the income deduction order is proper.

F. [§83.96] Judicial Council Form: Order for Income Deduction

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
ORDER FOR INCOME DEDUCTION (Pen. Code, § 1202.42)	CASE NUMBER:

To: Employer:

Address:

Phone:

1. The court has found that the defendant has the ability to pay restitution under Penal Code section 1202.42 and has ordered that he or she pay restitution of $ plus 10% interest.
2. You are ordered to withhold a portion of the earnings of the defendant in this action *(name)*: (last 4 digits of social security number *(specify)*:), each pay period.
3. You are ordered to deduct: $ from the above named employee's pay each period and forward funds to the

   ☐ Clerk of the above entitled court ☐ Other *(specify)*:

4. This order will terminate upon payment in full or further order of this court.

Date:

CLERK'S CERTIFICATE

SEAL

The foregoing is a full, true, and correct copy of the original on file in this office.

CLERK OF THE SUPERIOR COURT

Date:

By _____, Deputy

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT	CASE NUMBER:

Notice to Employer re: Order for Income Deduction (Pen. Code, § 1202.42)

1. You are required to deduct the amount specified in the *Order for Income Deduction* from the employee's income and to pay that amount to the clerk of the above entitled court or its agent.

2. The order is to be implemented no later than the first payment date that occurs more than 14 days after the date of service of the order.

3. *Within two days after each payment date,* forward the amount deducted and a statement about whether the amount totally or partially satisfies the periodic amount specified in the income deduction order.

4. If you fail to deduct the proper amount from the employee's income, you are liable for the amount you should have deducted, plus costs, interest, and reasonable attorney fees.

5. You may collect up to five dollars ($5) against the employee's income to reimburse you for administrative costs for the first deduction and up to one dollar ($1) for each deduction thereafter.

6. This order and notice are binding until further notice by the court or until you no longer provide income to the employee.

7. When you no longer provide income to the employee, you must notify the clerk of the above entitled court and provide the employee's last known address and the name and address of the employee's new employer, if known. If you violate this provision, you are subject to a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation or five hundred dollars ($500) for any subsequent violation.

8. You must not discharge, refuse to employ, or take disciplinary action against the employee because of an income deduction order. If you violate this provision, you are subject to a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation or five hundred dollars ($500) for any subsequent violation.

9. If you receive income deduction orders for two or more employees sent by the same court, you may combine the amounts that are to be paid in a single payment, but you must identify the portion of the payment that is attributable to each employee.

10. If you receive two or more income deduction orders against the same employee, you must contact the above entitled court for further instructions.

G. [§83.97] Sample Written Form: Order to Probation Department in Regard to Collection of Restitution

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

vs

_____,
Defendant

Case No. _____

ORDER TO THE PROBATION DEPARTMENT IN REGARD TO COLLECTION OF RESTITUTION PAYMENTS

TO: _____ County Probation Department
_____ Office

THE COURT ORDERS:

If the Probation Department receives information that Defendant _____ ("Defendant") has not made his or her monthly victim restitution payments as ordered, the Probation Department will request Defendant to provide evidence indicating that timely payments have been made or provide information establishing good cause for the failure. If Defendant fails to provide the Probation Department with the evidence or fails to establish good cause within five days of the request, the Probation Department will immediately inform Defendant in writing that the Stay of Income Deduction Order will be lifted. At the same time the Probation Department will inform the Clerk of the Court in writing that the Income Deduction Order must be served pursuant to Penal Code §1202.42(f), following a 15-day period, because the Defendant has failed to make restitution payments as ordered. The Defendant may apply for a hearing to contest the lifting of the stay.

Dated: _____

_____
Judge of the Superior Court

V. [§83.98] INFORMATION ABOUT THE CALIFORNIA VICTIM COMPENSATION PROGRAM

Authority

Under California law (Govt C §§13950–13966), qualified victims of crime may receive financial assistance from the California Victim Compensation Program (Program) for losses resulting from a crime when these losses cannot be reimbursed by other sources. The California Victim Compensation and Government Claims Board (Board) administers the Program.

Losses That May Be Covered

- Medical/Dental
- Mental Health Counseling
- Wage/Income
- Financial Support
- Funeral/Burial
- Job Retraining
- Child Care
- Relocation
- Residential Security
- Retrofitting of Residence and/or Vehicle
- Crime Scene Cleanup

Losses That Are Not Covered

Personal property losses, including cash, are not eligible for reimbursement under the Program. The Program also cannot reimburse applicants for expenses related to the prosecution of an alleged perpetrator or compensate applicants for "pain and suffering."

Losses not covered by the Program, however, may be recoverable either through court-ordered restitution as a part of a convicted perpetrator's criminal sentence or through the enforcement of a judgment obtained in a civil lawsuit against the alleged perpetrator.

Who Is Eligible?

- A victim who was injured or died as a result of a crime.
- A derivative victim who was not directly injured or killed as a result of a crime but who, at the time of the crime,
  - — was the parent, grandparent, sibling, spouse, child or grandchild of the victim; or

— was living in the household of the victim; or

— had lived with the victim for at least two years in a relationship similar to a parent, grandparent, sibling, spouse, child, or grandchild of the victim; or

— was another family member of the victim, including, but not limited to, the victim's fiancé or fiancée *and* witnessed the crime; or

— was not the primary caretaker of a minor victim, but is now the primary caretaker.

In addition, when a victim dies as a result of a crime, the Program may reimburse any individual who voluntarily, and without anticipation of personal gain, pays or assumes the obligation to pay medical and/or funeral/burial expenses. When a crime occurs in a residence, the Program may reimburse any individual who voluntarily, and without anticipation of personal gain, pays or assumes the obligation to pay the reasonable crime scene cleanup expenses.

Who Is Not Eligible?

- Persons who commit the crime.
- Persons who contribute to or take part in the events leading to the crime.
- Persons who failed to reasonably cooperate with law enforcement in the apprehension and conviction of the criminal committing the crime.
- Persons who do not cooperate with the staff of the Board and/or the Victim/Witness Assistance Center in the verification of the claim.

Additionally, no person who is convicted of a felony may be compensated for any losses incurred during probation, parole, or incarceration. Once that person has been discharged from probation or has been released from a correctional institution and has been discharged from parole, any crime-related losses that were not incurred during probation, parole, or incarceration may be considered for compensation. The Program is required to award compensation to a person seeking reimbursement for the funeral/burial expenses of a victim who died as a result of the crime without respect to any felony status of the victim.

These Requirements Must Be Met

Except as provided in Govt C §13956, a person shall be eligible for compensation when all the following requirements are met:

- The person for whom compensation is being sought is a victim, derivative victim, or a person who is entitled to reimbursement for funeral, burial, or crime scene cleanup expenses.
- Either
  - — the crime occurred within the State of California, whether or not the victim was a resident of California during the time period that the Board determines that federal funds are available, or
  - — whether or not the crime occurred in California, the victim was a resident of California, a member of the military stationed in California, or a family member living with a member of the military stationed in California.
- If compensation is being sought for a derivative victim regardless of whether they are a resident of California or not, they must meet the definition of derivative victim.
- The victim or derivative victim must reasonably cooperate with law enforcement in the apprehension and conviction of the criminal committing the crime.
- The victim or the applicant, if other than the victim, must cooperate with the staff of the Board and/or the Victim/Witness Assistance Center in the verification of the claim.
- All other sources of reimbursement must be used first.

Felony Convictions

The law prohibits Program-reimbursable expenses incurred by a victim or derivative victim who was also convicted of a felony on or after January 1, 1989, if those expenses were incurred during probation, parole, or incarceration. However, the Program is required to award compensation to a person seeking reimbursement for the funeral/burial expenses of a victim who died as a result of the crime without respect to any felony status of the victim.

Filing Deadlines

An application for compensation must be filed within one year of the date of the crime, one year after the victim attains 18 years of age, or within one year of the time the victim or derivative victim knew or in the exercise of ordinary diligence could have discovered that an injury or death had been sustained as a direct result of crime, whichever is later.

The board may for good cause grant an extension of these time periods. The factors to be considered in finding good cause are set forth in Govt C §13953(b).

Filing Assistance

Victim/Witness Assistance Centers are located throughout the state. These centers have staff who are trained to help victims apply for compensation under the Program.

Applicants may also be helped by a private attorney. Government Code §13957.7(g) provides that the Board shall pay private attorneys' fees of 10 percent of the approved award up to a maximum of $500. The attorneys' fees are not deducted from the applicant's award and are paid separately from the approved award. The law also prohibits attorneys from charging, demanding, receiving, or collecting any amount for their services except as may be awarded by the Board.

Emergency Awards

If the victim has an urgent unreimbursed loss of wages or income, emergency medical treatment expenses, funeral/burial expenses, crime scene cleanup expenses, and/or relocation expenses as a direct result of a crime, he or she may be eligible for an emergency award. The amount of an emergency award depends on the immediate needs of the victim or derivative victim subject to the rates and limitations established by the Board.

Applications for emergency awards are processed within 30 calendar days after the application is accepted as complete.

If the victim receives an emergency award but is later found ineligible to receive any part of it, he or she must repay the amount received in error.

Verification and Hearing on the Application

Applications filed with the Program are reviewed to determine eligibility. After completion of this review, the victim will be advised by mail of what recommendation the staff made to the Board on the application. If the victim disagrees with the staff recommendation, appeal rights will also be provided.

An applicant for an emergency award is not entitled to a hearing to contest the denial of the emergency award. Denial of an emergency award, however, shall not prevent further consideration of an application for a regular award and does not affect the applicant's right to a hearing if the staff recommends a denial of a regular award.

Program Pays Last

The Victim Compensation Program is the "payer of last resort." If the victim has any other sources of reimbursement available for crime-related losses, he or she must use these available sources before becoming eligible for payments from the Program. If the victim receives other reimburse-

ments after obtaining benefits from the program, he or she must repay the Program. Other reimbursement sources the victim may have available include, but are not limited to, medical, dental, or auto insurance, public program benefits, workers' compensation benefits, court-ordered restitution, or civil lawsuit recovery.

By using all other sources of reimbursement, the victim enables the Program to help other deserving victims who have no other source of reimbursement for their losses.

If the victim fails to disclose available sources of reimbursement, the claim may be denied by the Board for lack of cooperation. If this happens, the victim may have to repay any amount the Program has already paid to the victim or on his or her behalf.

General Payment Limitations

The total of all reimbursements to a victim cannot exceed the maximum Program benefit of $70,000.

There are also several specific payment limitations governing particular benefits under the Program for loss of wages or income, loss of support, medical expenses, outpatient mental health counseling expenses, residential security expenses, relocation expenses, residential and/or vehicle retrofitting expenses, and funeral/burial expenses.

An applicant who has incurred expenses that exceed the Program's rates/limitations may not be eligible for reimbursement beyond the Program's maximum benefit levels.

State law requires a provider who accepts the Program's payment to consider it as payment in full and prohibits the provider from taking further payment from the person who received the services. This limitation does not apply to reimbursement of funeral/burial expenses.

An applicant's eligibility for Program benefits does not guarantee payment for services rendered.

VI. [§83.99] INFORMATION ABOUT THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION RESTITUTION COLLECTION PROGRAM

The California Department of Corrections and Rehabilitation (CDCR) has authority to collect restitution fines and restitution orders from both adults and juveniles housed in an adult institution. Pen C §2085.5.

The CDCR is currently deducting 50 percent from prison wages and/or trust account deposits according to 15 Cal Code Regs §3097.

When a prisoner has both a restitution fine and a restitution order from the sentencing court, the CDCR shall collect the restitution order first under Pen C §2085.5(b). Pen C §2085.5(g).

No parolee or inmate may reside in another state unless all restitution orders have been paid in full. Pen C §11177.2.

Restitution obligations shall be considered when recommending a parolee for early discharge or when conducting an annual review. 15 Cal Code Regs §3501.

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RESTITUTION

[REVISED 2009]

ADMINISTRATIVE OFFICE
OF THE COURTS

EDUCATION DIVISION/CENTER FOR
JUDICIAL EDUCATION AND RESEARCH

ABOUT CJER

The California Center for Judicial Education and Research (CJER), as the Education Division of the Administrative Office of the Courts (AOC), is responsible for developing and maintaining a comprehensive and quality educational program for the California judicial branch. Formed in 1973 as a joint enterprise of the Judicial Council and the California Judges Association, CJER supports the Chief Justice, the Judicial Council, and the courts by providing an extensive statewide educational program for judicial officers and court staff at both the trial and appellate levels. It includes orientation programs for new judicial officers, court clerks, and administrative officers; continuing education programs for judicial officers, court administrators, and managers; an annual statewide conference for judicial officers and court administrators; video and audiotapes; and judicial benchbooks, benchguides, and practice aids.

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RESTITUTION

I. [§83.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of the law and procedure relating to restitution fines, fees, and orders in adult, juvenile, and diversion matters. Sections 83.2–83.3 contain procedural checklists. Sections 83.4–83.90 summarize the applicable law. Sections 83.91–83.97 contain forms. Sections 83.98–83.99 provide information about California's program to compensate victims of crime for unreimbursed losses and the California Department of Corrections and Rehabilitation (CDCR) restitution collection program.

II. PROCEDURAL CHECKLISTS

A. [§83.2] Restitution Fines

(1) *Before accepting a plea of guilty or no contest:*

(a) *Advise defendant that the sentence will include a restitution fine of $200 to $10,000 for a felony conviction, and $100 to $1000 for a misdemeanor conviction, in addition to any other fine the court may impose.* For discussion, see §83.11.

☛ JUDICIAL TIPS: The admonition may be, and often is, part of a written form. Defendant should be advised of the range of the fine and not merely the possible maximum. The admonition should also cover the probation revocation and parole revocation restitution fines. For discussion, see §83.11; for script and form, see §§83.91–83.92.

(b) *Determine whether the disposition is part of a plea bargain.*

- *If so, ascertain on the record whether the bargain limits the court's discretion with respect to the restitution fine.*

☛ JUDICIAL TIP: Proposed dispositions that purport to waive the fine or set it below the statutory minimum should be rejected. Pen C §1202.4(b); see §83.5.

(2) *Before sentencing:*

(a) *Preliminarily determine the amount of the restitution fine by considering*

- *Any limitation imposed by a negotiated plea.* Illustrations: fine to be in amount of statutory minimum; "wobbler" to be sentenced as misdemeanor.

☛ JUDICIAL TIP: In the aftermath of a plea bargain that failed to address the restitution fine, which was not mentioned in the court's advisements of the consequences of the plea, the court must either impose the minimum fine or give defendant an

opportunity to withdraw the plea. But if the court, in accepting the plea, advises the defendant that a restitution fine at or above the minimum will be imposed, the court is not precluded from imposing a fine above the statutory minimum. For discussion, see §83.12.

- *The statutory range:*

	Minimum	*Maximum*
Misdemeanor	$100	$1,000
Felony	$200	$10,000

For juvenile offenders, see §83.9.

- *Seriousness and circumstances of the offense.* Pen C §1202.4(b)(1), (d).
- *Inability to pay*. Pen C §1202.4(d).

☛ JUDICIAL TIPS: (1) Defendant has the burden of showing inability to pay. Pen C §1202.4(d). (2) Inability to pay only affects the amount of the fine above the statutory minimum. Pen C §1202.4(c). (3) The California Department of Corrections and Rehabilitation (CDCR) collects restitution fines from the wages and trust account deposits of prisoners. See §§83.5, 83.15, 83.23.

- *Defendant's economic gains, if any, from the crime; losses suffered by others; the number of victims, and any other relevant factors.* Pen C §1202.4(d); for discussion, see §83.14.

☛ JUDICIAL TIP: Judges often consider the amount of restitution to victims and other fines defendant will be ordered to pay. Again, these considerations only affect the amount of the restitution fine in excess of the statutory minimum.

- *The formula set out in Pen C §1202.4(b)(2) permits, but does not require, the court to set a restitution fine in a felony case as follows:* $200 x number of years to be served x number of felony counts of which defendant was convicted.

☛ JUDICIAL TIP: Some judges simplify the formula to $200 x number of counts. In the view of some judges, a life sentence calls for the maximum fine.

(b) *Determine whether an additional probation revocation restitution fine must be imposed and suspended under Pen C §1202.44.* Such a fine is mandatory whenever a defendant receives a conditional sentence or a sentence that includes a period of probation. For discussion, see §83.6.

(c) *In a felony case determine whether an additional parole revocation restitution fine must be imposed and suspended under Pen C §1202.45*. Such a fine is mandatory whenever defendant will be sentenced to state prison and will be eligible for parole. For discussion, see §83.7.

(d) *Consider whether there are compelling and extraordinary reasons not to impose a restitution fine.* Pen C §1202.4(c); for discussion, see §83.20. If yes, make notes for statement of reasons and proceed to (e); if no, proceed to (f).

☛ JUDICIAL TIPS: Inability to pay is not an adequate reason. Pen C §1202.4(c). Nor, in the view of most judges, is a prison sentence. See §§83.5, 83.15.

(e) *Determine either (i) how much community service to require of defendant instead of the restitution fine or (ii) whether there are compelling and extraordinary reasons to waive the requirement.* Pen C §1202.4(n). In the event of (ii), make notes for a second statement of reasons at sentencing.

(f) *Determine whether the offense is one for which an additional restitution fine may be imposed under Pen C §294 for specified acts of misconduct against children and for child pornography*. (Note: The CDCR does not have the authority to collect restitution fines under Pen C §294.) For discussion, see §83.8. If yes, proceed to (g); if no, proceed to 3.

(g) *Consider whether to impose an additional restitution fine, and if so, in what amount.* Pen C §294. See §83.8.

(3) *At sentencing:*

(a) *Consider matters raised by counsel and make final decision concerning the restitution fine.*

☛ JUDICIAL TIPS: (1) Restitution fines are normally imposed at the sentencing hearing; defendant is not entitled to a separate hearing. See §83.13. (2) A judge who is inclined to impose an additional restitution fine under Pen C §294 should so inform defendant at the outset of the sentencing hearing and give defendant an opportunity to be heard.

To impose a restitution fine proceed to (b); to waive the fine proceed to (f).

(b) *Impose a restitution fine (Pen C §1202.4).*

☛ JUDICIAL TIPS:

- No portion of this fine may be stayed, suspended, or offset by the amount of victim restitution defendant is ordered to pay. See §83.21.
- As long as the fine is imposed, findings are unnecessary (Pen C §1202.4(d)) and usually not made. See §83.18.
- The court should not enter a separate money judgment. Although restitution fines are enforceable in the manner of money judgments, the court may not actually enter a money judgment against a defendant for these amounts. See §83.25.

(c) *If defendant is granted probation:*

- *Make payment of the fine a condition of probation.* Pen C §1202.4(m).
- *Impose an additional fine in the same amount as the restitution fine and order it suspended unless probation is revoked.* Pen C §1202.44. The court cannot waive or reduce this fine absent compelling and extraordinary reasons, which must be stated on the record. See §83.6.

(d) *If defendant is sentenced to prison, impose an additional fine in the same amount as the restitution fine and order it suspended unless parole is revoked.* Pen C §1202.45.

☛ JUDICIAL TIP: It is unnecessary to order this fine when defendant is ineligible for parole. See §83.7.

(e) *Impose any additional discretionary restitution fine.* Pen C §294. See §83.8.

(f) *When no restitution fine is imposed:*

(i) *State compelling and extraordinary reasons for this action on the record and*

(ii) *Order defendant, as a condition of probation, to perform community service as specified by the court instead of the fine, or state on the record compelling and extraordinary reasons for not ordering community service.* Pen C §1202.4(n). See §83.20.

☛ JUDICIAL TIP: This statement should be in addition to the statement of reasons for not imposing a restitution fine. Pen C §1202.4(n).

B. [§83.3] Victim Restitution

(1) *Before accepting a plea of guilty or no contest:*

(a) *Advise defendant that the sentence may include an order to pay restitution to the victim in an amount to be determined by the court.* For discussion, see §83.31; for form, see §83.92.

☛ JUDICIAL TIPS: (1) When it is clear that the court will order restitution, many judges say so at this point. (2) The admonition can be incorporated into a written form.

(b) *Advise defendant that he or she is entitled to a hearing in court to dispute the amount of restitution but not the actual order to make restitution.* See §83.41.

☛ JUDICIAL TIP: Many judges prefer to give this advice at the time of sentencing.

(c) *When there is a* Harvey *waiver that will give the court authority to consider dismissed counts for restitution purposes, make sure that the waiver is stated clearly on the record, that its scope is clear, and that defendant understands it.* For discussion, see §83.87.

(2) *Before sentencing consider the probation report, when available, and*

(a) *Whether restitution should be ordered*

- Because one or more victims suffered or will suffer an economic loss as a result of the crime(s) of which defendant was convicted (Pen C §1202.4(a)(1); for discussion, see §§83.39–83.83; or
- For other reasons (*e.g.*, *Harvey* waiver; hit-run victim; see §§83.84–83.90).

☛ JUDICIAL TIP: Judges may order victim restitution, if appropriate, for infractions. Although restitution *fines* are expressly limited to felonies and misdemeanors, there is no such express limitation with respect to victim restitution. See Pen C §§19.7 (statutes relating to misdemeanors generally applicable to infractions), 1202.4(a)(1) (legislative intent that crime victims who suffer economic loss receive restitution), 1202.4(f) (restitution required in every case in which victim suffered economic loss as result of defendant's crime), and 1203b (courts may grant probation in infraction cases).

(b) *Whether the report includes detailed loss figures for each victim and whether they appear to be reasonable.*

(3) *At sentencing*

(a) *Announce either:*

(i) *The court's preliminary views on restitution and inquire whether the victim or the defendant wishes to be heard.* If yes, proceed to (c); if no, proceed to (d) to order restitution.

Or

(ii) *That the probation report does not contain (sufficient) restitution information and proceed to (b).*

(b) *When the probation report lacks restitution data:*

(i) *Ascertain whether the victim is present.* If yes, receive the victim's loss information; permit defendant to challenge it; upon request continue to give defendant time to rebut it. If no, proceed to (ii).

Or

(ii) *When the victim is not present and the report recommends a continuance, grant a reasonable continuance as to restitution issues.*

☛ JUDICIAL TIPS:

- Judges usually sentence the defendant even though restitution will be determined later. In such cases, the judge should include in the sentence an order for the defendant to pay restitution in an amount to be determined by the court. The court retains jurisdiction for the purpose of imposing restitution until the losses are determined.
- Judges often seek a waiver of defendant's presence at the subsequent restitution hearing. This is particularly important when the defendant is sentenced to prison. See §83.69.

Or

(iii) *When the victim is not present, was notified, has not made a claim, and the report does not request a continuance, do not order restitution, except for any benefits that the victim received from the Restitution Fund.* Some judges reserve jurisdiction to order restitution unless the prosecutor states that none is due. See §83.69.

☛ JUDICIAL TIP: In many cases, the victim is not notified, and the prosecutor may not have any information regarding losses. In these situations, the court should order restitution for benefits that the victim received from the Restitution Fund and reserve jurisdiction to order any additional restitution.

(c) *Conduct a hearing when the victim or defendant requests one.*

☛ JUDICIAL TIP: The hearing does not have the formality of a trial. Hearsay is admissible. For discussion, see §83.44.

(d) *Order defendant to pay restitution* (for discussion, see §§83.68–83.73):

Use a separate order for each victim. For form, see §83.93.

- *Identify each loss separately by name of victim and amount; do not merely order a lump sum payment.*
- *Specify whether interest (at 10 percent) will accrue from the date of the order or of the loss.* Pen C §1202.4(f)(3)(G).
- *Specify whether codefendants are jointly and severally responsible for restitution.*
- *Do not delegate determination of restitution amount unless the defendant consents to a determination by the probation officer; determination of the number and dollar amounts of installment payments is often delegated to the probation department or other county agency.* For discussion, see §83.70.
- *When the sentence includes probation, make payment of the restitution order a condition of probation.* Pen C §1202.4(m).
- *Order defendant to pay restitution to the California Victim Compensation and Government Claims Board to reimburse payments to the victim from the Restitution Fund.* Pen C §1202.4(f)(2).

☛ JUDICIAL TIP: The court should not enter a separate money judgment. Although restitution orders are enforceable in the manner of money judgments, the court may not actually enter a money judgment against a defendant based on an order to pay restitution. See §83.35.

(e) *Make and stay a separate income deduction order upon determining that defendant has the ability to pay restitution.* Pen C §1202.42; for discussion, see §83.76. For sample income deduction order and related forms, see §§83.95–83.97.

☛ JUDICIAL TIP: Penal Code §1202.42 does not apply to juvenile court restitution or to any restitution order not made under Pen C §1202.4. For discussion of orders to apply a specified portion of earnings to restitution, see §83.77.

III. APPLICABLE LAW

A. Restitution Fine

1. [§83.4] Purpose of Fine

Restitution fines are a major source of financing the state Restitution Fund (see Pen C §§1202.4(e), 1202.44, 1202.45); penalty assessments on

other fines provide additional financing. See Pen C §1464. Eligible victims of criminal acts may obtain restitution from the Restitution Fund, which is administered by the California Victim Compensation and Government Claims Board. For detailed information about the Board's Victim Compensation Program, see §83.98.

2. Major Statutory Requirements

a. [§83.5] Restitution Fine (Pen C §1202.4)

The principal statutes that govern the imposition of restitution fines on adult offenders are Pen C §§1202.4, 1202.44, and 1202.45. For discussion of Pen C §§1202.44 and 1202.45, see §83.6–83.7; for juvenile offenders, see §§83.9–83.10. Key features of Pen C §1202.4 include:

- *Mandatory nature of fine.* Imposition of the fine is mandatory except for compelling and extraordinary reasons stated on the record. See §83.20.
- *Statutory minimums and maximums:*

Felonies:	$200–$10,000
Misdemeanors:	$100–$1,000

- *Limited effect of inability to pay.* Defendant's lack of ability to pay does not justify waiver of the fine. It may be considered only in setting the amount above the statutory minimum. For discussion, see §83.15; for discussion of other factors the court should consider in setting the fine, see §83.14.
- *Hearing.* Defendant is not entitled to a separate hearing for determining the amount of the fine. See §83.13.
- *Community service.* When the court does not impose a restitution fine, defendant must be ordered to perform community service except for compelling and extraordinary reasons stated on the record. See. §83.20.
- *Probation.* Grants of probation must include payment of the restitution fine as a condition.

b. [§83.6] Probation Revocation Restitution Fine (Pen C §1202.44)

When a defendant receives a conditional sentence or a sentence that includes a period of probation, the court must impose an additional restitution fine. Pen C §1202.44. In felony cases, the fine applies to both defendants who are placed on probation after the court has suspended imposition of sentence and to defendants who are placed on probation after the court has suspended execution of sentence. *People v Taylor*

(2007) 157 CA4th 433, 436–439, 68 CR3d 682. The probation revocation restitution fine has the following features (Pen C §1202.44):

- It must be imposed in addition to, not instead of, the restitution fine required by Pen C §1202.4;
- The amount of the fine is the same as the amount imposed under Pen C §1202.4;
- The fine does not become effective unless and until the probation or conditional sentence is revoked; and
- The court may not waive or reduce the fine, absent compelling and extraordinary reasons stated on the record.

c. [§83.7] Parole Revocation Restitution Fine (Pen C §1202.45)

When a defendant is sentenced for one or more felonies and will be statutorily eligible for parole, the court must impose an additional restitution fine. Pen C §1202.45. The parole revocation restitution fine has the following features (Pen C §1202.45):

- It must be imposed in addition to, not instead of, the restitution fine required by Pen C §1202.4.
- The amount of the fine is the same as the amount imposed under Pen C §1202.4.
- The fine shall be suspended unless and until parole is revoked.

The parole revocation restitution fine cannot be imposed unless the defendant is eligible for parole. Pen C §1202.45; see *People v Oganesyan* (1999) 70 CA4th 1178, 1183, 83 CR2d 157 (defendant sentenced to life in prison without possibility of parole not subject to fine); *People v Brasure* (2008) 42 C4th 1037, 1074, 71 CR3d 675 (defendant who is sentenced to death for capital murder and sentenced to determinate prison term under Pen C §1170 for several other offenses is subject to fine).

d. [§83.8] Discretion To Impose Additional Restitution Fine (Pen C §294)

Penal Code §294 permits the court to impose an additional restitution fine on defendants convicted of specified offenses. Although labeled a restitution fine, it goes to the Restitution Fund only for the purpose of being transferred to the county children's trust fund for child abuse prevention.

Offenses. The court may impose the added fine upon conviction of any of the following offenses (Pen C §294(a)):

- Pen C §273a (child abuse);

- Pen C §273d (inflicting corporal injury on child);
- Pen C §288.5 (multiple sexual conduct with child under 14);
- Pen C §§311.2–311.3 (obscene depiction of minor);
- Pen C §647.6 (child molestation);

as well as for any of the violations listed below when the victim was under the age of 14 at the time of the offense (Pen C §294(b)):

- Pen C §261 (rape);
- Pen C §264.1 (rape in concert with others);
- Pen C §285 (incest);
- Pen C §286 (sodomy);
- Pen C §288a (oral copulation);
- Pen C §289 (sexual penetration by foreign or unknown object).

Amount. The maximum is $5000 for a felony and $1000 for a misdemeanor, in addition to the mandatory restitution fine.

Ability to pay. Defendant's ability to pay *is* a factor in deciding whether to impose the fine and in what amount.

Hardship on victim. When the defendant is a member of the victim's immediate family, the court is to consider whether the added fine would result in hardship for the victim. Pen C §294(c).

☛ JUDICIAL TIP: When the court is considering a fine under Pen C §294, it should so advise the defendant and afford an opportunity for a hearing on ability to pay, victim hardship, and other relevant matters.

The California Department of Corrections and Rehabilitation (CDCR) does not have the authority to collect restitution fines under Pen C §294.

e. [§83.9] Juvenile Offenders (Welf & I C §730.6)

Juvenile offenders are also subject to mandatory restitution fines. Welf & I C §730.6. The principal features of the provisions governing juveniles are:

- The felony fine range is $100 to $1000; the misdemeanor fine cannot exceed $100. There is no prescribed minimum misdemeanor fine. Welf & I C §730.6(b)(1).
- The factors that the court should consider in setting the fine are essentially the same as for adult offenders. See Welf & I C

§730.6(d)(1). See also chart in §83.10. Express findings are unnecessary and usually not made. See Welf & I C §730.6(e).

- Imposition of the fine is mandatory, except for compelling and extraordinary reasons in felony cases. The reasons must be stated on the record. Welf & I C §730.6(g). The restitution fine cannot be waived for misdemeanors, probably because there is no statutory minimum fine with respect to them.
- When the fine is waived, the minor must be required to perform community service except for compelling and extraordinary reasons stated on the record. Welf & I C §730.6(n), (o).
- Inability to pay does not justify failure to impose a restitution fine. Welf & I C §730.6(c). It is a factor in setting the amount of the fine. The offender has the burden of showing inability, but is not entitled to a separate hearing. Welf & I C §730.6(b), (d)(2). In determining a juvenile offender's ability to pay, the court may consider the juvenile's future earning capacity. Welf & I C §730.6(d)(2).
- Payment of the fine must be a condition of probation. Welf & I C §730.6(*l*).
- Parents and guardians may be jointly and severally liable. Welf & I C §730.7.

f. [§83.10] Chart: Comparison of Restitution Fine Provisions for Adult and Juvenile Offenders (Pen C §§1202.4, 1202.44, 1202.45; Welf & I C §730.6)

	Adult	*Juvenile*
Amount of fine		
Misdemeanor	$100–$1000	Not more than $100
Felony	$200–$10,000	$100–$1000
Factors to consider when setting fine above statutory minimum	All relevant factors including but not limited to: • Inability to pay • Seriousness of offense • Circumstances of commission • Economic gain by offender • Losses to others from offense	

	Adult	*Juvenile*
	Number of victims Optional formula for multiple felonies	
Burden of showing inability to pay when court sets fine above statutory minimum	Offender	
Waiver	Only for compelling and extraordinary reasons stated on record; inability to pay not adequate reason	
		No waiver when offense is a misdemeanor
Community service	Mandatory when fine waived except for compelling and extraordinary reasons stated on record	
Effect of restitution to victim	Cannot be offset against fine	
Relation to probation	Payment must be condition of probation	
Probation revocation fine	Must be imposed separately in same amount as restitution fine and becomes effective on revocation of probation or of a conditional sentence	Inapplicable
Parole revocation fine	Must be imposed separately in same amount as restitution fine and suspended unless and until parole is revoked	Inapplicable

3. Procedure at Time of Guilty Plea

a. [§83.11] Advisement When Taking Plea

A restitution fine is a direct consequence of a guilty or no contest plea. Accordingly, the court must advise defendant of the minimum and maximum fines. *People v Walker* (1991) 54 C3d 1013, 1022, 1 CR2d 902. For script and form, see §§83.91–83.92.

Error that results from not giving this advice is waived unless called to the attention of the trial court at or before sentencing. *People v Walker, supra.* Upon timely objection, the court must determine whether the error was prejudicial, and if so, either impose only the minimum fine or permit defendant to withdraw the plea. *People v Walker, supra,* 54 C3d at 1023–1024. The major factor in determining prejudice is the size of the fine that the court imposed. *People v Walker, supra.*

The *Walker* case should not be understood as finding that the restitution fine has been and will be subject of plea negotiations in every case. The parties are free to make any lawful bargain they choose, including leaving the imposition of fines to the discretion of the sentencing court. *People v Dickerson* (2004) 122 CA4th 1374, 1384–1385, 22 CR2d 854.

b. [§83.12] Silent Plea Bargain

When a plea bargain fails to address the restitution fine, the court must either reduce the fine to the minimum or allow defendant to withdraw the plea. *People v Walker* (1991) 54 C3d 1013, 1028–1029, 1 CR2d 902. Defendant does not waive this issue by failing to raise it at the time of sentencing; it may be raised on appeal. If the issue is raised after sentencing, the proper remedy generally is to reduce the fine to the statutory minimum and to leave the plea bargain intact. *People v Walker, supra.*

When a defendant enters a plea bargain that makes no mention of the imposition of a restitution fine, but the court, in accepting the plea, accurately advises the defendant that it will impose a restitution fine, and that the amount may be anywhere in the statutory range, the court is not thereafter precluded from imposing a restitution fine above the statutory minimum. *People v Crandell* (2007) 40 C4th 1301, 1307–1310, 57 CR3d 349. The court in *Crandell* stated that the lack of an agreement on the restitution fine demonstrates that the parties intend to leave the amount of the fine to the discretion of the court. 40 C4th 1309–1310. *Crandell* distinguished *People v Walker, supra,* in which the restitution fine was neither an element of the plea bargain nor mentioned in the court's advisements of the consequences of the plea. 40 C4th at 1307–1310.

☛ JUDICIAL TIPS:

- Counsel should be asked to state any agreement with respect to the fine when putting the proposed terms of negotiated plea on the record.
- When the negotiations leave the fine open, the court should explain to the defendant the minimum and maximum fines or have counsel do so and obtain defendant's oral assent.
- The court should give the Pen C §1192.5 admonition (relating to the defendant's right to withdraw the plea) whenever required by that statute. See *People v Walker*, *supra*, 54 C3d at 1030; *People v Crandell*, *supra*, 40 C4th at 1310.

4. Determination of Fine

a. [§83.13] No Separate Hearing

The defendant is not entitled to a hearing apart from the sentencing hearing with respect to the restitution fine. Pen C §1202.4(d).

☛ JUDICIAL TIP: Both sides should be given an opportunity to address the matter at the sentencing hearing, because, inter alia, defendant has the burden of demonstrating inability to pay. Pen C §1202.4(d).

b. [§83.14] Factors

Statutory factors. In determining the amount of the fine, the court should consider any relevant factor (Pen C §1202.4(d)), including:

- Inability to pay (for discussion, see §83.15);
- Seriousness of the offense;
- Circumstances of the offense;
- Defendant's economic gain, if any, from the crime;
- Pecuniary and intangible losses of victims or dependents of victims;
- Number of victims.

Criminal record. Defendant's criminal record is a relevant factor. *People v Griffin* (1987) 193 CA3d 739, 741–742, 238 CR 371; Cal Rules of Ct 4.411.5, 4.414.

Optional formula. In multicount felony cases the court may set the fine by using the formula stated in Pen C §1202.4(b)(2). See §83.16.

Juveniles. Factors to consider in juvenile cases are virtually the same as in cases involving adult offenders. See chart in §83.10.

c. [§83.15] Ability To Pay

Defendant is presumed to be able to pay the restitution fine and has the burden of demonstrating inability. Pen C §1202.4(d); *People v Romero* (1996) 43 CA4th 440, 448–449, 51 CR2d 26.

The court may consider future earning capacity. Pen C §1202.4(d); *People v Gentry* (1994) 28 CA4th 1374, 1376–1377, 34 CR2d 37 (court may consider defendant's future prison wages as well as possibility of employment when defendant is released from prison).

The court must impose the minimum fine even when defendant is unable to pay it. Pen C §1202.4(c); Welf & I C §730.6(b); *People v Draut* (1999) 73 CA4th 577, 582, 86 CR2d 469. The court may consider inability to pay only when increasing the amount of the restitution fine in excess of the $200 or $100 minimum. Pen C §1202.4(c). Such a mandate is not constitutionally infirm; however, imprisonment of an indigent defendant for nonpayment violates equal protection. *People v Long* (1985) 164 CA3d 820, 826–827, 210 CR 745.

d. [§83.16] Multiple Counts

Discretionary formula. For defendants convicted of several felony counts the court may calculate the fine by the following formula (Pen C §1202.4(b)(2)):

> $200 x number of years of sentence x number of counts of which defendant was convicted.

☛ JUDICIAL TIP: Some judges simplify the formula to $200 x number of counts. In the view of some judges, a life sentence calls for the maximum fine.

Limitation of maximum. The total fine may not exceed the statutory maximum, regardless of the number of victims and counts. *People v Blackburn* (1999) 72 CA4th 1520, 1534, 86 CR2d 134. See also *People v Ivans* (1992) 2 CA4th 1654, 1667, 4 CR2d 66 (decided under former Govt C §13967).

Resolution of multiple cases under negotiated plea bargain. A defendant, who enters a guilty plea in more than one separate case and is sentenced on all the cases at the same time, may be subject to a separate restitution fine in each case as long as the aggregate total of the restitution fines does not exceed the statutory maximum. *People v Schoeb* (2005) 132 CA4th 861, 864–865, 33 CR3d 889; *People v Enos* (2005) 128 CA4th 1046, 1048–1050, 27 CR3d 610.

Resolution of multiple cases in joint trial. When a defendant is convicted of crimes in two cases that are consolidated for trial, the court may not impose restitution fines in both cases, even if the cases involve

charges in separately filed informations. *People v Ferris* (2000) 82 CA4th 1272, 1275–1278, 99 CR2d 180.

Conviction of felony and misdemeanor in same proceeding. When a defendant is convicted of both a felony and misdemeanor in the same proceeding, the court must impose a separate restitution fine for each so long as the total of the restitution fines does not exceed the statutory maximum. *People v Holmes* (2007) 153 CA4th 539, 546–548, 63 CR3d 150.

Counts stayed under Pen C §654. The trial court may not consider a felony conviction for which the sentence is stayed under Pen C §654 as part of the court's calculation of the restitution fine under the formula provided in Pen C §1202.4(b)(2). *People v Le* (2006) 136 CA4th 925, 932–934, 39 CR3d 146.

e. [§83.17] No Joint and Several Liability for Restitution Fines

Restitution fines (Pen C §1202.4(b)), probation revocation fines (Pen C §1202.44), and parole revocation fines (Pen C §1202.45) may not be imposed as payable jointly and severally by multiple defendants. *People v Kunitz* (2004) 122 CA4th 652, 655–658, 18 CR3d 843 (although court addressed only Pen C §§1202.4(b) and 1202.45 fines, reasoning applicable to Pen C §1202.44 fine).

Direct victim restitution is not punishment, and it may be imposed jointly and severally. 122 CA4th at 657. For discussion, see §83.72.

f. [§83.18] Findings

The court need not specify reasons for setting the fine in any particular amount; only when the court waives the fine must reasons be stated. Pen C §1202.4(b), (d); *People v Urbano* (2005) 128 CA4th 396, 405, 26 CR3d 871; *People v Romero* (1996) 43 CA4th 440, 448, 51 CR2d 26 (court not required to make findings on ability to pay); for discussion of fine waiver, see §83.20.

☛ JUDICIAL TIP: Some judges state reasons when they set the fine at a level that departs from their usual practice.

The amount of the fine is reviewed only for abuse of discretion and upheld when supported by the record. *People v McGhee* (1988) 197 CA3d 710, 716–717, 243 CR 46 (maximum restitution fine justified when court properly imposed upper prison term); *People v Griffin* (1987) 193 CA3d 739, 740–742, 238 CR 371 (record of recidivist thief convicted of petty theft with prior supports $2000 restitution fine).

g. [§83.19] Retrial or Remand for Resentencing

The court may not increase the restitution fine after a retrial that followed defendant's successful appeal (*People v Thompson* (1998) 61 CA4th 1269, 1276, 71 CR2d 586; *People v Jones* (1994) 24 CA4th 1780, 1785, 30 CR2d 238), or after remand for resentencing following the defendant's partially successful appeal (*People v Hanson* (2000) 23 C4th 355, 366–367, 97 CR2d 58). Such an increase in the restitution fine is precluded by the state constitutional prohibition against double jeopardy (Cal Const art I, §15). 23 C4th at 366–367.

5. [§83.20] Waiver of Fine

The court must impose a restitution fine unless it finds "compelling and extraordinary reasons" for not doing so and states them on the record. Pen C §1202.4(b), (c); *People v Tillman* (2000) 22 C4th 300, 302, 92 CR2d 741.

Inability to pay is not an adequate reason for waiving the fine. Pen C §1202.4(c). There is no judicial guidance on what constitutes compelling and extraordinary reasons. Sentencing a defendant to prison is not a sufficient reason because the fine can be collected from prison wages and trust account deposits. See §83.23.

☛ JUDICIAL TIP: Some judges waive the fine in the case of street people who suffer from mental or other disabilities. Others excuse payment when the defendant is on SSI or receives General Assistance. Most judges do not regard being jobless or homeless standing alone a sufficient reason.

When the court waives the fine, it must order the defendant to perform community service instead, unless it finds additional compelling and extraordinary reasons stated on the record. Pen C §1202.4(n).

☛ JUDICIAL TIP: This statement should be in addition to the statement of reasons for not imposing a restitution fine. Pen C §1202.4(n).

The prosecution waives any objection to the trial court's failure to impose a restitution fine under Pen C §1202.4 by failing to object to the omission at the time of sentencing; in such event, the appellate court may not modify the judgment to add a restitution fine. *People v Tillman, supra*, 22 C4th at 302–303. However, when the trial court imposes a restitution fine under Pen C §1202.4, but omits or imposes an erroneous parole revocation restitution fine under Pen C §1202.45 (see §83.7) and the prosecution does not object to this omission, an appellate court has the authority to modify the judgment to impose or correct the fine. *People v Smith* (2001) 24 C4th 849, 102 CR2d 731 (trial court imposed $5000

restitution fine but only a $200 parole revocation fine); *People v Rodriguez* (2000) 80 CA4th 372, 375–379, 95 CR2d 299 (trial court imposed $200 restitution fine and no parole revocation fine).

6. [§83.21] No Crediting Amount of Restitution Against Restitution Fine

The court may not offset the amount of direct victim restitution against a Pen C §1202.4 restitution fine. *People v Blackburn* (1999) 72 CA4th 1520, 1534, 86 CR2d 134.

7. [§83.22] Penalty Assessments; Administrative Fees

Restitution fines, probation revocation restitution fines, and parole revocation restitution fines are exempt from the penalty assessments of Pen C §1464 and Govt C §76000, the state surcharge of Pen C §1465.7, and the state court construction penalty of Govt C §70372(a). Pen C §§1202.4(e), 1202.45, 1464(a)(3)(A), 1465.7(a); Govt C §§70372(a)(3)(A), 76000 (a)(3)(A).

Counties may impose a fee to cover the administrative costs of collecting the restitution fine. The fee may not exceed 10 percent of the fine. Pen C §1202.4(*l*).

☛ JUDICIAL TIP: In counties that charge this fee the sentence should include an order to pay it.

8. [§83.23] Collection of Fine by CDCR and DJJ

The California Department of Corrections and Rehabilitation (CDCR) deducts restitution fines from prisoners wages and trust account deposits, transmits the moneys to the California Victim Compensation and Government Claims Board. Pen C §2085.5; see, *e.g.*, *People v Gentry* (1994) 28 CA4th 1374, 1377–1378, 34 CR2d 37.

☛ JUDICIAL TIPS:

- Penal Code §2085.5 is self-executing and it is *not* necessary to refer to it when imposing sentence. If the judge chooses to make a reference, the judge should make it clear that the fine is *imposed* under Pen C §1202.4 and shall be *collected* under Pen C §2085.5. Court documents should not state that the fine is imposed under Pen C §2085.5. See *People v Rowland* (1988) 206 CA3d 119, 124, 253 CR 190.
- Courts should make sure that the abstract of judgment reflects the restitution fine because the CDCR relies on the abstract. See *People v Hong* (1998) 64 CA4th 1071, 1080, 76 CR2d 23.

The CDCR's Division of Juvenile Justice (DJJ) (formerly California Youth Authority) also collects restitution fines from wards' wages and trust account deposits and transfers the moneys to the California Victim Compensation and Government Claims Board. The DJJ must provide the sentencing court with a record of payments. Welf & I C §§1752.81–1752.82.

9. [§83.24] Applying Seized Funds to Restitution Fine

The court may apply funds confiscated from the defendant at the time of the defendant's arrest, except for funds confiscated under Health & S C §11469 (illegal drug funds), to the restitution fine if the funds are not exempt for spousal or child support or subject to any other legal exemption. Pen C §1202.4(c).

The common law rule that money belonging to an arrestee and held for safekeeping is exempt from execution does not apply to funds sought for payment of a restitution fine, a debt that was created after the defendant's conviction. *People v Willie* (2005) 133 CA4th 43, 49–50, 34 CR3d 532. Further, this exemption has been superseded by CCP §704.090, which effectively limits the exemption to $300 for a restitution fine. 133 CA4th at 50–52.

10. [§83.25] Fine Enforceable as Civil Judgment

An order to pay a Pen C §1202.4, §1202.44, or §1202.45 restitution fine is enforceable as if it were a civil judgment. Pen C §1214(a). Restitution fines derived from misdemeanor cases, cases involving a violation of a city or town ordinance, and noncapital cases with a plea of guilty or no contest, are enforceable in the same manner as a money judgment in a *limited* civil case. Pen C §1214(c); CCP §582.5.

A restitution fine is enforceable immediately and continues to be enforceable by the California Victim Compensation and Government Claims Board after termination of probation or parole. Pen C §1214(a).

☛ JUDICIAL TIP: The court should *not* enter a separate money judgment. Execution can issue on the order to pay the fine. *People v Hart* (1998) 65 CA4th 902, 906, 76 CR2d 837. See also *People v Willie* (2005) 133 CA4th 43, 47–49, 34 CR3d 532 (district attorney's motion for release of funds taken from defendant on his arrest for payment of restitution fine, and court's nunc pro tunc order for their release, were not appropriate methods for enforcing the restitution fine).

11. [§83.26] Restitution Fine in Bribery Cases

The court must impose restitution fines that exceed those required under Pen C §1202.4 on defendants convicted of specified bribery offenses.

Offenses: The court must impose the fine on conviction of any of the following offenses:

- Pen C §68 (asking for, receiving, or agreeing to receive, bribe by officer, employee, or appointee of state or local government);
- Pen C §86 (asking for, receiving, or agreeing to receive, bribe by member of state legislature or local legislative body);
- Pen C §93 (asking for, receiving, or agreeing to receive, bribe by judicial officer or other person authorized to determine matters in controversy).

Amount. In cases in which no bribe was received, the minimum fine is $2000 up to a maximum of $10,000. When a bribe has been received, the minimum fine is $2000 or the amount of the bribe, whichever is greater, and not more than $10,000 or double the amount of the bribe, whichever is greater. Pen C §§68(a), 86, 93(a).

Ability to pay. Defendant's ability to pay *is* a factor in deciding whether to impose the fine and in what amount. Pen C §§68(b), 86, 93(b).

B. Restitution Fee in Diversion Matters

1. [§83.27] Mandatory Fee; Amount

In diversion and deferred entry of judgment cases the counterpart to the restitution *fine* is the restitution *fee* required by Pen C §1001.90. Imposition is mandatory (Pen C §1001.90(a), (c)), subject to exceptions discussed in §83.28.

The minimum fee is $100; the maximum, $1000. Pen C §1001.90(b). The factors that should guide the court in setting the amount of the fee are essentially the same as apply to restitution fines. Pen C §1001.90(d); for discussion, see §83.14. The court may not modify the amount of the fee except to correct an error in setting the amount. Pen C §1001.90(e).

☛ JUDICIAL TIP: Modification is probably warranted only when the fee was erroneously omitted, set below the statutory minimum or above the maximum, and to correct ministerial errors. Forgiveness of the fee upon successful completion of diversion is probably precluded.

Counties may add a collection fee not to exceed 10 percent of the restitution fee. Pen C §1001.90(g).

Like restitution fines, the fee goes to the state Restitution Fund. Pen C §1001.90(f).

2. [§83.28] Exceptions

As with restitution fines, the court may waive the fee when it finds that there are compelling and extraordinary reasons and states them on the record. Pen C §1001.90(c). The fee must be imposed regardless of defendant's ability to pay it; ability to pay is, however, a factor to be considered in setting the amount. Pen C §1001.90(c), (d).

Additionally, Pen C §1001.90 does not apply to diversion of defendants with cognitive developmental disabilities. Pen C §1001.90(a).

3. [§83.29] Fee Enforceable as Civil Judgment

An order to pay a diversion restitution fee is enforceable as if it were a civil judgment. Pen C §1214(a). A diversion restitution fee is enforceable immediately and continues to be enforceable by the California Victim Compensation and Government Claims Board after the defendant has completed diversion. Pen C §1214(a).

☛ JUDICIAL TIP: The court should *not* enter a separate money judgment. Execution can issue on the order to pay the fine. *People v Hart* (1998) 65 CA4th 902, 906, 76 CR2d 837.

C. [§83.30] Victim Restitution

The court must order payment of restitution when the crime of which defendant was convicted resulted in economic loss to the victim. Pen C §1202.4; Welf & I C §730.6; see Cal Const art I, §28(b)(13)(A). A sentence without a restitution award to a victim, as mandated by Cal Const art I, §28(b) and Pen C §1202.4 is invalid; the only discretion retained by the court is that of fixing the amount of the award. *People v Rowland* (1997) 51 CA4th 1745, 1751–1752, 60 CR2d 351. For discussion, see §§83.39–83.83.

Under some circumstances California courts may order restitution when the losses are not the result of the crime underlying the defendant's conviction. For example, in probation cases, the courts have broad discretion to order restitution that is reasonably related to the defendant's crime. See §§83.84–83.86. And courts often order a defendant to make restitution to a victim of offenses that underlie dismissed counts. For discussion, see §§83.87–83.90.

1. Principles Applicable to Restitution Generally

a. Procedure at Time of Guilty Plea

(1) [§83.31] Advisement When Taking Plea

Restitution is a direct consequence of a guilty or no contest plea of which defendant must be advised. *People v Rowland* (1997) 51 CA4th 1745, 1752–1753, 60 CR2d 351; *People v Valdez* (1994) 24 CA4th 1194, 1203, 30 CR2d 4. For form, see §83.92.

Failure to so advise is fatal only if it prejudices the defendant. *People v Rowland, supra* 51 CA4th at 1753 (no prejudice because, inter alia, amount of restitution ordered matched defendant's civil liability).

(2) [§83.32] Silent Plea Bargain

A silent plea bargain does not circumscribe the mandatory duty of the trial court to order the payment of restitution. *People v Valdez* (1994) 24 CA4th 1194, 1203, 30 CR2d 4; see *People v Campbell* (1994) 21 CA4th 825, 829, 26 CR2d 433 (silent plea agreement did not nullify restitution order as condition of probation).

When a defendant enters into a plea bargain in which the defendant reasonably believes he or she will be ordered to pay a small amount of restitution, and thereafter at sentencing is ordered to pay a much larger amount, the defendant is entitled to withdraw his or her plea. *People v Brown* (2007) 147 CA4th 1213, 1221–1228, 54 CR3d 887. The court in *Brown* stated that an award of victim restitution constitutes punishment for purposes of determining whether there is a violation of a plea agreement when the sentencing court imposes a larger restitution amount than that specified in the plea agreement. 147 CA4th 1221–1223. In this case the victim restitution order imposed was a significant deviation from the terms of the plea agreement. Specific performance was not an available remedy because full victim restitution is mandated by Cal Const art 1, §28.5 and Pen C §1202.4(f), and the court has no discretion or authority to impose a negotiated sentence that provides for an award of less than full restitution. 147 CA4th at 1224–1228.

In *People v Rowland* (1997) 51 CA4th 1745, 60 CR2d 351, the plea agreement made no mention of victim restitution, and the trial court resentenced the defendant to include a substantial award of victim restitution. The First District Court of Appeal upheld the trial court's conclusion that absent a showing of prejudice, the defendant was not entitled to withdraw his plea. 51 CA4th at 1750–1754. The court in *People v Brown, supra*, distinguished *Rowland*, by pointing out that because restitution was not mentioned in the plea agreement in that case, the trial court's restitution order did not violate an express term of the agreement. 147 CA4th at 1223 n6.

b. [§83.33] Right to Notice and Hearing

Victims and defendants have a right to a hearing and to notice. For discussion, see §§83.41–83.45.

c. [§83.34] Restitution Not Affected by Bankruptcy

Defendant's bankruptcy. The Bankruptcy Code does not apply to restitution orders. *People v Washburn* (1979) 97 CA3d 621, 158 CR 822. A restitution obligation imposed as a condition of probation is not dischargeable in a liquidation or "straight bankruptcy" proceeding under Chapter 7 (11 USC §§701 et seq). *Kelly v Robinson* (1986) 479 US 36, 50–53, 107 S Ct 353, 93 L Ed 2d 216; 11 USC §523(a)(7). See also *Warfel v City of Saratoga* (In re Warfel) (9th Cir BAP 2001) 268 BR 205, 209–213 (civil restitution judgment originally imposed as a condition of debtor's probation not dischargeable under Chapter 7). Nor is a restitution obligation dischargeable under Chapter 13 (11 USC §§1301 et seq). 11 USC §1328(a)(3).

Bankruptcy does not block restitution even when defendant's civil obligations to the victim were discharged by bankruptcy *before* criminal charges were filed. *People v Moser* (1996) 50 CA4th 130, 136, 57 CR2d 647.

Because collection of restitution is a continuation of a criminal action, the automatic stay provisions of bankruptcy law do not apply. See *In re Gruntz* (9th Cir 2000) 202 F3d 1074, 1084–1087 (automatic stay did not enjoin state court criminal proceedings against debtor for failure to pay child support); 11 USC §362(b)(1).

Victim's bankruptcy. When the victim incurred an obligation to a third party as a result of defendant's conduct, the bankruptcy discharge of the victim's obligation does not preclude a restitution order. *People v Dalvito* (1997) 56 CA4th 557, 560–562, 65 CR2d 679 (bankruptcy is economic loss despite discharge; no explanation why loss is equal to amount of obligation).

d. [§83.35] Order Enforceable as Civil Judgment

An order to pay restitution is deemed a money judgment and enforceable as if it were a civil judgment. Pen C §§1202.4(i), 1214(b); Welf & I C §730.6(r). Restitution orders derived from misdemeanor cases, cases involving a violation of a city or town ordinance, and noncapital cases with a plea of guilty or no contest, are enforceable in the same manner as a money judgment in a *limited* civil case. Pen C §1214(c); CCP §582.5.

The following conditions must be met before a restitution order may be enforced as if it were a civil judgment (Pen C §1214(b)):

(1) The defendant was informed of the right to have a judicial determination of the amount, and

(2) the defendant was

- Provided with a hearing,
- Waived a hearing, or
- Stipulated to the amount of restitution.

In addition, Pen C §1214(b) gives victims and the California Victim Compensation and Government Claims Board the right to receive on request a certified copy of the restitution order and the defendant's financial disclosure (see §83.80). See also Welf & I C §730.7(c) (victims of juvenile offenses entitled to certified copy of restitution order). If requested, the court must provide the financial disclosure to the district attorney in connection with an investigation or prosecution involving perjury or the veracity of the information contained in the disclosure. Pen C §1214(b).

Penal Code §1214(b) also gives victims "access to all resources available under the law to enforce the restitution order," including, inter alia, wage garnishment and lien procedures.

A restitution order is enforceable immediately and continues to be enforceable by the victim after termination of defendant's probation or parole. Pen C §§1214(b), 1202.4(m); Welf & I C §730.6(*l*).

☛ JUDICIAL TIP: Enforcement, like a judgment, should not be confused with the actual entry of a civil judgment based on the order to pay restitution. Judges should not at any time order the entry of such a judgment. However, it is entirely proper for the judge to order the appropriate civil clerk to issue enforcement of judgment orders, such as writs of execution, to victims with a restitution order. See *People v Hart* (1998) 65 CA4th 902, 906, 76 CR2d 837. But see *People v Farael* (1999) 70 CA4th 864, 866–867, 83 CR2d 16 (on conviction of insurance fraud, court properly required defendant as condition of probation to sign confession of judgment in insurer's favor in amount of its investigation costs; appellate court found "no practical or legal difference between a restitution order and a confession of judgment for the purpose of restitution").

e. [§83.36] Penalty Assessments; Administrative Fees

Restitution orders are not subject to the penalty assessments of Pen C §1464 or Govt C §76000. Unlike penalty assessments, restitution is not collected by the courts, but is ordered payable directly to the victim.

People v Dorsey (1999) 75 CA4th 729, 734–737, 89 CR2d 498; *People v Martinez* (1999) 73 CA4th 265, 267–268, 86 CR2d 346.

Statutory penalties may not be included in a victim restitution order. *People v Boudames* (2006) 146 CA4th 45, 49–53, 52 CR3d 629.

Counties may impose a fee to cover the administrative costs of collecting restitution when the restitution is paid to the victim. The fee may not exceed 10 percent of the total amount of restitution ordered to be paid. Pen C §1203.1(l); *People v Eddards* (2008) 162 CA4th 712, 716, 75 CR3d 924. Administrative fees may not be imposed, however, when restitution is paid to the State Restitution Fund. 162 CA4th at 716–717.

f. [§83.37] Persons Found Not Guilty by Reason of Insanity

Article I, §28(b)(13), of the California Constitution, and Pen C §1202.4(a) refer to restitution from the persons *convicted* of crimes. A person found not guilty by reason of insanity (NGI) is not a convicted person. *People v Morrison* (1984) 162 CA3d 995, 998, 208 CR 800; *Newman v Newman* (1987) 196 CA3d 255, 259, 241 CR 712 (defendant found NGI is not "convicted" within meaning of CCP §340.3). Although there is no California case on point dealing with restitution in NGI cases, other states have ruled on the issue and concluded that there is no authority to order restitution in these cases. See *State v Heartfield* (Ariz 2000) 998 P2d 1080; *State v Gile* (Or App 1999) 985 P2d 199 (defendant found NGI not subject to assessment similar to Pen C §1202.4 restitution fine).

g. [§83.38] Effect of Acquittal

In a nonprobation context, a restitution order may not be imposed for a crime of which the defendant has been acquitted. *People v Percelle* (2005) 126 CA4th 164, 178–180, 23 CR3d 731. However, the court may impose a restitution order as a condition of probation, regardless of whether the defendant has been convicted of the underlying crime. 126 CA4th at 169. See also §83.84.

2. [§83.39] Restitution Under Pen C §1202.4 and Welf & I C §730.6

Penal Code §1202.4 or its counterpart for juvenile offenders, Welf & I C §730.6, apply when all four of the following conditions are present:

(1) a claim by a victim (see §§83.47–83.50.)

(2) who suffered an economic loss (see §§83.51–83.61) victim of felony violation of Pen C §288 entitled to restitution for noneconomic losses (Pen C §1202.4(f)(3)(F))

(3) as a result of the commission of a crime

(4) of which the defendant was convicted (Pen C §1202.4(a)(1); see *People v Carbajal* (1995) 10 C4th 1114, 43 CR2d 681; *People v Woods* (2008) 161 CA4th 1045, 1049–1053, 74 CR3d 786; *People v Lai* (2006) 138 CA4th 1227, 1246–1249, 42 CR3d 444).

When some of these conditions are not met, the court may have discretion to order restitution. For discussion, see §§83.84–83.90.

a. [§83.40] Presentence Investigation Report

A probation officer's presentence investigation report must include information and recommendations pertaining to restitution fines and victim restitution. Pen C §1203(b)(2)(C), (d), (g). Specifically, the report must include:

- Information concerning the victim of the crime, including the victim's statement, the amount of the victim's loss, and whether that loss is covered by the victim's or defendant's insurance (Cal Rules of Ct 4.411.5(a)(5); for discussion of the effect of insurance on restitution awards, see §§83.62–83.63);
- A statement of mandatory and recommended restitution, restitution fines, and other fines and costs to be assessed against the defendant (Cal Rules of Ct 4.411.5(a)(11)); and
- Findings concerning a defendant's ability to make restitution and pay any fine (Cal Rules of Ct 4.411.5(a)(8), (11)).

If, as is typical in misdemeanor cases, no probation report is prepared for sentencing, the court may consider any information that could have been included in a probation report. Pen C §1203(d).

Financial evaluation. The court may order the defendant to appear before a county financial evaluation officer, if available, for an evaluation of the defendant's ability to make restitution. Pen C §1203(j). The county officer must report findings regarding restitution and other court-related costs to the probation officer on the question of the defendant's ability to pay those costs. Pen C §1203(j).

b. Hearing

(1) [§83.41] Right to Hearing

Defendant. The defendant has the right to a court hearing to dispute the amount of restitution or the manner in which it is to be made. Pen C §§1202.4(f)(1), 1203(d), 1203.1k; *People v Carbajal* (1995) 10 C4th 1114, 1125, 43 CR2d 681. Juvenile offenders have the same right. Welf & I C §730.6(h)(1). Advisement of this right is a precondition to enforcement of the restitution order by a victim. Pen C §1214(b); for more on notice, see §83.42.

Victim. A victim has a right to appear at sentencing personally or by counsel to express his or her views regarding restitution. Pen C §1191.1. This right also extends to:

- The victim's spouse, parents, children, or guardian (Cal Const art I, §28(e); Pen C §1191.1);
- The lawful representative of the victim who is deceased, a minor, or physically or psychologically incapacitated (Cal Const art I, §28(e));
- The next of kin of a deceased victim (Pen C §1191.1);
- An insurer or employer victimized by workers' compensation fraud (Pen C §1191.10);
- The California Victim Compensation and Government Claims Board when enforcing its subrogation rights (Pen C §1202.4(f)(2); see §83.72).

(2) [§83.42] Notice

Defendant. The court should inform the defendant of the right to a hearing to contest restitution. See Pen C §§1202.4(f)(1) (right to hearing), 1214(b); *People v Carbajal* (1995) 10 C4th 1114, 1125, 43 CR2d 681. The consequences of failing to provide this information differ depending on whether the court follows the recommendations of the probation report:

- If the court does not order more restitution than the report recommends, failure to request a hearing waives any error. *People v Foster* (1993) 14 CA4th 939, 949, 18 CR2d 1; *People v Blankenship* (1989) 213 CA3d 992, 997, 262 CR 141.

☛ JUDICIAL TIP: Some judges obtain an express waiver of hearing when the defendant does not contest restitution. This forestalls later objections to civil enforcement of the restitution order based on a lack of hearing.

- However, when the court exceeds the recommendations without first bringing that prospect to the defendant's attention and affording the defendant an opportunity to contest it, the defendant has been deprived of any meaningful opportunity to be heard. See *People v Sandoval* (1989) 206 CA3d 1544, 1550, 254 CR 674. See also *People v Thygesen* (1999) 69 CA4th 988, 993, 81 CR2d 886.

☛ JUDICIAL TIP: When the judge contemplates ordering more restitution than the probation officer recommended, the judge should indicate this before making an order and should inquire whether the defendant desires a hearing.

Victim. The probation officer has the duty to notify the victim of

- All sentencing proceedings or juvenile disposition hearings,
- The right to appear, and
- The right to express his or her views. Pen C §§679.02(a)(3), 1191.1.

The probation officer must also provide the victim with timely written information concerning the court's duty to order restitution and the victim's

- Right to civil recovery against the defendant;
- Right to a copy of the restitution order from the court;
- Right to enforce the restitution order as a civil judgment;
- Responsibility to provide information about losses to the probation department, district attorney, and court; and
- Opportunity to be compensated from the Restitution Fund. Pen C §§679.02(a)(8), 1191.2.

☛ JUDICIAL TIP: When there is no probation referral, as is often the case with misdemeanors, the prosecutor should notify the victim unless the county has another agency in charge of victim restitution that notifies victims.

In cases of juvenile offenders the obligation to notify is limited to offenses that would have been felonies if committed by an adult. Pen C §679.02(a)(4).

Designated agencies are required to develop and make available a "notification of eligibility" card for victims and derivative victims that includes specified information about eligibility to receive payment from the Restitution Fund for losses resulting from the crime. Pen C §1191.21(a). The law enforcement officer with primary responsibility for investigating the crime and the district attorney may provide this card to the victim and any derivative victims. Pen C §1191.21(b).

☛ JUDICIAL TIP: To spare victims court appearances that are unnecessary because defendant does not contest restitution, some judges initially make only uncontested orders. They continue the case when the defendant plans to challenge restitution; the victim is invited to attend the continued hearing.

(3) [§83.43] Attendance of Prosecutor

The prosecutor must be present at the restitution hearing to advocate on the People's behalf and be heard on issues that affect a fair and just result on the question of victim restitution. *People v Dehle* (2008) 166

CA4th 1380, 1386–1389, 83 CR3d 461 (trial court erred in allowing hearing to go forward without the prosecutor; victim's private attorney did not appear on behalf of the People, but solely on behalf of the victim). Although private counsel may assist a district attorney, the district attorney may not delegate a restitution hearing entirely to a private attorney. 166 CA4th at 1389–1390.

(4) [§83.44] Nature of Restitution Hearing

A restitution hearing does not require the formalities of a trial. *People v Hartley* (1984) 163 CA3d 126, 130, 209 CR 131. Thus

- Defendant has no right to a jury trial on restitution issues (*People v Rivera* (1989) 212 CA3d 1153, 1161, 261 CR 93).
- Defendant has no right to confront and cross-examine witnesses, including the probation officer who prepared the probation report. *People v Cain* (2000) 82 CA4th 81, 86–88, 97 CR2d 836 (no right to cross-examine psychotherapist whose fees defendant was ordered to reimburse under Pen C §273.5(h)(2)).
- Victims have a right to express their views (Pen C §1191.1).
- The court may consider the recommendations in the presentence report despite their hearsay character (*People v Cain*, *supra*, 82 CA4th at 87–88; Pen C §§1203(b)(2)(C)(ii), 1203.1k), as long as the court independently determines the amount of restitution (*People v Hartley*, *supra*).
- The evidentiary requirements for establishing a victim's economic losses are minimal. The court must base its determination on the "amount of loss claimed by the victim or victims or any other showing to the court." Pen C §1202.4(f). A victim may submit estimates of losses. *People v Goulart* (1990) 224 CA3d 71, 82–83, 273 CR 477. An owner of property is always entitled to give an opinion of its value. Evid C §813. See *People v Prosser* (2007) 157 CA4th 682, 690–692, 68 CR3d 808 (in determining value of stolen property, court may consider testimony of victim as to its value, even though testimony was unsupported by receipts or appraisals, or a detailed description of each individual stolen piece); *People v Gemelli* (2008) 161 CA4th 1539, 1542–1544, 74 CR3d 901 (court may rely on victim's unverified statement of losses that is detailed and facially credible, and explains how the claimed losses relate to the crime).
- Documentary evidence such as bills, receipts, repair estimates, insurance payment statements, payroll stubs, business records, and similar documents relevant to the value of stolen or damaged

property, medical expenses, and wages and profits lost may not be excluded as hearsay evidence. Pen C §1203.1d(d).

☛ JUDICIAL TIP: Restitution hearings should not further victimize victims by long courtroom waits or multiple hearings. This problem often arises in misdemeanor cases that involve long calendars and that lack probation reports. To minimize delays for victims some judges

- Instruct courtroom clerks to ascertain cases in which victims are present and call these cases first; and
- Permit victims to present restitution information without delay when an out-of-custody defendant is absent, on a determination and finding that defendant's absence is voluntary and with knowledge of the hearing. See Pen C §1043 for a similar procedure at trial. Merely asking the victim to hand papers to the clerk and deferring the restitution determination may create confusion and an inadequate record.

(5) [§83.45] Burden of Proof

The victim must present evidence showing that there were losses and that the losses were caused by the crime committed by the defendant. *People v Fulton* (2003) 109 CA4th 876, 885–886, 135 CR2d 466. The amount of restitution must be proved by a preponderance of the evidence. *People v Gemelli* (2008) 161 CA4th 1539, 1542–1543, 74 CR3d 901. Once the victim makes a prima facie showing of economic losses, the burden shifts to the defendant to disprove the amount of the claimed losses. 161 CA4th at 1543. The defendant has the burden of showing that the restitution recommendation in the probation report or the victims' estimates are inaccurate. *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1; *People v Hartley* (1984) 163 CA3d 126, 130, 209 CR 131.

c. [§83.46] Ability To Pay

Defendant's inability to pay cannot be considered in determining the amount of restitution. Pen C §1202.4(g).

However, ability to pay is vital in two other respects:

(1) At the time of making the restitution order the court needs to make an ability-to-pay determination in order to decide whether to make an income deduction order. Pen C §1202.42(a); for discussion, see §83.76.

(2) Ability to pay becomes important if the defendant fails to pay restitution; it is a precondition to revoking probation or imprisoning defendant for failure to pay. See, *e.g.*, *People v Whisenand* (1995) 37 CA4th 1383, 1393, 44 CR2d 501. See §83.71.

d. Persons Entitled to Restitution

(1) Victims

(a) [§83.47] Constitutional Definition of Victim

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), which added Cal Const art I, §28(e), providing a constitutional definition of a victim, including for purposes of restitution. Under the constitutional definition, a "victim" is:

- A person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act.
- The person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated.

The term "victim" does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.

(b) [§83.48] Statutory Definition under Pen C §1202.4

A "victim" under Pen C §1202.4 is any individual who has suffered economic loss as a result of the commission of a crime of which the defendant was convicted. Pen C §1202.4(a)(1). Other individuals entitled to restitution under Pen C §1202.4 include:

- The immediate surviving family of the actual victim. Pen C §1202.4(k)(1).
- Parents and guardians of a victim who is a minor. Pen C §1202.4(f)(3)(D) and (E); for discussion, see §83.55.
- Any person who has sustained economic loss as the result of a crime and who satisfies any of the following conditions (Pen C §1202.4(k)(3)):
  - — At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim.
  - — At the time of the crime was living in the victim's household.
  - — At the time of the crime was a person who had previously lived in the victim's household for at least two years in a relationship substantially similar to that of a parent, grandparent, sibling, spouse, child, or grandchild.

— Is another family member of the victim, including, but not limited to, the victim's fiancé or fiancée, and who witnessed the crime.

— Is the primary caretaker of a minor victim.

• Any person who is eligible to receive assistance from the Restitution Fund under the California Victim Compensation Program (Govt C §§13950–13969.7). Pen C §1202.4(k)(4).

For discussion of restitution payments to the state Restitution Fund, see §83.72.

A victim of crime does not have to be an individual. A corporation, business trust, estate, trust, partnership, association, joint venture, government and governmental agency, or any other legal or commercial entity may be entitled to restitution under Pen C §1202.4 if it is a "direct victim" of a crime, *i.e.*, it is the immediate object of the offense or it is an entity against which the crime has been committed. Pen C §1202.4(k)(2); *People v Martinez* (2005) 36 C4th 384, 393, 30 CR3d 779; *People v Slattery* (2008) 167 CA4th 1091, 1096–1097, 84 CR3d 672. See, *e.g.*, *People v Saint-Amans* (2005) 131 CA4th 1076, 1084–1087, 32 CR3d 518 (restitution properly ordered for a bank for its losses from a defendant whose fraudulent transactions affected a deposit holder's account; the bank was a direct victim because the bank did not act as an indemnitor, the bank was the object of the crime, and the defendant pleaded guilty to "commercial" burglary); *People v Ortiz* (1997) 53 CA4th 791, 795–799, 62 CR2d 66 (defendant convicted of selling counterfeit tapes; trial court properly found record company trade association was a direct victim and was entitled to restitution for both investigation expenses and lost sales). Compare *People v Slattery*, *supra*, (2008) 167 CA4th at 1095–1097 (hospital that treated victim injured by criminal conduct is not a direct victim).

☛ JUDICIAL TIP: Caution is advisable when counsel refers to statutes other than Pen C §1202.4 for the purpose of defining who is a victim. See, *e.g.*, a narrower definition in Govt C §§13951(c), (g), 13955, dealing with persons entitled to compensation from the Restitution Fund, and Pen C §1191.10. These definitions do not limit who qualifies as a victim under Pen C §1202.4. See, *e.g.*, *People v Broussard* (1993) 5 C4th 1067, 1077, 22 CR2d 1078 (persons entitled to restitution not limited to those who qualify for assistance from Restitution Fund); *People v Valdez*, *supra*, 24 CA4th at 1199.

(2) [§83.49] Governmental Agencies

A governmental agency may be a direct victim of the defendant's crime under Pen C §1202.4(k). For example, a defrauded governmental agency is a direct victim entitled to restitution for its losses. See *People v Crow* (1993) 6 C4th 952, 957, 26 CR2d 1 (welfare fraud); *People v Akins* (2005) 128 CA4th 1376, 1385–1389, 27 CR3d 815 (welfare fraud); *People v Hudson* (2003) 113 CA4th 924, 927–930, 7 CR3d 114 (discussion of how to calculate restitution to defrauded government agency). See also *In re Johnny M.* (2002) 100 CA4th 1128, 123 CR2d 316 (school district is direct victim entitled to restitution from minor who vandalized school property in amount that included reimbursement for property damage and labor costs of salaried employees who repaired the damage).

Governmental units are often indirect victims, not entitled to restitution. For example:

- A law enforcement agency that bought illicit drugs from the defendant does not qualify for restitution for the funds expended. *People v Torres* (1997) 59 CA4th 1, 5, 68 CR2d 644 (overhead expenses costs incurred in the course of regular investigatory duties not recoverable).
- A public agency may not be awarded restitution for cleanup costs incurred in removing hazardous waste from a defendant's illegal drug lab. *People v Martinez* (2005) 36 C4th 384, 391–394, 30 CR3d 779 (Health & S C §§11470.1 and 11470.2 provide exclusive means by which Department of Toxic Substances Control can recover costs).
- A city may not be awarded restitution for workers' compensation payments to a police officer who was injured by defendant's criminal act. *People v Franco* (1993) 19 CA4th 175, 183–186, 23 CR2d 475 (city may pursue civil action under Lab C §3852 to collect restitution).
- A public agency may not be awarded restitution under Pen C §1202.4 for costs to investigate crimes or apprehend criminals. *People v Ozkan* (2004) 124 CA4th 1072, 1076–1077, 21 CR3d 854 (Board of Equalization entitled to recover costs under Bus & P C §12015.5).

As illustrated in some of the above cases, statutes often give governmental agencies other remedies to obtain reimbursement for expenditures attributable to defendant's conduct. Other examples include:

- *Emergency response to DUI auto accident.* The court may, as a condition of probation, order restitution to a public agency for

expenses incurred in its emergency response to a DUI auto accident. Govt C §53150; Pen C §§1203.1(e), 1203.1*l*. See *California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 38 CR3d 16 (discussion of recoverable emergency response costs under Govt C §53150).

- *Fire suppression*. Fire departments can receive restitution expenses incurred in putting out a fire that was negligently or unlawfully set. Related rescue and emergency medical costs are also recoverable. Health & S C §13009.
- *Medical examination*. The court may order restitution to a law enforcement agency for the cost of a medical examination conducted in child abuse or neglect cases and in sexual assault cases. Pen C §1203.1h.
- *Emergency response*. The court may, as a condition of probation, order restitution to a public agency for costs incurred due to their response to an emergency. Pen C §1203.1*l*
- *Child stealing cases*. The court must order the payment of restitution to the district attorney for any costs incurred in locating and returning a child to the custodial parent. Pen C §278.6(c); Fam C §3134.
- *Criminal threat cases*. The court must order payment to a public or private entity for costs incurred stemming from an emergency response to a false bomb threat or to a false threat to use a weapon of mass destruction. Pen C §422.1.
- *Damage to public property*. The court must order payment of restitution to a public entity for costs of cleanup, repair, replacement, or restoration of public property damaged by parties who refused to comply with an order to disperse. Pen C §416(b).

A governmental agency may be the beneficiary of restitution under Pen C §1203.1 (restitution imposed as condition of probation) for losses resulting from unusual expenses directly incurred because of defendant's criminal conduct. *People v Rugamas* (2001) 93 CA4th 518, 521–523, 113 CR2d 271 (court upheld restitution order requiring defendant to reimburse police department for medical expenses incurred to treat defendant after police shot him with rubber bullets). See §83.84.

(3) [§83.50] Insurance Companies

An insurance company that has paid the crime losses of its insured under the terms of an insurance policy is not a direct victim of crime and has no right to restitution. *People v Birkett* (1999) 21 C4th 226, 231, 245, 87 CR2d 205 (court also lacks discretion to divide restitution between

victim and insurer). However, when the defendant is convicted of submitting false claims to an insurance company, the insurance company is considered to be a direct victim of the defendant's crime and thus entitled to restitution. *People v O'Casey* (2001) 88 CA4th 967, 106 CR2d 263 (workers compensation fraud); *People v Moloy* (2000) 84 CA4th 257, 100 CR2d 676.

e. Losses Subject to Restitution; Amount

(1) [§83.51] Full Restitution for Economic Losses

Penal Code §1202.4 requires

(a) *full* restitution

(b) for *economic* losses determined by the court. Pen C §1202.4(a)(1), (f)(3).

Two kinds of losses not covered by Pen C §1202.4 are:

- Noneconomic losses (*e.g.*, psychological harm) except those suffered by victims of felony violations of Pen C §288; and
- Losses that did not result from the crime of which defendant was convicted. Pen C §1202.4(a)(1), (f)(3)(F); for basis of restitution other than Pen C §1202.4, see §§83.84–83.90.

(2) [§83.52] Components of Economic Loss

Penal Code §1202.4(f)(3) lists a number of losses and expenditures that qualify as recoverable economic losses. The list is not inclusive; the statute provides broad discretion with respect to the type of losses subject to a restitution order. Pen C §1202.4(f)(3) ("losses . . . including, but not limited to . . ."); *In re Johnny M.* (2002) 100 CA4th 1128, 1135–1136, 123 CR2d 316; *In re M. W.* (2008) 169 CA4th 1, 5–6, 86 CR3d 545 (list of losses enumerated in Welf & I C §730.6(h) is not inclusive). See, *e.g.*, *People v Keichler* (2005) 129 CA4th 1039, 1046–1047, 29 CR3d 120 (trial court properly ordered restitution for the cost of a traditional Hmong healing ceremony and herbal medicines to victims of a fight). See also §83.58 (support to victims' children).

(a) [§83.53] Property Damages or Loss

Victims have a right to restitution "for the value of stolen or damaged property," defined as the replacement cost of like property or the cost of repairing it when repair is possible. Pen C §1202.4(f)(3)(A).

The Fourth District Court of Appeal held in *People v Yanez* (1995) 38 CA4th 1622, 1627, 46 CR2d 1, that the restitution for damaged but reparable property is limited to the amount of damages recoverable in a

civil action. That is, the restitution for such property is the lesser of the following:

- Market value before the crime minus market value after it; or
- The reasonable cost of repairing the property to its condition before defendant damaged it.

However, the First District Court of Appeal in *In re Dina V.* (2007) 151 CA4th 486, 488–489, 59 CR3d 862, disagreed with the holding in *Yanez* and held that in imposing restitution in a juvenile wardship case when property has been damaged, the court has discretion to impose the actual cost of repairing the property, even if that amount exceeds the replacement cost. The Court stated that neither Welf & I C §730.6 nor Pen C §1202.4 limits victim restitution to that amount recoverable in a civil action.

Restitution may be ordered for cleanup, repair, or replacement of property damaged by parties who refused to comply with order to disperse. Pen C §416(b).

Stolen property. For most types of stolen property, original cost is a fair approximation of replacement cost. *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1. Accordingly, the court may consider a victim's statement of what the property cost, as set out in the probation report. It is up to the defendant to contest the valuation. *People v Foster*, *supra*.

Appreciated property. When the value of stolen property appreciates after the theft, as may happen with securities, the court may order restitution in the amount of the appreciated value. See *People v Tucker* (1995) 37 CA4th 1, 4–6, 44 CR2d 1 (embezzled mutual fund shares; decision based on former Pen C §1203.04).

☛ JUDICIAL TIP: The converse is not true in the view of most judges. When shares decline in value after defendant embezzled them, defendant should not get a windfall; defendant's crime deprived the victim of the opportunity to sell the shares before their value dropped.

Application of other statute to determine loss. In *People v Baker* (2005) 126 CA4th 463, 468–470, 23 CR3d 871, a defendant was convicted of cattle theft and was ordered to make restitution for the stolen cows and for the calves that were born while the cows were misappropriated. In calculating the restitution owed, the trial court properly applied Food & A C §21855 in quadrupling the restitution amount. 126 CA4th at 469–470.

(b) [§83.54] Medical and Counseling Expenses

Medical expenses are a proper item of restitution (Pen C §1202.4(f)(3)(B)) and include future expenses. *People v Phelps* (1996) 41 CA4th 946, 949–951, 48 CR2d 855. Victims also have a right to restitution for mental health counseling expenses. Pen C §1202.4(f)(3)(C). See *People v O'Neal* (2004) 122 CA4th 817, 820–821, 19 CR3d 202 (defendant convicted of sexual molestation ordered to pay restitution for psychological counseling expenses incurred by victim's brother); *In re M. W.* (2008) 169 CA4th 1, 4–7, 86 CR3d 545 (cost of mental health services incurred by victim of crime committed by a juvenile is a recoverable loss under Welf & I C §730.6(h)).

Other statutes provide for restitution of medical and counseling expenses in specific situations. For example:

- Defendants convicted of the following offenses may be ordered to reimburse a victim for reasonable costs of counseling and other reasonable expenses as condition of probation:
  - — Domestic battery (see Pen C §243(e)(2)(B)),
  - — Spousal rape (see Pen C §262(d)(2)),
  - — Spousal abuse (see Pen C §273.5(h)(2)), and
  - — Violation of protective order (see Pen C §273.6(h)(2)).
- Defendants convicted of the sexual assault on a minor are required to make restitution for the victim's medical or psychological treatment expenses. Pen C §1203.1g.
- Defendants convicted of the sexual assault on an elderly person are required to make restitution for the victim's medical or psychological treatment expenses. Pen C §1203.1j.

For a discussion of restitution for medical expenses when the victim is covered by Medi-Cal, see §83.64,

(c) [§83.55] Lost Wages and Profits; Out-of-Pocket Expenses

Wages or profits lost by the victim as a result of the crime are a proper item of restitution. Pen C §1202.4(f)(3)(D)–(E); see, *e.g.*, *People v Ortiz* (1997) 53 CA4th 791, 798, 62 CR2d 66 (sales lost as result of counterfeited cassette tapes).

Restitution should include:

- Future lost wages. See *People v Fulton* (2003) 109 CA4th 876, 880 n2, 887, 135 CR2d 466 (lost wages associated with future post-surgery recovery).

- Profits or wages lost because of time spent as a witness. Pen C §1202.4(f)(3)(E); *People v Nguyen* (1994) 23 CA4th 32, 42, 28 CR2d 140; see *People v Ryan* (1988) 203 CA3d 189, 192, 249 CR 750.
- Out-of-pocket expenses assisting the authorities in the investigation and prosecution of the case. Pen C §1202.4(f)(3)(E); *People v Ortiz, supra,* 53 CA4th at 797; see *People v Rowland* (1997) 51 CA4th 1745, 1749–1750, 60 CR2d 351.
- Wages or profits lost by the parents or guardian of a victim who is a minor. Pen C §§1202.4(f)(3)(D) (loss while caring for injured minor), 1202.4(f)(3)(E) (loss because of time spent as witness or assisting prosecution).
- Wages lost because of psychological injury. *People v Brasure* (2008) 42 C4th 1037, 1074–1075, 71 CR3d 675 (Pen C §1202.4(f)(3) applied to compensate a murder victim's mother for two years' lost wages due to the trauma of her son's death; the statute does not distinguish between economic losses covered by physical injuries and those caused by psychological trauma).
- Lost wages, mileage expenses, and parking fees incurred by parents of victim while attending defendant's trial. *People v Crisler* (2008) 165 CA4th 1503, 1507–1509, 81 CR3d 887 (trial court ordered restitution for time spent by mother, father, and stepfather of a minor murder victim to attend the defendant's murder trial).

Lost wages include any commission income as well as any base wages. Commission income must be established by evidence of this income during the 12-month period before the date of the crime for which the court is ordering restitution, unless good cause for a shorter time period is shown. Pen C §1202.4(f)(3)(D)–(E).

☛ JUDICIAL TIP: If a victim is unable to go to work because of injuries inflicted by the defendant, and he or she used hours of sick leave in order to be paid, the victim should be reimbursed for the economic value of the hours of depletion of his or her accrued sick leave.

(d) [§83.56] Lost Work Product

A restitution award may include the reasonable value of employee work product lost as a result of the crime. *In re Johnny M.* (2002) 100 CA4th 1128, 1134, 123 CR2d 316. In *In re Johnny M.*, a minor admitted to vandalizing school property. Several salaried school employees were required to spend time repairing the damage to the classrooms. The juven-

ile court held that the school district incurred an economic loss because the district was deprived of the work product the salaried employees would have generated if they had not been obliged to repair school property. The court reasonably valued the lost work product at the salary rate of the district employees, including benefits, for the lost time. *In re Johnny M.*, *supra*.

(e) [§83.57] Future Economic Losses of Spouse of Deceased Victim

The court may order the defendant to pay restitution to compensate the spouse of a deceased victim for the spouse's future economic losses attributable to the deceased victim's death. *People v Giordano* (2007) 42 C4th 644, 68 CR3d 51. In support of its decision, the Supreme Court looked to the state's wrongful death statutes that allow a spouse of a person wrongfully killed to seek compensation for the loss of financial benefits the decedent was contributing to support his or her family at the time of the decedent's death and the loss of that that support that was reasonably expected in the future. The Court stated that when the Legislature enacted Pen C §1202.4, "it did so with the presumed knowledge that courts have long understood that a surviving spouse incur an economic loss upon the death of his or her spouse." 42 C4th at 659.

In calculating the loss of support, the trial court should consider the earning history of the deceased spouse, the age of the survivor and decedent, and the degree to which the decedent's income provided support to the survivor's household. These factors are not an exhaustive list; the trial court has discretion to be guided by the particular factors in each individual claim. 42 C4th at 665.

(f) [§83.58] Child Support to Victims' Children

The children of a homicide victim are entitled to restitution for the loss of support. *People v Harvest* (2000) 84 CA4th 641, 652–653, 101 CR2d 135 (defendant ordered to pay child support for murder victim's children). See also *People v Clark* (1982) 130 CA3d 371, 384, 181 CR 682 (court ordered defendant to make monthly support payments to the children of a manslaughter victim as condition or probation). The court may also order restitution to the Restitution Fund for support to widows and children paid by the Fund. See Govt C §13957.5(a)(4).

(g) [§83.59] Interest

The court must award interest on a restitution order under Pen C §1202.4 at the rate of 10 percent per year. Pen C §§1202.4(f)(3)(G),

1214.5. The court has the option of awarding interest from the date of sentencing or loss. Pen C §1202.4(f)(3)(G).

☛ JUDICIAL TIPS: The latter is most workable when there was a single loss. Many judges leave it to the probation officer or other county agency to factor interest into a payment schedule.

(h) [§83.60] Attorneys' Fees

Penal Code §1202.4(f)(3)(H) mandates restitution for actual and reasonable attorneys' fees "and other costs of collection accrued by a private entity on behalf of the victim." See *People v Maheshwari* (2003) 107 CA4th 1406, 1409–1411, 132 CR2d 903 (defendant convicted of embezzlement ordered to pay victim's attorneys' fees and private investigator fees incurred in civil action to determine the amount of and recover embezzled funds). Only those attorneys' fees attributable to the victim's recovery of economic damages are allowed under Pen C §1202.4(f)(3)(H). The victim, however, is entitled to full reimbursement for attorneys' fees incurred to recover both economic and noneconomic losses when the fees cannot be reasonably divided. *People v Fulton* (2003) 109 CA4th 876, 882–885, 135 CR2d 466.

People v Fulton, *supra*, sets out the procedure for determining the proper amount of attorney's fees as restitution. Once evidence is introduced that the victim suffered economic losses and incurred reasonable attorney fees to recover those losses, this showing establishes the amount or restitution the victim is entitled to receive, unless challenged by the defendant. In that event, the burden shifts to the defendant to show, by a preponderance of the evidence, the portion of the attorney fees that are not recoverable because those fees are attributable solely to noneconomic losses. 109 CA4th at 886.

A contingent fee paid by the victim to an attorney to pursue civil liability is recoverable under Pen C §1202.4(f)(3)(H). *People v Pinedo* (1998) 60 CA4th 1403, 1405–1406, 71 CR2d 151. Restitution is also proper for attorneys' fees incurred to prevent a dispersal of assets by defendant. *People v Lyon* (1996) 49 CA4th 1521, 57 CR2d 415. However, legal expenses related to opposing discovery in the criminal case are not allowable. *People v Lyon*, *supra.*

Although Welf & I C §730.6 does not include legal fees and costs in its list of compensable economic losses, the Second District Court of Appeal has held that a juvenile offender can be ordered to pay restitution for the legal fees and costs that the victim incurred to collect restitution. *In re Imran Q.* (2008) 158 CA4th 1316, 1319–1321, 71 CR3d 121 (Welf & I C §730.6's silence on attorney's fees and costs is a mere legislative

oversight; trial court should utilize procedure discussed in *People v Fulton*, *supra*, for allocating fees).

(i) [§83.61] Other Expenses

Relocation expenses. Adult victims have a right to restitution for expenses in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, and expenses for clothing and personal items. Pen C §1202.4(f)(3)(I). These expenses must be verified by law enforcement to be necessary for the victim's personal safety or by a mental health treatment provider to be necessary for the victim's emotional well-being. Pen C §1202.4(f)(3)(I). See *People v Mearns* (2002) 97 CA4th 493, 501–502, 118 CR2d 511 (court properly ordered relocation expenses to rape victim in the amount of difference between the sale price of the victim's original mobilehome where the rape occurred and the purchase price of a new one).

Residential security expenses. Penal Code §1202.4(f)(3)(J) mandates restitution for expenses to install or increase residential security related to any violent felony (as defined in Pen C §667.5(c)), including, but not limited to, a home security device or system, or replacing or increasing the number of locks.

Residence and/or vehicle retrofitting expenses. Penal Code §1202.4(f)(3)(K) requires restitution for expenses to retrofit a residence or vehicle, or both, to make the residence accessible to, or the vehicle operational by, the victim, if the victim is permanently disabled, whether the disability is partial or total, as a direct result of the crime.

(3) [§83.62] Matters That Do Not Affect Amount of Restitution

Inability to pay. See §83.46.

Victim's insurance. A victim is entitled to restitution regardless of whether the victim has submitted an insurance claim or has been partially or fully reimbursed by his or her insurer. *People v Birkett* (1999) 21 C4th 226, 245–247, 87 CR2d 205. The amount that a victim paid as a deductible under his or her insurance contract is not the measure of restitution. Rather, it is the full amount of loss, including the total amount that the victim's insurance company paid out plus the victim's deductible payments, and any other amounts not covered by the victim's insurance. See *In re Brittany L.* (2002) 99 CA4th 1381, 1386–1390, 122 CR2d 376.

Bankruptcy. See §83.34.

Third party rights. Third party indemnification or subrogation rights do not affect the amount of restitution that is to be ordered. Pen C §1202.4(f)(2); *People v Hove* (1999) 76 CA4th 1266, 1272–1273, 91 CR2d 128 (court properly ordered restitution in full amount of medical expenses even though victim had not incurred any actual economic losses because of coverage by Medicare and/or Medi-Cal benefits).

Victim's release of liability. A victim's release of liability to the defendant's insurance company as part of a settlement does not release the defendant from his or her restitution obligation. A release cannot waive the People's right to have a defendant pay restitution ordered as part of the sentence. The victim would be in an untenable position if he or she had to reject a settlement offer from the defendant's insurance company that covers only a portion of the victim's losses in order to preserve the uncertain possibility that the full amount might be recovered. *People v Bernal*, *supra*, 101 CA4th at 160–161. See also *In re Tommy A.* (2005) 131 CA4th 1580, 1592, 33 CR3d 103 (minor defendant's restitution order based on a plea agreement created an implied agreement between the minor and the state obligating the minor to satisfy a "rehabilitative and deterrent debt to society" by paying restitution; the victim, not being a party to the implied agreement, could not release the minor from court-ordered restitution under Welf & I C §730.6(a)(1)). However, a victim's release of claims against the parent or guardian of a minor for damages inflicted during the minor's commission of a crime releases the parent or guardian. *In re Michael S.* (2007) 147 CA4th 1443, 1451–1455, 54 CR3d 920.

Prison sentence. See §83.78.

(4) [§83.63] Payment by Defendant's Insurer

If the defendant's insurer has made payments to the victim for losses subject to a Pen C §1202.4 restitution order, those payments must be offset against the defendant's restitution obligation. *People v Bernal* (2002) 101 CA4th 155, 165–168, 123 CR2d 622.

An insurer's payment to the victim must be made on behalf of the defendant as a result of the defendant's status as an insured under the policy. *People v Short* (2008) 160 CA4th 899, 903–905, 73 CR3d 154 (defendant was entitled to an offset for a settlement payment made by defendant's employer's liability insurer to victim of defendant's DUI accident involving company vehicle; even though defendant did not procure policy or make premium payments, he was member of class of insureds covered under the policy); *People v Jennings* (2005) 128 CA4th 42, 53–58, 26 CR3d 709 (defendant was entitled to an offset for an insurance settlement payment when both defendant and a parent were named on policy; irrelevant whether defendant or parent paid the

premiums). Compare *People v Hamilton* (2004) 114 CA4th 932, 941–943, 8 CR3d 190 (payments made by insurer of defendant's parent to settle victim's civil action against both the defendant and parent may not offset defendant's restitution obligation when payments are made on parent's behalf and not directly on behalf of defendant); *In re Tommy A.* (2005) 131 CA4th 1580, 1590–1592, 33 CR3d 103 (juvenile committed hit-and-run accident while driving another person's car without permission; settlement payment by owner's insurer was "completely distinct and independent from the minor" and therefore could not be offset against minor's restitution obligation).

When offsetting a defendant's restitution obligations by the amount of a civil settlement, the court must determine what portion of the settlement payment is directed to cover economic losses outlined in the restitution order. Only that portion of settlement may be used to reduce the defendant's obligations. *People v Short*, *supra*, 160 CA4th at 905; *People v Jennings*, *supra*, 128 CA4th at 58–59.

(5) [§83.64] Medi-Cal Payments

When the victim is covered by Medi-Cal, victim restitution for medical expenses is based on the amount actually paid by Medi-Cal and not the amount charged by the medical provider. *In re Anthony M.* (2007) 156 CA4th 1010, 1015–1019, 67 CR3d 734 (juvenile court erred in imposing restitution based on the amount charged by the medical provider). If the medical provider accepts payment from Medi-Cal for medical services rendered, that payment constitutes payment in full, and it is barred from seeking any unpaid balance from the patient. 42 CFR §447.15; Welf & I C §§14019.3(d), 14019.4(a). Under certain circumstances, Medi-Cal, on the other hand, may seek reimbursement from the patient or other responsible party for the amount it paid to the provider. 42 USC §§1396a(a)(25)(B), (a)(45), 1396k(a)(1)(A), (b). The court in *In re Anthony M.* distinguished *People v Hove* (1999) 76 CA4th 1266, 91 CR2d 128, in which the trial court ordered restitution in an amount in excess of that paid by Med-Cal to cover continuing care costs beyond the date of the award. No finding of ongoing medical care was made in *In re Anthony M.*, 156 CA4th at 1019. See also *People v Bergin* (2008) 167 CA4th 1166, 1169–1172, 84 CR3d 700 (private insurance case; trial court properly ordered victim restitution for medical expenses in the amount that the victim's medical provider accepted from victim's insurer as full payment for their services, plus the deductible paid by victim, rather than the amount billed by the medical provider).

(6) [§83.65] No Waiver of Full Restitution

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), which amended Cal Const art I, §28(b), removing language allowing the waiver of a portion or all victim restitution if there are compelling and extraordinary reasons for not ordering full restitution. Proposition 9 effectively negates provisions in Pen C §§1203.3(b)(4), 1202.4(f), (g) and (n) authorizing the reduction of restitution for compelling and extraordinary reasons.

(7) [§83.66] Audio-Video Hearing To Impose or Amend Restitution Order

Where such technology exists, the court may conduct a hearing to impose or amend a restitution order by two-way electronic audio-video communication between a defendant incarcerated in state prison and the courtroom in place of defendant's appearance in the courtroom. Pen C §1202.41(a)(1). The hearing is allowed only in those cases when the victim has received assistance from the Restitution Fund. Pen C §1202.41(a)(1). The hearing must be initiated through a request of the California Victim Compensation and Government Claims Board to the California Department of Corrections and Rehabilitation (CDCR), to collaborate with the court to arrange the hearing. Pen C §1202.41(a)(1).

If the defendant is represented by counsel, the attorney may be present with the defendant during the hearing, or may be present in the courtroom if the CDCR establishes a confidential telephone and facsimile transmission link between the defendant and the attorney. Pen C §1202.41(a)(3).

The determination to hold a two-way audio-video hearing lies within the discretion of the court. The court has the authority to issue an order requiring the defendant to be physically present in those cases where circumstances warrant. Pen C §1202.41(a)(2).

If a defendant is incarcerated in a prison without two-way audio-video communication capability, and does not waive his or her right to be present at a hearing to amend a restitution order, the California Victim Compensation and Government Claims Board must determine whether the cost of holding the hearing is justified. If the Board determines that the cost of holding the hearing is not justified, the Board may not pursue the amendment of the restitution order. Pen C §1202.41(b).

(8) [§83.67] Restitution and Civil Actions

A victim may be planning civil litigation or may have civil litigation pending. Until there is a civil settlement or judgment, the civil litigation should not be considered when determining restitution. However, once

there has been a settlement or judgment involving a victim and the defendant, the court must consider the civil award. The civil award must be allocated toward any restitution to the extent those payments cover economic losses for which restitution is being awarded. *People v. Short* (2008) 160 CA4th 899, 905, 73 CR3d 154; *People v Bernal* (2002) 101 CA4th 155, 165–166, 123 CR2d 622.

f. Order

(1) [§83.68] Specificity and Form

Specificity. The court's restitution order must be specific and detailed, identifying each victim and each loss to the extent possible. Pen C §1202.4(f)(3); see *People v Blankenship* (1989) 213 CA3d 992, 998, 262 CR 141. An order for restitution is unenforceable if it does not specify the losses to which it pertains. *People v Guardado* (1995) 40 CA4th 757, 762–763, 47 CR2d 81. Because a restitution order is enforceable by the victim as if it were a civil judgment (see §83.35), it must have the same degree of specificity as a civil judgment. 40 CA4th at 762. For discussion of procedure when the amount of restitution is uncertain at the time of sentencing, see §83.69.

☛ JUDICIAL TIP: Courts are encouraged to use Judicial Council form CR–110/JV–790 when making restitution orders. For form, see §83.93.

Separate form. Many judges issue a separate copy of the restitution order for each victim because victims often need a certified copy of the order for enforcement purposes and are entitled to one on request. Pen C §1214(b); see discussion in §83.35. The California Victim Compensation and Government Claims Board is also entitled to a copy on request. Pen C §1214(b). Penal Code §1202.4(f)(3) also seems to contemplate separate orders.

Notice to Board. The court clerk must notify the California Victim Compensation and Government Claims Board within 90 days of the court's imposition of a restitution order if the defendant is ordered to pay restitution to the Board because of the victim receiving compensation from the Restitution Fund. Pen C §1202.4(p).

(2) [§83.69] Amount Initially Uncertain

At the time of sentencing, the amount of restitution often cannot be fixed because necessary information is lacking or a subsequent hearing is needed to resolve a dispute about the amount. In these situations the court may order that it will determine the amount later. Pen C §1202.4(f); See *People v Amin* (2000) 85 CA4th 58, 62, 101 CR2d 756 (as part of plea

bargain defendant agreed to pay restitution, and decision on amount reserved by court for later hearing). The court retains jurisdiction over the defendant for purposes of imposing or modifying restitution until the losses are determined. Pen C §1202.46. There is no limitation on when the court must set the restitution hearing. See *People v Bufford* (2007) 146 CA4th 966, 969–972, 53 CR3d 273 (trial court did not lose jurisdiction to order restitution, notwithstanding that defendant had fully served her prison sentence before the final restitution hearing was held).

☛ JUDICIAL TIPS:

- Judges often seek a waiver of defendant's presence at the future restitution hearing. For judicial economy, judges will often set the date for the restitution hearing at the time of sentencing.
- When the defendant is sentenced to prison, it is highly advisable to address restitution prior to the defendant being transported to the prison. If the defendant is transported to prison with a "to be determined" order, it is highly unlikely that the victim will ever be able to obtain a restitution order unless the defendant waives his or her personal appearance at any future hearing. Counties typically cannot afford to bring a prisoner back to the local area for a restitution hearing. If the total amount of losses cannot be determined prior to the defendant being transported, the court should (1) order the amount that can be determined so that the California Department of Corrections and Rehabilitation (CDCR) can start the collection, (2) include an order in the sentence for the defendant to pay any additional restitution in an amount to be determined by the court, and (3) seek a waiver of the defendant's presence at any future restitution hearings.
- There is a prevailing misperception that when a "to be determined order" is issued, the CDCR will subsequently set the amount of restitution. CDCR can collect on restitution orders, but CDCR cannot set or order the amount.

(3) [§83.70] Delegating Restitution Determination

General rule. The court may not delegate to the probation officer the duty to determine the amount of restitution. *People v Cervantes* (1984) 154 CA3d 353, 358, 201 CR 187; see Pen C §1202.4(f) (court shall require restitution in amount to be established by court order). But see *People v Lunsford* (1998) 67 CA4th 901, 79 CR2d 363 (restitution order directing county agency to determine amount at later time enforceable). As to minors, see *In re Karen A.* (2004) 115 CA4th 504, 507–511, 9 CR3d 369, which holds that Welf & I C §730.6(h) allows the juvenile court to

delegate to the probation officer the tasks of identifying losses and specifying the amount of restitution. Minors are entitled to a court hearing to dispute the probation officer's determination of the restitution amount. Welf & I C §730.6(h).

Delegation with consent. The court with the defendant's consent may order the probation officer to set the amount of restitution. Pen C §1203.1k; see *People v DiMora* (1992) 10 CA4th 1545, 1549, 13 CR2d 616. The defendant can contest the probation officer's determination in court. Pen C §1203.1k.

Delegation when amount uncertain at sentencing. When the extent of a victim's loss cannot be ascertained at the time of sentencing, *People v Lunsford, supra,* permits the court to order the defendant to pay restitution in an amount to be determined by the local agency that administers the victim restitution program; the defendant has a right to a court hearing in accordance with Pen C §1202.4(f)(1).

☛ JUDICIAL TIPS:

- Most judges seek defendant's consent or proceed as discussed in §83.69.
- The California Department of Corrections and Rehabilitation (CDCR) is not authorized to initiate collection of restitution based on determinations by probation officers or other county agencies. CDCR must have a signed, sealed, and certified court order reflecting specific amounts and names of victims.

Setting payment schedule. Courts often delegate the task of setting up the defendant's payment schedule to the probation department or another county agency. See *People v Ryan* (1988) 203 CA3d 189, 198, 249 CR 750. Payment schedules are not necessary for adults committed to the CDCR or youthful offenders committed to the CDCR's Division of Juvenile Justice (DJJ) (formerly California Youth Authority). Under statute, a specified percentage will be deducted from prison wages and trust account deposits. Pen C §2085.5; Welf & I C §§1752.81–1752.82.

☛ JUDICIAL TIP: The defendant should be given an opportunity to challenge the determination.

Relying on probation report. The court may rely on the probation report in setting the amount of restitution. *People v Campbell* (1994) 21 CA4th 825, 830–832, 26 CR2d 433; *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1; see §83.44.

(4) [§83.71] Relation of Restitution Order to Probation

Penal Code §1202.4 applies whether or not the court grants probation. Pen C §1202.4(a)(1), (f).

☛ JUDICIAL TIP: When defendant is sentenced to prison, an order for full restitution is as mandatory as in cases of probation.

When the court grants probation, payment of restitution must be made a condition of probation. Pen C §1202.4(m)–(n). Termination of probation does not affect the victim's right to enforce the order. Pen C §1202.4(m).

☛ JUDICIAL TIP: When probation is revoked or terminated, and the defendant is sentenced to CDCR, the initial order reflecting the restitution must be included in the legal documents accompanying the inmate to CDCR. In order for the restitution to continue to be collected, the victim must submit a request to CDCR.

The court may revoke a defendant's probation based on the defendant's willful failure to pay restitution when the defendant has the ability to do so. Pen C §1203.2(a); *People v Lawson* (1999) 69 CA4th 29, 81 CR2d 283.

If the defendant is unable to pay full restitution within the initial term of probation, the court may modify and extend the period of probation to allow the defendant to pay off all restitution within the probation term. Pen C §1203.3(b)(4); *People v Cookson* (1991) 54 C3d 1091, 1097, 2 CR2d 176. Generally, the probation term may be extended up to but not beyond the maximum probation period allowed for the offense. *People v Medeiros* (1994) 25 CA4th 1260, 1267–1268, 31 CR2d 83. However, Pen C §1203.2(e) provides an exception, allowing probation to be extended past the maximum period if probation is revoked based on a violation of probation and the revocation has been set aside. *In re Hamm* (1982) 133 CA3d 60, 67, 183 CR 626; *People v Carter* (1965) 233 CA2d 260, 268, 43 CR 440.

A defendant is not entitled to have his or her conviction expunged under Pen C §1203.4 following termination of the defendant's probation when the defendant has not paid the full amount of the restitution. For purposes of Pen C §1203.4, a defendant has not fulfilled a restitution condition of probation unless the defendant has made all court-ordered payments for the entire period of probation and has paid the obligation in full. *People v Covington* (2000) 82 CA4th 1263, 1271, 98 CR2d 852.

For a discussion of the court's broad discretion under Pen C §1203.1 to order restitution as a condition of probation, see §83.84.

(5) [§83.72] Relation of Restitution Order to Restitution Fund

Victims of criminal acts may recover compensation from the state Restitution Fund under specified circumstances; the Fund is administered by the California Victim Compensation and Government Claims Board. Govt C §§13950–13969.7.

A restitution order does not preclude a victim's right to financial assistance from the Fund, but the amount of such assistance is reduced by the amount the victim actually receives for the same loss under the restitution order. Pen C §1202.4(j).

Restitution payments are made to the Fund to the extent that it provided compensation to the victim. Pen C §1202.4(f)(2). More broadly, when the Fund pays a victim, it is subrogated to the victim's rights against persons liable for restitution. Pen C §1202.4(f)(2); Govt C §13963(a).

Assistance from the Fund as a result of the defendant's conduct is presumed to be a direct result of the defendant's crime and must be included in the amount of restitution ordered by the court. Pen C §1202.4(f)(4)(A). The amount of assistance provided by the Fund may be established by copies of bills submitted to the Board reflecting the amount paid by the Board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Pen C §1202.4(f)(4)(B). Certified copies of these bills provided by the Board and redacted to protect the victim's privacy and safety or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that the bills were submitted to and paid by the Board, are sufficient to meet this requirement. Pen C §1202.4(f)(4)(B); see *People v Cain* (2000) 82 CA4th 81, 87–88, 97 CR2d 836 (Board's statement of claims paid on victim's behalf is inherently reliable document). If the defendant offers evidence to rebut this presumption, the court may release additional information contained in the Board's records to the defendant *only after* (1) reviewing the information in camera, and (2) finding that the information is necessary for the defendant to dispute the amount of the restitution order. Pen C §1202.4(f)(4)(C).

(6) [§83.73] Order Imposing Joint and Several Liability

A restitution order under Pen C §1202.4 may require codefendants to pay restitution jointly and severally. *People v Blackburn* (1999) 72 CA4th 1520, 1535, 86 CR2d 134; *People v Madrana* (1997) 55 CA4th 1044, 1049, 64 CR2d 518. Courts frequently make such orders. Under such an order, each defendant is entitled to a credit for any actual payments made by the other. *People v Blackburn*, *supra*, 72 CA4th at 1535. But a defendant cannot be jointly and severally liable with a codefendant for

restitution if the defendant did not participate in the crime causing the victim's loss. See *People v Leon* (2004) 124 CA4th 620, 21 CR3d 394 (defendant convicted of passing one forged check for $2450, and codefendant convicted of passing three forged checks totaling $11,000; trial court erred in ordering defendant to pay victim restitution of $13,450 jointly and severally with codefendant).

As to joint and several liability of the parents or guardians of a juvenile offender, see §83.82.

(7) [§83.74] Correction, Modification, and Amendment of Restitution Orders

Correcting failure to order restitution. A sentence without a restitution award to a victim within Pen C §1202.4 is invalid; the trial court may properly add a restitution order later. Pen C §1202.46; *People v Rowland* (1997) 51 CA4th 1745, 1750–1752, 60 CR2d 351. See also *People v Moreno* (2003) 108 CA4th 1, 132 CR2d 918 (correction of sentence under Pen C §1202.46 not limited to situations where restitution amount is not ascertainable at the time of sentencing).

Modification. Penal Code §1202.4(f)(1) authorizes courts to modify restitution on motion of the prosecutor, victim, defendant, or court. See also Pen C §1203.2(b) (modification of probation). Penal Code §1203.3(b)(5) additionally provides that nothing in Pen C §1203.3 prohibits the court from modifying the dollar amount of a restitution order under Pen C §1202.4(f) at any time during the term of the probation. Both the prosecutor and the victim have a right to notice and a hearing before a restitution order may be modified or terminated. Pen C §§679.02(a)(3), 1191.1, 1202.4(f)(1); 1203.3(b)(1). See *Melissa J. v Superior Court* (1987) 190 CA3d 476, 237 CR 5 (court set aside termination of restitution order made without notice to the victim or an opportunity for the victim to object). For modification of probation generally, see 3 Witkin and Epstein, California Criminal Law, *Punishment* §§573–576 (3d ed 2000).

☛ JUDICIAL TIP: When the court revokes probation and commits defendant to prison, it should modify the original judgment by ordering defendant to pay restitution because the probation condition that requires such payment no longer exists. See *People v Young* (1995) 38 CA4th 560, 567, 45 CR2d 177. Some judges believe that this is unnecessary because in their view a restitution obligation, like a restitution fine, survives a revocation of probation. See *People v Arata* (2004) 118 CA4th 195, 201–203, 12 CR3d 757; *People v Chambers* (1998) 65 CA4th 819, 821–823, 76 CR2d 732; Pen C §1202.4(m) (restitution unpaid, when defendant no longer on probation, enforceable like a civil judgment).

g. Enforcement

(1) [§83.75] Satisfaction of Victim Restitution Before Other Court-Ordered Debt

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), which added Cal Const art I, §28(b)(13)(C) to require that any funds collected by a court or law enforcement agencies from a person ordered to pay restitution must go to pay the restitution before being used to pay any other fines, penalties, assessments, or obligations that an offender may legally owe.

☛ JUDICIAL TIP: A fine or assessment ordered at the time of sentencing, but before a restitution order is imposed, may be paid, even though it is collected before restitution.

See also Pen C §1203.1d (allocation of restitution payments) and Pen C §2085.5(e), (g) (collection of monies from prisoners first distributed to victims).

(2) [§83.76] Income Deduction Orders

On entry of a restitution order under Pen C §1202.4, the court must enter a separate order for income deduction on determination of the defendant's ability to pay, regardless of probation status, in accordance with Pen C §1203. Pen C §1202.42(a). The court may consider future earning capacity when determining the defendant's ability to pay. The defendant bears the burden of demonstrating an inability to pay. Pen C §1202.42(a). Express findings by the court as to the factors bearing on the amount of the deduction are not required. Pen C §1202.42(a).

The order is stayed as long as defendant pays restitution. Pen C §1202.42(b)(1). Penal Code §1202.42 includes detailed provisions for enforcing the order by service on defendant's employer if defendant fails to meet the restitution obligation. Defendant has a right to notice and a hearing before the income deduction order is enforced. Pen C §1202.42(b)(2), (f).

By its terms, Pen C §1202.42 applies only to restitution orders made under Pen C §1202.4 or its predecessors.

☛ JUDICIAL TIP: The court should *not* consider making an income deduction order in the following situations:

- A restitution order directed to a juvenile offender under Welf & I C §730.6.
- An order to pay restitution for losses from conduct other than the commission of a crime of which defendant was convicted. See §§83.84–83.90.

County retirement benefits exemption. The court may not order a county retirement system to deduct restitution payments from a disability allowance owed to a defendant who is a retired county employee. Government Code §31452 provides an exemption from execution or other court process for benefits under county retirement systems. *Board of Retirement v Superior Court* (2002) 101 CA4th 1062, 124 CR2d 850 (court found that neither Proposition 8 nor former Govt C §13967.2 (recast as Pen C §1202.42) has impliedly repealed the exemption).

See the Judicial Council income deduction form and related forms in §§83.95–83.97.

(3) [§83.77] Order To Apply Specified Portion of Income to Restitution

In two situations the court must order probationers to seek and maintain employment and apply a portion of earnings specified by the court to make restitution for the victim's medical and psychological treatment expenses:

(1) Conviction of sexual assault on a minor. Pen C §1203.1g.

(2) Conviction of assault, battery, or assault with a deadly weapon on a senior. Pen C §1203.1j.

In all cases of probation, the court may require as a condition of probation that the probationer go to work and earn money to pay any reparation condition and apply those earnings as directed by the court. Pen C §1203.1(d).

(4) [§83.78] Collection of Restitution by CDCR and DJJ

The California Department of Corrections and Rehabilitation (CDCR) and the CDCR's Division of Juvenile Justice (DJJ) (formerly California Youth Authority) collect restitution from the funds of inmates and wards in the same manner as restitution fines. Pen C §2085.5; Welf & I C §§730.6(p), 1752.81; for discussion, see §83.23. Victim restitution is collected before the restitution fine. Pen C §2085.5(g); Welf & I C §§730.6(p), 1752.81(f).

☛ JUDICIAL TIPS:

- Courts should make sure that the CDCR and the DJJ are given restitution information that includes *specific amounts and names of victims.*
- Courts should not direct the correctional institutions to collect restitution; their obligation to do so rests on statute, not court order.

The CDCR provides a form CDCR 1707 (Request for Victim Services) that a victim may complete and send to the CDCR to notify the CDCR of a restitution order. Completion of the form is not required for the CDCR to collect restitution on the victim's behalf, but it greatly assists the CDCR in disbursing funds to victims, because it requests the victim's address of where to send the money. Frequently, CDCR does not have this information, and therefore, disbursement of collections is thwarted. The victim may use form CDCR 1707 to request notification of the inmate's status in prison or to request special conditions of parole on the inmate's release. The form can be obtained at the CDCR Office of Victim and Survivor Rights and Services Web site: www.cdcr.ca.gov/victim_services/application.html.

(5) [§83.79] Restitution Centers

The Secretary of the California Department of Corrections and Rehabilitation (CDCR) may establish and operate restitution centers, which are facilities that house nonviolent defendants who are required to work outside the facilities during the day to pay off restitution owing to their victims. Pen C §§6220–6236. Of the wages earned by a defendant while housed at a restitution center, one-third is given to the victim, one-third to the Department of Corrections and Rehabilitation to pay for the operation costs of the center, and one-third to the defendant's savings account. Pen C §6231. To participate in the restitution center, defendants must be employable, provide no risk to the community, and have no prior convictions of crimes involving violence, sex, or the sale of narcotics. See Pen C §6228 for discussion of eligibility requirements.

At present, there are no restitution centers in operation in California.

(6) [§83.80] Financial Disclosure

A restitution order under Pen C §1202.4 subjects the defendant to detailed financial disclosure requirements in aid of enforcement. Pen C §1202.4(f)(5)–(11).

The defendant must disclose all assets, income, and liabilities in which the defendant held or controlled a present or future interest as of the date of the defendant's arrest. Pen C §1202.4(f)(5). See the Judicial Council asset disclosure form CR–115 in §83.94. The disclosure must be filed with the clerk of the court no later than the defendant's sentencing date unless otherwise directed by the court under Pen C §1202.4(f)(8). Pen C §1202.4(f)(7).

The court may consider a defendant's unreasonable failure to make a complete disclosure as (1) a circumstance in aggravation of the crime in imposing a term under Pen C §1170(b), or (2) a factor indicating that the interests of justice would not be served by admitting the defendant to

probation, by conditionally sentencing the defendant, or by imposing less than the maximum fine and sentence fixed by law for the case. Pen C §1202.4(f)(9). A defendant's failure or refusal to file a disclosure statement does not delay the entry of an order of restitution or pronouncement of sentence. Pen C §1202.4(f)(10). A defendant who willfully states as true on the disclosure any material matter that the defendant knows to be false is guilty of a misdemeanor, unless this conduct is punishable as perjury or another provision of law provides for a greater penalty. Pen C §1202.4(f)(5), (11).

Financial information filed by the defendant under Pen C §987(c) to help the court determine the defendant's ability to employ counsel may be used instead of the required financial disclosure when the defendant fails to file the disclosure. Pen C §1202.4(f)(6). In such an event, the defendant shall be deemed to have waived confidentiality of the information. Pen C §1202.4(f)(6).

Filing of updated financial disclosure. If a defendant has a remaining unpaid balance on a restitution order or fine 120 days before the defendant's scheduled release from probation or completion of a conditional sentence, the defendant must prepare and file a new and updated financial disclosure identifying all assets, income, and liabilities. Pen C §1202.4(f)(11). The defendant must file this updated financial disclosure with the court clerk no later than 90 days before the defendant's scheduled release from probation or completion of the defendant's conditional sentence. Pen C §1202.4(f)(11).

Use of interrogatories. A crime victim who has not received complete payment of restitution may serve Judicial Council Form CR–200 interrogatories on the defendant once a year to discover information about the defendant's assets, income, and liabilities. CCP §2033.720(b).

For enforcement of restitution orders as civil judgments, see §83.35.

(7) [§83.81] Applying Seized Assets to Restitution

The court may apply funds confiscated from the defendant at the time of the defendant's arrest, except for funds confiscated under Health & S C §11469 (illegal drug funds), to the restitution order if the funds are not exempt for spousal or child support or subject to any other legal exemption. Pen C §1202.4(f).

The common law rule that money belonging to an arrestee and held for safekeeping is exempt from execution does not apply to funds sought for payment of a restitution order, a debt that was created after the defendant's conviction. *People v Willie* (2005) 133 CA4th 43, 49–50, 34 CR3d 532. Further, this exemption has been superseded by CCP §704.090, which effectively limits the exemption to $300 for a restitution order. 133 CA4th at 50–52.

If a complaint alleges facts to support an aggravated white collar enhancement under Pen C §186.11, the prosecution may act to preserve the defendant's assets for the payment of restitution. Pen C §186.11(e); see, *e.g.*, *People v Semaan* (2007) 42 C4th 79, 64 CR3d 1; *Q-Soft, Inc. v Superior Court* (2007) 157 CA4th 441, 68 CR3d 687. The assets of the defendant that may be frozen are not limited to assets involved in the crime with which the defendant is charged, because the obligation to pay restitution is a general obligation. *People v Semaan*, *supra*, 42 C4th at 86–87.

Before the court may release seized assets to a victim, it must afford the defendant notice and opportunity to be heard in opposition to the victim's claim. *People v Chabeear* (1984) 163 CA3d 153, 155, 209 CR 218 (due process violation to deny defendant the right to challenge robbery victim's claim of money seized during search of defendant's residence). However, in *People v Nystrom* (1992) 7 CA4th 1177, 1181–1182, 10 CR2d 94, the court held, in contrast to *Chabeear*, that a defendant was not entitled to notice and hearing before money seized at the time of arrest was released to the victim because the trial court had already entered a valid restitution order as part of a negotiated plea, and thus there was no question that the victim was entitled to the money. 7 CA4th at 1181–1182.

i. [§83.82] Juvenile Offenders

Juvenile restitution law under Welf & I C §730.6 parallels Pen C §1202.4. The more extensive case law on adult restitution can therefore be used by a juvenile court for guidance on most restitution issues. See *In re Johnny M.* (2002) 100 CA4th 1128, 1132–1133, 123 CR2d 316. Although there is a substantial similarity between juvenile and adult restitution law, there are the following exceptions:

- *Ability to pay.* For minors, as for adults, ability to pay is not a consideration in making restitution orders (Welf & I C §730.6(h)), subject to an exception in Welf & I C §742.16 (when minor is unable to repair damage caused by vandalism or graffiti offense, order for monetary restitution depends on ability to pay).
- *Liability of parents.* Parents and guardians with joint or sole legal and physical custody and control of the minor are rebuttably presumed to be jointly and severally liable for a minor's restitution obligation. Welf & I C §730.7(a). The amount of their liability is limited by statute and is subject to the court's consideration of their inability to pay. Welf & I C §730.7(a); CC §§1714.1, 1714.3. The parents or guardians have the burden of showing inability to pay and the burden of showing by a preponderance of the evidence

that they were either not given notice of potential liability for payment of restitution before the wardship petition was sustained or that they were not present during the proceedings when the petition was sustained and during any subsequent hearing addressing restitution. Welf & I C §730.7(a). A child's age at the time of the offense, and not his or her age on the date the restitution order is imposed, determines whether parents may be held jointly and severally liable. *In re Jeffrey M.* (2006) 141 CA4th 1017, 1022–1027, 46 CR3d 533 (defendant was age 17 when offense was committed but had reached majority at time of disposition order; trial court properly held parent liable for son's restitution obligation).

- *Economic losses.* Penal Code §1202.4(f)(3) includes interest, attorneys' fees, and collection costs in the definition of economic losses; Welf & I C §730.6 does not. However, the Second District Court of Appeal has held that a juvenile offender can be ordered to pay restitution for the victim's legal fees and costs that the victim incurred to collect restitution. *In re Imran Q.* (2008) 158 CA4th 1316, 1319–1321, 71 CR3d 121 (Welf & I C §730.6's silence on attorney's fees and costs is a mere legislative oversight). See also *In re M. W.* (2008) 169 CA4th 1, 4–7, 86 CR3d 545 (cost of mental health services incurred by victim of crime committed by a juvenile is a recoverable loss even though not specifically enumerated in Welf & I C §730.6(h)).
- *Financial disclosure.* Welfare and Institutions Code §730.6 does not impose financial disclosure requirements on juvenile offenders.
- *Wage deduction order.* Juvenile offenders are not subject to such orders. See Pen C §1202.42.
- *Identification of victims.* The restitution order, to the extent possible, must identify each victim, unless the court for good cause finds that the order should not identify the victim(s). Welf & I C §730.6(h).
- *Retention of jurisdiction to determine restitution amount.* If the amount of restitution cannot be ascertained at the time of sentencing, the court retains jurisdiction to determine restitution only during the minor's term of commitment or probation. Welf & I C §730.6(h). The restitution obligation of the minor may extend beyond expiration of wardship and into adulthood. *In re Michael S.* (2007) 147 CA4th 1443, 1456–1457, 54 CR3d 920.

j. [§83.83] Remand for Resentencing

A restitution order may be increased or imposed for the first time after a remand for resentencing following the defendant's partially successful appeal. *People v Harvest* (2000) 84 CA4th 641, 646–650, 101 CR2d 135 (no double jeopardy bar because victim restitution is civil remedy).

Restitution fines may *not* be increased after remand for resentencing following a successful appeal. See §83.19.

3. [§83.84] Restitution as Condition of Probation

The court has broad discretion to order restitution as a condition of probation consistent with the ends of fostering rehabilitation and protecting public safety. Pen C §1203.1(a)(3), (j); *People v Carbajal* (1995) 10 C4th 1114, 1120, 43 CR2d 681. Under Pen C §1203.1(j), the court can order restitution when the losses are not the result of the crime underlying the defendant's conviction. However, the restitution condition must be reasonably related either to the crime of which the defendant was convicted or to the goal of deterring future criminality. 10 C4th at 1121–1124. In *People v Rugamas* (2001) 93 CA4th 518, 521, 113 CR2d 271, the court upheld, as a condition of probation, restitution for the cost of medical treatment received by the defendant and paid for by the police department, and administered as a result of injuries sustained by the defendant when the police shot him with rubber bullets. Even though the police department was not a victim entitled to restitution under the mandatory restitution provisions of Pen C §1202.4, the restitution order was proper under Pen C §1203.1. The restitution was reasonably related to both the crime of which the defendant was convicted (brandishing weapon to avoid arrest) and the goal of deterring future criminality. See also *In re I. M.* (2005) 125 CA4th 1195, 1208–1211, 23 CR3d 375 (restitution for funeral expenses of murder victim's family was properly imposed, as a condition of probation, against a juvenile offender who was found to have acted as an accessory after the fact in connection with the murder; order was reasonably related to the crime of which defendant was convicted and was calculated to deter defendant's gang involvement). Compare *People v Woods* (2008) 161 CA4th 1045, 1049–1053, 74 CR3d 786 (defendant who is convicted of acting as accessory after the fact of murder and *sentenced to prison* could not be required to pay restitution for economic losses resulting from the murder).

A similar provision to Pen C §1203.1j is found in Welf & I C §730(b). It states that when a ward is placed under the supervision of the probation officer or committed to the care, custody, and control of the probation officer, the court may make any and all reasonable orders for the conduct of the ward, including the imposition of any reasonable conditions

that it may determine fitting and proper to the ends that justice may be done and the reformation and rehabilitation of the ward enhanced. See *In re G. V.* (2008) 167 CA4th 1244, 1248–1251, 84 CR3d 809.

a. [§83.85] Accidents Related to Hit-and-Run or DUI Offenses

Conviction of a hit-and-run or misdemeanor DUI offense does not establish responsibility for the accident in which defendant was involved. See *People v Braz* (1998) 65 CA4th 425, 432, 76 CR2d 531 (in a hit-and-run case the crime is the running, not the hitting). However, even though the crime did not cause the loss, the court may order restitution as a condition of probation, at least when "there is no question as to defendant's responsibility for the loss." *People v Carbajal* (1995) 10 C4th 1114, 1124, 43 CR2d 681 (defendant conceded liability in hit-and-run accident); *People v Kleinman* (2004) 123 CA4th 1476, 1479–1481, 20 CR3d 885 (hit-and-run); *People v Phillips* (1985) 168 CA3d 642, 650, 214 CR 417 (DUI).

Restitution is appropriate in these cases because it is reasonably related to the crime of which defendant was convicted and to the goal of probation to deter future criminality. *People v Carbajal*, *supra*, 10 C4th at 1123. It is particularly important for the court to

- Notify defendant that the court may consider requiring restitution as a condition of probation; and
- Give defendant "a meaningful opportunity to controvert the information" that the court considers. 10 C4th at 1125.

The Fourth District of the Court of Appeal has applied the reasoning of *Carbajal* in a nonprobation case. See *People v Rubics* (2006) 136 CA4th 452, 456–461, 38 CR3d 886 (defendant was convicted of felony hit-and-run resulting in death, sentenced to prison, and ordered to pay funeral expenses as direct restitution to victim's family).

☛ JUDICIAL TIPS:

- In the absence of a plea agreement, restitution in a hit-and-run case (Veh C §§20001, 20002) or misdemeanor DUI case (Veh C §23152) should probably be ordered only when it is obvious or undisputed that defendant caused the accident.
- Convictions of *felony* DUI causing injury (Veh C §23153) pose no causation problems and should be handled as mandatory restitution cases. See *People v Pinedo* (1998) 60 CA4th 1403, 71 CR2d 151.

b. [§83.86] Receiving Stolen Property

A receiving conviction does not by itself permit a conclusion that the defendant was responsible for the underlying theft; such a conviction is not a basis for ordering restitution to the theft victim as a condition of probation. *People v Scroggins* (1987) 191 CA3d 502, 506, 236 CR 569; *In re Maxwell C.* (1984) 159 CA3d 263, 266, 205 CR 310.

4. Restitution Based on Dismissed and Uncharged Counts: *Harvey* Waivers

a. [§83.87] General Principles

The court may order restitution on dismissed counts when the negotiated disposition includes a *Harvey* waiver. Pen C §1192.3. See, *e.g.*, *People v Campbell* (1994) 21 CA4th 825, 26 CR2d 433; *People v Beck* (1993) 17 CA4th 209, 21 CR2d 250. *Harvey* waivers derive their name from *People v Harvey* (1979) 25 C3d 754, 758, 159 CR 696 (defendant to suffer no adverse sentencing consequences from dismissed count in absence of contrary agreement); see *People v Dalvito* (1997) 56 CA4th 557, 559 n2, 65 CR2d 679; *People v Moser* (1996) 50 CA4th 130, 132, 57 CR2d 647.

The waiver may also encompass unfiled charges; when it does, the court may base a restitution order on defendant's uncharged offenses. See, *e.g.*, *People v Goulart* (1990) 224 CA3d 71, 273 CR 477; *People v Baumann* (1985) 176 CA3d 67, 222 CR 32.

The *Harvey* waiver suffices; the plea agreement need not specifically refer to restitution on dismissed counts. *People v Campbell, supra.*

b. [§83.88] Burden of Proof

The prosecution has the burden of proving defendant's culpability for uncharged or dismissed offenses by a preponderance of the evidence when the defendant denies having committed them. *People v Baumann* (1985) 176 CA3d 67, 80, 222 CR 32.

☛ JUDICIAL TIP: Disputes concerning this culpability can be avoided by having the plea agreement pinpoint the matters on which the court may order restitution. See, *e.g.*, *People v Moser* (1996) 50 CA4th 130, 133, 57 CR2d 647.

For the amount of restitution, the rule is the same as for orders under Pen C §1202.4: defendant has the task of showing that the recommendation of the probation officer or the figures of the victims are inaccurate. *People v Baumann, supra*; see §83.45.

c. [§83.89] Relation to Probation

The court may make a valid restitution order under a *Harvey* waiver even when it does not place defendant on probation. See *People v Beck* (1993) 17 CA4th 209, 21 CR2d 250 (defendant sentenced to prison); but see *People v Carbajal* (1995) 10 C4th 1114, 1120–1123, 43 CR2d 681 (dicta that authority to order restitution in situations not covered by Pen C §1202.4 derives from court's discretion to impose probation conditions); *People v Lai* (2006) 138 CA4th 1227, 1246–1249, 42 CR3d 444. See also *People v Percelle* (2005) 126 CA4th 164, 178–180, 23 CR3d 731, discussed in §83.38.

5. [§83.90] Restitution in Bad Check Diversion Cases

In counties with a bad check diversion program, the district attorney may enter an agreement with the offender not to prosecute on the condition, inter alia, of full restitution to the victim of the bad check. Pen C §1001.64.

IV. SCRIPT AND FORMS

A. [§83.91] Sample Script: Admonition Concerning Restitution Fine

Misdemeanor case:

Do you understand that in this case the court must impose a restitution fine of at least $100 and no more than $1000? Do you further understand that if you are granted probation, the sentencing judge will also impose an additional probation revocation restitution fine in the same amount, but this fine will be suspended unless your probation is revoked? If probation is revoked, the fine will be reinstated against you. Do you have any questions regarding these restitution fines?

Felony case:

Do you understand that in this case the court must impose a restitution fine of at least $200 and no more than $10,000? Do you further understand that if you are granted probation or sentenced to state prison, in addition to the restitution fine the court determines to be appropriate in your case, the court must impose an *additional* fine in the same amount? This additional fine will be suspended and not imposed *unless* [*probation is revoked/after being paroled, your parole is revoked*]. Do you have any questions regarding these restitution fines?

B. [§83.92] Sample Written Form: Admonition Concerning Restitution Fine and Restitution

Misdemeanor case:

I understand that I must pay a restitution fine of no less than $100 and up to $1000. If I am placed on probation, the court will impose an additional probation revocation restitution fine in the same amount that will be collected only if my probation is revoked. I also understand that I must pay full restitution to all victims for any losses suffered as a result of the crime(s). ☐ Initials

Felony case:

I understand that I must pay a restitution fine of no less than $200 and up to $10,000. If I am placed on probation, the court will impose an additional probation revocation restitution fine in the same amount that will be collected only if my probation is revoked. If I am sentenced to state prison, the court will impose an additional parole revocation restitution fine in the same amount that will be collected only if my parole is revoked. I also understand that I must pay full restitution to all victims for any losses suffered as a result of the crime(s). ☐ Initials

C. [§83.93] Judicial Council Form: Order for Restitution and Abstract of Judgment

ATTORNEY OR PERSON WITHOUT ATTORNEY (*Name, State Bar number, and address*):

☐ rding requested by and return to:

TELEPHONE NO.: FAX NO. (*Optional*):

E-MAIL ADDRESS (*Optional*):

☐ ORNEY FOR ☐ GMENT CREDITOR ☐ GNEE OF RECORD

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

FOR RECORDER'S USE ONLY

CASE NUMBER:

CASE NAME:

FOR COURT USE ONLY

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT
(Penal Code, §§ 1202.4(f), 1203.1(*l*), 1214;
Welfare and Institutions Code, § 730.6(h) and (i))

ORDER FOR RESTITUTION

1. a. ☐ On *(date)*: defendant *(name)*:
was convicted of a crime that entitles the victim to restitution.

b. ☐ *(date)*: child *(name)*:
was found to be a person described in Welfare and Institutions Code section 602, which entitles the victim to restitution. Wardshi ☐ terminated.

c. ☐ ents or guardians jointly and severally liable *(name each):*

d. ☐ offenders found jointly and severally liable *(name each):*

2. Evidence was presented that the victim named below suffered losses as a result of defendant's/child's conduct. Defendant/child was informed of his or her right to a judicial determination of the amount of restitution and
a. ☐ earing was conducted.
b. sti ☐ d to the amount of restitution to be ordered.
c. wa ☐ a hearing.

3. **THE COURT ORDERS** defendant/child to pay restitution to
a. ☐ victim *(name)* : in the amount of: $
b. ☐ State Victim Compensation Board, to reimburse payments to the victim from the Restitution Fund, in the amount of: $
c. ☐ s interest at 10 percent per year from the date of loss **or** sentencing ☐ ☐
d. ☐ s attorney fees and collection costs in the sum of $
e. ☐ s an administrative fee at 10 percent of the restitution owed (Pen. Code, § 1203.1(*l*))

4. The amount of restitution includes
a. ☐ e of property stolen or damaged
b. ☐ dical expenses
c. ☐ wages or profits
(1) i ☐ ed by victim due to injury
(2) c ☐ im's parent(s) or guardian(s) (if victim is a child) incurred while caring for the injured child
(3) i ☐ ed by victim due to time spent as a witness or in assisting police or prosecution
(4) ☐ ctim's parent(s) or guardian(s) (if victim is a child) due to time spent as a witness or in assisting police or prosecution
d. ☐ economic losses (felony violations of Pen. Code, § 288 only)
e. ☐ er *(specify)*:

Date:

JUDICIAL OFFICER

VICTIM TO RECEIVE CERTIFIED COPY FOR FILING WITH COUNTY RECORDER

Form Approved for Optional Use
Judicial Council of California
CR-110/JV-790 [Rev. January 1, 2008]

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT

Penal Code, §§ 1202.4(f), 1203.1(*l*), 1214
Welfare and Institutions Code, § 730.6(h), (i), (q)
Civil Code, § 1714.1
Code of Civil Procedure, § 674(a)(7)

CASE NAME:	CASE NUMBER

NOTICE TO VICTIMS

PENAL CODE SECTION 1214 PROVIDES THAT ONCE A DOLLAR AMOUNT OF RESTITUTION HAS BEEN ORDERED, THE ORDER IS THEN ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT. ALTHOUGH THE CLERK OF THE COURT IS NOT ALLOWED TO GIVE LEGAL ADVICE, YOU ARE ENTITLED TO ALL RESOURCES AVAILABLE UNDER THE LAW TO OBTAIN OTHER INFORMATION TO ASSIST IN ENFORCING THE ORDER.

THIS ORDER DOES NOT EXPIRE UNDER PENAL CODE SECTION 1214(d).

THE VICTIM SHALL FILE A SATISFACTION OF JUDGMENT WITH THE COURT WHENEVER AN ORDER TO PAY RESTITUTION IS SATISFIED, PURSUANT TO PENAL CODE SECTION 1214(d).

APPLICATION FOR ABSTRACT OF JUDGMENT

5. The ju☐t creditor ☐hee of record ☐ *(specify)*:
applies for an abstract of judgment and represents the following:
a. Judgment debtor's
Name and last known address

b. ☐ Driver's license no. [last 4 digits] and state: ☐ Unknown

c. ☐ Social security no. [last 4 digits]: ☐ Unknown

d. ☐ Date of birth: ☐ Unknown

Date:

_____ ▸ _____
(TYPE OR PRINT NAME) (SIGNATURE OF APPLICANT OR ATORNEY)

☐NFORMATION AND BELIEF

ABSTRACT OF JUDGMENT

6. I certify that the following is a true and correct judgment entered in this action.

[SEAL]

7. Judgment creditor *(name)*:
☐ whose address or whose attorney's address appears on this form above the court's name.

8. Judgment debtor *(full name as it appears in judgment)*:

9. Judgment entered on *(date)*:

10. Total amount of judgment as entered or last renewed: $

11. ☐ A stay of enforcement was ordered on _____ and is effective until _____.

☐ A stay of enforcement was not ordered.

This abstract of judgment issued on *(date)*:

Clerk, by _____, Deputy

NOTICE TO COUNTY RECORDER

THIS ORDER IS ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT, PURSUANT TO PENAL CODE SECTION 1202.4(l) AND (m), PENAL CODE SECTION 1214, AND WELFARE AND INSTITUTIONS CODE SECTION 730.6(i) AND (r), AND FUNCTIONS AS AN ABSTRACT OF JUDGMENT.

D. [§83.94] Judicial Council Form: Defendant's Statement of Assets

NAME OF VICTIM ON WHOSE BEHALF RESTITUTION IS ORDERED:	*FOR COURT USE ONLY*
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT:	
DEFENDANT'S STATEMENT OF ASSETS	CASE NUMBER:
It is a misdemeanor to make any willful misstatement of material fact in completing this form (Pen. Code, § 1202.4(f)(4)).	

(*Attach additional sheets if the space provided below for any item is not sufficient*.)

PERSONAL INFORMATION

1. a. Name:
   b. AKA:
   c. Date of birth:
   d. Social security number:
   e. Marital status:
   f. Driver license number:
      State of issuance:
   g. Home address:
   h. Home telephone no.:
   i. Employer's telephone no.:

EMPLOYMENT

2. What are your sources of income and occupation? (*Provide job title and name of division or office in which you work.*)

3. a. Name and address of your business or employer (*include address of your payroll or human resources department, if different*):

   b. If not employed, names and addresses of all sources of income (*specify*):

4. How often are you paid (for example, daily, weekly, biweekly, monthly)? (*specify*):

5. What is your gross pay each pay period? $

6. What is your take-home pay each pay period? $

7. If your spouse earns any income, give the name of your spouse, the name and address of the business or employer, job title, and division or office (*specify*):

8. Other sources of income (*specify*):

CASH, BANK DEPOSITS

9. How much money do you have in cash? $

10. How much other money do you have in banks, savings and loans, credit unions, and other financial institutions either in your own name or jointly *(list)*:

	Name and address of financial institution	Account number	Individual or joint	Balance
a.				$
b.				$
c.				$

PROPERTY

11. List all automobiles, other vehicles, and boats owned in your name or jointly:

	Make and year	Value	Legal owner if different from registered owner	Amount owed
a.		$		$
b		$		$
c.		$		$

(Continued on reverse**)**

CR-115 [New July 1, 2000]

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT	CASE NUMBER:

12. List all real estate owned in your name or jointly:

	Address of real estate	Fair market value	Amount owed
a.		$	$
b.		$	$

OTHER PERSONAL PROPERTY *(Do noted list household furniture and furnishings, appliances, or clothing.*)

13. List anything of value not listed above owned in your name or jointly (*continue on attached sheet if necessary*):

	Description	Value	Address where property is located
a.		$	
b.		$	
c.		$	

ASSETS

14. List all other assets, including stocks, bonds, mutual funds, and other securities *(specify)*:

15. Is anyone holding assets for you? Yes☐ If yes, d☐be the assets and give the name and address of the person or entity holding each asset (*specify*):

16, Except for attorney fees in this matter and ordinary and routine household expenses, have you disposed of or transferred any assets since your arrest on this matter? Y☐o. If yes, gi☐e name and address of each person or entity who received any asset and describe each asset (*specify*):

DEBTS

17. Loans (*give details*):

18. Taxes (*give details*):

19. Support arrearages (*attach copies of orders and statements*):

20 Credit cards (*give creditor's name and address and the account number*):

21. Other debts (*specify*):

Date:

_____ ▸ _____
(TYPE OR PRINT NAME) _ (SIGNATURE)

I, (*name*): , a certified interpreter, having been duly sworn, truly translated this form to the defendant in the (*specify language*): language. The defendant indicated that he/she understood the contents of the form and he/she completed the form.

Date:

_____ ▸ _____
(TYPE OR PRINT NAME) _ (SIGNATURE)

E. [§83.95] Judicial Council Form: Information Regarding Income Deduction Order

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
INFORMATION REGARDING INCOME DEDUCTION ORDER (Pen. Code, § 1202.42)	CASE NUMBER:

1. The court has found that you have the ability to pay restitution and has ordered you to pay restitution in the amount of

   a. $ plus percent interest from the date of the order and fees of $ to all victims

   b. ☐ as listed in the probation report, dated *(specify)*:

   c. ☐ listed in the sentencing minute order, dated *(specify)*:

   Payment must be made as ordered at the hearing.

2. The court has entered an income deduction order for your employer to deduct: $ from your pay each pay period.

   a. The order applies to current and subsequent employers and all periods of employment.

   b. A copy of the income deduction order will be served on each of your employers and payers.

   c. Enforcement of the income deduction order may only be contested on the ground of mistake of fact regarding the amount owed or a showing of good cause for nonpayment.

   d. You are required to notify the Clerk of the Court *within 7 days* of a change in your address, a change in any of your employers, or a change in the address in any of your employers.

   e. **This income deduction order will be enforced under Penal Code section 1202.42(b) only if you fail to pay the restitution as ordered at the hearing.**

   f. Upon receipt of notice that you have failed to pay the restitution ordered at the hearing:

      (1) The court or its agent will request that you provide evidence that timely payments have been made or provide information establishing good cause for the failure. *If you fail to provide the evidence or fail to establish good cause within 5 days of the request*, you will receive notice that the order will be enforced, and the court will serve the income deduction order on each of your employers.

      (2) *Within 15 days* of being informed that the stay will be lifted, you may apply for a hearing to contest enforcement of the income deduction order on the ground of mistake of fact regarding the amount of restitution owed or on the ground that you have good cause for the nonpayment. Upon the timely request for a hearing, the income deduction order will not be enforced until the hearing is held and a determination is made on whether the enforcement of the income deduction order is proper.

F. [§83.96] Judicial Council Form: Order for Income Deduction

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
ORDER FOR INCOME DEDUCTION (Pen. Code, § 1202.42)	CASE NUMBER:

To: Employer:

Address:

Phone:

1. The court has found that the defendant has the ability to pay restitution under Penal Code section 1202.42 and has ordered that he or she pay restitution of $ plus 10% interest.
2. You are ordered to withhold a portion of the earnings of the defendant in this action *(name)*: (last 4 digits of social security number *(specify)*:), each pay period.
3. You are ordered to deduct: $ from the above named employee's pay each period and forward funds to the

   ☐ Clerk of the above entitled court ☐ Other *(specify)*:

4. This order will terminate upon payment in full or further order of this court.

Date:

CLERK'S CERTIFICATE

SEAL

The foregoing is a full, true, and correct copy of the original on file in this office.

CLERK OF THE SUPERIOR COURT

Date:

By _____, Deputy

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT	CASE NUMBER:

Notice to Employer re: Order for Income Deduction (Pen. Code, § 1202.42)

1. You are required to deduct the amount specified in the *Order for Income Deduction* from the employee's income and to pay that amount to the clerk of the above entitled court or its agent.

2. The order is to be implemented no later than the first payment date that occurs more than 14 days after the date of service of the order.

3. *Within two days after each payment date,* forward the amount deducted and a statement about whether the amount totally or partially satisfies the periodic amount specified in the income deduction order.

4. If you fail to deduct the proper amount from the employee's income, you are liable for the amount you should have deducted, plus costs, interest, and reasonable attorney fees.

5. You may collect up to five dollars ($5) against the employee's income to reimburse you for administrative costs for the first deduction and up to one dollar ($1) for each deduction thereafter.

6. This order and notice are binding until further notice by the court or until you no longer provide income to the employee.

7. When you no longer provide income to the employee, you must notify the clerk of the above entitled court and provide the employee's last known address and the name and address of the employee's new employer, if known. If you violate this provision, you are subject to a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation or five hundred dollars ($500) for any subsequent violation.

8. You must not discharge, refuse to employ, or take disciplinary action against the employee because of an income deduction order. If you violate this provision, you are subject to a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation or five hundred dollars ($500) for any subsequent violation.

9. If you receive income deduction orders for two or more employees sent by the same court, you may combine the amounts that are to be paid in a single payment, but you must identify the portion of the payment that is attributable to each employee.

10. If you receive two or more income deduction orders against the same employee, you must contact the above entitled court for further instructions.

G. [§83.97] Sample Written Form: Order to Probation Department in Regard to Collection of Restitution

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

THE PEOPLE OF THE STATE OF CALIFORNIA,

Case No. _____

Plaintiff

vs

ORDER TO THE PROBATION DEPARTMENT IN REGARD TO COLLECTION OF RESTITUTION PAYMENTS

_____,
Defendant

TO: _____ County Probation Department
_____ Office

THE COURT ORDERS:

If the Probation Department receives information that Defendant _____ ("Defendant") has not made his or her monthly victim restitution payments as ordered, the Probation Department will request Defendant to provide evidence indicating that timely payments have been made or provide information establishing good cause for the failure. If Defendant fails to provide the Probation Department with the evidence or fails to establish good cause within five days of the request, the Probation Department will immediately inform Defendant in writing that the Stay of Income Deduction Order will be lifted. At the same time the Probation Department will inform the Clerk of the Court in writing that the Income Deduction Order must be served pursuant to Penal Code §1202.42(f), following a 15-day period, because the Defendant has failed to make restitution payments as ordered. The Defendant may apply for a hearing to contest the lifting of the stay.

Dated: _____

_____
Judge of the Superior Court

V. [§83.98] INFORMATION ABOUT THE CALIFORNIA VICTIM COMPENSATION PROGRAM

Authority

Under California law (Govt C §§13950–13966), qualified victims of crime may receive financial assistance from the California Victim Compensation Program (Program) for losses resulting from a crime when these losses cannot be reimbursed by other sources. The California Victim Compensation and Government Claims Board (Board) administers the Program.

Losses That May Be Covered

- Medical/Dental
- Mental Health Counseling
- Wage/Income
- Financial Support
- Funeral/Burial
- Job Retraining
- Child Care
- Relocation
- Residential Security
- Retrofitting of Residence and/or Vehicle
- Crime Scene Cleanup

Losses That Are Not Covered

Personal property losses, including cash, are not eligible for reimbursement under the Program. The Program also cannot reimburse applicants for expenses related to the prosecution of an alleged perpetrator or compensate applicants for "pain and suffering."

Losses not covered by the Program, however, may be recoverable either through court-ordered restitution as a part of a convicted perpetrator's criminal sentence or through the enforcement of a judgment obtained in a civil lawsuit against the alleged perpetrator.

Who Is Eligible?

- A victim who was injured or died as a result of a crime.
- A derivative victim who was not directly injured or killed as a result of a crime but who, at the time of the crime,
  - — was the parent, grandparent, sibling, spouse, child or grandchild of the victim; or

— was living in the household of the victim; or

— had lived with the victim for at least two years in a relationship similar to a parent, grandparent, sibling, spouse, child, or grandchild of the victim; or

— was another family member of the victim, including, but not limited to, the victim's fiancé or fiancée *and* witnessed the crime; or

— was not the primary caretaker of a minor victim, but is now the primary caretaker.

In addition, when a victim dies as a result of a crime, the Program may reimburse any individual who voluntarily, and without anticipation of personal gain, pays or assumes the obligation to pay medical and/or funeral/burial expenses. When a crime occurs in a residence, the Program may reimburse any individual who voluntarily, and without anticipation of personal gain, pays or assumes the obligation to pay the reasonable crime scene cleanup expenses.

Who Is Not Eligible?

- Persons who commit the crime.
- Persons who contribute to or take part in the events leading to the crime.
- Persons who failed to reasonably cooperate with law enforcement in the apprehension and conviction of the criminal committing the crime.
- Persons who do not cooperate with the staff of the Board and/or the Victim/Witness Assistance Center in the verification of the claim.

Additionally, no person who is convicted of a felony may be compensated for any losses incurred during probation, parole, or incarceration. Once that person has been discharged from probation or has been released from a correctional institution and has been discharged from parole, any crime-related losses that were not incurred during probation, parole, or incarceration may be considered for compensation. The Program is required to award compensation to a person seeking reimbursement for the funeral/burial expenses of a victim who died as a result of the crime without respect to any felony status of the victim.

These Requirements Must Be Met

Except as provided in Govt C §13956, a person shall be eligible for compensation when all the following requirements are met:

- The person for whom compensation is being sought is a victim, derivative victim, or a person who is entitled to reimbursement for funeral, burial, or crime scene cleanup expenses.
- Either
  - — the crime occurred within the State of California, whether or not the victim was a resident of California during the time period that the Board determines that federal funds are available, or
  - — whether or not the crime occurred in California, the victim was a resident of California, a member of the military stationed in California, or a family member living with a member of the military stationed in California.
- If compensation is being sought for a derivative victim regardless of whether they are a resident of California or not, they must meet the definition of derivative victim.
- The victim or derivative victim must reasonably cooperate with law enforcement in the apprehension and conviction of the criminal committing the crime.
- The victim or the applicant, if other than the victim, must cooperate with the staff of the Board and/or the Victim/Witness Assistance Center in the verification of the claim.
- All other sources of reimbursement must be used first.

Felony Convictions

The law prohibits Program-reimbursable expenses incurred by a victim or derivative victim who was also convicted of a felony on or after January 1, 1989, if those expenses were incurred during probation, parole, or incarceration. However, the Program is required to award compensation to a person seeking reimbursement for the funeral/burial expenses of a victim who died as a result of the crime without respect to any felony status of the victim.

Filing Deadlines

An application for compensation must be filed within one year of the date of the crime, one year after the victim attains 18 years of age, or within one year of the time the victim or derivative victim knew or in the exercise of ordinary diligence could have discovered that an injury or death had been sustained as a direct result of crime, whichever is later.

The board may for good cause grant an extension of these time periods. The factors to be considered in finding good cause are set forth in Govt C §13953(b).

Filing Assistance

Victim/Witness Assistance Centers are located throughout the state. These centers have staff who are trained to help victims apply for compensation under the Program.

Applicants may also be helped by a private attorney. Government Code §13957.7(g) provides that the Board shall pay private attorneys' fees of 10 percent of the approved award up to a maximum of $500. The attorneys' fees are not deducted from the applicant's award and are paid separately from the approved award. The law also prohibits attorneys from charging, demanding, receiving, or collecting any amount for their services except as may be awarded by the Board.

Emergency Awards

If the victim has an urgent unreimbursed loss of wages or income, emergency medical treatment expenses, funeral/burial expenses, crime scene cleanup expenses, and/or relocation expenses as a direct result of a crime, he or she may be eligible for an emergency award. The amount of an emergency award depends on the immediate needs of the victim or derivative victim subject to the rates and limitations established by the Board.

Applications for emergency awards are processed within 30 calendar days after the application is accepted as complete.

If the victim receives an emergency award but is later found ineligible to receive any part of it, he or she must repay the amount received in error.

Verification and Hearing on the Application

Applications filed with the Program are reviewed to determine eligibility. After completion of this review, the victim will be advised by mail of what recommendation the staff made to the Board on the application. If the victim disagrees with the staff recommendation, appeal rights will also be provided.

An applicant for an emergency award is not entitled to a hearing to contest the denial of the emergency award. Denial of an emergency award, however, shall not prevent further consideration of an application for a regular award and does not affect the applicant's right to a hearing if the staff recommends a denial of a regular award.

Program Pays Last

The Victim Compensation Program is the "payer of last resort." If the victim has any other sources of reimbursement available for crime-related losses, he or she must use these available sources before becoming eligible for payments from the Program. If the victim receives other reimburse-

ments after obtaining benefits from the program, he or she must repay the Program. Other reimbursement sources the victim may have available include, but are not limited to, medical, dental, or auto insurance, public program benefits, workers' compensation benefits, court-ordered restitution, or civil lawsuit recovery.

By using all other sources of reimbursement, the victim enables the Program to help other deserving victims who have no other source of reimbursement for their losses.

If the victim fails to disclose available sources of reimbursement, the claim may be denied by the Board for lack of cooperation. If this happens, the victim may have to repay any amount the Program has already paid to the victim or on his or her behalf.

General Payment Limitations

The total of all reimbursements to a victim cannot exceed the maximum Program benefit of $70,000.

There are also several specific payment limitations governing particular benefits under the Program for loss of wages or income, loss of support, medical expenses, outpatient mental health counseling expenses, residential security expenses, relocation expenses, residential and/or vehicle retrofitting expenses, and funeral/burial expenses.

An applicant who has incurred expenses that exceed the Program's rates/limitations may not be eligible for reimbursement beyond the Program's maximum benefit levels.

State law requires a provider who accepts the Program's payment to consider it as payment in full and prohibits the provider from taking further payment from the person who received the services. This limitation does not apply to reimbursement of funeral/burial expenses.

An applicant's eligibility for Program benefits does not guarantee payment for services rendered.

VI. [§83.99] INFORMATION ABOUT THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION RESTITUTION COLLECTION PROGRAM

The California Department of Corrections and Rehabilitation (CDCR) has authority to collect restitution fines and restitution orders from both adults and juveniles housed in an adult institution. Pen C §2085.5.

The CDCR is currently deducting 50 percent from prison wages and/or trust account deposits according to 15 Cal Code Regs §3097.

When a prisoner has both a restitution fine and a restitution order from the sentencing court, the CDCR shall collect the restitution order first under Pen C §2085.5(b). Pen C §2085.5(g).

No parolee or inmate may reside in another state unless all restitution orders have been paid in full. Pen C §11177.2.

Restitution obligations shall be considered when recommending a parolee for early discharge or when conducting an annual review. 15 Cal Code Regs §3501.

Table of Statutes

CALIFORNIA

VEHICLE CODE

WELFARE AND INSTITUTIONS CODE

PROPOSITIONS

CALIFORNIA CODE OF REGULATIONS

Title 15

CALIFORNIA RULES OF COURT

ACTS BY POPULAR NAME

UNITED STATES

UNITED STATES CODE

Title 11

Title 42

CODE OF FEDERAL REGULATIONS

Title 42

Table of Cases

THURSDAY – JUNE 3, 2010

3:30 pm – 4:45 **Workshop Session IV**

IV.D.

education credit:
MCLE

target audience:
all

Grant Application Writing: Tips to Improve Your Odds for Success

In these challenging economic times, finding funding sources to support new and continuing projects is critical. Annually, millions of dollars are released from public and private funding sources to support programs and projects. This workshop will cover tips, tools and resources to help grant writers craft a strong proposal.

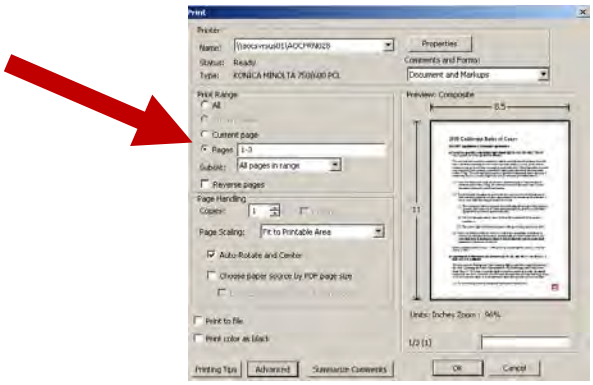
Learning Objectives:

- Identify the required components of a full proposal package.
- How to write a compelling statement of need.
- Recognize the elements of a well developed program design.

Faculty:

o **Martha Wright**
Senior Court Services Analyst /
Fund Development Specialist, AOC
Executive Office Programs Division

Before you choose to print these materials, please make sure to **specify the range of pages**.



Grant Application Writing

Tips to Improve Your Odds of Success

Grants Course Objectives

Grant Seeking:

- 1) Learn where to look for funds
- 2) Learn what to look for in an RFP to decide if it's appropriate

Grants Course Objectives

Grant Writing:

- 1) Identify the components of a full application package
- 2) Learn what makes a compelling statement of need
- 3) Recognize the elements of a thorough program design
- 4) Learn how to build a reasonable budget

Finding Appropriate Funding Opportunities

Grant Seeking:

- Let you need be your guide
- Don't get overwhelmed
- Identify likely funding sources
- Look regularly and often

Where to Look

- State Justice Institute (SJI)
- Federal Department of Justice
- Federal Health and Human Services
- California Executive Branch

Finding Appropriate Funding Opportunities

Grant Seeking: What to look for in an RFP

- Eligibility: Who can apply?
  - If courts are not eligible, look for partnerships
  - What "Government" means

Finding Appropriate Funding Opportunities

Grant Seeking: What to look for in an RFP

- Grant Award Size: Total Amount
  - How many awards
  - What is the size range of each
  - Project length

Finding Appropriate Funding Opportunities

- Award Size Example:

"OJJDP will make awards of up to $500,000 per award for up to 3 years for implementation grants."

Finding Appropriate Funding Opportunities

- Award Size Example:

"Estimated HHS Award Amount: Up to $370,000. Length of Project Period: Up to 4 years. Proposed budgets can not exceed $370,00 in total costs in any year of the proposed project. Annual continuation awards will depend on availability of funds."

Finding Appropriate Funding Opportunities

- RFP Requirements:
  - Due date, method of submission
  - Complexity of application
  - External agreements/letters
  - Internal review process

Writing a Grant Proposal

If Only…

Part 1: Components of a Full Application Package

- Cover page – info. sheet
- Narrative
- Timeline
- Budget narrative and summary
- Appendices (resumes, letters of support)
- Standard forms

Exercise #1: Find…

- Eligible applicants?
- Size of awards to be given?
- When is proposal due?
- *How* is it to be submitted?
- How is the narrative/budget to be structured?

Part 2: Writing a Compelling Statement of Need

The Statement of Need establishes that you understand the issue/problem and therefore can reasonably address it.

Statement of Need: Basic Rules

- Use facts and statistics that support the project
- Give the reader hope, avoid overstating the problem
- Explain if the need you are stating is *acute*

Statement of Need: Basic Rules

- Avoid circular reasoning:
  - The absence of your proposed solution is not the problem.
  - "We don't have enough case managers so we need to hire more."

Statement of Need: Basic Rules

- The statement should focus on those people you serve, rather than your organization's needs.
- State the problem in terms of community impact.
- "An additional case manager would allow us to…"

Statement of Need: Helpful Web Sites

- Annie E Casey Kids Count Data Center for CA and its communities: http://datacenter.kidscount.org/data/bystate/StateLanding.aspx?state=CA
- US Census CA and Counties quick facts http://quickfacts.census.gov/qfd/states/06000.html
- CA Attorney General Crime Data http://ag.ca.gov/crime.php
- CA Association of Counties http://www.csac.counties.org/default.asp?id=4
- CA Department of Education Data http://www.cde.ca.gov/ds/

Statement of Need: Exercise #2

- Read the statement of need in the real proposals provided to you.

Part 3: The Elements of a Thorough Program Design

- What is a "program design"?
- What's involved in designing a program/project?
- How does the statement of need relate to program design?
- What is a logic model and why is it important?

It's All About the Need

Defining the *situation* is the first step in logic model development

- What problematic condition exists that demands a programmatic response?
- Should be community based need

The Logic Behind the Request

A logic model is:

...a depiction of your proposed project showing what it will accomplish.

The Logic Behind the Request

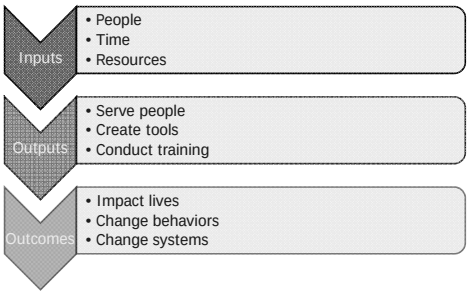
- Creating a logic model assures the concept behind your project is solid
- It keeps you focused as you write your narrative
- It enhances the case for your requested investment

Logic by Another Name

- Theory of change
- Program plan
- Conceptual map
- Outcome map

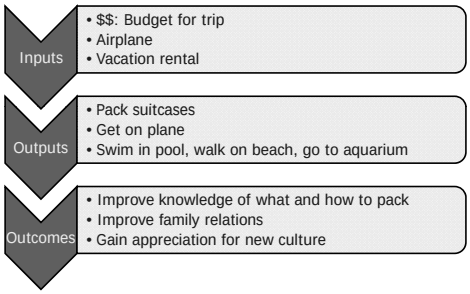
Simple Logic Model

Situation _____



Everyday Example:

Situation: Family is tired and stressed, needs a vacation

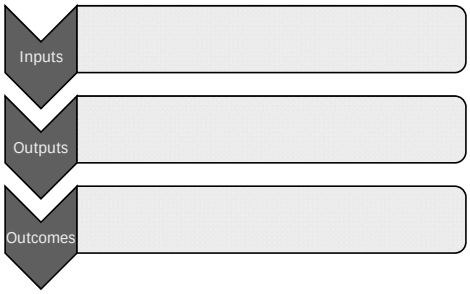


The Program Design: Exercise #3

- USDOJ, OJJDP Family Drug Court Program
- Read the narrative and identify the inputs, outputs and outcomes
- Fill out your blank logic model

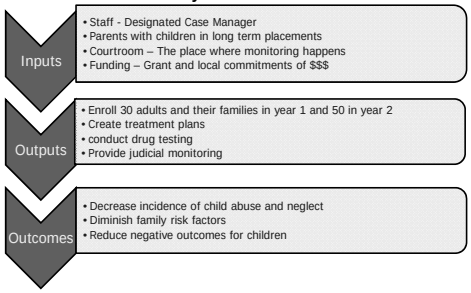
Now You Try…

Situation _____



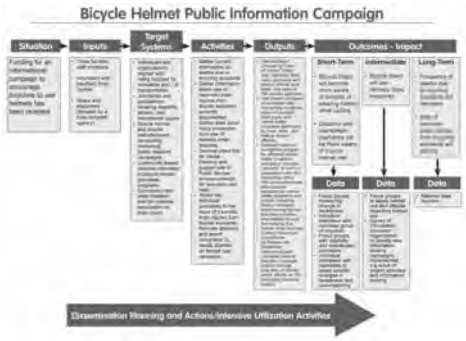
SF Dependency Drug Court

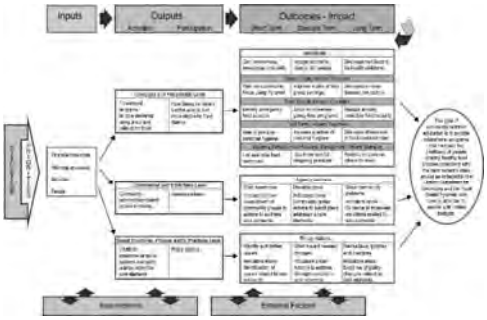
Situation: Long-term foster care placements can lead to intergenerational poverty and delinquency. Parental substance abuse is a barrier to family reunification



Feeling Really Adventurous?

- Real Logic Model Examples
- From simple fundamentals to the complex, by adding detail





Logic Model Resources

Kellogg Foundation
http://www.wkkf.org/Pubs/Tools/Evaluation/Pub3669.pdf

United Way of Bay Area
http://www.uwba.org/

University of Wisconsin
http://www.uwex.edu/ces/pdande/evaluation/evallogicmodel.html

Part 4: The Budget $$$

- Most funders provide a budget form and also ask for a narrative.
- Your budget is an estimate but it should be specific.
- DO NOT ask for $300,000 *exactly* if grant request max is $300,000.

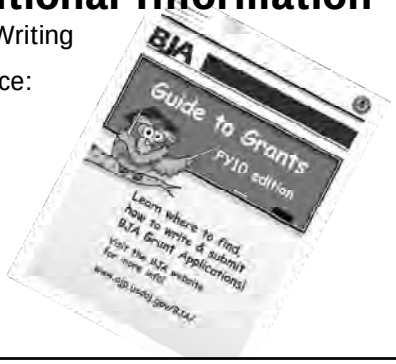
IV: The Budget $$$

- The proposed budget should mirror your narrative.
- All sections in the narrative that describe an activity with an associated cost should be addressed in budget.

For Questions, Advice, Additional Information

Grant Writing

Resource:



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THURSDAY – JUNE 3, 2010

3:30 pm – 4:45

Workshop Session IV

IV.E.

education credit:
BBS
MCLE

target audience:
attorneys
CASAs
judicial officers
probation officers
social workers

Hear My Voice! Strategies for Including Youth in Court Proceedings

Foster youth are often left out of permanency planning and dependency court proceedings that will chart their future. The California Blue Ribbon Commission recently recommended that children and youth "have an opportunity to be heard and meaningfully participate in court." Changes in state and federal law reinforce these recommendations and many courts are now starting to implement policies to involve youth in hearings. This session will discuss the benefits of youth participation in court; address common challenges; and present best practices to implementing systemic changes. A Washington State legislative pilot program using "in-chambers" interviews with youth will be discussed. Additional resources will also be presented, including benchcards by age on strategies for meaningful youth involvement in court.

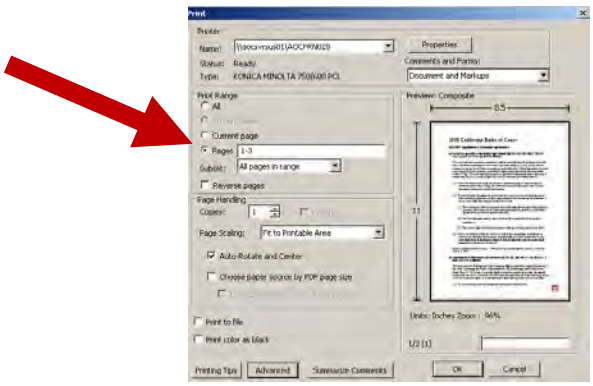
Learning Objectives:

- Recognize federal and state requirements for youth participation in court.
- Understand the advantages for both youth and professionals of engaging youth in court.
- Be aware of challenges to youth participation in court and ways to address concerns.
- Identify strategies to encourage meaningful youth participation.
- Identify best practices in transforming permanency planning, court processes to include youth.

Faculty:

- **Miriam A. Krinsky**
  Attorney, Member of the Judicial Council of California, and Lecturer at the UCLA School of Public Policy
- **Andrea Khoury**
  Director, American Bar Association's Youth Empowerment Project
- **Hon. Bobbe J. Bridge** (Ret.)
  Justice, Washington State Supreme Court, and *CEO of Center for Children & Youth Justice*
- **Jasmine Orozco**
  California Youth Connection, San Diego

Before you choose to print these materials, please make sure to **specify the range of pages**.



"Hear My Voice – Strategies for Including Youth in Court Proceedings"
Beyond the Bench Conference
San Diego, CA
June 3, 2010

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Articles and Materials

Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings by Miriam Aroni Krinsky and Jennifer Rodriguez, Nevada Law Journal, vol. 6, no. 3, Spring 2006

Seen and Heard: Involving Children in Dependency Court by Andrea Khoury, ABA Child Law Practice, vol. 25, no. 10, December 2006

With Me, Not Without Me: How to Involve Children in Court by Andrea Khoury, ABA Child Law Practice, vol. 26, no. 9, November 2007

Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings by Jaclyn Jean Jenkins, 46 Fam. Ct. Rev. 163 (January 2008)

Giving Children a Voice in Court, Juvenile and Family Justice articles (Fall 2006)

Overwhelmed System Must Not Silence Voices of Foster Youth by Miriam A. Krinsky, Daily Journal, March 15, 2005

Foster Youth Need Greater Voice in Court Proceedings by Miriam Aroni Krinsky, Child Welfare Report, October 2006

Establishing Policies for Youth in Court – Overcoming Common Concerns by Andrea Khoury, Bar-Youth Empowerment Project, National Child Welfare Resource Center on Legal and Judicial Issues, July 2, 2008

Involving Youth in the Dependency Court Process: The Washington State Experience by Hon. Bobbe J. Bridge, Family Court Review, Vol. 28 No. 2, p. 284-293. April 2010.

Judicial Bench Cards, prepared by the ABA Center for Children and the Law's Bar Youth Empowerment Project

Additional materials on this topic are available at the Bar Youth Empowerment Project website: *http://www.abanet.org/child/empowerment/home.html*

Nevada Law Journal
Spring 2006

Special Issue on Legal Representation of Children

Responses to the Conference

***1302** GIVING A VOICE TO THE VOICELESS: ENHANCING YOUTH PARTICIPATION IN COURT PROCEEDINGS

Miriam Aroni Krinsky, Jennifer Rodriguez [FNa1]

> I was only six when I went into foster care. I remember vividly just sitting outside the courthouse . . . my birth mother crying. And then suddenly, I was living somewhere else, in some house I didn't know. No one told me anything. For five years, no one told me anything.
>
> Luis, now 23 [FN1]

The confusion, frustration, and isolation from the court process that Luis, a former foster youth, described to the Pew Commission on Children in Foster Care are not unique. Courts play a critical, often life-changing role in the lives of children who enter the child welfare system--determining if children will enter foster care, how often they will be moved from placement to placement once they enter care, whether and when they will see siblings and other family members, and if and when they will exit the system. Yet the voices of far too many foster children and former foster youth are ignored in this process.

A 2005 survey conducted by the California Commission on the Future of the Courts found that the most critical factor in determining how people viewed the courts was not the end results, as might be expected, but rather the extent to which courts' decisions are made according to what are regarded as “fair procedures.” [FN2] The Commission's findings, along with other research, define the key elements comprising fair procedures as: interpersonal respect, neutrality of decision-makers, and participation--the ability of litigants to express their own views as the legal process unfolds. [FN3]

This study underscores what many who seek to improve the legal process have consistently emphasized: It is often the process and the integrity of the ***1303** path followed, and not the ultimate result, that determine our perceptions of the legal system and our willingness to have faith in judicial decision-making. In particular, the public places a high value on individuals' ability to participate in court proceedings and to have a voice in this process.

Too often, however, abused and neglected youth in the foster care system have only limited opportunities to interact and communicate in the court proceedings that so profoundly impact their lives. “No child enters or leaves foster care without a judge's decision,” observed the Hon. Bill Frenzel, former Congressman (R-MN) and Chair of the national, nonpartisan Pew Commission on Children in Foster Care. [FN4] Additionally, every significant decision in

the child's life from the time of entry into care to the moment of the child's exit from the system is overseen by the court.

Foster youth need and deserve the opportunity to participate as partners with the court and other professionals in making decisions that will impact their lives. For foster youth, the ability to move on and accept the life path the court has crafted for them is an inherent part of their ability to enjoy a successful and stable adult life. Despite the lasting impact of decisions made by the court on their lives, foster youth in some jurisdictions do not participate at all in court proceedings, and, in other jurisdictions, have inadequate access to the legal process and its protections.

During the groundbreaking 1995 Fordham Conference, Bruce A. Green and Barnardine Dohrn characterized children as "the silent presence in courtrooms." [FN5] Attendees at the 2006 UNLV Conference continued to focus their attention on ways to ensure that attorneys can better represent the wishes and interests of their "silent" minor clients in judicial and administrative proceedings. [FN6]

The ethical and practical considerations surrounding the development of models for representation of children are essential areas for study, discussion, and policy change, and UNLV Conference attendees spent many hours struggling with these issues. Yet an equally significant, and sadly less often mentioned, topic is the need for lawyers to enable and facilitate youth in expressing their own voice. Empowering individual children and creating procedural opportunities for their participation in the court hearings that have a profound impact on their lives should not be overlooked as our legal and judicial community strives to enhance the plight of the more than 500,000 children in our nation's foster care system.

Annette R. Appell aptly identified the need for children to be present themselves and express their own voice:

> [T]he "child's voice" is contingent on which children are being given voice and for what purpose. The very notion of the child's voice, especially in larger policy contexts, is challenging because children speak with so many voices and often in the ***1304** context of individual cases. Moreover, children do not necessarily speak the language of adults or the legal systems in which they are being given voice; thus their own voice is susceptible to interpretation and translation, i.e., distortion, by the adults--even their own lawyers. [FN7]

Opening remarks at the 2006 UNLV Conference similarly challenged attendees to amplify the child's voice and needs, to make sure the child's voice is heard, and his or her input respected, as part of the all-important juvenile court process. Yet, too often, we are quick to presume that lawyers are the only ones who can and should perform this function. This presumption and the possibility of distortion of a child's voice are further complicated by the widely acknowledged divergence in race, class, and culture between children and their lawyers. Too little attention is devoted to how our system can or should promote the ability of the child to speak for him or herself.

Attorneys build their careers on advocating for others. As a result, it seems counterintuitive to do otherwise. Yet, attorneys who represent youth need to redefine their role. They need to develop skills that will allow them to become interpreters and enablers, so that youth are able to understand the legal process and be supported in expressing their own voice as a part of that process. To achieve this goal, attorneys and judges will often have to change their customary way of conducting business and create a more youth-focused and child-friendly system for interacting with their clients.

Children in foster care have great needs and face daunting challenges. Professionals widely agree that these challenges and needs do not disappear when a child exits the foster care system. Former foster youth rarely have the resources to employ personally a lawyer to help them solve the problems they encounter. Given these realities, it is important that lawyers for children empower their clients by involving youth and teaching them the problem solving skills that define their profession. Engaging clients in this different way moves toward a model of actually changing lives and achieving justice, rather than only addressing immediate needs.

The Pew Commission on Children in Foster Care--composed of leading child welfare experts, including practitioners, advocates, academics, legislators and foster and adoptive parents--offered recommendations designed to reform the federal financing structure and court oversight of foster care. In its court recommendations, the Pew Commission stressed the critical value and importance of including youth in the legal process: "[J]udges need to hear from the people who will be most affected by their decisions--children, parents, siblings and other relatives, foster and adoptive parents." [FN8] Calling for comprehensive dependency court reforms, the Pew Commission recommended that courts should be organized to enable children and parents to participate in a meaningful way in their own court proceedings. "Children, parents, and caregivers all benefit when they have the opportunity to actively participate in court proceedings, as does the quality of decisions when judges can see and hear from key ***1305** parties." [FN9] Foster youth and youth organizations similarly underscore the desire of youth to be part of decisions made about their life and to participate in the forums where those decisions are made.

> Listen to us. Find out what our style is. Talk to other people that know us, if we say it's okay. Check with us about things. Remember the motto, 'Nothing About Me Without Me!' Don't make choices for us or make fun of us. Know that we have thoughts, feelings, and ideas just like you. [FN10]

All parts of the system should be held accountable for ensuring that this participation by youth becomes a routine part of the court and legal process.

> The child welfare system should be required to involve foster youth as participants and equal partners in all decisions made about their lives. Youth should be involved in case plan development, case plan meetings, and given the option to attend court hearings. Foster youth should be allowed to offer a formal response to court reports, incident reports, and proposed permanency plans. [FN11]

Dependency bench officers only have a small window of time to make life-altering decisions about children and families. In order to make meaningful decisions that will positively impact the lives of the youth before them, judges need to hear directly from the youth whose lives are at issue. Youth are in the best position to provide accurate and compelling insights into their wishes, needs, and progress. Moreover, when youth put a human face to the discussion of these issues and experiences, it forces all concerned to see the system through their eyes.

Just by having children attend the hearing, judges can glean vital information that would otherwise be lacking. Bench officers can observe first-hand the child's appearance, demeanor, and personal interaction with others, including parents, social workers, attorneys and caregivers, who are present. Judges have an opportunity to evaluate for themselves critically important nonverbal information that may help shape their ultimate decisions, and decision-making is informed by a one-on-one personal interaction that gives life to an otherwise sterile report and file.

Admittedly, creating a place for youth in the legal process is not an easy task. For children to participate meaningfully in court proceedings, lawyers and judges need to change the very way they communicate and conduct court proceedings. Children's attorneys and bench officers must strive to communicate with children on their own terms. Foster youth advocacy organizations have developed suggestions that can assist attorneys and court professionals with changing practice and preparing children to participate. [FN12]

Youth report that attorneys and judges, due to the press of a busy day and a heavy caseload, too often rush through information, talk rapidly, and rely on jargon that is unfamiliar and confusing to non-lawyers, and is that much more ***1306** incomprehensible to children. One youth opining on the court process requested that the court, "stop talking in acronyms." [FN13] Another added, "I was 11 and remember being talked about using the reference 'the child' and not my name." [FN14] For many children, the result of this faulty communication is to presume that they are to blame for what unfolds in court. Yet another youth poignantly recalled: "I was confused, scared, and thought everything was my fault." [FN15]

All involved in the court and legal process need to redouble their efforts to explain clearly to youth the intricate nature of the court proceedings that determine their future--before, during, and after the court hearing. Attorneys for children can play an invaluable role in "translating" and demystifying the court process and preparing youth for what

will transpire before they walk through the courtroom doors.

It is therefore critically important for youth participation that attorneys representing youth meet with and engage their clients. The issues that arise in dependency court touch on the most sensitive areas of vulnerable children's lives, and strong feelings and reactions are to be expected. Lawyers who have developed a supportive relationship can assist youth in dealing with these feelings in a healthy manner.

Along with educating youth about their rights and the issues being addressed, attorneys have an obligation to provide youth with reasonable expectations about the legal services they are receiving. Youth should understand what the role of their attorney is, how often they will see their attorney, how to contact the attorney, and how long it customarily takes for their attorney to reply.

Prior to court hearings, it is imperative that the lawyer explain the purpose of the hearing, what issues may be discussed, what information from the youth may be helpful, and what issues are appropriate to be raised with the judge. This is an opportunity to review the court report and to allow the youth to add or respond to information contained in the report. Clients should be briefed, among other things, on courtroom etiquette, who might attend the hearing, how long the proceeding is expected to last, and how to request a private meeting with the judge.

It is also valuable to develop a system for training, encouraging, and mentoring youth in their ability to express themselves--both inside and outside of the courtroom. In California, recent legislation (Assembly Bill 408) [FN16] mandates efforts to create a lifelong connection and adult anchor for children in foster care. This legislation also requires that children ten years of age or older receive notice of, and have the right to attend, their court proceedings. If a child is not present in court, the court must inquire as to whether notice to the child was proper. It is the obligation of the county child welfare department to ensure that the child is present in court, unless the child does not wish to appear ***1307** or the child's whereabouts are unknown and the child's social worker has documentation to that effect.

California's Assembly Bill 408 demonstrates that laws and procedures can help achieve much of the system change necessary to provide for greater youth participation in court proceedings. As this bill recognizes, a critical ingredient of youth involvement in the court process must be providing youth with notice of court proceedings and committing as a matter of law to the presumptive rights of youth to be present at their own court proceeding, absent a judicial determination that presence in court would not be in the youth's best interest.

Before true system change can result, however, we must debunk the myths surrounding reasons children cannot or should not be brought to court.

The belief that the court process is “too complex” for youth to be capable of participating effectively can be overcome by having all involved endeavor to explain in simple terms what is taking place and preparing the youth beforehand for standard court protocols.

The concern that youth who come to court will be forced to miss school can also readily be addressed--court hearings can be set on days and times that minimize school disruption for youth. For dependency courts to be truly youth-focused, we may need to design more creative courtroom schedules to accommodate the youth we seek to serve. If we place a high value on youth's presence in court, we need to treat that time commitment with the same degree of seriousness currently associated with doctor, dentist, and other appointments that routinely result in time away from school.

The concern that information discussed in court may be “disturbing and upsetting” to youth is another argument often associated with the view that youth presence in court is ill advised. However, judges and attorneys should keep in mind that the circumstances pertinent to these cases deal with real life events that were personally experienced by the youth. They have already been exposed to--and lived--the very harsh details to be discussed in court. Indeed, youth

often report that the ability to be present in court and privy to the decision making that will chart their future is exactly what they need to enable them to heal and move on--hearing difficult information in an appropriate setting, with support available and the opportunity to express their own views about their life's course, enables them to come to terms with and work through the abuse and neglect they have suffered. [FN17]

The presence of youth in court proceedings that affect them is invaluable, even in cases when the children are too young to express themselves. The child alone can give a face to what would otherwise be simply words on a paper. And their participation serves to bring their caregivers to court more often than would otherwise be the case and to provide direct evidence of ongoing physical development and well being of the child. While a picture may be worth a thousand words, nothing can substitute for personally evaluating the welfare of the child.

***1308** Youth who are under the jurisdiction of the dependency court system understandably feel frustrated and angry that they are excluded from decisions when their family relationships, their physical safety, their health, and their very home are at stake. One former foster youth, now an adult, asserted, "If I would have been allowed to attend a court hearing regarding my case, I don't think I would have been as scared or worried because I would have been able to see first hand what [was] happening [to] me and my family. I would have also felt less resentful towards the system because I would have felt like I had some say." [FN18]

We should take to heart the lament Luis expressed to members of the Pew Commission: "No one told me anything. For five years, no one told me anything." [FN19] Youth like Luis feel--and indeed, are--voiceless and powerless when decisions that define how they will live the remainder of their lives are made by people who barely know them in courtrooms behind closed doors.

We owe it to Luis, and the thousands of other youth in our foster care system, to listen to their voice and strive to do better.

Our system can empower youth by providing these youth the opportunity to attend and actively participate in court proceedings that affect them. On the other hand, the system can continue to send the message, by excluding youth from their own court cases, that they are not valued or respected and are not considered to be a meaningful part of the process.

The entire legal community must endeavor to see that a more positive message to children and youth becomes the norm. We can give abused and neglected children a better chance to flourish by ensuring that their presence and participation is welcomed in court and in the judicial decisions that so profoundly impact their lives and futures.

***1309** Appendix A

Excerpted from Fostering the Future: Strengthening Courts for Children in Foster Care

The Pew Commission on Children in Foster Care

Courts are often the unseen partners in child welfare, yet they have enormous responsibility. Along with child welfare agencies, the courts have an obligation to ensure that children are protected from harm. Courts determine whether abuse or neglect has occurred and whether a child should be removed from the home and placed in foster care. Once a child is in foster care, courts review cases to decide if parents and the child welfare agencies are meeting their legal obligations to a child. Federal laws charge courts with ensuring that children leave foster care for safe and permanent homes within statutory timeframes. And courts determine if and when a parent's rights should be terminated and whether a child should be adopted or placed with a permanent guardian.

This profound and far-reaching work affects both the current circumstances and future prospects of the children

who pass through the courts. Yet the public is largely unaware of the depth of the court's responsibility and has little information on its effectiveness in protecting children and promoting their well-being. Higher-profile criminal and civil courts often overshadow dependency courts and secure a larger proportion of limited state court resources.

Judicial work in dependency court is different from judicial work in other areas of the justice system. When done well, it involves consultation with executive branch agencies, outreach to the community, and a commitment to legal proceedings that rely more on a problem-solving approach than on the traditional adversarial process. It also entails oversight that extends well beyond placing a child in foster care to include ensuring that children in out-of-home care receive the safety, permanence, and well-being promised them in federal and state law.

The dependency courts generally face structural issues and other challenges that limit their ability to make informed and timely decisions for children. For example,

• Many courts do not track and analyze their overall caseloads, making it difficult for them to spot emerging trends in the cases that come before them, eliminate the major causes of delays in court proceedings, and identify groups of children who may be entering or reentering foster care at very high rates, or staying in care the longest. Without such data, courts may also miss important information that would allow them to lower large caseloads, and thus give judges more time to consider the cases before them.

• Institutional barriers discourage courts and child welfare agencies from working together to improve outcomes for children in foster care.

***1310** • Many judges come to this work without sufficient training in child development or knowledge of effective dependency court practices - information that could help them make appropriate and timely decisions that move children out of foster care to safe, permanent homes.

• Children and parents often lack a strong and effective voice in court, thus limiting the information available to judges and denying children and parents input into decisions that affect their lives.

***1311** Appendix B

California Youth Connection

Policy Recommendations to Facilitate Foster Youth Participation in Court Hearings

Foster youth want to be a part of decisions made about their life and to participate in the forums where those decisions are made, like court hearings. However, foster youth often face barriers to participation that can be resolved by changes to existing state or local policy. Following are suggestions on areas that can be improved to support foster youth participation in court hearings.

• Youth Involvement: The child welfare system should be required to involve foster youth as participants and equal partners in all decisions made about their lives. Youth should be required to be involved in case plan development, case plan meetings, and given the option to attend court hearings. Foster youth should be allowed to offer a formal response to court reports, incident reports and proposed permanency plans. Child welfare professionals should be held accountable for ensuring foster youth participate by the court and advocates. Judges can take notice at hearings if youth are not present and ask for explanation for their absence to ensure that it is not professionals have done their part to give youth the choice to attend.

• Attorney Caseloads: Attorneys are critical to preparing foster youth for court participation and ensuring that the court process is a meaningful one that is truly about the needs and best interests of the foster youth. Without reasonable caseloads, attorneys are unable to visit with youth and provide quality representation.

• Judicial Training: Dependency judges can benefit from training on the importance of youth involvement, how to modify hearings so they are more youth friendly, and how to communicate with youth and ask the right questions. judge.

• Transportation: Policy should be created clarifying who is responsible for coordinating and funding transportation for youth to attend their court hearing.

• Addressing Barriers to Attendance: Set policy so that youth are not penalized at school or in group care placements for missing school due to court related absences.

• Client Satisfaction: It is critical for dependency attorneys to systematically gather feedback about foster youth's satisfaction with the quality of representation as well as their suggestions for improvement. This keeps everyone focused on the goal of being an advocate for the youth. A contact person and clear process should be identified for youth if they have questions or concerns about their attorney or legal services.

***1312** • Attorney Training: Foster youth often look towards their advocate to be knowledgeable about services and resources available to them. All dependency attorneys should receive regular training on foster youth's rights, available resources and areas impacting foster youth such as education, immigration, transition services and LGBTQ youth issues.

• Training for Foster Youth: Jurisdictions should develop training for foster youth on the court process, how to participate effectively, and their rights. This training can be modeled after the training offered by the Judicial Council for foster parents on court participation. The best trainers are of course, current and former foster who have experienced the court process and who are the best experts on what others in their situation need to know!

Questions? Contact Jennifer Rodriguez, Legislative and Policy Coordinator

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***1313** Appendix C

California Youth Connection

Tips for Attorneys on Preparing Foster Youth to Participate in Court

Foster youth want to be a part of decisions made about their life and to participate in the forums where those decisions are made, like court hearings. However, in order for foster youth's participation in court to be meaningful, attorneys and others working with them must adequately prepare youth and support their participation. Following are tips to prepare foster youth in your jurisdiction to participate in court hearings.

• PRE AND POST SUPPORT: Work with youth, provider and social worker to ensure youth has therapeutic and relational support both before and after the hearing to deal with feelings that will inevitably arise. Many of the issues discussed may bring up strong feelings and reactions with youth, and this is a valuable opportunity for youth to learn to deal with these feelings in a healthy way.

• ATTORNEY'S ROLE: Explain to youth what your role as their attorney is, how frequently they will see you, how to contact you and how long it usually takes you to get back to your clients. Also educate youth on their rights and what issues you can help with. Provide information to youth on how they can advocate for themselves if they have

concerns about the legal or social work services they are receiving.

• WHAT? Explain what the purpose of the hearing is, what type of issues might be discussed, what type of information might be helpful for the youth to share, and issues that are appropriate to raise with the judge. Review the court report with the youth for any inaccuracies, clarifications or additions. Youth should have the chance to add and respond to information contained in the report. Explain to youth courtroom etiquette and how to request a private meeting with the judge.

• WHO? Talk with your client about who might attend the hearing, including professionals, other attorneys, judges and family members. Explain what the role of each person who will be attending the hearing is, and what they may say/do at the hearing. Give youth information about the judge. Discuss any emotional issues or potential problems that may arise in the hearing. Give youth the option to bring a support person to the hearing, and make any necessary arrangements to facilitate this.

***1314** • WHEN? Discuss how long the hearing and possible wait time may be. Review the time frame for when hearings must take place.

• WHERE? Provide information on where the hearing will take place, where youth will be waiting, and where parents and other family members may wait. Also describe or draw a map of where parties will be sitting in the courtroom. Give tips to the youth on where they can have privacy or alone time if needed. If possible, take the youth to visit the courthouse prior to the hearing so it won't be so unfamiliar and scary.

• DRESS: Explain how others will be dressed at the hearing. Encourage the youth to dress in a way that will help them feel comfortable and not out of place. If youth need help obtaining clothing, work with the provider and social worker.

• TRANSPORTATION: Assist with arranging reliable transportation to and from the hearing so youth can attend. Follow up to ensure youth are actually transported to the hearing.

• LEGAL LINGO: Provide a “cheat sheet” of legal terms and definitions that will be used in the hearing. After, be sure to debrief with the youth to ensure they understood what happened in the hearing and answer any questions about next steps.

• NOTICE: Ensure youth is receiving timely notice of the hearing. Many youth do not receive notice that is mailed to providers. This is important to mentally prepare for the hearing, as well as to adjust work/school/therapy/activity schedules.

• ROLEPLAYING: Roleplaying can be important to helping youth feel prepared and informed. Roleplaying is particularly important if the youth wants to address the judge or will be testifying in the hearing.

Questions? Contact Jennifer Rodriguez, Legislative and Policy Coordinator

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[FNa1].. Miriam Aroni Krinsky is Executive Director of Home At Last, a national partnership to encourage education and action on the court's recommendations of the Pew Commission on Children in Foster Care. She also serves as Executive Director of the Children's Law Center of Los Angeles, a nonprofit legal services organization that provides representation for more than 20,000 children in the Los Angeles dependency system. For more information on Home

At Last, visit http://fostercarehomeatlast.org; for more information on the Children's Law Center, visit http://www.clcla.org.

Jennifer Rodriguez is a former foster youth and Legislative and Policy Coordinator for the California Youth Connection, a grassroots organization of foster youth who participate in policy development and legislative change to improve the foster care system. For more information on the California Youth Connection, http://www.calyouthconn.org.

[FN1]. Gloria Hochman, et al., Foster Care: Voices From The Inside, 2 (2004), http://pewfostercare.org/research/voics/voices-complete.pdf.

[FN2]. David B. Rottman, What Californians Think About Their Courts: Highlights From a New Survey of the Public and Attorneys, Cal. Cts. Rev., Fall 2005, at 6.

[FN3]. Id. at 6-7.

[FN4]. Testimony of William Frenzel Chairman, Pew Comm. on Children in Foster Care, Federal Document Clearing House Congressional Testimony (Jul. 13, 2004).

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[FN11]. California Youth Connection, Policy Recommendations to Facilitate Foster Youth Participation in Court Hearings (2005), attached as Appendix B.

[FN12]. See California Youth Connection, Tips for Attorneys on Preparing Foster Youth to Participate in Court (2005), reprinted in Appendix C.

[FN13]. Home At Last: My Voice, My Life, My Future (forthcoming May 2006) (survey on youth participation in court), http://www.fostercarehomeatlast.org.

[FN14]. Id.

[FN15]. Id.

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[FN17].. Jennifer Rodriguez, Empowering Foster Youth: Inclusion in Court Hearings and Decision-Making, Partners: Programs & Resources For Child. & Fams., Winter 2003, at 2, http://www.casabr.org/Document_Library/Online_Docs/Inservice/inservice_6_05.pdf.

[FN18]. Home at Last: My Voice, My Life, My Future, supra note 15, http:// www.fostercarehomeatlast.org.

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Child Law Practice
Helping Lawyers Help Kids
Vol. 25 No. 10 December 2006

IN PRACTICE

Seen *and* Heard: Involving Children in Dependency Court

by Andrea Khoury

All I ever wanted was to be heard and not just dismissed.

—Youth in foster care

Every significant decision in the child's life, from entry into until exit from foster care, is in the hands of the court. Yet in many parts of the country, these vulnerable children have only limited opportunity, if any, to participate in court proceedings that so profoundly affect their future.

—Miriam Krinsky, Executive Director, Home At Last

Major national child welfare organizations agree that youth should participate to some extent in their child welfare hearings. However, little guidance exists to help professionals involve children in court proceedings in meaningful ways. This article addresses the following issues:

- How and to what extent should children participate.
- How attorneys, judges, and other child welfare professionals should encourage and facilitate children participating.
- How the system, made up of courts, agencies, and other child welfare professionals, should change to make it possible for children to participate.
- How to make the child welfare legal system more meaningful to youth by involving them in court.

This article includes an overview of national policies addressing children's participation in court, followed by discussion of the benefits of such participation. It then offers concrete suggestions for reforming practice, policy, and systems to better engage youth in the court process.

Policies of National Judicial and Bar Associations

National judicial and bar associations addressing this issue have uniformly emphasized the importance of youth appearing in court in child abuse and neglect cases. For example:

- The National Council of Juvenile and Family Court Judges published *Resource Guidelines Improving Court Practice in Child Abuse and Neglect Cases* in spring 1995. These *Guidelines*, which were also endorsed by the ABA and the Conference of Chief Justices, discuss who should and may be present during each major type of hearing in a child abuse and neglect case.[1]
- The American Bar Association (ABA) approved standards for representing children in abuse and neglect cases[2] that suggest children should be present at significant court hearings. For example, the commentary explains that having a youth in court emphasizes for the judge and all parties that this hearing is about a child.[3]
- The National Association of Counsel for Children (NACC) adopted similar standards in 1999. Their standard for children's participation in court mirrors that of the ABA. At significant court hearings, children in most circumstances should be present.[4]
- The Pew Commission on Children in Foster Care report, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care*, recommends that courts should be organized to enable children and parents to

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(Continued from previous page)

participate in a meaningful way in their own court proceedings. The Commission states that children benefit when they have the opportunity to actively participate in court proceedings as does the quality of decisions when judges can see and hear from key parties.

- The *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham* state that children should be included in their proceedings unless they choose not to or the court finds it harmful to the child to be present.[5] Judges should also encourage youth to participate in the courtroom.[6]

What's Happening around the Country

Many courts assume that youth should not be present in court, except in limited circumstances. Home At Last, a national outreach and education partnership headed by the Children's Law Center of Los Angeles and supported through a grant by The Pew Charitable Trusts, conducted a national study of participation in court by foster youth. Entitled *My Voice, My Life, My Future*, the Home At Last survey reports that an overwhelming majority of youth respondents stated they attend court only some of the time (73%), followed by never (29%), most of the time (20%), and always (18%).[7] These results were based on foster youths' self reports.

The majority of youth who completed the Home At Last survey indicated that when they did attend court, it was helpful. The youth appreciated their involvement, which ranged from being informed about the hearing, to attending the hearing, to speaking to the judge. Satisfaction from attending court hearings did not rely exclusively on the youth speaking to the judge. Being allowed to attend made youth feel that they were more informed about their life and the experience was worthwhile.[8]

However, some youth did not have positive experiences. Their responses ranged from feeling they were ignored to being bored. Some felt that they had to miss other important activities in their life for court, such as school.[9]

Some states address youth's participation in their state statutes. For example:

- Kansas directs the court to hear testimony of a youth 14 years old or older if the youth requests it and is of sound intellect.[10]
- Minnesota states that children have the right to participate in all proceedings.[11]
- New Mexico allows a child 14 and older to be present in court and requires the court to find a compelling reason and state the factual basis if the child is to be excluded.[12] A child under 14 is permitted to be in court in New Mexico, unless the court finds it's in the best interest of the child to exclude her.[13]
- Florida only restricts a child's presence in court if the court finds the child's mental or physical condition or age is such that appearing in court is not in the child's best interests.[14] Additionally, Florida specifically addresses a child's participation at hearings before the child's 18th birthday to address the issue of independent living transition services.[15]
- Virginia requires notice and the ability of a child 12 years of age or older to participate in foster care review hearings.[16]
- California lists a youth's ability to attend court hearings and speak to the judge as one right for children in foster care.[17]
- Michigan requires youth over age 11 to be notified of review,

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permanency, and termination of parental rights hearings.[18]

In the New York City Family Court, the administrative judge issued a policy requiring that youth 10 years of age and older appear in court regularly.[19] The policy leaves many of the details up to the trier of fact, but makes clear that the general rule is children 10 years of age and older make regular appearances (at least once a year) in court.[20] The policy also allows exceptions based on the case and the individual needs of the youth and family.

Benefits when Youth Participate

Attending court benefits both youth and the court. Youth have the opportunity to understand the process by seeing firsthand the court proceeding. They also develop a sense of control over the process when they actively participate. The court learns more about children than simply what is presented in reports.

Sense of control

When a youth is removed from his home, he generally has little control over when or why that occurs, where he goes, and what happens to his parents. Important things in his life are taken away, including his ability to make decisions. He generally is placed in a new home, goes to a new school, has to develop new friends, and has new parents and new siblings. All of these events are beyond his control. He is told there will be a court hearing at which a judge, whom he may never have met, will decide if he will return home. Sometimes a child advocate identifies his needs and conveys his best interests to the court. If he is not in court, he may simply be told the outcome and either continue in his foster home or go back home.

If the goal of the child welfare system is to do what is in the best interests of the child, the child should have input. When a youth has adequate representation, she is informed of the process and her role. When a youth attends a court hearing, she senses the judge who is deciding her best interests has listened to her. Regardless of the outcome, youth have reported that simply being heard by the decision maker empowers them and gives them a sense of control over what is happening to them. They feel they have a part to play and can influence the outcome.

Understanding the process

In an ideal situation, the youth has good representation, the social worker regularly communicates with the youth, the birth parents are honest with the youth about the situation, and the foster parents are present in court and openly discuss the case with the youth. However, a youth may not fully understand what is happening without seeing it firsthand. The youth is told that critical decisions are made by a judge in court. Yet, in most instances the youth is not involved in that component of the case.

When a youth attends court, he can ask his advocate questions about what is happening. He hears what the social worker says about his home, school, visitation with parents, etc. He hears what his parent(s) say about their progress. When the judge makes a ruling and discusses why she orders something, the youth hears it firsthand and can ask questions.

Information for the court

Many questions that the court will have about the case may be addressed by the child welfare agency's and child advocate's reports, the parent(s)' testimony, and other service providers' input. However, if the youth is present and the court has a question about how often the youth has seen her mother or how the youth is doing in school, the youth can provide the answer.

The youth makes the case more real and vivid for the judge. For example, the court may be deciding whether it is time to change the permanency plan to adoption because the parents haven't complied with the agency's family service plan. If the youth is in court, the court doesn't have to rely on the reports to see how long the child has been in care. The court can see that the child is getting older and needs permanency in her life. Indeed, the youth may say this directly to the judge. Even if the youth is not verbal, the court can observe how the youth appears and interacts with others.

If the youth is very young and cannot speak to the judge, being present in court will bring the case to life and help show the case is about a human being with wants, needs, desires, and hopes that should be considered.

When youth attend the hearing, the court is less likely to focus excessively on the parents' circumstances as opposed to the youth's

> The best approach to children's participation in court is to have excellent representation of the child, whether it's by GAL, attorney, CASA or some combination. There must be a representative who will talk to the child before court, develop a relationship with the child, ensure that the voice of the child is heard in court, and if the child wants to attend make sure the child is present. The discussion of whether youth should be included in court hearings should be done on a case-by-case approach led not by a rule but by an interview with child and informed decision by counsel.
>
> —Judge Leonard P. Edwards. (ret.)

needs. When only the parents attend court, the focus is on what they have and or have not accomplished. When the youth is present, there is equal attention on the youth and what the youth needs.

Policy and Practice Considerations

Regardless of how your jurisdiction views children's participation in court, a clear policy should be in place about when and how youth should attend court hearings. This policy should provide enough flexibility to accommodate the individual needs of each child, not impose rigid requirements.

Key issues to address

What are the youth's wishes? Most youth have definite feelings about whether they want to attend court.

How old is the youth? Some states place age restrictions on youth attending hearings. If the youth is an infant, the court will gain insight from her demeanor, appearance, and personal interaction with her parents. An older youth can be an information resource for the judge.

What is the developmental level of the youth? Will the youth understand what is happening during the hearing?

Will attending court upset the youth? Abuse and neglect hearings can contain graphic details of abuse that may be troubling for the youth to hear. A youth may hear a judge reprimanding her parents for their behavior. They may hear things that they don't understand. Youth may be afraid of abusive parents and may suffer additional trauma if forced to confront them. Youth may be frightened to take a position contrary to their parents. The youth may also feel responsible for what the court orders. On the other hand, it may be therapeutic for youth to be exposed to the realities of the situation.

> It's important to remember that we empower youth by including them in court hearings. They feel more invested and more involved and more likely to be successful. Even if the final order is contrary to what the youth wants, they feel that their voice was heard and have a better understanding of why a particular decision was made. Everything in foster care is taken out of their control (school, home, friends). In court and with their lawyer, they have a say in what happens. They have some control over their future and their life.
>
> —Melanie Klein, Maryland Legal Aid Bureau

Will attending court disrupt the youth's routine? Generally court proceedings occur during regular school hours. The youth may have to miss school. If hearings are postponed, the youth may have to miss multiple days. Youth may have sports and other extracurricular activities that may be disrupted. Yet this concern is not insurmountable. If one values youth participation, scheduling issues and conflicts can be addressed the same way we juggle other commitments in a youth's life, such as doctor or dentist appointments.

Will court be confusing or boring to the youth? Often multiple cases are scheduled for one day. Youth have to wait until their cases are called, sometimes for hours. Most courtrooms do not have child-friendly waiting areas and the youth have to bring something to do while they wait. Also, there must be supervision for the youth while waiting. During the hearing, attorneys and judges use words and talk about concepts that the youth may not understand. Youth have to remain quiet and attentive during hearings that can be long and boring to them if they do not understand what is happening.

Who will transport the youth? Most courts rely on the child welfare agency to transport the youth to and from court. In some jurisdictions, youth are placed far from the courthouse and transporting youth can be time consuming and inconvenient.

Will the court need additional time for the hearings? When a youth is actively involved in her hearing, the hearing may be longer. The youth may want to update the court on her status and express any concerns. The judge may also want to spend extra time interacting with the youth who has taken the time to attend court.

What type of hearing is scheduled?[21] *Some* hearings lend themselves to youth participation more than others. If there is a hearing dealing with a legal issue that has little impact on the youth, it may make more sense for the youth to not attend. However, if the hearing concerns visitation with parents or long-term permanency plans, the youth's attendance will be vital.

Tips for involving youth in court proceedings

There is no single rule or process that governs a youth's presence and participation in court. Several variables must be considered. The following suggestions offer different ways to involve children in court proceedings that consider the factors outlined above.

Have the youth present throughout the hearing. In many hearings, it will be appropriate to have a youth present for the whole hearing,

> The presence of children in court proceedings that affect them is invaluable, even when they are too young to express themselves. The child's presence alone can give a face to what would otherwise be simply words on paper. Nothing can substitute for personally observing and engaging a child.
>
> —Judge William G. Jones (ret.)

without restricting testimony and information that she may hear. This occurs when the judge and parties feel the testimony will not harm the youth and the youth's input is vital.

Present the youth's testimony in-chambers. Bring the youth into chambers with the judge and lawyers to discuss the case. This can occur during the hearing. Most jurisdictions allow in-chambers meetings between the judge and the youth. All lawyers and a court reporter can be present, and all discussions can be on–the-record. This provides the youth with a voice directly to the judge and protects him from any potential damage from seeing abusive parents or hearing negative information about his parents. Recording the interaction protects the parties who are not permitted in chambers (i.e., the parents) by informing them what information the youth has shared.

Arrange an advance visit to the courthouse. Bring the youth to the courthouse when hearings are not occurring. Introduce the youth to the judge who makes the decisions in their case. Show the youth the courtroom and explain where everyone sits and what everyone does. It is not necessary to discuss the specific case. Simply meeting everyone involved helps the youth feel included. It also may spark the youth's curiosity, so that she begins asking questions and playing a larger role in the case. This is especially useful with a preschool-aged youth who may not benefit from being present during the hearing. The judge will have the benefit of meeting the youth and the youth can meet some of the participants.

Have the youth wait in a waiting area for the hearing. When the youth's input is required, bring the youth into court. The attorneys and judge can ask the youth questions and the youth can provide critical information about what is happening in her life. The youth would not be present for any other part of the hearing. This allows the youth to have input into decisions made on her behalf while protecting her from information provided or discussed during other parts of the hearing.

Exclude the youth from court during harmful testimony. Have the child present for all of the hearing except parts that may be harmful. All parties should have the opportunity to be heard on whether an issue is harmful to the youth. If the judge finds it would not be in the best interests of the youth to hear or see something, the child would be excused. For example, if the judge is going to hear graphic testimony about the sexual abuse of a sibling, the youth can be asked to leave the courtroom for that part of the hearing. This allows the youth to participate in the hearing, even when the youth's input is not required, and have similar protections as the previous two options.

Present the child's hearsay statements in court, without the youth present. Allow the child's guardian ad litem to have access to the child at an offsite location or by telephone. Check with your state and local rules for procedural requirements when introducing hearsay evidence (e.g., provide all parties with notice of intent to introduce youth's statements). In all cases, the child should be accessible in case the court determines the child's presence is needed.[22]

Systemic changes to increase youth participation in court

A majority of jurisdictions, either because they lack statutory guidance or because of common practice, work with the presumption that youth should *not* be present in court except in certain circumstances. Changing years of practice may be challenging, but the more comfortable lawyers, judges, and other child welfare professionals become with it, the more common it will become. Changing the system to include youth in their hearings starts with the following steps:

Statutes and court rules

Each state should have a state statute or court rule identifying who should be present at dependency hearings. The statute or court rule should state a presumption favoring youth appearing in court and criteria for exceptions. Such criteria should include age, the youth's wishes about court participation, the youth's cognitive ability to understand the court hearings, the youth's emotional stability, the case facts, and other factors. A mental health professional's opinion may be needed, particularly if a youth is to be excluded from the hearing. There should, however, be a presumption that the youth be present in court unless the court finds it is not in the youth's best interest to attend. A court rule should require notifying the child via foster parents or other caregivers.

Court administrative policies

Absent a statute or court rule, a court can implement an administrative policy describing when youth should be present in court. The New

York City Family Court has such an administrative policy. Courts' policies should ensure that youth do not have to attend court during school hours. If that is not possible, the court should hear these cases before others so the youth can be excused and return to school. In most cases, courts should establish specific times for hearings so youth do not have to spend many hours waiting for their cases to be called. The New York City Family Court policy directs the court to call cases where a youth is present in a "timely fashion so the child does not remain in the courthouse unnecessarily."[23]

The court should make clear who is responsible for transporting the youth to the hearing. In most cases, it makes sense to have the youth's custodian responsible for transportation. A youth should also be able to have a trusted support person accompany her to court.

If a youth is not present at a hearing, the court should routinely inquire about the youth's whereabouts. This helps the parties understand that the court expects the youth to attend the hearings.

Youth's representative practices

The youth's representative plays a major role in his client's court attendance and participation. Rarely does a youth attend a court proceeding if the youth's representative does not want his client to be there. Often the only way a youth will be brought to court is when the representative requests it. It is important for the youth's representative to be informed of the benefits of court participation and the ways youth can participate.

As the person speaking for the youth, the youth's representative's first priority should be quality representation. Regardless of whether the youth attends court, the youth's representative should at a minimum:

- Be appropriately trained in child welfare law, child development, and child psychology.
- Be familiar with child interviewing techniques and children's communication skills.
- Have a caseload that permits him to establish a personal relationship with every client.
- Explain his role to his client.
- See his client, at minimum, before every court hearing in a setting familiar to the child (e.g., school, home, park, etc). Meeting the youth in the courthouse is not conducive to developing a trusting relationship.
- Complete an independent investigation of the case, including speaking with parents, relatives, therapists, teachers, and anyone with significant information about the youth.
- Ensure the youth's voice is heard in every proceeding.

When deciding whether the youth should attend court, the youth's representative should consider the factors listed in the prior section. When appropriate, he should encourage the youth to attend the hearing. He should inform the court whether there should be an in-chambers discussion, whether the youth would like to meet the judge in advance, or whether there are some issues the youth should be excluded from during the hearing.

If the youth's representative decides, after meeting and talking with the youth, that she should be present during the hearing, he should prepare her. He should explain who will be present (and what their roles are), what will be discussed, and what decisions will be made. Above all, he should discuss with the youth what she would like to the court and the other parties to know. The representative could even do a mock hearing so the youth is comfortable. If the youth would like to speak, he should assist her in deciding what to say. He should ensure that the youth will be transported to the hearing.

During the hearing, the youth's representative should ensure the youth is aware of what is happening and consult with her when questions arise. If the youth would like to speak, he should ensure that she is given that opportunity. He should then spend time with the youth after the hearing to discuss what occurred and allow the youth to ask questions and express any concerns. If necessary, he should request therapeutic services to help the youth more thoroughly process the court experience. He should praise her for attending and participating.[24]

If after meeting and talking with the youth, the representative thinks she should not attend the hearing, he should also have a way to contact the youth during the hearing if something unexpected occurs. He should contact the youth directly after the proceeding and let her know what occurred, answer any questions, and let the youth know when the next hearing is scheduled.

In some jurisdictions, the representative is required to submit a report about the youth to the court. This report should bring the youth "to life" for the court.[25] It should discuss the youth's physical appearance and personality, strengths and needs, relationships with significant people, and results from medical and educational assessments. It should also include a picture.[26] This report is especially important for a very young youth. During court proceedings, the representative should continually refer to the youth described in the report to help the judge and parties understand her unique needs.

Accommodations for youth in court

The national, nonpartisan Pew Commission on Children in Foster Care recommends that children under court supervision and their parents must have an informed voice in decision-making related to whether a child enters foster care,

It's important for kids to be in court so they can understand the process. I wanted to be there so that the judge would know what my plan was for my future. I should have a say in what the plans are for me. I think the judge liked me being in court because it showed that I cared about my case and what was happening to me.

—Former foster youth

how a child fares while in care, and what kind of plan is in place to secure a safe, permanent home for that child. The Pew Commission encouraged state court leaders to consider the impact of several factors on the youth's experience in court. These factors include courtroom and waiting area accommodations, case scheduling, use of technology in the courtroom, and translation of written materials to make the process more accessible and meaningful for all participants including children.[27]

Courts around the country are beginning to create child-friendly waiting areas. Courts could solicit donations of toys, reading materials, smaller tables and chairs, and other child-friendly tools to make waiting for court hearings more tolerable for youth. Many courthouses have waiting areas with televisions tuned to news programs. During dependency court days when children may be present, the television can be changed to youth-friendly programs. In one Seattle court, a trained dog from Canine Companions for Independence is placed in the courthouse to comfort the kids.[28] There should also be separate conference rooms for attorneys to meet with youth before court. (See box on special accommodations for kids with disabilities.)

Agency policy

Agency policy and training guidelines should stress that youth must be at all hearings unless the court, agency attorney, or child's attorney says otherwise. There should be an understanding of who is responsible for transportation. It seems reasonable that if the agency has custody, the youth's social worker or transportation aid should organize transporting the youth to court. Some agencies around the country have transportation units that bring youth to court.

Preparing children for court should also be an agency priority. Discussing what the youth will see, who will be present, and what questions the youth should expect is critical in making the court experience more valuable for the youth. Agencies around the country have created booklets for youth in foster care explaining their rights in age-appropriate language using cartoon characters to explain the players.[29] One of the first rights typically listed is the right to attend court hearings. This tool can be used by social workers and attorneys to begin a dialog with youth about the court experience and how to make it more valuable for youth.

In addition, the social worker should follow up with the youth after court to ensure she understood what happened. If necessary, enlist the assistance of a mental health professional to help the youth process the experience.

Court orders

In addition to the judge asking why the youth is not in court, court orders should have a place to state whether the child was present. Additionally, the court should note whether the youth is to be transported to the next hearing on each court order and should enforce this requirement.

School accommodations

Schools should not penalize a youth for attending a court hearing. There should be a dialogue and a memorandum of understanding between the schools and the child welfare agency about youth in foster care. The youth should not be sanctioned for any absences for child welfare-related appointments, court hearings, visits, etc.[30]

Child and Family Service Reviews

The Child and Family Service Review (CFSR) is a tool used by the federal Children's Bureau to review states' policies and practices for ensuring safety, permanency, and well-being for youth in foster care. Improving youth's participation in court is linked to an important "systemic factor," contact between youth and caseworker, in the CFSR. Greater contact between youth and caseworkers improves outcomes for youth in foster care.[31] Presence in court should provide this contact. The caseworker will often transport the youth to court and spend time with the youth while waiting for court hearings. This can provide valuable relationship-building time.

Improving youth's participation in court is also linked to an important case outcome, family reunification. Research shows that increased visitation between youth and parents boosts the chances for reunification.[32] Contact between the child and

Judges can choose to exclude young people from court proceedings, but by doing so, they send a message that youth have no meaningful role in the process. Judges are, however, also able to empower young people by providing them with the opportunity to attend and actively participate in court proceedings that affect them.

—Judge William G. Jones (ret.)

parents before or after court contributes to this outcome.

The results from the CFSRs show that most states must improve the thoroughness and quality of the permanency hearings. Youths' presence in court may increase the quality of hearings because the court would take time to interact with the youth. There would also be less chance of short, cursory hearings.

Conclusion

Child welfare cases are about taking care of youth and doing what is best for them. Youth need and deserve to be a part of that process. A critical component of that process is court hearings. The more guidance attorneys and judges have on incorporating youth into their child welfare proceedings, the more likely the youth will have the opportunity to participate.

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Endnotes

1. According to the *Guidelines*, a youth should be present at some point for the judge to observe them, at least during the review and permanency planning hearings. If the child is able to present information to the court on their needs and desires or if they have questions or concerns, they should be permitted to address the court. In addition, during the preliminary protective hearings, adjudication, disposition, and termination hearings a youth may be present depending on factors including age, physical and emotional condition of the child, and potential trauma to the child. National Council of Juveniles and Family Court Judges. *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*. Spring 1995, 69.

2. American Bar Association. *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases.* Approved by the American Bar Association House of Delegates, February 5, 1996.

3. In addition, the standards specify criteria for children's attorneys to decide whether to bring a youth to court, including whether the child wants to attend, the child's age, and the potential trauma to the child. The lawyer or child's representative, in making this decisions is urged to consult with therapists, caretakers, or other persons who have specific knowledge of the youth and whether attending the hearing would be damaging to the youth. *Id*.

4. National Association of Counsel for Children. *American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases* (NACC Revised Version). April 21, 1999. D-5, D-6

5. "Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham." *Nevada Law Journal* 6, July 27, 2006, 106.

6. Attorneys should not only encourage and facilitate youth attending dependency proceedings but also encourage the youth to advocate for themselves. Attorneys and judges should promote policies and practices that reflect this thinking on a systemic level. Ibid. 117, 122, 130.

7. Home at Last. *My Voice, My Life, My Future Foster Youth Participation in Court: A National Survey*, 2006, 10. <www.fostercarehomeatlast.org>

8. Ibid.,11

9. Ibid.. 13

10. K.S.A. § 38-1570(a)

11. M.S.A. § 260C.163

12. N.M. § 32A-3B-13(c)

13. Ibid.

14. Florida Rule of Juvenile Procedure 8.255(b)

15. FL ST 39.701

16. VA 16.1-282

17. CA Welf. & Inst. §16001.9

18. MCL §§ 712A.19(5), 712A.19a(4), and MCL § 712A.19b(2)

19. Memorandum from Judge Joseph Lauria to Judges, JHO's, and Referees. RE: Court Appearance of Subject Children, February 25 2004.

20. Ibid.

21. It is worth noting that in delinquency hearings, children are required to attend hearings and they are afforded the same procedural protections as adult offenders.

22. National Council of Juvenile and Family Court Judges, Spring 1995, 34.

23. Judge Lauria's memo, February 25, 2004.

24. Freundlich, Madelyn and Sue Badeau. *Including the Voices of Young Children and Children with Disabilities in their Own Court Proceedings.* In press, June 5, 2006, 25.

25. Freundlich and Badeau. In press, June 5, 2006, 15.

26. Ibid.

27. Pew Commission on Children in Foster Care. *Fostering the Future: Safety, Permanency and Well-Being for Children in Foster Care*, May 18, 2004.

28. "How Courthouses Are Accommodating Children and Youth." *Children's Voice* 15(1), Jan/Feb 2006. Washington, DC: Child Welfare League of America. <www.cwla.org>

29. For example, The Association for Children of New Jersey published a book entitled *I Can Make It! The Story of Justin and Jenn in Foster Care*, by Mary Coogan and Nancy Parello. The project was funded by a federal Court Improvement Grant.

30. For example, California passed AB 490, which states: "Grades of a child in foster care may not be lowered due to absences from school because of a change in placement, attendance at court hearing or other court related activity." Cal. Educ. Code 49069.5(h).

31. National Conference of State Legislatures. *Child Welfare Caseworker with Children and Parents*, September 2006. www.ncsl.org. This report provides information about the potential of the effective child welfare caseworker visits in achieving positive outcomes for children and families, both those receiving in-home and foster care services.

32. Leathers, Sonja. *Parental Visitation and Family Reunification: Could Inclusive Practice Make a Difference?* Washington, DC: Child Welfare League of America, 2002. <www.caseyfoundation.org.>

Strategies to Help Children with Disabilities Communicate in Court

For helpful tips for involving and accommodating children with disabilities in court, visit CLP Online: www.childlawpractice.org Select "Weblink" from the menu.

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Child Law Practice
Helping Lawyers Help Kids
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This article is a follow up to "Seen and Heard: Involving Children in Dependency Court," in the December 2006 *CLP.*

With Me, Not Without Me: How to Involve Children in Court

by Andrea Khoury

Youth are the most important part of an abuse and neglect case. Failure to give a child a say in court diminishes the process and prevents judges from having the most information to make the best decision.

—Judge Steven Rideout (ret.),
Alexandria, VA, Juvenile and Domestic Relations District Court

As the child's advocate or the judge presiding over a child welfare case, you know that involving a youth in court is a key step in the proceedings.[1] The next step is exploring what to do when a youth is in the courtroom. What do you do when a child is in court to ensure her participation is as meaningful as possible to the child and the court? How do you use the child's participation to dig deeper into what you already know and promote permanency for the child?

Children are a resource in the case and can offer valuable insights to aid decision making. This article offers tips to help lawyers and judges in child welfare cases:

- prepare for children's involvement in court;
- make courtroom accommodations that help children feel comfortable participating in the court process; and
- ask age-appropriate questions to obtain information from the child that will aid decision making in the case.

The tips that follow are not new or revolutionary. They remind busy practitioners. Choose the tips that relate to your case and use them to make children's participation routine practice in every case.

Preparing for Children's Involvement

Remember that the child welfare proceedings are about the child. A child who comes to court should not be invisible. The child's involvement should be welcomed and dependency court judges and child welfare advocates should do all they can to prepare and plan for that involvement.

Judges

As the judge, you will not be as intimately involved with the child as the social worker and the child advocate. It's important to get as much information in advance about the child's history, current placement, school progress, health issues, child's relationship with family, and other issues that develop. The information you'll need will differ based on the type of hearing, the child's age, and the child's cognitive and emotional level. The last article[2] discussed the value *to the child* of being in court. This article focuses on the value *to the judge* of the child being in court, so the court needs to be clear on what kind of information the child will provide and how best to elicit that information. The following questions can help identify the reason for the child's involvement and should guide discussions with the child:

- What is the child's role in the proceedings?
- Does the child have important knowledge about the allegations in the petition?
- Has there been a recent change in the child's placement?
- Do you need the child's input about the placement?
- Do you need the child's reactions to child welfare services he has recently received?
- Is termination of parental rights

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being considered and, if so, do you need to hear the child's reaction or do you need to make sure the child understand what is going on?

Once the reason for the child's involvement is clear, judges can prepare for the child's permanency or review hearing by taking the following steps:

- Review previous court orders for outstanding issues (e.g., Is the child participating in the mentoring program that was ordered? Is the child happy with the change in visitation ordered at the last hearing? Has the child increased his grade point average as he promised at the last hearing? Has the child welfare agency been facilitating relationships between the child and stable adults in hopes of creating long-term connections for the child?).
- Require the social worker and other service providers to submit their reports at least three days before the hearing on the permanency plan and efforts to achieve that plan.
- Read the reports highlighting the child's strengths and potential weaknesses (e.g., Notice whether the child's grades have improved or the child's behavior has changed. Notice if the child has stopped attending therapy or refuses to go to school. These are the areas the judge should discuss with the child.)
- If the child welfare agency worker or attorneys would like you to address certain issues with the child, ask them to let you know in advance.
- Become familiar with permanent placement options for the child.
- Encourage the child advocate to submit a written statement to the court identifying anything the child wants to discuss.
- Create the presumption that all children will be present for their hearings unless the court finds it is not in the child's best interest. Require the parties to inform you in advance if they do not want the child present for all or some of the hearing and the reasons it's not in the child's best interests.

Child Advocates

As the child's attorney, you must spend time preparing the child for court involvement. Steps you can take to prepare for the child's involvement include:

- Make sure the child understands who will be present at the hearing and their roles, what will happen at the hearing, and what the child's involvement will entail.
- If the child will testify, provide guidance about how to testify effectively. Advise the child if the judge or other advocates will ask the child questions in court and the nature of those questions.
- Help the child feel comfortable with the questioning process and help him prepare. For example, role play a court hearing in a comfortable environment so the child will know what to expect and has the opportunity to ask questions in advance.

(Continued on page 134)

Getting Kids to Court

Many children do not come to court because they cannot get there. The child is placed too far away. No one has been identified to bring the youth to court. Strategies to address transportation are:

- ☑ Set the hearing date and inform all parties well beforehand so they can arrange for transportation.
- ☑ Set the hearing at a convenient time for the child and transporter.
- ☑ Include transportation in the court order.

(Continued from page 130)

- Encourage the child to write down what she will say in an outline or notes. Speaking to a judge in court can make a child anxious and forget what she wants to say. Having something written down will jog her memory.
- If the youth doesn't want to speak in court, help the youth write something to give the judge to read.

Accommodating Children in Court

Highlight a child's positive accomplishments first, like congratulating her on how well she is doing in school or how well she is adjusting to a new foster home before delving into any issues that may cause some anxiety. Mention things from the previous hearing (based on your notes) that will make the child feel special. Do not ask the same questions over and over signaling that you have not reviewed the case. Conclude the hearing by setting expectations for the child that you will follow up on during the next hearing.

—Judge Juliet McKenna,
District of Columbia Circuit Court

While the child is in court, the role of the judge and attorneys is twofold: to make the experience a positive one for the child, and to gain as much information about the child and family as possible. The following tips accomplish both tasks for verbal and nonverbal children.

Verbal Children

Children tend to be more accurate and complete in providing information when they are familiar with the questioner, their surroundings, and the purpose for being present.[3] When this happens, the child's participation in court is more meaningful to the child and the court. Judges can help make a child more comfortable and familiar with the court process by making a few easy accommodations.

- Hear cases where children are present first.
- Ask any nonparty to leave the courtroom if a sensitive issue will be discussed.
- Arrange for (or allow) children to have a support person present if they desire.
- Respect the child's family members, especially those that may be present in court.

Hearing directly from the child offers a valuable perspective that you won't get from reading reports or getting information secondhand.

- Provide age-appropriate reading material describing the court process to the child.
- Address the child directly using a supportive voice and making eye contact.
- Connect with the child by learning what the child likes/dislikes and commenting on it (e.g., The judge could ask: If you had three wishes, what would they be? If you could change places with anyone in the world for a day, who would you choose and why? Is there something that scares you?).
- Explain your role (and the roles of other adults participating in the hearing) to the child and explain what issues you can address.
- Allow the child to look around and ask questions about her surroundings.
- Provide an age-appropriate list of some legal terms and definitions that may be used during the hearing.[4]
- Avoid acronyms or legal jargon that a child would not understand.
- If the child submits a letter, read it in the presence of the child.
- Publicly praise the child about her accomplishments.
- Thank the child for coming to court.

Children's advocates can also help children feel comfortable in court. Sometimes during court proceedings the child has planned to speak but changes her mind. She may have become nervous or rethought her decision to speak after seeing her parents in court. Be prepared to continue to be the child's voice and present options to the child:

- Offer to speak on the child's behalf.
- Ask the judge to ask parents to leave the courtroom (perhaps in a side bar at the bench).
- Ask for an in-chambers discussion.

The child will look to you for guidance. Make the court experience positive and thoroughly prepare each child based on his/her unique needs and circumstances.

Infants, Toddlers, and Nonverbal Children

If the child is an infant, toddler, or is nonverbal, it is still important for the child to be meaningfully involved in the court hearing. Judges often can learn valuable information simply by observing the child's appearance, demeanor, and interactions with others.[5]

The younger child's involvement differs from an older child's involvement. By taking the following steps, judges can obtain valuable information to shape decisions and ensure nonverbal children benefit from court hearings:

- Expect the child to be present in court only for short periods (no more than 10-15 minutes if the child is restless).

- Observe the child at hearings. Try to make these hearings low key with minimal stress to the child.
- See the child in-chambers.
- Observe the child interacting with her caregivers (parents, relatives, foster parents) and siblings during the hearing.
- Notice the child's demeanor, behavior, and appearance, but be careful about drawing conclusions based on this one snapshot in time.
- When the child does attend court hearings, ensure someone she trusts is present with her.
- Ask someone who has spent time with and fully knows the child to speak about the child.
- Request an updated picture of the child at each hearing.
- Have toys for the child during the hearing. Observe the child playing with the toys.

Questioning Children in Court

Even young children have the competence to tell adults what they know when they are questioned in age-appropriate ways. Until children have fully developed linguistic skills, the responsibility for getting at what children know rests squarely on the adult, and in particular, on the language of the question, and not on the language of the answer.

—Anne Graffam Walker, Forensic Linguist[6]

Hearing directly from the child offers a valuable perspective that you won't get from reading reports or getting information secondhand. The child can take you into his day-to-day life, what's going well at home and what's not, how he is doing at school, and what kind of permanent living situation he desires and how to get there. Consider the child's perspective on these and related issues when reviewing and making decisions about services and the child's permanency plan.

Sample Legal Definitions for Children

Dependency case—A family comes to court because a parent has hurt his or her child or the parent has not taken care of his or her child.

Foster family—A temporary family that a child lives with when his or her parents can't take care of the child. A foster family will make sure that you are safe. They will take care of you until you go home.

Social worker—Someone who will help you and your family. You can talk to your social worker about how you are feeling and if you have any questions.

Judge—Works in the courthouse and is in charge of what happens in court. The judge decides what should happen to you. The judge makes sure everyone is doing what they are supposed to be doing.

Reunification—A child goes home to his or her parents when the home is safe for the child.

Abuse—When a child is being hit or touched in bad ways.

Neglect—When a child does not having proper food, clothing, a place to live, or other things a child needs to live.

Lawyers/Attorneys— A person who goes to college and law school. Lawyers/attorneys give advice and speak for people in court. The judge may give you a lawyer to speak for you. You should meet with your lawyer.

Adoption—The way a child legally becomes part of a new family.

Guardianship—Another person acts as the parent for a child.

Court—The court is the building where the judges work, the hearings are held, and all the papers are filed in your case. The court is where all the decisions are made that will affect what happens to you.

Court hearing or trial—A judge listens to the people and attorneys talk about what is happening with your family. After the hearing or trial the judge decides what should happen to you and how to make sure you are safe. The judge also decides how to make sure your family gets the help they need. Tell your caseworker or attorney if you want to talk to the judge.

Guardian ad Litem (GAL)—Helps the judge decide what is best for you. You can meet with your GAL. Your GAL will probably want to talk to you alone to learn more about you.

Court Appointed Special Advocate (CASA)—There may be a CASA in your dependency case. The CASA will talk to you and your family and tell the judge what is best for you.

Sources: New Mexico Supreme Court, Court Improvement Project Task Force. *What's Going On? A Booklet for Children in Foster Care*. New Mexico: Shaening and Associates, 2001; Judicial Council of California. *What's Happening in Court – An Activity Book for Children Who are Going to Court in California*, 2002 <www.courtinfo.ca.gov/programs/children.htm>; North Carolina Court Improvement Services/Resources Subcommittee. *North Carolina Juvenile Court: Child Protection Hearings—A Handbook for Parents, Guardians, Custodians, and Children*, 2001.

Involving Children in Permanency Hearings: Federal Guidance

Section 8.3C.2c TITLE IV-VE, Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Case review system, permanency hearings

Question: In what way can a state meet the requirement for the court holding a permanency hearing to conduct age-appropriate consultation with the child in section 475(5)(C)(ii) of the Social Security Act (the Act)?

Answer: Any action that permits the court to obtain the views of the child in the context of the permanency hearing could meet the requirement. Section 475(5)(C)(ii) of the Act tasks the state with applying procedural safeguards to ensure that the consultation occurs. However, the statute does not prescribe a particular manner in which the consultation with the child must be achieved which provides the state with some discretion in determining how it will comply with the requirement.

We do not interpret the term 'consult' to require a court representative to pose a literal question to a child or require the physical presence of the child at a permanency hearing. However, **the child's views on the child's permanency or transition plan must be obtained by the court for consideration during the hearing.** For example, a report to the court in preparation for a permanency hearing that clearly identifies the child's views regarding the proposed permanency or transition plan for the child could meet the requirement. Also, an attorney, caseworker, or guardian ad litem who verbally reports the child's views to the court could also meet the requirement. Information that is provided to the court regarding the child's best interests alone are not sufficient to meet this requirement. Ultimately, if the court is not satisfied that it has obtained the views of the child through these or any other mechanism, it could request that the child be in the courtroom, or make other arrangements to obtain the child's views on his/her permanency or transition plan.

Source: U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. *Child Welfare Policy Manual*, August 7, 2007. Available online: http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=58

Using Language

Before hearing from the child, give thought to the words you will use when questioning the child in court. Consider the child's age, developmental level, cultural background, and verbal ability. Use care to match appropriate language to these factors. When preparing to question a child in court:

- Keep questions short and simple. (e.g., How old are you? What is your best friend's name?)
- Refrain from using pronouns or acronyms. (e.g., "What did Chris do?" instead of "What did she do?")
- Ask the child to explain what was just said if you're concerned that he doesn't understand a question or statement. Children will often not disclose if they don't understand.
- Use concrete (simple and familiar) nouns and verbs. (e.g., use words like "in the back yard" instead of "area")
- Recognize cultural differences in language. (e.g., A long pause is socially acceptable in Native American cultures but may be seen negatively in American culture. In some cultures kinship terms can refer to nonrelatives.[7])
- Avoid abstract questions. (e.g., "How well do you get along with your family?")
- Recognize that children usually respond to questions literally (e.g., Q: Are you in school? A: No. The child is referring to where she is right now (in the courtroom) not the broader question of whether she attends school.)
- Be alert for miscommunication. Ask follow-up questions to ensure both people are speaking about the same topic.[8]

Questioning Children in Child Welfare Proceedings

You are the one who makes the decisions, and I need to be heard so people may understand how I feel or what I need. Listen to me, since no one else will, and try to understand where I'm coming from. Maybe I am a child, but I'm not dumb; I know right from wrong. I need to know that you will make the right decisions for me, so that I can live life the way it's supposed to be.
—Foster youth[9]

The nature of the proceeding will govern what questions you ask the child in court. Several common areas of focus in child welfare proceedings are discussed below with suggested questions for each.

Placement and Permanency

If you don't ask foster children what they want, how can you make an informed decision about their lives?[10]

Although permanency involves much more than where the child will live, the child's placement, and whether that placement is permanent are important to the child. How the child feels about the placement often determines whether the placement will succeed. It is important to seek the child's opinion and thoughts on current and anticipated placements, including whether changes can be made in the current placement that will resolve a child's

concerns, thereby saving the placement. Children can often find their own placement if the decision makers take the time to talk with them. Too often the child's wishes are ignored. In some cases, they aren't even consulted on this issue which is so central to the quality of their lives.

Aside from questions that will be answered in the social worker's report about whether the child likes her placement, number of placements since the last hearing, and plans for future housing, judges should ask about potential permanent placements. Some questions are obvious but others can reveal information that the court and agency may not have considered. This list of questions is not comprehensive and will vary from case to case but are worth considering.

- Who do you spend most of your time with?
- Is there a relative to whom you are especially close?
- Is there a close family friend with whom you like to spend time?
- Over the holidays, where do you eat dinner?
- If you could take three people to Disney World, who would you take?

The answers to these questions may lead to people who have not already been formally involved in permanency decisions. The child welfare agency should investigate the child's answers to these questions for potential permanent placements or for permanent connections in a child's life.

Education

Children spend many of their waking hours in school. Judges can gain a great deal of information about school from the social worker and educational records. However, the child's well-being is shaped by more than academics. Judges should go beyond the basics available in the social worker's report or the educational records. Certain questions can elicit school-related issues that may not be apparent to the social worker such as relationships with teachers and peers, or participation in extracurricular activities. The child's representative should prepare the child to answer these questions and the judge should be comfortable posing them.

If the child is in regular education and thinking about postsecondary education opportunities, the judge should ask questions about the child's intended field of study and what schools the child is considering. The judge should also ask if anyone is helping the youth consider education options, fill out applications, visit schools, and navigate the complex maze of financial assistance. Children see judges as highly educated people and may be interested in the judge's perspective on higher education and attending a four-year college. Even a short conversation with the judge on this issue can boost a young person's confidence and desire to pursue higher education.

Children can often find their own placement if the decision makers take the time to talk with them. Too often the child's wishes are ignored.

If the child is having problems in his sixth grade class (e.g., suspensions, bad grades) the judge should not focus on the negative but discuss such issues as the following:

- What classes do you like and why?
- Who are your friends and are they in your classes?
- Are there kids at school who are mean?
- What do you do after school?
- Do you have trouble following along in your classes?

These questions help uncover the cause of school problems and can help to build a relationship and trust between the judge and the youth. The youth may need a special education referral, specialized tutoring, or intervention if he's being harassed by his peers. These questions also show the youth that the court is interested in helping to solve his problems, and can help to boost the youth's self esteem.

Services

Most children and families require services to facilitate permanency. Services for parents may include parenting classes, substance abuse treatment, and mental health evaluations and treatment. Services for children may include therapy, mentoring, and facilitated visitation. In most cases children should have input into what services will be ordered. The questions the judge should ask are aimed at discovering the child's view on what the issue is and how best to solve it. When the services are in place the questions should be:

- Are the services helpful?
- Are the services provided at a convenient time and place?
- Are the services addressing the issue?
- Do you like the service provider?
- Has anything changed as a result of the services?
- What still needs to be improved?

The answers to these questions (along with any service provider reports) may make services more meaningful and effective.

Transitioning out of the system

For youth who "age out" of foster care, there are a number of important questions to ask to help prevent later homelessness due to the lack of proper transition planning. In addition to the above questions about placement and permanency, judges should ask the child:

- Have you been formally involved in your discharge planning

(attending case planning sessions, providing input about housing, health, and other long-term needs)?

- What is your plan for health care after you are discharged?
- What are your plans for education or employment?
- If the child is currently in treatment for substance abuse, mental health, or other reasons: Do you know how to continue that treatment?
- Who are the adults in your life that you will rely upon after your case is closed?

Ending Proceedings

Before the child leaves the courtroom, take time to engage the child and ensure his participation has been meaningful. Judges should address the following when closing hearings:

- Ensure the child understands what was ordered and why.
- Ask the child what she wants to accomplish before the next court hearing.
- Encourage the child to attend the next hearing.
- Consult with the child when setting the time for the next hearing.
- Tell the child what she has to do before the next hearing.
- Invite the child to submit report cards, letters, or other personal items periodically to signal interest and concern.
- Review or ensure that someone will review the outcome of the hearing with the child and answer any questions.
- Thank the child for coming to court.
- Finally, ask whether the youth has any questions in a manner that invites questions.

Conclusion

A child can meaningfully participate in her court hearings or she can be left out. The decision is up to the judges and child advocates. Taking the time to prepare for a child's involvement, using proper language, asking good questions, and talking about the right issues will lead to more productive hearings. Through these efforts, everyone benefits.

Andrea Khoury, JD, is an assistant director of child welfare for the National Child Welfare Resource Center on Legal and Judicial Issues, a project of the ABA Center on Children and the Law.

Endnotes

[1] See Khoury, Andrea. "Seen and Heard: Involving Children in Dependency Court." *ABA Child Law Practice* 25(10), December 2006, 145. This article discussed why to include youth in dependency proceedings, including:

- empowering the youth,
- giving them a sense of understanding and control of the process, and
- providing valuable information to the court.

It also discussed how to involve youth, including:

- in-chambers discussions,
- bifurcated hearings,
- full participation in all hearings,
- strategies for practitioners, and
- systems changes to make participation meaningful to the youth.

[2] Ibid.

[3] Walker, Anne Graffam. *Handbook on Questioning Children: A Linguistic Perspective,* 2d edition. Washington, DC: ABA Center on Children and the Law, 1999, 22.

[4] Jones, Judge William G. (ret.). "Making Youth a Meaningful Part of the Court Process." *Juvenile an Family Justice Today,* Fall 2006, 20.

[5] Krinsky, Miriam Aroni. "The Effect of Youth Presence in Dependency Court Proceedings." *Juvenile and Family Justice Today,* Fall 2006, 16.

[6] Walker, 1999, 24.

[7] Ibid., 71.

[8] Ibid., 91.

[9] Foster youth quoted in *My Voice, My Life, My Future,* 2006, prepared by Home at Last and the Children's Law Center of Los Angeles. Available at http://www.pewtrusts.org/our_work_ektid19876.aspx

[10] Lockett, Veronica. "Right to Speak in Court Vital to Cases of Foster Children." *The University Star*. www.star.txstate.edu

*(**In re Kalil,** Continued from p. 131)*

cases to place confidential reports in a sealed envelope that is available only to the "parties in the action and their attorneys." The court explained that the court rule describes general procedures for filing GAL reports but does not prevent the court from keeping portions of the GAL report confidential if there is a stipulation and confidentiality is in the child's best interests.

The father's second issue was whether his due process rights were violated when the court refused to let him view the GAL's report? The court explained that while parents have a due process right to be heard, examine witnesses, and to be informed of and challenge adverse evidence, these rights are not absolute. Since the trial court approved the parents' stipulation limiting their right of access to the child's confidential communications, they waived their right to review the report. Therefore, the trial court properly denied the father's request to access the sealed report.

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Note

*163 LISTEN TO ME! EMPOWERING YOUTH AND COURTS THROUGH INCREASED YOUTH PARTICIPATION IN DEPENDENCY HEARINGS

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Currently, there are more than half a million youth in foster care. Often, these youth are unaware of when, or if, legal hearings about their lives are taking place. This Note advocates for states to pass laws ensuring that youth receive notice of their hearings and for courts to conduct review hearings when youth are not present. Through the course of this Note, the benefits of youth participation are outlined, as are the reasons most often given for denying youth the opportunity to meaningfully participate. The Note concludes with suggestions to help courts more effectively engage youth and the benefits of doing so.

Keywords: *youth; foster youth; notice; participation; dependency hearing; therapeutic justice; voice; advocate; courts; best interests*

I. INTRODUCTION

> All I want for my birthday is a voice. And as I mature, I want to know one thing: How old do I have to be? Sixteen? Eighteen? Twenty-one? Elementary School? Junior high? High School? College? Old and wrinkled, my bones turning to dust as I crochet in my old rocking chair in the corner?
> -Krystin, age 12 [FN1]

> Listen to me, since no one else will, and try to understand where I'm coming from. Maybe I am a child, but I'm not dumb; I know right from wrong. I need to know that you will make the right decision for me, so that I can live life the way it's supposed to be.
> -Antoinette, age 14 [FN2]

Louis was 6 years old when he was placed into foster care. That one decision by the court created life-altering ramifications. Louis was separated from his mother and his brothers and sisters, put in a new home, a new school, and, essentially, a new life. Any one of these changes, individually, would have been traumatic. [FN3] For Louis, this trauma was magnified by the fact that he had no voice, or for that matter warning, that his life was going to so dramatically change. He reflected that, “I was only 6 when I went into foster care. I remember vividly just sitting outside of the courthouse ... my birthmother crying. And then suddenly I was living somewhere else, in some house I didn't know. No one told me anything. For 5 years, no one told me anything.” [FN4]

***164** Although Louis may have felt isolated in his silence, the truth is that he is far from alone. When Louis entered foster care, he joined more than half a million children who have also been removed from their homes. [FN5] And when decisions about Louis' life were made without his knowledge or input, he joined a large number of similarly situated youth who are denied one of the fundamental virtues of the American legal system: the right to be heard. [FN6]

The exclusion of youth's voices from court proceedings that have the capacity to fundamentally rearrange their lives has become an issue of major concern. The Pew Commission, [FN7] the American Bar Association, [FN8] the United Nations Convention on the Rights of the Child, [FN9] and numerous scholars and practitioners have all advocated that children should have a more substantial role in abuse and neglect, or dependency, hearings. [FN10] And still, youth are largely silenced and thus, remain silent. This Note addresses the need for a new conception of dependency hearings, one which places youth in the center of their hearings and their voices directly into the courtroom. It does so by providing measures to make sure that youths receive notice of their hearings and by establishing a system for review when youth are not present.

In order to assure that youth's voices are heard, states should adopt legislation establishing that youth's preferences will be taken into account and that youth will be afforded the right to attend dependency hearings. In tandem, dependency courts should adopt a rule further defining the statute. The court rule would encourage youth, starting at age 10, to attend dependency hearings if they wish to do so. [FN11]

In order to assure that there is compliance with this proposed rule, courts should be required to self-regulate by holding hearings when youth are absent from court proceedings to determine why the youth was not present. The court should hold a fact-finding hearing to determine if the youth received notice of the hearing and whether the youth's lack of participation is due to a lack of interest in the proceedings as opposed to a lack of awareness that the proceedings are occurring. This determination should be made on the record, to ensure the possibility of appeal and as a symbolic representation of the seriousness with which the courts treat youth participation. If the youth is not present because of lack of notice, the hearing should be halted and the judge should take appropriate action against whomever it is appropriate. [FN12]

It is important to note that this proposal has two parts: because of the nature of dependency hearings, youth encouraged to attend should be at least 10 years old. Additionally, courts should be encouraged to allow youth to use alternative means of expressing themselves to the court besides testifying, such as writing letters, sending voice or video recordings, or talking with judges in chambers. Youth should not, in any case, be forced to participate. However, in every case, they should be afforded the opportunity to do so to whatever degree they wish.

The first section of this Note provides statistics about foster care, delineating what a dependency hearing looks like and presents what children experience in a majority of dependency hearings. The second section briefly discusses the constitutional issues surrounding youth participation, such as whether they are constitutionally guaranteed a right to attend. The third section highlights the benefits of youth participation experienced by youth, while the fourth section highlights the benefits of youth participation for courts. The fifth section explores some of the justifications for not having youth participate in dependency proceedings and responds to these arguments. The sixth section explores what courts should do to allow youth to more fully participate in their hearings. The final section presents suggestions to courts and legislatures which would better encourage youth participation at dependency hearings.

*165 II. THE FRAMEWORK

A. DEFINING THE SCOPE OF THIS NOTE

There are more than half a million children in foster care nationally. [FN13] Thus, an unlimited inquiry into foster care procedures in every state would be gargantuan in scope and, as a practical matter, impossible to handle. Therefore, this Note looks primarily at only three states: New York, California, and Oregon. New York and California serve as illuminating foils. Both states are large and together contain more than 20% of the foster children in the United States. [FN14] However, in both geography and dependency hearing procedure, the two states could not be more dissimilar. Oregon, smaller and less diverse demographically, serves as an informative point of comparison. If the degree to which states encourage youth to participate in dependency hearings through their statutes is conceptualized on a continuum, California would be placed at one end, New York would be on the other, and Oregon would fit somewhere in between. [FN15]

Further limiting this Note is the fact that it only examines dependency hearings. It does not, therefore, address the need for youth to voice their opinions on custody arrangements following a divorce. [FN16] Nor does it address the need or presence of children's attorneys, because children are not always given attorneys in dependency proceedings. [FN17] Even if youth are given an attorney, there is significant debate in the legal community as to what the proper role for children's attorneys is: whether it is to advocate for what is in the youth's best interests, as perceived by the attorney, or whether it is to act as a traditional lawyer for the youth. [FN18]

B. FOSTER CARE SYSTEMS AND DEPENDENCY PROCEEDINGS IN NEW YORK, CALIFORNIA, AND OREGON

In any of the three states looked at by this Note, or, for the most part, in any other state, the path to a dependency hearing is much the same. Generally, a case begins with an allegation of abuse or neglect filed against a child's parents, which leads to an investigation by a child welfare agency. [FN19] This allegation could be made by anyone from a mandated reporter, such as a teacher or doctor, to a concerned neighbor. If the agency determines that there is sufficient basis for the allegation, a petition is filed with the court responsible for hearing such matters. After this determination a number of hearings take place. The first of these hearings generally determines where the youth will be placed pending the next hearing, which determines the veracity of the statements alleged in the petition. Following this hearing, if the facts alleged are proven true, there is yet another hearing to determine where the youth will be placed. Following this placement hearing, periodic hearings are held to assess the progress and health of the youth. [FN20]

Although the way in which a case enters a dependency court is generally uniform, the size of the population of foster youth in the three states this Note focuses on is very different, as are the rules governing youth participation. [FN21] One way to assess a court system's willingness to accommodate (at least) or encourage (at best) youth participation in dependency hearings is to look to the state's notice statutes, as notice functions much like an invitation to the proceedings. California law provides that youth age 10 and older are to be afforded notice of their hearings. [FN22] Furthermore, if a youth age 10 or older is *not* at his or her hearing, the court is mandated to determine if the youth received notice and to question the parties who are present as to why the youth is not there. [FN23] Currently, New York has no statutory provisions as to whether children should be in attendance at their dependency ***166** hearings, or if they should receive notice of those hearings. [FN24] In the middle of the continuum, Oregon does provide that children age 12 and older must receive notice of their hearings, but has no provisions about making sure that they actually attend. [FN25]

Other statutes hint at courts' willingness to encourage youth participation in dependency hearings. Oregon allows the court to order the youth's presence during the hearing, but this is a discretionary power. [FN26] California law provides that a youth age 10 or older be asked about people who matter to the youth to assist in the determination as to where the youth will be placed. [FN27]

Although the statutory framework differs between these three states, the reality in the courtroom is the same: that is, in all three states, children's voices are often unheard. [FN28] Even in California, the state that has the most inclusive rules of the three, many children are still not present at their hearings. [FN29] In all three states, children

often do not receive notice of their hearings. [FN30] Because they are unaware of their hearings, children often are not present. [FN31] In cases where the youth *do* receive notice, they are often discouraged from attending by social workers or by the court proceedings themselves, which are made inaccessible through highly technical and unapproachable language coupled with esoteric procedures. [FN32] This sort of exclusion would be unacceptable in any other form of civil trial and is unthinkable in the context of a criminal trial. Yet, for children, the results of a dependency hearing are just as profound as are the results for defendants in either of the other two kinds of cases. As Bruce A. Green and Bernadine Dohrn point out, "[w]hat happens in court shapes children's lives." [FN33]

III. CONSTITUTIONAL CLAIMS

The idea that children totally lack constitutional protections has been rejected by the U.S. Supreme Court. [FN34] However, those rights are nowhere near as expansive as those enjoyed by adults. [FN35] The question that invariably comes up when discussing youth participation in dependency hearings is whether youth have a constitutional right to be present. The answer is, most likely, no.

While *In re Gault* [FN36] provided constitutional protections for youth, those protections were limited to delinquency hearings, where there was a liberty interest at stake. [FN37] Courts have held that there is no such interest at stake in a dependency hearing. [FN38] As was pointed out in the concurrence in *Smith v. Org. of Foster Families*:

> ... I would reject ... that "the trauma of separation from a familiar environment" or the "harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family," ... constitutes a "grievous loss" which therefore is protected by the Fourteenth Amendment. Not every loss, however "grievous," invokes the protection of the Due Process Clause. Its protections extend only to a deprivation by a State of life, liberty, or property. [FN39]

While it has answered, affirmatively, whether *parents* at risk of loosing their parental rights have procedural due process rights such as the right to receive notice and attend hearings, [FN40] the Supreme Court has not directly addressed whether children in foster care are entitled to similar procedural due process protections. As was reiterated repeatedly in *Gault*, the case that most directly addresses the issue of juvenile rights, constitutional protections for youth were not meant to be applied, "upon the totality of the relationship of ***167** the juvenile and the state," were confined "to this case," and were "concerned only with a proceeding to determine whether a minor is 'delinquent' and which may result in commitment to a state institution." [FN41]

However, the issue need not be so narrowly defined. The issue at hand in *Gault* is really the denial of liberty (incarceration) without a fair trial. [FN42] There is an equally daunting potential loss of liberty at stake in a dependency hearing. [FN43] To believe otherwise ignores the ramifications of the decision on the youth. Severing ties to one's family, being forced to relocate, or being forced to remain in a home where one's safety is in danger all seem like fundamental liberty issues. Recognizing this, two lower courts have recently granted children in the midst of dependency hearings rights based upon reasoning that appears to echo the liberty interest pointed to in *Gault*.

In *Kenny A. ex rel. Winn v. Perdue*, the interests of children in Georgia to maintain family connections and to be safe were affirmed, when the court held that

> children have a fundamental interest at stake in n deprivation and TPR proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents. [FN44]

Similarly, a Baltimore court, extrapolating from the fact that children are provided attorneys in dependency cases, found that they are necessary to resolve the issues presented in a dependency hearing. The court concluded that the youth thus have independent standing as parties to request a hearing before their parent's rights are terminated, even if the parents have consented to the termination. The court also found that children have a liberty

interest in the outcome of such hearings. [FN45]

Although both of these courts invoked the language of due process, there are problems in applying either form of analysis to other dependency cases. First, neither of these cases was decided by the Supreme Court, as both decisions were premised largely on state constitutions and legislation. More importantly, neither explicitly held that children have a constitutional right to attend their dependency hearings. Instead, both cases explicitly said that, in consideration of the particular facts of *that* case, the children involved had the right to actively participate in *their* hearings. [FN46]

The U.S. Supreme Court and the Massachusetts and Georgia state courts have left unanswered the question of whether children participating in dependency hearings have constitutionally protected procedural due process rights. However, logically, it seems that the justification for granting children in the midst of delinquency proceedings these rights could easily and logically be transferred to dependent youth, with the same justifications. [FN47] Nevertheless, because no court as of yet has held that dependent youth have the same rights as delinquent youth, the extent of the constitutional protections extended to dependent youth remains in question. Still, just because a right is not constitutionally guaranteed does not mean it should be denied. Whether or not the courts give a legal mandate allowing children to participate in their hearings, there still exists a moral mandate, and sound public policy reasons, for courts to do so. [FN48]

IV. BENEFITS TO CHILDREN WHO PARTICIPATE IN THEIR HEARINGS

While most would agree that courts could be made more approachable for youth, the question that remains is why they should do so. There are tremendous benefits that can ***168** result for children who are active participants in their hearings. If the court hearing is viewed as something besides a process with the limited goal of adjudication, and instead seen as a tool for emotional healing, these benefits become even more pronounced. This is the goal of therapeutic justice. [FN49] Barbara Atwood describes therapeutic jurisprudence as "[t]he study of law as a therapeutic agent." [FN50] Within a therapeutic justice framework, the emphasis is on providing litigants a voice ("the ability to tell their story") and validation ("the feeling that the judge ... has listened to them and has given serious consideration to their opinions and views"). [FN51] Dependency proceedings have the capability to reap great benefits from such a conception of the law, and the children in those proceedings are the ones who benefit most.

When talking about these hearings, it is important to remember the youth who are involved. These are predominately minority children [FN52] who have been neglected. [FN53] Membership in these groups guarantees the presence of children in this system who are well aware of the sting of unfairness, the fear of not knowing what will happen tomorrow, and the crippling lack of control that accompanies a parent's bad decisions. [FN54] These sensations are familiar because they shape the life of the child before they enter the dependency court system and, sadly, become entrenched throughout the child's time within that system.

These perceptions can, however, be addressed within the very system that presently perpetuates them. For instance, if youth were more involved, the court process could be seen as a time of fairness, not justified "legal laryngitis." [FN55] The present system is one that has been characterized as presenting a "crowning insult" to youth: unfair practices are perpetuated for the child's own good or for his or her best interests. [FN56] It should not be surprising that fairness is such a pressing issue: studies have found that people are generally more concerned with procedural fairness then the actual result of a court case. [FN57]

Court proceedings can also be utilized as a time to combat the stifling fear experienced by youth who do not know what is happening in their life. Psychologists and sociologists have commented on the fatalism and insecurity experienced by foster youth. [FN58] These emotions make sense if one considers the life of the foster child before he or she enters foster care. These are children whose lives change at the whim of a parent, whose experience is

shaped by impermanence. In self-defense, they learn, quickly, not to rely on continuity or warnings of impending change. When children enter the legal system through a charge of abuse or neglect against their parents, the courts, perhaps unthinkingly, perpetuate this mindset by excluding the youth from the process and then, from the perspective of the youth, arbitrarily moving them from home to home. [FN59] This is especially problematic when one considers how many times a child in the dependency system may be removed and placed in a different home in their lifetime. [FN60]

The exclusion of children from dependency hearings is also problematic when one considers the framework in which these decisions are being made. Before entering the legal system, the one constant in this child's life was his or her home, however dysfunctional it may have been. In one fell swoop, the court system has taken that away from the child and left him or her dangling, alone and scared.

The trauma experienced by children in dependency hearings is an issue of great concern. As previously stated, many judges consider the court hearing itself to be another instance in which the child experiences trauma, but this is not necessarily true. Whether or not a judge accedes to the wishes of the child, the proceedings themselves can still be helpful, as they can afford the youth the opportunity to make a sort of "psychological statement." [FN61] ***169** The opportunity to formulate a view and share it with the judge is in itself a powerful thing, whether or not those wishes are granted. [FN62]

The dependency hearing can also be seen as a time to ward off the feelings of fear and helplessness that often accompany a child into the dependency system. [FN63] Even in a healthy parent--child relationship there is a power imbalance, with the child functioning as the party with the lesser degree of power. [FN64] In a family involved in the dependency system, however, that power imbalance is compounded by the circumstances that brought the youth into court. The court process can counteract that compounded sense of forced helplessness. Indeed, one of the great benefits of youth participation in dependency hearings "pertains to the greater sense of control which the child can now feel residing within him; he begins to feel perhaps for the first time, that she [*sic*] is in control of his own destiny." [FN65]

Not only can dependency hearings be utilized to redress past psychological damage, but they can also better the future of a child by presenting an opportunity to mold behaviors that can be used outside the courtroom and in life after foster care. Jill Chaifetz has identified "the fundamental lack of care and respect" shown to children in dependency proceedings as the "major reason" many of these youth "will never reach their full potential as contributing members of society." [FN66] This reinforces the idea that what happens in the dependency hearing stays with the youth involved in ways which are both profound and largely unintended. [FN67]

Equally unintended is the view of the legal system that results from an association shaped by procedural unfairness and reinforced helplessness. At that point the message being sent is not only about the legal process in dependency hearings, but the legal process as a whole: namely, that it is unfair, to be viewed with suspicion and perhaps fear. [FN68] Again, the legal process does not have to function this way. Instead, the dependency court could be utilized as a time during which both the youth and the court could model ideal behaviors. [FN69] The court can involve the youth in the proceedings, making the hearings, in both facial appearance and in actuality, more fair and honest. [FN70] The youth can be engaged in the proceedings, thus becoming more responsible for the course his or her life takes. [FN71] "[T]he more self-determination and responsibility accorded to minors, the greater the accountability." [FN72] Additionally, the greater role youth are allowed to play in the process, the more invested they are in the results, and the more likely that what follows from the hearing will be a successful outcome. [FN73]

As adults, citizens are lauded when they speak up assertively for their rights in court or outside of it; or when they take the time to participate in the decision-making processes that fundamentally affect their lives at the courthouse, the ballot box, or during everyday interactions with fellow citizens. [FN74] These are the exact behaviors that youth-attended dependency hearings can encourage. Thus, dependency courts have the unique opportunity to embed in youth the very behaviors that will serve them well throughout their lives. [FN75]

The dependency hearing can also make a participating youth's future better by making him or her face up to it. It is difficult to move into and embrace one's future, while simultaneously desperately clinging to one's past. [FN76] This diametric pull is, understandably, often experienced by foster youth who more than anything want to go home, but for whom that is the one event that can never occur. The current court system allows this pull to continue by distancing the youth from the decision-making process. Sometimes all that is needed for a youth to become aware that going home is not an option is to hear it from the judge's lips. [FN77] Sometimes it is seeing his or her parent show up drunk, or high, or not at all. In any case, the dependency hearing presents a valuable opportunity:

> ***170** Youth often report that ability to be present in court and privy to the decision making that will chart their future is exactly what they need to enable them to heal and move on--hearing difficult information in an appropriate setting, with support available and the opportunity to express their own views about their life's course, enables them to come to terms with and work through the abuse and neglect they have suffered. [FN78]

Suffice to say, if the youth is unable to work through his or her past, it becomes doubtful that he or she will be able to work toward his or her future. [FN79]

V. BENEFITS TO COURTS

Youths are not the only ones who benefit when courts encourage their participation in dependency hearings. Courts, too, will gain benefits from a regime that includes youth to a greater degree. The dependency court judge's job is not an easy one. In a very limited amount of time, these individuals are called upon to make life-altering decisions while contending with informational deficiencies as well as the anger and fear experienced by both for parents and youth. [FN80] The best way to limit both of these debilitating pressures is to restructure the court system to empower children's voices.

The idea that hearings which involve children to a heightened degree creates better outcomes centers around the argument that, by participating, youth are more invested in the process and are thus more willing to work with the court to achieve that end. [FN81] It also centers on the fact that a greater degree of youth participation allows the court to make more informed decisions. Inherently, more informed decisions are more effective decisions. [FN82] This is because "[e]ven the most skilled judges and attorneys with the best intentions cannot and should not be making life changing decisions and recommendations about a child they have never met or a family they know only as a case number." [FN83] In order to make a responsible decision, judges need to weigh every piece of evidence available to them. One of the best sources of this information is the child. [FN84]

Having the child present in the courtroom is one of the best, and easiest, ways of combating a situation where one party has more information than the others, or to another extreme, *no* parties having *any* information. This has been called "informational asymmetries." [FN85] Just by having youth in the courtroom, even if they never say a word, judges are given the opportunity to assess a youth's behavior and demeanor, as well as his or her emotional and physical state. [FN86] Such an assessment might be determinative in making decisions about the youth. At the very least, it can function as a source of supplemental information and assist judges in their decision-making process. [FN87] Even if the youth never says anything while in the courtroom that impacts the judge, his or her mere presence will do so. [FN88] The massive number of dependency cases that judges deal with every day makes knowing each file intimately an unreasonable expectation. [FN89] What can help a judge to remember the details of a file is to put a face to it, and the best way to do that is to have the judge see and listen to the youth. Having the youth in the courtroom, or bringing in the child's actual words, reinforces to the judge the idea that the child is a person, not simply a file. [FN90] This changes the whole focus of the discussion taking place in the courtroom and forces the judge to see things through the gaze of the child. [FN91]

It is important to point out, as well, that when youth are present in the courtroom, the gaze through which the

judge views the proceedings becomes focused on the particular needs of *that* child. [FN92] This particularized gaze is important in two ways. First, like most ***171** social groups, youth in foster care run the risk of being stereotyped based solely upon their presence in the dependency system. When this happens, what is good for one child becomes the standard for all children. This cookie-cutter mentality is counterproductive. Each child comes into dependency court needing something different, and the best way to assess that need is to hear from the individual child involved. [FN93]

Youth's needs may be individualized in different ways. One youth may want something entirely different than any number of his or her peers in the dependency system. A youth may also have different desires for his or her future than do his or her parents, either wanting to be reunified or removed. [FN94] Whether or not the judge adjudicates in the way the child wishes, it is important that the judge realize and recognize his or her wishes. [FN95]

VI. WHY ARE YOUTH EXCLUDED?

It is unproductive, and untrue, to say that youth are discouraged from participating in their hearings solely due to capriciousness on the part of attorneys or judges. The problem with this line of thinking is that it denies justifications for excluding youth that, while unsound, are ultimately well meant. [FN96] The main justifications for excluding youth from dependency hearings are: that the hearings are too traumatic for youth, that there is no need for youth to attend because they are already represented, that youth have nothing to contribute, and that having youth participate is administratively inconvenient.

A. DEPENDENCY HEARINGS AND TRAUMA

One of the main rationalizations for not involving youth in dependency hearings is a belief that the proceedings are too emotionally charged for youth and might further traumatize them. [FN97] There is a fair basis for this concern: dependency hearings are indeed emotionally intense. [FN98] Fundamentally, a court is evaluating how a family works and that sort of judgment cannot be made without inquiries that are inherently painful. Questions must be asked about parental misbehavior and the frequency of that misbehavior. Additionally, these proceedings are adversarial in nature, which means that defendants are defensive and prosecutors are aggressive. [FN99] As Jane Weinstein pointed out, "[t]he adversary system is not humane." [FN100] Even highly competent parents can come out of such a proceeding looking far less competent then they did walking in. Furthermore, the stakes are high: nothing less then the survival of a family is being decided.

The main concern for those who worry about the traumatic nature of dependency hearings does not center on those competent parents. The concern centers on the children of parents whose decisions are being questioned for good reason. [FN101] These children, to whatever degree, have already survived a bad situation. What good does it do to make them go over it again? And how healthy is it for them to see their parents being torn apart over the course of a trial? [FN102]

What this concern ignores is the fact that, in many cases, participation helps the youth's emotional recovery. Katrina, a foster youth, reported that she "wanted to go to court, but they wouldn't let me go because my guardian ad litem said that going to court might upset me. It was not being allowed to speak to the judge that upset me." [FN103] It is important to remember that the event that the youth would be asked to describe has already occurred. The youth has lived through, and to whatever degree survived, the real trauma. [FN104] Instead of furthering trauma, as has been suggested, youth participation in dependency hearings has ***172** the capability to instead further healing. [FN105] The important thing to remember is that the youth has already been traumatized. What furthers their trauma is not inclusion in their hearings, but the rearrangement of their lives without any notice or the chance to speak their minds. [FN106] As Chief Judge Judith Kaye of New York recently pointed out,

> [i]t's incredible to me that we so long believed that the greater good was keeping children-even

teenagers-out of court, so that they wouldn't miss school or be exposed to a trauma. What greater trauma could there be than cataclysmic change in their lives without their knowledge? [FN107]

B. DEPENDENCY HEARINGS AND VOICES FOR THE CHILD

Other opponents of youth having an active part in their hearings feel that the presence of the child is unnecessary because the youth's voice is already being heard through his or her attorney, social worker, or parents. [FN108] If one takes this view, the presence of the child could easily be seen as superfluous. [FN109]

In almost every dependency hearing, the standard by which the judge makes her decision is the best interests of the child. And in any dependency hearing there are a large number of people--the social worker, the state's attorney, and the child's parents, to name a few--arguing over what those best interests are. [FN110] The only one who can actually say what the youth wants, definitively, or who can provide the necessary information to determine what is in the youth's best interests, is the youth. It is also important to remember that all these parties who are supposed to speak for the youth have their own viewpoints that might override how convincingly, if at all, they relay the child's wishes. [FN111] It is particularly counterintuitive that a parent who has been charged with abuse or neglect would make it a priority to speak and act in the best interests of his or her child. The parent who severely abuses his or her child, emotionally, physically, or sexually, is not likely to change or confess these behaviors to a court, even though this might be in the best interests of the child. The parent may, in fact, be committing the abuse because he or she believes it is in the best interests of his or her child. Likewise, the parent actively engaged in criminal activity is not going to want social services involved in his or her life, even if that is what would provide badly needed assistance for his or her child. For instance, a mother with continuing substance abuse problems may testify that her child should be returned to her care, even if the child has settled well into a foster home and the mother has made no changes to her lifestyle. [FN112] In short, if ever there is a situation in which there could be a conflict of interest, the relationship between a parent accused of abuse or neglect and the child who was abused or neglected seems paramount.

Social workers and attorneys may also have a conflict. [FN113] If the child wants to return home and the welfare agency has decided that releasing the child would be inappropriate, the social worker has to choose between presenting the child's view assertively, heeding the wishes of his or her employer and doing so less assertively than if the child's thinking aligned with the agency's, or presenting the youth's views and discussing them with the court in a fair and reasonable manner. [FN114] Attorneys following a best-interests model of representations fall into the same trap. If a youth wants to return home, and the home is unsafe, the attorney advocating for the best interest of his or her client is bound to argue against the youth returning home, even if that is what the youth wants. [FN115] Even if the child's attorney does present the child's view, and does so aggressively, the fact remains that the most forceful expression of that view would come from the person most affected: the child. [FN116]

***173 C. DEPENDENCY HEARINGS AND CHILDREN'S JUDGMENT**

An additional argument against youth being at their dependency hearings is that the youth's presence is unnecessary because youths lack the judgment to be able to contribute anything of significance to the proceedings. [FN117] Studies have shown that children as young as 6 years of age have the capability to reason and understand. [FN118] Certainly from age 6, and at ages even younger than that, children are capable of having and sharing their view of what happened in the past and what they would like to see happen in the future. [FN119] This is especially true for foster children, who, by necessity, have had to grow up more quickly then their peers. As Trudy Festinger pointed out, “If a kid is old enough to be transferred around like a ping-pong ball he's old enough to decide where he's happy ... children in foster care grow up very quickly.” [FN120]

D. DEPENDENCY HEARINGS AND ADMINISTRATIVE INCONVENIENCE

A final point in opposition to having youth take a more active part in dependency hearings is that involving youth to a greater degree is a hassle and slows down the entire hearing process. [FN121] In order for youth to participate meaningfully in dependency hearings, adjustments must be made to the court system. [FN122] These adjustments might involve relatively minor things, such as refraining from using acronyms and highly technical legal language, or might demand more profound changes, such as slowing down the proceedings to allow the youth time to process the information at hand or scheduling the hearings in the evening so that the youth does not have to miss school. [FN123] In any case, whether relatively minimal or major, the presence of the youth's voice in the courtroom means more work for the courts. [FN124] It is true that some of the current structures and procedures would need to be adjusted. It is also true that these changes might not be very convenient for adult participants. [FN125] Then again, for youth in the system, neither is foster care.

VII. REFIGURING JUSTICE

Obviously, in order for youth to participate more fully in dependency hearings, the current structure must be adjusted to allow them a space in the courtroom. There are a number of changes courts and legislatures might consider making, and several things that are mandatory, for this change to occur. Most importantly, legislatures should adopt notice statutes like those enacted in California. If youth are not informed of their hearings, they cannot attend. It should also be mandatory for all involved, foster parents, case workers, and most importantly children's attorneys, to adequately prepare their clients for their court date. [FN126] This means explaining what the proceedings are about, what will happen, and appropriate courtroom behavior. [FN127]

As important as it is that attorneys adequately prepare their clients for their hearings ahead of time, it is equally, if not more important, that courts modify their procedures to prepare themselves for the youth. The proceedings must become more youth friendly. Judges and attorneys must utilize legalese and acronyms less and conversational English more. Phrases such as summary judgment, jurisdiction, and dispositional order are often thrown into courtroom conversations, sometimes without any further context. To *anyone* not familiar with the legal system, this esoteric language serves as an almost impermeable barrier to significant participation. [FN128] Almost as intimidating as the legal language used in ***174** these proceedings are the procedures themselves. Rules of evidence and for questioning witnesses are very strange to those uninitiated to the legal process. While it is perhaps impossible, or unrealistic, to expect courtrooms to simplify these procedures, it is certainly reasonable to request that judges explain what is going on to youth who are present. [FN129]

Judges should also utilize the youth. [FN130] Youth represent one of the most valuable sources of information in any dependency case. [FN131] Judges should ask youth if there are inaccuracies in reports and if their attorney is honestly and fully advocating for them. [FN132] This would have an additional benefit: it would function as an on-site performance evaluation for attorneys. [FN133]

Courts should also look toward making changes that, while not so important as to rise to the level of mandatory changes, would vastly increase the ability of youth to participate in and feel comfortable at their hearings. Courts might consider changing the time at which they hold their sessions. [FN134] Holding hearings during school hours, when the hearings are about children who are supposed to be in school, is counterproductive. Courts might consider starting and ending court at a later time to allow children to attend both court and school. [FN135] Additionally, courts might distribute manuals that describe the court process to children in easy-to-understand language, which would make the proceedings more approachable. [FN136] Courts might have special trainings for judges that handle juvenile dockets that educate them on how to deal with youth in dependency hearings. They might also establish youth advisory boards to inform them of the needs of the youth in their courtrooms and how the judges are doing in meeting those needs. Courts might also display artwork created by youth, have books or games in waiting areas, or in the very least, colorful pictures on the wall to make the courthouse less intimidating for the youth. This list, while hardly exhaustive, is illustrative of the types of changes that are needed, at a bare minimum, to fully engage youth in dependency hearings. [FN137]

VIII. CONCLUSION

There are many reasons why youth should be present at their dependency hearings: they stand to gain from the process, both emotionally and conceptually; courts stand to benefit from being able to sift through all the information available to arrive at a decision; and attorneys are held more accountable. The most important reason, however, that youth should be afforded the right to attend their hearings and give voice to their desires in regard to placement is both simpler and more profound: it is what is fair to these children. In a world in which, to these youth, right and wrong appear negligible and authority figures arouse fear and distrust, not faith, a system that, even unintentionally, perpetuates unfairness through procedure undermines itself. If in no other place, youth should at least be able to count on the courts to give them fairness and justice. We should listen to youth, not because it is the most efficient thing to do or even because it is the most logical. We should listen, quite simply, because it is the *right* thing to do. As one attorney has said: "We're making decisions about their lives--how can they not be a part of that?" [FN138]

[FNa1]. This Note would not have been possible without the help and support of many people, especially the following persons to whom I am particularly grateful. First, I would like to thank Miriam Krinsky, who, to me, serves as an illustration of the best of the legal profession: she is both a tireless advocate for youth and a skillful attorney. She was generous in sharing both her time and experience with me and was a great source of help and inspiration both during the course of writing this Note and after. I would similarly like to extend my gratitude to Professor Andrew Schepard for his continual support and enthusiasm for this project, as well as to Lynda Madera and Melissa Lombreglia for their painstaking feedback and support during the course of writing this Note. I would also like to recognize Elizabeth Clawson and Erin Cook Thompson for their patience and encouragement during the writing process. Finally, I would like to thank my family for their love and support during law school and throughout all my endeavors. I would like to specifically thank my sister, Nichole, my most faithful fan. Most importantly, I would like to thank my Aunt Patti who was my voice when I had none. She taught me how to speak for myself and gave me the encouragement and courage to speak for others. Writing this Note is one of the many things I could not have done without her.

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[FN1]. *Thoughts to the Judge, in* MY VOICE, MY LIFE, MY FUTURE/MI VOZ, MI VIDA, MI FUTURO, 10 (Home At Last ed., 2006).

[FN2]. *To the Judge, in* MY VOICE, MY LIFE, MY FUTURE/MI VOZ, MI VIDA, MI FUTURO, 13 (Home At Last ed., 2006).

[FN3]. DAVID FASHNEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION 11 (1978).

[FN4]. GLORIA HOCHMAN ET AL., THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, VOICES FROM THE INSIDE 4 (2004).

[FN5]. ALFRED PEREZ ET AL., *Demographics of Children in Foster Care*, THE PEW COMMISSION ON CHILDREN IN FOSTER CARE 1 (2003), *available at* http://pewfostercare.org/research/docs/Demographics0903.pdf (last visited August 28, 2007).

[FN6]. SHERRY SHINK, *Justice for Our Children: Justice For a Change*, 82 DENV. U. L. REVV. 629, 639 (2005) (characterizing this denial as discrimination).

[FN7]. HOCHMAN ET AL., *supra* note 4, at 9-11.

[FN8]. The American Bar Association, *American Bar Association Standards of Practice For Lawyers Representing a Child in Abuse and Neglect Cases* 11 (1996) *available at* http://www.abanet.org/child/repstandwhole.pdf (last visited August 28, 2007). *See also* *Recommendations From the ABA Youth at Risk Initiative*, 45 FAM. CT. REV. 366 (2007).

[FN9]. HOWARD A. DAVIDSON, *The* *Child's Right to be Heard in Judicial Proceedings*, 18 PEPP. L. REVV. 255 (1991).

[FN10]. *See, e.g.*, Leonard P. Edwards & Inger J. Sagatun, *Domestic Violence, Child Abuse, and the Law: Who Speaks for the Child*? 2 U. CHI. L. SCH. ROUNDTABLEE 67 (1995); Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 19 FAM. L.Q. 343 (1985); Bruce A. Green & Bernadine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281 (1996); Jill Chaifetz, *Listening to Foster Children in Accordance With the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1 (1999).

[FN11]. Although this Note will only focus on youth age 10 or older, I fervently believe that children, at any age, as long as they are capable of expressing an opinion, should be allowed and encouraged to do so and that this information would be highly valuable to the court and for the child.

[FN12]. Such a regulatory scheme is not unheard of. *See* CAL. WELF. & INST. CODE § 349 (West 2007).

[FN13]. Perez et al., *supra* note 5, at 1.

[FN14]. *See* Child Welfare League of America (CWLA), *New York's Children 2006* (2006), *available at* http://ndas.cwla.org/data_stats/states/Fact_ Sheets/NewYork.pdf (last visited August 28, 2007); CWLA, *California's Children 2006* (2006), *available at* http://ndas.cwla.org/data_stats/states/Fact_ Sheets/California.pdf (last visited August 28, 2007).

[FN15]. To compare, see, e.g., OR. REV. STAT. § 419B.839 (West 2005); CAL. WELF. & INST. CODE § 291(a)(4) (West 2007).

[FN16]. For articles that do, see, e.g., BARBARA A. ATWOOD, *The* *Child's Voice in Custody Litigation: An Empirical Survey and Suggestions For Reform*, 45 ARIZ. L. REV. 629 (2003); Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299 (1994).

[FN17]. Maerril Sobie, *The* *Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. R. 745, 755 (2006).

[FN18]. *See, e.g.*, Martin Guggenheim, Special Issue, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 823 (2006); David R. Kanter, *Coming to Praise, Not to Bury, The New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103 (2000); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1507, 1564-70 (1996); Robert A. Solomon, *Staying in Role: Representing Children in*

Dependency and Neglect Cases, 70 CONN. B. J. 258, 262 (1996); Emily Bus, *Your're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1700-1711 (1996).

[FN19]. CAL. WELF. & INST. CODE § 366.21 (2007); NY FAM. CT. ACT § 1089 (McKinney 2007).

[FN20]. HOCHMAN ET AL., *supra* note 4, at 6.

[FN21]. CWLA, *supra* note 4; *see also* CWLA, *Oregon's Children 2006* (2006), *available at* http://ndas.cwla.org/data_stats/states/Fact_Sheets/Oregon.pdf (last visited August 28, 2007). As of September 30, 2003 there were 37,067 children in foster care in New York, 97,261 children in foster care in California, and 9,381 children in foster care in Oregon.

[FN22]. CAL. WELF. & INST. CODE § 294(3) (West 2007) (providing that notice of the hearing shall be given to the child, if the child is 10 years of age or older).

[FN23]. CAL. WELF. & INST. CODE § 349 (West 2007) ("A minor who is the subject of a juvenile court hearing and any person entitled to notice of the hearing under the provisions of Sections 290.1 and 290.2, is entitled to be present at the hearing. The minor and any person who is entitled to that notice has the right to be represented at the hearing by counsel of his or her own choice. If the minor is 10 years of age or older and he or she is not present at the hearing, the court shall determine whether the minor was properly notified of his or her right to attend the hearing.").

[FN24]. Although New York State currently has no such provision, legislation will go into effect on December 31, 2007 which will require family court judges to consult with children at all permanency hearings. This law mandates that judges consult with children only during permanency hearings, the proceeding that takes place towards the end of the child's relationship with the court. Additionally, the new law has no provisions for when children are not consulted. 2007 Sess. Law News of N.Y. Legis. Memo Ch. 327 (McKinneys). Currently, in New York City, judges have been advised through an internal memo that children should be encouraged to attend their hearings, although it gives no methods of ensuring that this occurs. It is important to keep in mind, however, that this memo is limited to the city and, in any case, does not bear the regulatory strength of a statute. *See* Memorandum from Judge Joseph Lauria to Judges, JHO's, and Referees. RE: Court Appearance of Subject Children (Feb. 25, 2004) (on file with *Family Court Review*).

[FN25]. OR. REV. STAT. § 419B.839.

[FN26]. OR. REV. STAT. § 419B.473 (West 2007).

[FN27]. CAL. WELF. AND INST. CODE § 366.26(4)(A) (West 2007) ("A child who is 10 years of age or older, shall be asked to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential guardians. The agency may ask any other child to provide that information, as appropriate.").

[FN28]. HOCHMAN ET AL., *supra* note 4, at 4-5. "More than 1 in 4 foster youth respondents say that they never attended their court hearings."

[FN29]. *Id.*

[FN30]. *See* HOCHMAN ET AL., *supra* note 4, at 12 (41% of youth surveyed said they did not attend their hearings because "No one told me the dates of the hearings" and 39% did not attend because "No one told me I was allowed to go.").

[FN31]. *Id*.

[FN32]. *Id*. 14% of youth responding to the survey said that they did not attend their hearings because "My social worker told me not to."

[FN33]. Green & Dohrn, *supra* note 10, at 1284.

[FN34]. *See, e.g., In re* Gault, 387 U.S. 1 (1967); Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503 (1969); *In re* Winship, 397 U.S. 358 (1970); Morse v. Frederick, 127 S. Ct. 2618 (2007).

[FN35]. *Id*.

[FN36]. *Gault*, 387 U.S. at 1.

[FN37]. *Id*.

[FN38]. Smith v. Org. of Foster Families, 431 U.S. 816, 858 (1977).

[FN39]. *Id*. at 858 (Stewart, J., concurring).

[FN40]. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

[FN41]. *Gault*, 387 U.S. at 1.

[FN42]. *Id*.

[FN43]. Barbara Ann Atwood, *Representing Children: The Ongoing Search For Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL L. 187, 188 (2005); Martin Guggenheim, *The Right To Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 90-91 (1984).

[FN44]. Kenny A. *ex rel*. Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. GA. 2005).

[FN45]. *In re* Adoption/Guardianship No. T97036005, 746 A.2d. 379, 387 (Md. 2000).

[FN46]. *Id*.

[FN47]. Gail Chang Bohr, *Public Interest Law: Improving Access to Justice:* *Children's Access to Justice*, 28 WM. MITCHELL L. REV. 229, 238-9 (2001) (children should be granted party status to assure they get due process).

[FN48]. Currently 28 states explicitly say that children may attend hearings. Those states are: AL, AK, AZ, CA, CO, CT, DE, DC, MD, MI, MN, NB, NV, NJ, NC, ND, OH, OR, RI, SC, TX, UT, VT, VA, WA, WV, WI, and WY. Of these states, two allow youth to attend if they are 10 or older (OR and SC), seven allow youth to attend if they are 12 years old or older (AZ, NC, VT, VA, WA, WV, WI), one if they are 14 years old or older (NE), one if the youth is 17 years old or older (AL) and one where the age is unspecified, but the youth must be "of appropriate age and intellectual capacity" (RI). Of these states, only three (CA, CT, and TX) explicitly state that a youth *must* be at their hearing. In 22 states, the presence of youth at dependency hearings is not mentioned. Those states are: AR, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MO, MS, MT, NM, OK, NY, PA, SD, and TN. *See* Child Welfare

Information Gateway, *Court Hearings for the Permanent Placement of Children: Summary of State Laws* (2006), *available at* http://www.childwelfare.gov/systemwide/laws_ policies/statutes/planningall.pdf (last visited August 28, 2007).

[FN49]. Bruce J. Winick, *Special Series: Problem Solving Courts and Therapeutic Jurisdprudence: Therapuetic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1063 (2003).

[FN50]. Atwood, *supra* note 16, at 660.

[FN51]. Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 595 (2005).

[FN52]. CWLA, *supra* note 14.

[FN53]. *Id*.

[FN54]. Fashnel & Shinn, *supra* note 3, at 455.

[FN55]. Kandel, *supra* note 16, at 301.

[FN56]. Foster & Freed, *supra* note 10, at 375.

[FN57]. *See* Perlmutter, *supra* note 51, at 561; Winick, *supra* note 49, at 1089.

[FN58]. Fashnel & Shinn, *supra* note 3, at 15.

[FN59]. Carylyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623, 655 (2005).

[FN60]. *See* Miriam Aroni Krinsky, *The Effect of Youth Presence in Dependency Hearings*, JUV. & FAM. JUST. TODAYY, Fall 2006, at 18.

[FN61]. *Id*.

[FN62]. *Id*.

[FN63]. Miriam Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless--Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302, 1307 (2006); Practising Law Institute, *Decision-Making In Foster Care: The Child as the Primary Source of Data*, 158 PLI/Crim 73, 112-113 (1991).

[FN64]. STEVEN J. WOLIN & SYBIL WOLIN, THE RESILIENT SELF: HOW SURVIVORS OF TROUBLED FAMILIES RISE ABOVE ADVERSITY 22 (1st ed., 1993).

[FN65]. Practising Law Institute, *supra* note 63, at 112-113.

[FN66]. Chaifetz, *supra* note 10, at 10.

[FN67]. *Id*.

[FN68]. Shink, *supra* note 6, at 639.

[FN69]. Foster & Freed, *supra* note 10, at 343.

[FN70]. JANET GILBERT ET AL., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1205 (2001).

[FN71]. Winick, *supra* note 49, at 1072.

[FN72]. Gilbert, *supra* note 70, at 1205.

[FN73]. Practising Law Institute, *supra* note 63, at 112.

[FN74]. Atwood, *supra* note 16, at 660.

[FN75]. *Id*.

[FN76]. Krinsky & Rodriguez, *supra* note 63, at 1307.

[FN77]. *Id*.

[FN78]. *Id*.

[FN79]. ROSALIND EKMAN LADD, CHILDREN'S RIGHTS RE-VISHIONED; PHILOSOPHICAL READINGS 180 (1st ed., 1996).

[FN80]. Krinsky, *supra* note 60, at 16.

[FN81]. Practising Law Institute, *supra* note 63, at 112.

[FN82]. Edwards & Sagatun, *supra* note 10, at 69.

[FN83]. Edith Matthai, *Report: Creating a Better Future For Our Most Vulnerable Children*, 5 (2005), *available at* http:// pewfostercare.org/press/files/ABAPewResolutionReport.pdf (last visited August 28, 2007).

[FN84]. Krinsky & Rodriguez, *supra* note 63, at 1306.

[FN85]. *Id.*, at 1305.

[FN86]. *Id*.

[FN87]. *Id*.

[FN88]. Krinsky, *supra* note 60, at 16.

[FN89]. *See* Hon. Leonard Edwards, *William H. Rehnquist Award Address*, 43 FAM. CT. REV. 544, 546 (2005).

Judge Edwards concluded that each day, our nation's juvenile court judges hear approximately 30,800 cases. This figure includes dependency and delinquency cases. Judge Edwards concluded that each day, our nation's juvenile court judges hear approximately 30,800 cases. This figure includes both dependency and delinquency cases.

[FN90]. The American Bar Association, *supra* note 8, at Comment to D-5.

[FN91]. Krinsky & Rodriguez, *supra* note 63, at 1305.

[FN92]. Edwards & Sagatun, *supra* note 10, at 64.

[FN93]. Matthai, *supra* note 83, at 5.

[FN94]. Foster & Freed, *supra* note 10, at 356.

[FN95]. *Id*.

[FN96]. Judge William G. Jones, *Making Youth a Meaningful Part of the Court Process*, JUV. & FAM. JUST. TODAYY, Fall 2006, at 20.

[FN97]. *Id.*; Edwards & Sagatun, *supra* note 10, at 67.

[FN98]. Jones, *supra* note 96; Edwards & Sagatun, *supra* note 10, at 67.

[FN99]. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 82-83 (1997).

[FN100]. *Id*. at 83.

[FN101]. Jones, *supra* note 96, at 20.

[FN102]. Edwards & Sagatun, *supra* note 10, at 86.

[FN103]. Salisbury, *supra* note 59, at 656.

[FN104]. Jones, *supra* note 96, at 20; Krinsky & Rodriguez, *supra* note 63, at 1307.

[FN105]. Jones, *supra* note 96, at 20; Krinsky & Rodriguez, *supra* note 63, at 1307.

[FN106]. Jones, *supra* note 96, at 20; Krinsky & Rodriguez, *supra* note 63, at 1307; Salisbury, *supra* note 59, at 654 (quoting a criminal defendant who pointed out that “to be voiceless was the greatest pain of all.”).

[FN107]. Hon. Judith S. Kaye, *Seizing the Opportunity to Make Good on Our Promises to At-Risk Youth*, 45 FAM. CT. REV. 361, 363 (2007).

[FN108]. Edwards & Sagatun, *supra* note 10, at 82.

[FN109]. *Id.*; Smith v. Org. of Foster Families, 431 U.S. at 852.

[FN110]. Edwards & Sagatun, *supra* note 10, at 72.

[FN111]. Guggenheim, *supra* note 43, at 823.

[FN112]. *See In re* Grimes, 2007 WL 2780990 (Mich. App. 2007).

[FN113]. *Id*.

[FN114]. Edwards & Sagatun, *supra* note 10, at 67; Donald N. Danquette, *Legal Representation For Children In Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441, 446 (2000); Gugenheim, *supra* note 16, at 823.

[FN115]. *Id*.

[FN116]. Matthai, *surpa* note 83, at 1.

[FN117]. Ferdinand Shoeman, *Childhood Competence and Autonomy*, 12 J. LEGAL STUD. 267, 269 (1983).

[FN118]. Kandel, *supra* note 16, at 366.

[FN119]. *Id.*; Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REVV. 1585, 1600 (1995).

[FN120]. Perlmutter, *supra* note 51, at 561.

[FN121]. Krinsky & Rodriguez, *supra* note 63, at 618.

[FN122]. *Id*.

[FN123]. Jones, *supra* note 96, at 20.

[FN124]. Edwards & Sagatun, *supra* note 10, at 72.

[FN125]. Krinsky, *supra* note 60, at 18.

[FN126]. Krinsky & Rodriguez, *supra* note 63, at 1306.

[FN127]. *Id*. at Appendix C.

[FN128]. Krinsky, *supra* note 60, at 3.

[FN129]. Jones, *supra* note 96, at 20.

[FN130]. *Id*.

[FN131]. Practising Law Institute, *supra* note 63, at 75-76.

[FN132]. For more suggestions, see, e.g., Jones, *supra* note 96, at 20; Sue Badeau & Madelyn Freundlich, *Hearing the Voices of Young Children and Children With Disabilities in Court*, JUV. & FAM. JUST. TODAYY, Fall 2006, at 19.

[FN133]. This might also cause tension in the courtroom between the youth and his or her attorney. However, that tension would be present, anyway. The only difference is that the court would be aware of its cause, and the youth's opinion would at least be heard by the court.

[FN134]. Krinsky & Rodriguez, *supra* note 63, at 1307.

[FN135]. HOCHMAN ET AL., *supra* note 4 (21% of children surveyed said they did not attend their hearing because “I didn't want to miss school”).

[FN136]. For an example of this, see THERESA HUGHES ET AL., TIMMY'S STORY; EXPLAINING THE CHILD WELFARE SYSTEM TO OUR YOUTH (2006) (this is a brochure, in book form, published by St. John's University School of Law which explains for children, in simple terms, the dependency hearing process).

[FN137]. For more suggestions, see Badeau & Freundlich, *supra* note 131, at 19; Krinsky & Rodriguez, *supra* note 63, at Appendixes B and C.

[FN138]. Home At Last, *My Voice, My Life, My Future: Foster Youth Participation in Court: A National Survey*, 9 (2005).

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JUVENILE AND FAMILY JUSTICE TODAY

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Giving Children a Voice in Court

Children, Families and Courts Benefit from Increased Youth Participation

Also in this issue:

- 69th Annual Conference Highlights
- Is Your Court Prepared for a Pandemic?

The Effect of Youth Presence in Dependency Court Proceedings

National Survey, Youth Summits Reveal Need for Enhanced Foster Youth Voice

By Miriam Aroni Krinsky

Untitled - Marcus, age 14, and Clay, age 16

Decisions made in our nation's dependency courts play a critical role in the lives of the more than half a million children currently in foster care, often profoundly altering their future.

However, there is neither a standard of practice nor agreement in principle among judges and other child welfare professionals regarding the presence and participation of young people in dependency court proceedings.

In its 2004 report, Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care, the national, nonpartisan Pew Commission on Children in Foster Care stated, "No child or parent should face the partial or permanent severance of familial ties without a fully informed voice in the legal process. Even when less shattering decisions are made, judges need to hear from the people who will be most affected by their decisions—children, parents, siblings and other relatives, foster and adoptive parents."

Calling for comprehensive dependency court reforms, the Pew Commission report recommended that courts should be organized to enable children and families to participate in a meaningful way in their own court proceedings. "Children, parents, and caregivers all benefit when they have the opportunity to actively participate in court proceedings, as does the quality of decisions when judges can see and hear from key parties."

The results of a recent, first-ever national survey reinforce the need for courts to be organized to enable children and parents to take part and be well represented in their own legal proceedings. The survey was conducted by Home At Last, an outreach and educational effort to encourage action on the recommendations of the Pew Commission.

The survey of 248 current and former foster youths from 40 states and 1,794 child welfare professionals, including judges, lawyers, social workers, and others who work in the child welfare system from all 50 states, found that while both foster children and child welfare professionals feel there is value to having the young people participate in dependency proceedings, their participation is infrequent at best.

A majority of current and former foster youths reported that they would like to be present at their dependency court hearings. One former foster youth from South Dakota observed: "I never went to court. I have been in and out of foster care since I was a baby and I really resent that I never got the chance to speak on my behalf, or even be present when my future was being discussed."

More than one in four foster youths reported that they never attended their own court hearings. A former foster youth from Michigan said, "[If I had gone to court] I would have been able to understand exactly what was going on. When my caseworker said things to me, she would try to make it understandable for a child, but this just made it more confusing because I did not have the whole picture."

Of those young people who attended court at least some of the time, 60% stated that their presence yielded real benefits—from having an opportunity to take an active role in decisions being made about their lives to simply being able to hear what transpires. Almost half (46%) said that their experience in foster care would have been different had they been in court more often. According to an Arizona youth, "It made me feel like I was important, considering that people (professionals) could put a face with the case number."

Often judges have only a short window of time to make life-altering decisions about children and families. As such, it can be invaluable to hear directly from the young people whose lives are at issue. Youths are in the best position to provide accurate and compelling insights into their wishes, needs, and progress. Putting a human face to the discussion of these issues and experiences forces all concerned to see the system through their eyes.

Judges can observe first-hand the child's appearance, demeanor, and personal interaction with parents, social workers, attorneys, caregivers, and others present. Having children in the courtroom provides bench officers with an opportunity to evaluate for themselves critically important nonverbal information that may help shape their ultimate decisions; their decision making is informed by a one-on-one personal interaction that gives life to an otherwise sterile report and file.

Although child welfare professionals agreed that foster youth participation is important, just 8% of child welfare professionals surveyed believed that youths should always be present, only 28% said that children should be present most of the time, and a majority (59%) of judges and other child

welfare professional respondents said youths should be present only sometimes.

Child welfare professionals with more experience are slightly more likely to advocate for regular youth presence in court—42% of professionals with more than 10 years of experience reported that children should attend court most or all of the time, compared to 34% of professionals with 10 or fewer years experience who gave the same answer.

The vast majority of the child welfare professionals surveyed believed that the age and maturity of a youth should weigh heavily in determining whether or not he or she should attend court. They opined that older children should be present more often, because they are better able to understand the proceedings and less apt to be bored or disruptive. However, even teens' presence is sporadic: Just 29% of child welfare professional respondents reported that children 12 and older attend court most or all of the time. Moreover, only 9% of child welfare professionals surveyed believed that the child's own wishes about being present—or not being present—should be considered.

One judge observed, "Every case varies. Young children often don't understand what is going on. Some children are disruptive. Some children need to see and want to see what is happening and who the judge is that makes the decisions about them. Some children benefit from hearing the reality of their family. In some cases, the hearing can be traumatic."

To strengthen and promote foster youth involvement and empowerment in their own cases and the planning for their future, a series of Youth Summits and convenings sponsored by Home At Last were launched in May and are taking place nationwide this year. These events, featuring stories, insights, and experiences from current and former foster youths, are highlighting the need for young people to have a voice in the legal process that will leave a lasting imprint on their future.

One California teen made the following recommendation during a recent Youth Summit: "One thing I would change is I would want people to actually listen and actually be there, no matter whether you're a lawyer, a social worker, a judge, a mentor, a staff, a therapist. To … just listen."

New Home, New Life, New Joy - Michael, age 17

Many youths who spoke out at the Summits displayed a resilient and positive view of the future. They were determined to help others avoid troubling experiences they have undergone. "When I graduate, I want to become an advocate for children. I want to work with children. I want to be a children's lawyer and help them out from my

NCJFCJ MODEL COURTS ADVOCATE GIVING CHILDREN A VOICE

Ensuring that children are both seen *and* heard in courtrooms is a fundamental goal of the NCJFCJ's Victims Act Model Courts Project. Established in 1992 through NCJFCJ's Permanency Planning for Children Department, the Model Courts Project has grown into a national network of 32 "Model Courts" serving a variety of communities around the country, ranging from large urban centers like New York, Los Angeles, and Chicago, to smaller jurisdictions and a tribal court in Zuni, N.M. By identifying impediments to the timeliness of court events and delivery of services for families with children in care, and designing and implementing court- and agency-based changes to address these barriers, the NCJFCJ and Model Court teams work to improve court processes so fewer children linger in foster care and find permanent homes in a timely manner.

Making sure that children's wishes are heard is among the key principles of NCJFCJ's 1995 best practices bench book, *RESOURCE GUIDELINES: Improving Court Practices in Child Abuse & Neglect Cases*, a cornerstone of the Model Courts Project. Many of the recommendations outlined in this issue's articles about giving children a voice in court proceedings are echoed in the *RESOURCE GUIDELINES* and implemented through the Model Courts Project. For example, the *RESOURCE GUIDELINES* emphasize:

- The importance of having age-appropriate children attend proceedings, so that judges can:
  - Observe the child's appearance, demeanor, and interaction with others in the courtroom;
  - Talk with the child, explaining his or her rights and the judge's and stakeholders' roles and reviewing the court report for accuracy.
- The benefits of creating child- and family-friendly courts which provide:
  - Materials such as coloring books or books that help explain the court process;
  - An opportunity for children to visit the courtroom and meet the judge before the hearing.
- The importance of scheduling court proceedings with infants' and school-age children's regular routines in mind.

For more information about NCJFCJ's Victims Act Model Court Project, please visit our website at *www.ncjfcj.org* and click on Child Abuse and Neglect, or call (775) 327-5300.

– NCJFCJ staff report

experience," stated an 18-year-old currently in care.

Efforts are underway on a national and state level to improve dependency courts, encourage collaboration between courts and child welfare agencies, better track the progress of children through the foster care system and, most importantly, to listen to the voices of the children in the child welfare system. [See sidebar on page 17.]

Creating a place for young people in the legal process is not, admittedly, a simple undertaking. For children to meaningfully participate in court proceedings, judges and lawyers need to change the very way they communicate and conduct court hearings. Courts may need to be "retooled" to enable children and parents to participate in a meaningful way in their own legal proceedings.

Judges, hearing officers, and other child welfare professionals need to be informed by the people who will be most affected by their decisions—children, parents, siblings and other relatives, and foster and adoptive parents. Despite the current impediments to involving children and families in dependency court proceedings, the thousands of children in our foster care system deserve to have their voices heard and to be more fully included in the legal process that so deeply influences their future.

As one attorney remarked, "We're making decisions about their lives—how can they not be a part of that?"

ABOUT THE AUTHOR:
Miriam Aroni Krinsky is executive director of both the nonprofit Children's Law Center, which represents abused and neglected children in the Los Angeles dependency court system, and Home At Last, which promotes action based on the recommendations of the Pew Commission on Children in Foster Care.

Editor's Note: Artwork on pages 16-18 is courtesy of Home at Last, and was previously published in their 2006 publication, *My Voice, My Life, My Future.*

My Voice, My Life, My Future
~Mi Voz, Mi Vida, Mi Futuro

"Thoughts to the Judge"
by Krystin, age 12

Childhood is: learning to jump as high as you can and not let your feet shake the floor. Childhood is drawing your dreams. Childhood is learning that taking your first grade teacher's candy bar is stealing.

But, judge, childhood is also letting your voice be heard; whether you are screaming because your sister called you "stupid" or telling a judge like your high and mightiness what you need to say.

But how can I do that if you don't even want to hear what I, one insignificant twelve-year-old, have to say? All I want for my birthday is a voice. And as I mature, I want to know one thing: How old do I have to be? Sixteen? Eighteen? Twenty-one? Elementary school? Junior high? High School? College? Old and wrinkled, my bones turning to dust as I crochet in my old rocking chair in the corner?

How I Feel About Foster Care - Valarie, age 14

"To the Judge"
by Antoinette, age 14

Let me stay in a home with loving parents that care for me. I want to be somewhere where I can live life as a child, in a better situation. Can you find a home that is truly good and where the people will help me? You are the one who makes the decisions, and I need to be heard so people may understand how I feel or what I need. Listen to me, since no one else will, and try to understand where I'm coming from. Maybe I am a child, but I'm not dumb; I know right from wrong. I need to know that you will make the right decisions for me, so that I can live life the way it's supposed to be.

"Mama, Carry Me Home"
by Khadijjah, age 16

Still devastated from the day
They took my brothers and I away
Over time, I've grown emotionally stronger
Yet still I miss those days.
In my sleep, I can hear the songs
You used to hum and sing to me,
The melody making the belief it's once again reality.
These past three years haven't been so easy;
Although I know things can be worse
Like some days, I feel I can't walk on my own…
I just need you mama;
To carry me home.

"Excuse Me, Your Honor"
by Paul, age 16

Excuse me your honor! You have to understand. Moving is not always better for the child. Don't get me wrong. If they're getting abused or sexually molested, then the children should surely be moved. But in my case, my mother made a few bad choices, and I understand that is probably the only way to make her learn her lesson, by taking her children away. But who knows how many times we'll move around? I mean we have to make new friends, go to new schools, live in people's houses that are pretty much strangers to us, and somehow keep adapting to all these different changes. Can you possibly look at this from the child's point of view, and what we're going to have to go through?

Hearing the Voices of Young Children and Children with Disabilities in Court

By Sue Badeau and Madelyn Freundlich

The national, nonpartisan Pew Commission on Children in Foster Care embraces the principle that ALL children should have a "direct voice in court, effective representation, and the timely input of those who care about them." This recommendation and the principles that support it apply equally to very young children and children and youth with disabilities. Their voices, however, often have not been heard as a result of limited expectations regarding their participation in the judicial decision-making process and, even when there is an interest in hearing their voices, uncertainties as to how to ensure that they are heard in court proceedings.

There are several ways to promote the direct involvement of children in their court proceedings when it is determined that young children and children with disabilities will benefit from participation in court. Preschoolers may benefit from seeing the courtroom and being told what will happen there or from meeting the judge and then being present during some portion of the proceeding. Children with physical, communication, developmental, or mental health/behavioral health challenges may also be able to participate with appropriate accommodations.

When a child cannot be physically present in court and directly participate, it is critical that the child be brought "to life" for the court, so that the child is not simply a case number.

Following are some specific tips for judges to consider to ensure that all children, particularly the very young and those with disabilities, are given the opportunity to have a genuine voice in court proceedings:

- Let it be known that you expect to see children in court. When the judge sets an expectation, others are more likely to follow.
- Work with your court staff to create a "child-friendly" space in the waiting area.
- Work with your court staff to develop time-specific calendaring for children's cases; try to schedule school-age children after school hours and infants in the morning when they are most alert.
- Make yourself, your staff, and your courtroom facilities available for children to receive pre-hearing tours of the court building and to meet the judge.
- Consider holding occasional court hearings off-site in special settings to accommodate medically fragile disabilities.
- Consider creating a specific "infant day" in court, much like New York's "Teen Day," when multiple infant cases are heard and extra supports, information, or activities are provided for babies and their caregivers.
- Provide materials, such as the coloring book created by the Judicial Council of California, that de-mystify court and explain court proceedings in simple, child-friendly terms.
- When a child is present in court, spend a few moments talking directly to the child. Make eye contact and use a reassuring voice tone.
- When a child is not present in court, ask for pictures or video presentations—from the time the child came into care until the present, and in various settings. These help demonstrate the child's growth, development, and unique personality.
- Directly engage others who know and care about the child in court proceedings. The court is more likely to develop an in-depth understanding of the child by hearing from birth parents, relatives, older siblings, foster parents, day care providers, teachers, and others who spend a lot of time with the child.
- Make specific and direct inquiries about the child's health, development, and education using bench guides and checklists, such as NCJFCJ's "Asking the Right Questions: A Judicial Checklist to Ensure that the Educational Needs of Children and Youth in Foster Care are being Addressed" and "Ensuring the Healthy Development of Foster Children: A Guide for Judges, Advocates and Child Welfare Professionals," created by New York's Permanent Judicial Commission on Children.
- Support the development of, and participate in cross-system training on specific issues related to infants, young children, and those with disabilities who come into contact with the child welfare and dependency court systems.

When children have a voice in court and the opportunity to participate in the critical processes that profoundly impact their lives, the entire system benefits from better-informed decision making.

ABOUT THE AUTHORS:

Sue Badeau is Deputy Director of the Pew Commission on Children in Foster Care and a child welfare policy consultant to agencies, courts, and organizations.

Madelyn Freundlich is an independent child welfare consultant with experience in child welfare practice, program development and implementation, training, policy, and research.

Making **Youth** *a Meaningful Part of the Court Process*

By Judge William G. Jones (ret.)

Children under the abuse and neglect jurisdiction of the juvenile court have great needs and face daunting challenges. They are understandably frustrated when they are excluded from court proceedings in which their family relationships, physical safety, health, education, and where they will live are all at stake.

Foster youths need and deserve the opportunity to participate as partners with the court in making decisions that have enormous impact on their lives. Their concurrence in the life path the court has directed for them is critical to their ability to enjoy a successful and stable adult life.

Many judges, however, have a well-intentioned concern about youth participation in court proceedings and believe that the court process is too complex for them to participate effectively. This concern can be alleviated by communicating with children on their own terms and by explaining clearly the intricacies of the court proceedings that determine their future.

Another concern is that children who come to court will miss valuable school time; however, court hearings can be set on days or at times that minimize school disruptions. For courts to be truly youth-focused, we need to design more creative courtroom schedules to accommodate the young people we seek to serve. If we place a high value on a youth's presence in court, we need to treat that time commitment with the same degree of seriousness associated with doctor, dentist, and other appointments that routinely result in time away from school.

The concern that information discussed in court may be disturbing and upsetting to children is another argument often associated with the view that their presence in court is ill-advised. Judges, however, and attorneys too, should keep in mind that children are involved in the court process because of real-life events they have experienced. They have already been exposed to and survived the harsh realities of their lives that will be discussed in court. And if some issues are not appropriate for discussion in a child's presence, then he or she can be excused from the courtroom during that part of the hearing.

Indeed, youths often report that the ability to be present in court and to participate in decision making that will chart their future is exactly what they need to heal and move on. Hearing difficult information in an appropriate setting, with support available and the opportunity to express how they feel about their life experiences can help them come to terms with what they have suffered.

The presence of children in court proceedings that affect them is invaluable, even when they are too young to express themselves. The child's presence alone can give a face to what would otherwise be simply words on paper. Nothing can substitute for personally observing and engaging a child.

We can give abused and neglected children a better chance to flourish by ensuring that their presence and participation is welcomed in court and in the judicial decisions that are so important to their lives.

There are several techniques for creating a child-friendly court:

1. Help children understand, in simple terms, the purpose of the hearing, what issues might be discussed, what type of information might be helpful for them to share, and what issues are appropriate to raise in court. Explain courtroom etiquette and how to request a private meeting with you.
2. Review the court report with the youth for any inaccuracies, clarifications, or additions. Youths should have the chance to add and respond to information contained in the report.
3. Explain your role as a judge and the issues you can address. Also, educate youths about their rights.
4. Provide information on how children can advocate for themselves if they have concerns about the legal or social services they are receiving.
5. Provide a list of legal terms and definitions that may be used in the hearing.
6. Describe the roles of adults who take part in the hearing, including attorneys and family members. Explain what these individuals may say or do at the hearing.
7. Discuss how long the hearing will last and the time frames for future hearings.
8. Ensure that youths have therapeutic and relational support both before and after the hearing to deal in healthy ways with any strong reactions or emotions that surface as a result of the hearing.

Judges can choose to exclude young people from court proceedings, but by doing so, they send a message that youths have no meaningful role in the process. Judges are, however, also able to empower young people by providing them with the opportunity to attend and actively participate in court proceedings that affect them.

The judicial community must endeavor to see that a more positive message to children and youths becomes the norm. We can give abused and neglected children a better chance to flourish by ensuring that their presence and participation is welcomed in court and in the judicial decisions that will shape their future. They deserve no less.

ABOUT THE AUTHOR:
When he retired after 25 years on the bench, **Judge Bill Jones** was Chief District Court Judge in Charlotte, N.C. He is currently a consultant for the National Resource Center for Legal and Judicial Issues at the ABA Center on Children and the Law and for the National Council of Juvenile and Family Court Judges.

Juvenile Delinquency Guidelines: Court Improvement Is Off and Running

After five years of research and two years of intensive scrutiny and discussion by a multidisciplinary national stakeholder group, the Juvenile Delinquency Guidelines (JDG) have now been shared with more than 10,000 recipients and have entered the implementation phase in multiple sites. A number of those sites are already experienced in the planning and team decision-making processes, either through the implementation of NCJFCJ's Resource Guidelines (now in 32 jurisdictions), or the Graduated Sanctions initiative (now in 16 jurisdictions).

With a focus on improving court process and case outcomes, the Juvenile Delinquency Guidelines convey 16 Key Principles and numerous recommendations for transforming participating jurisdictions into "Courts of Excellence."

Each jurisdiction is unique with respect to Delinquency Guidelines implementation, and the duration and scope of each project is related to its current application of the Key Principles. One court, for example, might have little difficulty with timely case processing, while another might be plagued by requests for continuances. One court might already have one judge/one case assignments, while another might calendar cases in rotation, or based on availability. As a rule of thumb, the greater the number of Key Principles and recommendations already in place, the smaller the scope, duration, and budget for the project.

Several jurisdictions are setting the pace toward becoming Courts of Excellence. Pima County (Tucson), Ariz., has completed an in-depth self-assessment and has provided training to more than 50% of its large probation staff at the line, management, and administrative levels. Lead Judge Patricia Escher served as co-faculty with Judge James Ray of Toledo, Ohio, on the topic at NCJFCJ's Annual Conference in Milwaukee. She is also scheduled to serve as JDG faculty at Fall College with Judge Tom Lipps of Hamilton County, (Cincinnati), Ohio. Her enthusiasm has spilled over to the state level, and Arizona will feature the JDG at its annual judicial conference in November, with a view toward expanding the initiative to all 15 counties.

Hamilton County, Ohio, has completed its initial site visit, and is expecting to participate in a three-year implementation effort. Judge Lipps has appointed an attorney, John Shore, as Model Court Site Liaison, and both conducted immersion training for Program Manager Cathy Lowe from sallyport to placement facility.

Buchanan County (St. Joseph), Mo., has likewise appointed an attorney, Sue Rine, as liaison, and has begun to name those policy-level stakeholders who will participate in the "fast track" planning process. Presiding Judge Patrick Robb and Chief Juvenile Officer Chad Campbell have already accomplished major court improvements through the Graduated Sanctions Initiative.

Other jurisdictions that are finalizing funding and will be prepared to start implementation this fall are: El Paso, Texas; Salt Lake City, Utah; Lackawanna County, Pa.; and Toledo, Ohio. During 2007, New Orleans, La., and Charlotte, S.C., hope to get underway.

Lastly, some jurisdictions are forging ahead independently on the road to excellence. Judges James Ray and Sharon McCully began a statewide education process in late spring. Judge Ray and Cathy Lowe participated in a video teleconference sponsored by the Ohio Judicial College. Judge McCully completed two statewide trainings in Utah: the first for juvenile probation officers and the second for the bench. Judge Mike Nash, Lead Judge in Los Angeles, Calif., has been circulating the JDG's Key Principles on an incremental basis to build understanding and support in one of the nation's most populous counties.

For further information on becoming a Court of Excellence, please contact Cathy Lowe, Program Manager, (775) 784-8070, or *clowe@ncjfcj.org*.

Redesigned Juvenile Drug Court Trainings Held in Los Angeles and Boston

NCJFCJ's Alcohol and Other Drugs Division unveiled the new Juvenile Drug Court Planning Initiative "Planning Your Juvenile Drug Court" training on July 24-28, 2006 in Los Angeles, Calif., and on Aug. 7-11, 2006 in Boston, Mass. The Los Angeles training hosted ten jurisdictional teams of eight members each from Arizona, Louisiana, Michigan, Mississippi, Nevada, New Mexico, New York, Oregon, and Washington. Two weeks later, the Boston training was held with twelve jurisdictional teams from Alaska, Georgia, Michigan, Ohio, South Carolina, Tennessee, Virginia, Vermont, and Wisconsin. The jurisdictional teams are composed of eight required members: judge, coordinator, prosecutor, defense, treatment, community supervision (probation, case management, or law enforcement), school, and evaluator.

The 2006 Juvenile Drug Court Planning Initiative (DCPI) marks the sixth year that NCJFCJ has partnered with the Bureau of Justice Assistance and the Office of Juvenile Justice and Delinquency Prevention to offer training to jurisdictions from around the country that are planning and implementing juvenile drug courts. NCJFCJ has been providing training and technical assistance to the nation's juvenile drug courts since 1998.

Based on budget cuts at the federal level, this year the training series underwent a significant retooling. Originally a three-part training series, the Juvenile DCPI has been restructured as one week-long training with an on-site facilitated follow-up work session for each team. The new design requires teams to complete substantial work together prior to the training series and between the training series and the on-site work session. Teams are asked to inventory their community's resources so they can ensure they have the services and support necessary for the juvenile drug court to be effective.

Through presentations, team work sessions, and numerous activities, the Juvenile DCPI provided the team the information necessary for them to begin to lay the foundations for their juvenile drug court policy and procedure manuals as well as determine their program's structure.

Led by a facilitator, teams will spend two days in their communities working through additional juvenile drug court issues and creating their implementation plan. NCJFCJ's goal, through the one-week training and the on-site facilitated work session, is to provide each team with the resources necessary to move to the next step—the implementation of their juvenile drug court.

FAMILY • Mar. 15, 2005

Overwhelmed System Must Not Silence Voices of Foster Youth

Forum Column

By Miriam Aroni Krinsky

We tout our constitutional principles of democracy and due process as a guiding beacon for the world. The U.S. Constitution proclaims our allegiance to fairness and to the need to ensure that no citizen suffers deprivation without due process of law. And President Bush recently anchored a successful re-election campaign on the notion that we should extend our country's commitment to a free, fair and democratic process to nations throughout the world.

Yet when it comes to youth in foster care, we may be disregarding the essence of due process that our judicial system seeks to ensure.

The dictionary defines democracy as a doctrine of equality of rights, opportunity and treatment. Inherent within those principles is the critical importance of an independent judicial system - a system in which parties are guaranteed that their voices will be heard, that due process will protect the integrity and legitimacy of the result, and that decision-making will be guided by the merits of the case - not by outside influence, monetary clout or political power.

A fair and just legal system, however, cannot exist in a vacuum; all parties must be assured that their voices, perspectives and interests are considered and zealously advanced within the court process. But the right to be heard means little without access to a legal advocate who can navigate the court system. As the Supreme Court has recognized, "[t]he right to legal representation is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice." *Kent v. United States*, 383 U.S. 541 (1966).

In our dependency proceedings, however, we ignore those who have the greatest need for legal counsel and an empowered voice in court. Abused and neglected youth too often are relegated to second-class status when it comes to legal representation. The child's abusers, child welfare agencies and non-offending parents all have a voice and legal representation in court, while youth in some jurisdictions have no voice at all and in others have only limited access to the legal process and protections.

It can be argued that the child's interest in a dependency proceeding is even greater than the interest of the parent, because his or her entire future, maintenance of family relationships, physical safety, health and very home are at stake.

From the perspective of the bench, it is impossible to consider how a fair and just decision can be rendered without knowledge of the child's perspective and what the child wants.

We send a message to children when we exclude them from their own court cases. That message is that we don't value them, that they are not a meaningful part of the process. We extinguish any concept of due process, fairness or legitimacy of decision-making when we exclude the very participants our system is designed to protect - the children we agree to raise under the jurisdiction of our dependency courts.

The national bipartisan Pew Commission on Foster Care recognized the significance of these concerns. The commission opined, "[n]o child ... should face the partial or permanent severance of familial ties without a fully informed voice in the legal process." The commission also noted the "dissonance" and "wildly inconsistent approaches" around the country in regard to the issue of legal representation for children.

Nearly 40 years ago, the Supreme Court established that children have a constitutional right to counsel in juvenile delinquency proceedings. *In re Gault*, 387 U.S. 1 (1967). The *Gault* decision marked the start of a new way of thinking about legal representation for children and extended to children due process protections when liberty deprivations are at stake.

Unfortunately, the extension of these principles beyond the delinquency arena in the intervening years has been a slow process. Tellingly, however, the rationale underlying the *Gault* court's commitment to a voice for children was not limited to delinquency cases.

Instead, the court looked to a presidential commission report that found: "[J]uveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests, particularly when important decisions are made." *Gault*.

Over time, federal law has sought to propel the notion of representation for children in dependency

proceedings. The Child Abuse Prevention and Treatment Act requires that each foster child be represented by either an attorney or a guardian ad litem. While these provisions are an important first step toward giving children a voice in court, federal law fails to ensure that all children have effective and independent legal representation.

A lay guardian ad litem, no matter how zealous and committed, lacks the expertise gained from a legal education and practical experience in issues related to abuse and neglect. As a nonlawyer, the guardian ad litem has little ability to use the process of the court to the child's advantage. Without adequate legal representation, the child cannot be on an equal footing with the other parties in the case.

A guardian ad litem may be a valuable resource in a dependency proceeding, but the roles of attorney and guardian ad litem are fundamentally different. The guardian's role is to express his or her view of the child's best interest, but the guardian is under no obligation to express the view or wishes of the child. An attorney has an ethical responsibility to express and represent the wishes of his or her client before the court.

In addition, an attorney, unlike a guardian ad litem, is bound by the traditional rules of attorney-client privilege. This allows the child, who is already undergoing emotionally chaotic and traumatic events, to be more comfortable and open with his or her representative and to feel that the process has a true sense of legitimacy.

Moreover, providing children with legal counsel may increase the likelihood that the court will have greater access to facts in the case, be better positioned to make more accurate and informed decisions to promote the best interests of the child, and reduce the risk of making erroneous decisions.

Last month, a landmark ruling from a federal district court in Georgia moved the issue of legal representation of children to the forefront. The court embraced the notion that abused and neglected children have a constitutional due process right to legal representation. The court observed in *Kenny A. v Perdue,* 218 F.R.D. 277 (N.D. Ga. 2005): "it is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake."

The Georgia court not only endorsed the right to legal representation for children in dependency proceedings, but it also underscored that these rights are meaningless unless we ensure that counsel is effective. As the court recognized, however, the goal of assuring effective legal counsel for children cannot be achieved without minimum training, competency standards and reasonable caseloads.

Common sense dictates that counsel who are forced to take on hundreds of cases simply cannot perform effectively. Marvin Ventrell, executive director of the National Association of Counsel for Children, testified in the Georgia case that a child cannot receive effective representation if his or her attorney carries a caseload of significantly more than 100, and certainly not if the attorney has a caseload of 200.

Yet children's attorneys far too often have clients substantially in excess of these numbers, in some instances reaching case loads of as many as 600 clients apiece. No system of justice can or should sanction these practices as consistent with the concept of due process our country purports to promote.

As this nation seeks to spread our constitutional principles to other shores, we must ensure that our own house is in order, that principles of democracy and due process are firmly ingrained in our own legal system. The California Youth Connection, a passionate association of current and former foster youth, has adopted a rallying cry that encapsulates the essence of these democratic values. They demand simply: "Nothing about us without us!"

Our dependency courtrooms and our national policymakers would be well served to heed this sound advice.

Miriam Aroni Krinsky is executive director of the Children's Law Center of Los Angeles, a nonprofit organization that represents abused and neglected children in the Los Angeles dependency court system.

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CHILD WELFARE REPORT

practical solutions for professionals

Foster Youth Need Greater Voice in Court Proceedings

By Miriam Aroni Krinsky

Courts play a critical role in the lives of foster youth. It is judges who decide whether children will be placed in foster care, what services they will receive while in care, what contact — if any — they will have with their parents and siblings, and when and how they will leave the system. Yet, our nation's foster youth are often absent — or without a meaningful voice — in the court proceedings that have a profound impact in shaping their future.

Home At Last recently conducted a first-ever nationwide survey of 248 current and former foster youth from 40 states and 1,794 child welfare professionals, including judges, lawyers, social workers, and others who work in the child welfare system. The survey results revealed that, while youth and child welfare professionals agree there is value to having youth participate, youth report only sporadic attendance at these proceedings.

A former foster youth from South Dakota responding to the survey articulated the frustration felt by many in being excluded from the court process: "I never went to court. I have been in and out of foster care since I was a baby, and I really resent that I never got the chance to speak on my behalf, or even be present when my future was being discussed."

"...I really resent that I never got the chance to speak on my behalf, or even be present when my future was being discussed."

— former foster youth

A majority of current and former foster youth similarly reports that they would like to be present at their dependency court hearings.

One foster youth from Texas observed that going to court was helpful because it allowed for greater transparency in the process: "I didn't have any reason to believe that something was being hidden from me."

Despite these sentiments, more than one in four foster youth report that they never attended hearings. And exclusion from court proceedings matter greatly to these youth. One survey respondent who had been in foster care in two different states remarked: "If [attending court] would have happened, I might have actually had a different life."

Of those who attended court at least some of the time, 60% say that their presence yielded real benefits — from having an opportunity to take an active role in decisions being made about their lives to simply being able to hear what transpires. Almost half (46%) state that their perspectives and experience in foster care would have changed had they been in court more often. An Arizona youth said: "It made me feel like I was important, considering that

continued on Page 2

Foster Youth continued from Page 1

people (professionals) could put a face with the case number."

Although child welfare professionals agree that foster youth participation in court is important:

- Just 8% of adults surveyed believe that youth should always be present, and only 28% said that children should be present most of the time.
- A majority (59%) of child welfare professional respondents say youth should be present only sometimes.
- Child welfare professionals with more experience are slightly more likely to advocate for regular youth presence in court — 42% of professionals with more than 10 years of experience report that children should attend court most or all of the time; compared to 34% of professionals with 10 or less years experience who responded to the same question.

An overwhelming majority believes that the age and maturity of the youth should weigh heavily in determining whether or not they attend court. Child welfare professionals agree that older children should be present more often, because they are better able to understand the proceedings and less apt to be bored or disruptive. However, even teens' presence is sporadic: just 29% of child welfare professional respondents report that children 12 and older attend court most or all of the time.

One judge observed: "Every case varies. Young children often don't understand what is going on. Some children are disruptive. Some children need to see and want to see what is happening and whom the judge is that makes the decisions about them. Some children benefit from hearing the reality of their family. In some cases, the hearing can be traumatic."

The national, nonpartisan *Pew Commission on Children in Foster Care* called for comprehensive reforms of the dependency court and federal finance systems. Among its recommendations to reform dependency courts, the Pew Commission proposed that: "Children and their parents must have a direct voice in court, effective representation, and the timely input of those who care about them."

There are nationwide efforts underway to improve dependency courts, encourage collaboration between courts and child welfare agencies, better track the progress of children through the foster care system, and — most importantly — to listen to the voices of the half-million children in the child welfare system. Examples include:

- States have created foster care commissions and task forces to address the specific needs of children in their state;
- Congress recently passed legislation providing $100 million in new money for programs designed to strengthen court performance and collaboration; and
- Youth Summits featuring stories, insights, and experiences from current and former foster youth are taking place across the country.

These efforts will help foster youth participate in the court decisions that impact their lives and help focus our attention on the need for broad, system-wide reform. With these goals in mind, we can begin to chart a better future for children and families, and help youth living in foster care take charge of their own lives.

CHILD WELFARE REPORT

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In the words of Pew Commission Chairman Bill Frenzel: "There are 500,000 children currently in foster care. That's half a million reasons why we need to reform the foster care system." ■

Miriam Aroni Krinsky is executive director of both the nonprofit Children's Law Center, which serves as appointed counsel for the majority of children under the jurisdiction of the Los Angeles dependency court, and Home At Last (www.fostercarehomeatlast.org), a national outreach and education partnership that seeks to encourage implementation of the court reform recommendations of the Pew Commission on Children in Foster Care.

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July 2, 2008

ESTABLISHING POLICIES FOR YOUTH IN COURT – OVERCOMING COMMON CONCERNS

This document addresses common concerns expressed by judges, attorneys, social workers, and foster parents about youth attending court hearings. The suggested solutions can be tailored to individual jurisdictions.

Common Concerns and Solutions

#1 Participating in Court Proceedings will Upset Youth

Youth will become upset during court hearings because they raise emotional and upsetting issues that youth shouldn't be subjected to and they may hear alarming things about their parents.

Overview: Most of the time, this concern is exaggerated. Youth are the first to remind us that they have lived through these issues. As long as they are prepared for the hearing, discussions in court will not cause them additional trauma or harm. Moreover, excluding youth from court can be equally (if not more) upsetting, by stripping youth of the opportunity to come to terms with their past and move on and by precluding youth from having a sense of involvement in and control over planning their future. If they do get somewhat upset (but not traumatized), there should be a supportive person to work through the feelings with the youth. In addition, as noted below, if certain parts of the court proceeding raise unusually upsetting issues, the youth can be excluded from that part. Also, youth participation allows the youth to hear how the parent has progressed in meeting court and agency requirements and have a better ability to come to terms with what the court orders. This may be therapeutic for the youth to hear parents and others being held accountable for their actions.

Solutions:

Set clear standards for when youth should be in court and establish a presumption of youth inclusion.

- Set a presumptive rule that youth will come to court unless specific circumstances are present.
- Under limited circumstances, detailed below, allow the following justifications for youth not coming to court:
    - Unavoidable trauma, as established by compelling evidence that the youth's participation would be emotionally detrimental to the youth's well being;
    - Strong objection by youth based on the youth's own informed choice. Youth's desire not to participate must be taken into account and may waive the youth's opportunity to be present

- Apply above standards to assess whether to excuse youth from a portion of hearing that may not be in the best interest of the youth to hear.

Prepare the youth for court hearings.

The youth's attorney, guardian ad litem (GAL), social worker, and therapist (if any) should inform the youth about the hearings, who will be there, what is expected to happen, and how to talk to the judge.

- The **youth's representative** will inform the youth about each hearing.
  - This information will include the purpose of the hearing, when the hearing will occur, who will be there, what is expected to happen, and how to talk to the judge. There should be other suggested areas to discuss with the youth (e.g. courtroom etiquette)

- The **social worker** will inform the foster parents about each hearing, who will be there, and how to talk to the judge. Note: This enables the foster parents to answer any questions or concerns the youth has about the hearing.

- The youth's **attorney, GAL, or social worker** should contact the caregiver before and after the court hearing to make sure the youth is comfortable and to convey anything that transpired during the hearing that the caregiver may need to know about.

- Develop policy to support this solution. Decide where this policy will appear. Select those that apply:

  - Agency policy – for social workers' obligations related to youth.
  - Agency policy – for therapists' obligations related to youth.
  - Agency policy – for social workers' obligations related to foster parents.
  - Foster parent contracts with agency, if applicable – foster parents' obligations.
  - Contracts with attorneys – attorney obligations.
  - Court rules – attorney obligations and recommended court inquiry to occur if youth isn't present in court.

Allow a support person to accompany the youth to court.

- The youth will be offered a support person of his or own choice.
  - Assess how this may impact confidentiality?
  - Are the courts open?

#2 No One Can Get the Youth to Court and the Court Facility is Not Youth Friendly

Many youth are not placed near the courthouse and can't be easily transported to court hearings. In addition, parties don't have the time or money to transport youth far distances for short

hearings. Some youth also may need an escort because they pose a flight risk. Moreover, once they get to court, they have to wait a long time in an area that is not youth friendly.

Solutions:

Schedule the hearing to coincide with a planned visit to the area where the courthouse is located.

- Try to schedule court hearings around planned overnight or weekend visits the youth may have in the area. If a court date is already scheduled, attempt to set up visits or something else the youth can do in the area.
    - Follow this policy when youth live far from the court.
    - Communicate this policy through materials to attorneys, GALs, foster parents, or others.

Request/require the placement agency to transport the youth.

- Include transportation to court as a contracted responsibility of the foster parent or group home.
- Request/require the court or agency to pay for transportation to court, regardless of cost, at least once per year or more, if requested by judge.

Allow youth to participate in court proceedings via telephone or video conference.

- Develop a court rule(s) to support alternative participation.
- Ensure the court has the technology to have conference calls or video conferencing in courtrooms.

Create a youth-friendly space in the courthouse (even if it is small).

- Use a jury room or extra conference room where youth can wait.
- Engage a local school, college, or youth art program in the courthouse to create art, reading or other programs to keep youth occupied.

Provide some youth an escort to court.

- Court will provide some youth an escort to court when security assistance is needed because the youth is a flight risk. If necessary, juvenile justice agency will provide support.
- Youth in the juvenile justice system go to court all the time with security assistance. Foster youth may be provided similar security.

#3. Attending Court Will Disrupt the Youth's Schedule

School outcomes are already poor for youth in foster care. They shouldn't miss more school to attend court proceedings.

Solutions:

Schedule hearing times so youth miss the least amount of school as possible.

- Schedule hearings before or after school hours or on school holidays and determine at the hearing whether this sort of schedule will be necessary for each school age youth who will be attending court.
- Consult with the youth to ensure there are no conflicts with tests, sports, field trips, and other necessary school related activities.
- Schedule the next hearing at the end of each hearing to make sure the proper accommodations to the youth's schedule are made.

Work with the Department of Education to ensure youths' court attendance does not negatively impact their schooling.

- Work with local board of education to ensure that youth's grades are not affected by missing school to attend court
- Ensure that the youth's social worker, attorney, GAL or foster care provider notifies the school in advance of the youth's absence so that it will not be labeled unexcused

When youth are present, hear their cases first.

- If the court uses block scheduling, when youth are present for their hearings, hear their cases first to get them out early.
- Develop a court policy to assure this practice is uniformly followed.

#4 Youth Can't See the Parent

The court has an outstanding no-contact court order between youth and parent, making it hard to allow the youth to attend court hearings. The youth may be scared of her parent or the parent's presence unduly influences the youth.

Solutions:

Require parent to leave for portion of hearing when youth is present.

- Authorize exclusion of parent by court rule, under certain circumstances.
- Ask youth's therapist whether it is appropriate to exclude parent from portion of hearing where youth is present using a best interests standard.
    - May not apply at adjudication/trial stages of case.

Allow youth to meet the judge in chambers.

- Authorize by court rule to allow youth, under certain circumstances, to meet with the judge in chambers.
    - Ensure attorneys for parties and court reporter are present to preserve the record.

#5 Allowing Youth to Speak to the Judge Privately Raises Ethical Issues

This may be deemed an inappropriate ex parte communication with the judge and may raise due process concerns for the parents. The judge can't promise confidentiality and it may not be clear whether the judge is a mandatory reporter.

Solutions:

Allow the attorneys and court reporter to be present when youth speaks with the judge.

- The judge may not want to speak with the youth privately and instead have the attorneys and court reporter present.
- Make a record of all discussions.

The judge should not promise confidentiality to the youth..

- The judge should set the ground rules for conversation with the youth and disclose to parties what he/she shared.
- The judge should inform that youth that anything that the youth said can be shared with the attorneys.

#6 Youth's Wishes are not Court Ordered

Youth may not understand that the judge will not always do what they ask and may become upset when they don't get what they want.

Overview: Youth want to be heard and don't expect their wishes to always prevail. Indeed, being included in court proceedings often matters more to the youth than the end result. Allowing them to be part of the process enables the youth to accept and come to terms with a result or court order they don't like.

Solutions:

Meet with the youth before court to prepare him.

- The youth's attorney or GAL and social worker should let the youth know the role of the judge. They should explain that the judge will do what she thinks is in the youth's best interest.

Have the judge explain her position.

- The judge should explain the court's order and why the youth's request cannot be accommodated. The judge should also explain what would have to happen for the youth's wishes to be fulfilled.

Debrief the youth.

- The youth's attorney, GAL, social worker, and others should meet with the youth and process what happened after the hearing and ensure the youth understands.

#7 Parents' Privacy Rights will be Infringed if the Youth is Present
Parents have a right to privacy about their issues and may not want the youth to hear about their problems, drug use, mental illness or see them in shackles.

Overview: Often youth know what their parents are doing because they have lived with the issues their whole lives. Most youths' ideas of what is happening to their parents in prison are worse than reality and it may be good for them to see that their parents are okay and healthy. Youth have to process the truth before they can move on.

Solutions:

Excuse the youth for portions of the hearing.

- If there are portions of the hearing that may be harmful or that the parents are justified in not letting the youth hear, excuse the youth for that limited portion.
- Set standards for when the youth can be excluded, as determined by a therapist.

#8 The Court Hearing will not be Meaningful for the Youth
The judge may not know how to properly engage the youth and the youth will not understand what is going on as much of the court proceeding involves legal "lingo."

Solutions:

Encourage judges to attend trainings on communicating with system-involved youth.

- Training may cover ways to move away from using "legal lingo" as it will also benefit parents and caregivers.
- Develop sample questions for judges on various issues (education, health, permanent connections, etc)
- Read available literature on the subject, such as "*With Me, Not Without Me"* and the judicial bench card.

Hold hearings that are complete and not cursory in length.

- Encourage judge to engage the youth in conversation and questioning about how the youth is progressing in care.

Prepare youth for court hearings.

- Youth's attorney, GAL or social worker should prepare youth before court hearings. Issues to discuss should include:
    - Who will attend
    - Where everyone will sit
    - What will be discussed and why
    - The opportunity for the youth to compose a written statement of what she wants to say to the court

- Develop guidelines, statutory language or agency policy to support this.

#9 If the Youth Is Present, the Court Hearing will Take Longer

Judges' dockets are full and they don't have enough time for hearings as it is. They can't add more time by including youth. This will increase wait times and may require postponing some hearings, which may violate ASFA timelines.

Overview: Done properly, hearings will probably take longer, but youth (and parents) deserve time to be heard. In addition, youth's presence improves the quality of hearings and enables the court to get information and have a "human face" that enhances decision-making.

#10 The Youth Does not Want to Attend Court Proceedings

The youth says he doesn't want to go to court hearings.

Solutions:

Talk with the youth to determine his reasoning.

- The youth's attorney, GAL or social worker should determine whether:
    - the youth has been given enough notice
    - the hearing conflicts with something else important to the youth
    - the youth knows how important providing input can be
    - participation in court is presented to the youth in a positive way

Accommodate the youth's schedule.

- The youth's attorney, GAL, or social worker should ask the court to schedule hearings according to the youth's schedule

Don't require the youth to participate.

- The youth's attorney, GAL or social worker should inform the youth of the importance of court involvement and ask why he does not want to participate.
- If the youth still strongly objects court and the child's representative waives his appearance, do not require him to do so. The court order should document the reason the youth is not present.

ENGAGING YOUNG CHILDREN (AGES 0-12 MO) IN THE COURTROOM

JUDICIAL BENCH CARD[1]

Document court actions

Document in the court order:

- Whether the infant is present at the hearing.
- OR if not present, address the reasons why the infant is not in attendance.
  - Ask why the infant is not present and what efforts were made for the infant's attendance.
  - Explore and encourage resolution of transportation issues as a reason for nonattendance.
  - Depending on the situation, consider postponing the hearing until the infant can be present.
  - Request a current picture that will be introduced into the record.[2]

Observe the infant's behavior and appearance

- How does the child interact and respond to caregivers, parents, and guardians?
- Assess whether the child appears healthy and well kept.
- Does the child exhibit appropriate developmental milestones?[3]

Preparations for court attendance

- Ensure that your courtroom is child friendly.[4]
- Ensure all children are accompanied by a familiar caregiver.

Possible questions to ask the caregiver about the infant

- Is the infant forming healthy attachments?[5] With whom?
- Is the infant meeting developmental milestones?[6]

AGE	MILESTONES*
2 months	Lifts head up 45 degrees Laughs Smiles spontaneously
4 months	Rolls over Follows to 180 degrees Turns to rattling sound
6 months	Sits with no support Turns to voice Feeds self
9 months	Pulls to stand Says "Dada" and "Mama," nonspecific Waves bye-bye
12 months	Stands alone Can say 1 word Imitates activities
18 months	Runs Can remove garment Can point to at least 1 body part

*50% to 90% of children can perform these milestones.

The Milestone Chart was adapted from Hagan JF, Shaw JS, Duncan PM, eds. 2008. *Bright Futures: Guidelines For Health Supervision of Infants, Children, and Adolescents*, Third Edition, Elk Grove Village, IL: American Academy of Pediatrics and Schor EL, ed. 2004. *Caring For Your School-Age Child*, New York: Bantam Books.

[1] This bench card was created to assist judges when a child is present in the courtroom. It does not include what information the judge should require from additional parties, such as a report from the child's therapist about the child's mental health status.

[2] The social worker or caregiver can provide the court with a picture.

[3] Please refer to the Milestone Chart. For more information about child development, see Genie Miller Gillespie and Diane Boyd Rauber (eds.), *A Judge's Guide: Making Child-Centered Decisions In Custody Cases* (ABA Child Custody and Adoption Pro Bono Project and ABA Center on Children and the Law 2d ed. 2008).

[4] It may be necessary to address issues related to the infant's safety at the courthouse and the appropriateness of courtroom waiting areas. Judges may find it beneficial to have age-appropriate toys and books available.

[5] For more information about attachment, see JoAnne Solchany and Lisa Pilnik, *Healthy Attachment for Very Young Children in Foster Care*, Child Law Practice, Vol. 27, No. 6 (August 2008).

[6] Please refer to the Milestone Chart.

For more information, see http://www.abanet.org/child/empowerment/home.html.

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ENGAGING TODDLERS (AGES 1-3) & PRESCHOOLERS (AGES 3-5) IN THE COURTROOM

JUDICIAL BENCH CARD[1]

Document court actions

Document in the court order:

- If the child is present and verbal, have him identify himself on the record.
- OR if the child is not present, address the reasons why the child is not in attendance.
  - What efforts were made and the accommodations offered to encourage the child's attendance.
  - Explore and encourage resolution of transportation issues as a reason for nonattendance.
  - Depending on the situation, consider postponing the hearing until the child can be present.
  - Request a current picture that will be introduced into the record.[2]

Communicate with the child during the hearing

- Keep language simple and age appropriate.
- Speak slowly and allow the child time to process the information.
- Use concrete terms.[3]
- Use names instead of pronouns.
- Stop at regular intervals to ask the child if he understands and if he has any questions.
- Ask the child to perform simple age-appropriate tasks (as outlined in the Milestone Chart).

Observe the child's behavior and appearance

- How does the child interact and respond to caregivers, parents, and guardians?
- Observe the child's demeanor when answering the questions (if verbal).[4]
  - Who does the child look to for help in answering questions?
  - Is he scared? Anxious? Avoidant?
  - Does he look to the caregiver for the "right" answer?
  - Assess whether the child appears healthy and well kept.
  - Does the child exhibit appropriate developmental milestones?[5]

AGE	MILESTONES*
12 months	Stands alone Can say 1 word Imitates activities
18 months	Runs Can remove garment Can point to at least 1 body part
24 months	Jumps up Combines words Puts on clothing
3 years	Balances on each foot 1 second Speech all understandable Can name a friend
4 years	Hops Names 4 colors Can copy a cross (+)
5 years	Can walk on tiptoes Can draw a person with head, body, arms, and legs Capable of lacing own shoes

*50% to 90% of children can perform these milestones.

The Milestone Chart was adapted from Hagan JF, Shaw JS, Duncan PM, eds. 2008. *Bright Futures: Guidelines For Health Supervision of Infants, Children, and Adolescents*, Third Edition, Elk Grove Village, IL: American Academy of Pediatrics and Schor EL, ed. 2004. *Caring For Your School-Age Child*, New York: Bantam Books.

[1] This bench card was created to assist judges when a child is present in the courtroom. It does not include what information the judge should require from additional parties, such as a report from the child's therapist about the child's mental health status.

[2] The social worker or caregiver can provide the court with a picture.

[3] Concrete terms refer to objects or events that are available to the senses. For example, use "in the backyard" instead of "area."

[4] Changes in a child's demeanor while answering questions may have several meanings. For example, a child could look to an adult for the answer because he is attached to that adult and wants to please him or her. On the other hand, the same action can mean that the child is afraid of the adult. For more information about questioning children, see Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective* (ABA Center on Children and the Law 2d ed. 1999).

[5] Please refer to the Milestone Chart. For more information about child development, see Genie Miller Gillespie and Diane Boyd Rauber (eds.), *A Judge's Guide: Making Child-Centered Decisions in Custody Cases* (ABA Child Custody and Adoption Pro Bono Project and ABA Center on Children and the Law 2d ed. 2008).

Engaging School-Age Children (ages 5-11) in the Courtroom

Judicial Bench Card[1]

Document court actions

Document in the court order:

- If the child is present, have him identify himself on the record.
- OR if the child is not present, address the reasons why the child is not in attendance.
  - What efforts were made and the accommodations offered to encourage the child's attendance.
  - Explore and encourage resolution of common reasons for nonattendance, including interference with the school schedule and transportation issues.
  - Depending on the situation, consider postponing the hearing until the child can be present.
  - Request a current picture that will be introduced into the record.[2]

Communicate with the child during the hearing

- Keep language simple and age appropriate.
- Talk with the child about his interests, likes, and dislikes.
- If helpful, offer to have a conversation in chambers, making sure it complies with all procedural rules.
- Provide an age-appropriate list of legal terms to the child before court to which he may refer during the hearing.[3]
- Avoid legal jargon and acronyms.
- Encourage the child to ask questions, particularly if he doesn't understand a question or statement.
- Answer one question at a time.
- Recognize cultural differences in language.
- Avoid abstract questions.[4] Recognize that school-age children usually answer questions literally. *For example:* Q: Are you in school now? A: No. The child may be referring to where she is right now (the courtroom) instead of the broader question of whether she attends school.
- Publicly praise the child's accomplishments.

Observe the child's behavior and appearance

- Observe the child's interaction with caregivers, parents, and guardians.[5]
  - Does the child look to them for help, support, advice, etc.?
- Observe the child's physical appearance and health.
  - Is the child appropriately dressed?
  - Does the child look well-nourished?
  - Does the child have appropriate personal hygiene?
- Observe the child's body language.
  - Be mindful of signs that the child may be frustrated or overwhelmed.[6]

Preparations for court appearance

- Ensure that your courtroom is child friendly.[7]
- Ensure all children are accompanied by a support person at the hearing such as a foster parent, CASA, mentor, coach, or other adult role model.
- Have the agency encourage the child to submit report cards, letters, drawings, or other age-appropriate materials periodically. Refer to anything previously submitted.
- Read anything that the child gives to the court while the child is present.
- Review the outcome of the hearing with the child and answer any questions (or ensure that someone else will do so).
- Ensure the child understands what was ordered and why.
- If age appropriate, ask the child what he wants to accomplish before the next hearing.

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[1] This bench card was created to assist judges when a child is present in the courtroom. It does not include what information the judge should require from additional parties, such as a report from the child's therapist about the child's mental health status.

[2] The social worker or caregiver can provide the court with a picture.

[3] See Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, Child Law Practice, Vol. 26, No. 9 (November 2007).

[4] An example of an abstract question is "How well do you get along with your family?" For more information about questioning children, see Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective* (ABA Center on Children and the Law 2d ed. 1999).

[5] Please note that some school-age children act out behaviorally with those they trust because they feel safe enough to express their stress, fear, or frustration. The child may also be testing limits. In addition, changes in a child's demeanor while answering questions may have several meanings. For example, a child could look to an adult for the answer because he is attached to that adult and wants to please him or her. On the other hand, the same action can mean that the child is afraid of the adult.

[6] Signs may include squirming, lying down, or fussing.

[7] It may be necessary to address issues related to the child's safety at the courthouse and the appropriateness of courtroom waiting areas. Judges may find it beneficial to have age-appropriate toys and books available.

- Consult with the child and his caregiver when scheduling the next hearing so it does not interfere with the child's normal daily routine, including school.
- Keep a school district calendar on the bench to ensure there are no conflicts with state standardized tests.
- Thank the child for coming to court.
- Encourage the child to attend the next hearing.
- Ask the child whether he has any last questions, thoughts, or concerns.

Possible questions to ask the child

- How old are you?
- What is your best friend's name?
- What do you like (or not like) about where you are staying now?
- Do you see your mom and dad?
- Do you miss anyone? Provide options, e.g., brothers, sisters, grandparents.
- Where do you go to school?
- What grade are you in?
- Who is your favorite teacher?
- Who takes you to school?
- Are you having any problems in school?
- Do you have a tutor?
- What do you like to do before and after school?

For more information, see http://www.abanet.org/child/empowerment/home.html.

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Preparations for court attendance

- Ensure that your courtroom is child friendly.[6]
- Ensure all children are accompanied by a familiar caregiver, such as a foster parent.
- Consult with the child's caregiver when scheduling the next hearing so it does not interfere with the child's normal daily routine, e.g., naptime, mealtime, etc.
- If the child is verbal:
  - If helpful, offer to have a conversation in chambers, making sure it complies with all procedural rules.
  - Have the agency invite him to submit drawings, cards, or other age-appropriate materials periodically. Refer to anything previously submitted.
  - Acknowledge anything that the child gives to the court while the child is present.
  - Thank the child for coming to court.
  - Encourage the child to attend the next hearing.
  - Ask the child whether he has anything to say before the hearing ends.

Possible questions to ask the child (if child is verbal)

- How old are you?
- Do you like where you are staying now?
- What do you like (not like) about where you are staying now? Suggest options (e.g., bedroom, pets, people who live there).
- Do you go to preschool or daycare? What things do you like to do while you are there?
- What kinds of things did you and your mommy (or daddy) do the last time you saw her (or him)?
- Do you feel sad or miss anyone? Suggest options (e.g., brothers, sisters, grandparents).
- Have you been to the doctor?
- Do you like the doctor?

Possible questions to ask the caregiver about the child

- Is the child forming healthy attachments?[7] With whom?
- Is the child meeting developmental milestones?[8]

[6] It may be necessary to address issues related to the child's safety at the courthouse and the appropriateness of courtroom waiting areas. Judges may find it beneficial to have age-appropriate toys and books available.

[7] For more information about attachment, see JoAnne Solchany and Lisa Pilnik, *Healthy Attachment for Very Young Children in Foster Care*, Child Law Practice, Vol. 27, No. 6 (August 2008).

[8] Please refer to the Milestone Chart.

For more information, see http://www.abanet.org/child/empowerment/home.html.

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Engaging Adolescents (ages 12-15) in the Courtroom

Judicial Bench Card[1]

Document court actions

Document in the court order:

- If the youth is present, have him identify himself on the record.
- OR if the youth is not present, address the reasons why the youth is not in attendance.
  - What efforts were made and the accommodations offered to encourage the youth's attendance.
  - Explore and encourage resolution of common reasons for nonattendance, including interference with the school schedule and transportation issues.
  - In the absence of exceptional circumstances, postpone the hearing until the youth can be present.
  - Request a current picture that will be introduced into the record.[2]

Communicate with the youth during the court hearing

- Keep language simple and age appropriate.
- Talk with the youth about his interests, likes, and dislikes.
- If helpful, offer to have a conversation in chambers, making sure it complies with all procedural rules.
- Provide an age-appropriate list of legal terms to the child before court to which he may refer during the hearing.[3]
- Avoid legal jargon and acronyms.
- Encourage the youth to ask questions, particularly if he doesn't understand a question or statement.
- Recognize cultural differences in language.
- Avoid abstract questions.[4]
- Ask directed questions.[5]
- Publicly praise the youth's accomplishments.

Observe the youth's behavior and appearance

- Observe the youth's interaction with caregivers, parents, and guardians.
  - Does the youth look to them for help, support, advice, etc.?
- Observe the youth's physical appearance and health.
  - Is the youth appropriately dressed?
  - Does the youth look well-nourished?
  - Does the youth have appropriate personal hygiene?

Preparations for court attendance

- Ensure that your courtroom is teen friendly.[6]
- Ensure all children are accompanied by a support person at the hearing such as the foster parents, CASA, mentor, coach, or other adult role model.
- Provide the youth with a task (e.g., taking notes) during the hearing.[7]
- Have the agency encourage the youth to submit report cards, letters, or other age-appropriate materials periodically. Refer to anything previously submitted.
- Read anything that the youth gives to the court while the youth is present.
- When appropriate, ask for the youth's input and opinions.
- Review the outcome of the hearing with the youth and answer any questions (or ensure that someone else will do so).
- Ensure the youth understands what was ordered and why.
- When appropriate, share court documents with the youth.[8]
- Ask the youth what he wants to accomplish before the next hearing.
- Consult with the youth and his caregiver when scheduling the next hearing so it does not interfere with the youth's normal daily routine, including school.

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[1] This bench card was created to assist judges when a child is present in the courtroom. It does not include what information the judge should require from additional parties, such as a report from the child's therapist about the child's mental health status.

[2] The social worker or caregiver can provide the court with a picture.

[3] See Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, Child Law Practice, Vol. 26, No. 9 (November 2007).

[4] An example of an abstract question is "How well do you get along with your family?"

[5] Where do you want to live? What do you like about your home? Do you know why you live away from home? Do you see your mom and dad? What things do you like to do with them? Do you wish you could see them more? For more information about questioning children, see Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective* (ABA Center on Children and the Law 2d ed. 1999).

[6] It may be necessary to address issues related to the youth's safety at the courthouse and the appropriateness of courtroom waiting areas. Judges may find it beneficial to have age-appropriate games and books available.

[7] Performing the task should be presented to the youth as an option and solely for his benefit. Performing the task may help the youth to focus attention and dissipate anxiety.

[8] Sharing documents increases awareness and gives the youth a sense of control.

- Keep a school district calendar on the bench to ensure there are no conflicts with state standardized tests.
- Thank the youth for coming to court. Reward even the smallest attempt at participation.[9]
- Encourage the youth to attend the next hearing.
- Ask the youth whether he has any last questions, thoughts, or concerns.

Possible questions to ask the youth

- How old are you?
- What do you like (or not like) about where you are staying now?
- Do you see your mom and dad?
- Do you miss anyone? Provide options, e.g., brothers, sisters, grandparents.
- Where do you go to school?[10]
- What grade are you in?
- Who are some of your friends?
- What courses are you taking?
- Who is your favorite teacher?
- Do you participate in any extracurricular activities?
- Have you thought about a career or what you want to do when you finish school?
- Are you having any problems in school?
- Do you have a tutor?
- What do you do on the weekends?

[9] Rewarding all attempts at participation adds to the youth's sense of control and self-confidence.

[10] For a more detailed list of questions to ask regarding school and related issues, see National Council of Juvenile and Family Court Judges, *Asking The Right Questions: A Judicial Checklist to Ensure That The Educational Needs of Children and Youth in Foster Care Are Being Addressed* (2005). Other resources to address education issues can be found at the Legal Center for Foster Care & Education website, www.abanet.org/child/education, and in the Legal Center's recent publication, *Blueprint For Change: Education Success For Children in Foster Care*, available at www.abanet.org/child/education/blueprint.

For more information, see http://www.abanet.org/child/empowerment/home.html.

This publication was made possible in collaboration with Casey Family Programs, whose mission is to provide, improve – and ultimately prevent the need for – foster care.

ENGAGING OLDER ADOLESCENTS (AGES 16+) IN THE COURTROOM

JUDICIAL BENCH CARD[1]

Document court actions

Document in the court order:

- If the youth is present, have him identify himself on the record.
- OR if the youth is not present, address the reasons why the youth is not in attendance.
  - What efforts were made and the accommodations offered to encourage the youth's attendance.
  - Explore and encourage resolution of common reasons for nonattendance, including interference with the school schedule and transportation issues.
  - In the absence of exceptional circumstances, postpone the hearing until the youth can be present.
  - Request a current picture that will be introduced into the record.[2]

Communicate with the youth during the court hearing

- Use age-appropriate language.[3]
- Talk with the youth about his interests, likes, and dislikes.
- If helpful, offer to have a conversation in chambers, making sure it complies with all procedural rules.
- Provide an age-appropriate list of legal terms to the youth before court to which he may refer during the hearing.[4]
- Avoid legal jargon and acronyms.
- Ask directed questions.[5]
- Encourage the youth to ask questions, particularly if he doesn't understand a question or statement.
- Recognize cultural differences in language.
- Publicly praise the youth's accomplishments.

Observe the youth's behavior and appearance

- Observe the youth's interaction with caregivers, parents, and guardians.
  - Does the youth look to them for help, support, advice, etc.?
- Observe the youth's physical appearance and health.
  - Is the youth appropriately dressed?
  - Does the youth look well-nourished?
  - Does the youth have appropriate personal hygiene?

Preparations for court attendance

- Ensure that your courtroom is teen friendly.[6]
- Ensure all children are accompanied by a support person at the hearing such as the foster parents, CASA, mentor, coach, or other adult role model.
- Have the agency invite the youth to submit report cards, letters, drawings, stories, poems, or other age-appropriate materials periodically. Refer to anything previously submitted.
- Read anything that the youth gives to the court while the youth is present.
- When appropriate, ask for the youth's input and opinions.
- Talk with the youth about permanency options.[7]
- Review the outcome of the hearing with the youth and answer any questions (or ensure that someone else will do so).
- Ensure the youth understands what was ordered and why.
- When appropriate, share court documents with the youth.[8]
- Ask the youth what he wants to accomplish before the next hearing.
- Consult with the youth and his caregiver when scheduling the next hearing so it does not interfere with the youth's normal daily routine, including school.
- Keep a school district calendar on the bench to ensure there are no conflicts with state standardized tests.

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[1] This bench card was created to assist judges when a child is present in the courtroom. It does not include what information the judge should require from additional parties, such as a report from the child's therapist about the child's mental health status.

[2] The social worker or caregiver can provide the court with a picture.

[3] Older adolescents can understand more complex concepts.

[4] See Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, Child Law Practice, Vol. 26, No. 9 (November 2007).

[5] Where do you want to live? What do you like about your home? Do you know why you live away from home? Do you see your mom and dad? What things do you like to do with them? Do you wish you could see them more?

[6] It may be necessary to address issues related to the youth's safety at the courthouse and the appropriateness of courtroom waiting areas. Judges may find it beneficial to have age-appropriate games and books available.

[7] Questions that address permanency may include: Who do you spend most of your time with? Over the holidays, who do you spend time with? Is there a relative that you are close to? Is there a close family friend that you like to spend time with? Do you know what adoption is? Do you want to be adopted?

[8] Sharing court documents increases awareness and gives the youth a sense of control.

- Thank the youth for coming to court.
- Encourage the youth to attend the next hearing.
- Ask the youth whether he has any last questions, thoughts, or concerns.

Possible questions to ask the youth

- Who is your favorite teacher? Why?
- Do you participate in sports or other extracurricular activities?
- Is there anyone helping you with vocational or college applications?[9]
- When will you graduate?
- What are your post-graduation plans?
- Do you have an interest in the military?
- Do you have a mentor?
- Do you have someone you can call at anytime?
- Who do you rely on if you need help?
- Do you drive?
- What do you like to do on the weekends?
- Do you have a job?

[9] For a more detailed list of questions to ask regarding school and related issues, see National Council of Juvenile and Family Court Judges, *Asking the Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed* (2005). Other resources to address education issues can be found at the Legal Center for Foster Care & Education website, www.abanet.org/child/education, and in the Legal Center's recent publication, *Blueprint for Change: Education Success for Children in Foster Care*, available at www.abanet.org/child/education/blueprint.

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"Hear My Voice"

Strategies for Youth Inclusion in Court Proceedings

Beyond the Bench Conference
June 3, 2010

Youth artwork and writings are thanks to the efforts of Children's Law Center of Los Angeles, Home at Last, and the Pew Charitable Trusts

New Home, New Life, New Joy - Michael, age 17

Recent advances in law and policy…

- 2006 Amendment to Promoting Safe and Stable Families – Court must "consult" with youth in an age appropriate manner in regard to permanency and transition planning

  "The federal government recognizes the importance of a youth's voice in planning for her future. Judges are the final gatekeepers when a youth is leaving the care and security of foster care to begin a life without that support. Judges should see it as their responsibility to ensure that the youth has the skills and the support system as they enter into adulthood."

- One court has held that "consultation" requires physical presence in court
  - *In re Pedro M.*, 864 N.Y.S.2d 869, 873 (N.Y.Fam.Ct., 2008).

Another Lost Soul - Gabrielle, age 20

Fostering Connections to Success Act

Signed into Law October 7, 2008

- Youth must be involved in case planning and plans must be "as detailed as youth desires"
- Extension of care/support beyond age 18 will result in court oversight of "young adults" – necessarily changes the calculus

Self Portrait - CJ, age 16

International Perspectives – UN Convention on the Rights of the Child

Article 12:

"The child shall… be provided the opportunity to be heard in any judicial and administrative hearing affecting the child…."

- The Committee on the Rights of the Child has identified Article 12 as one of the four fundamental principles of the CRC
- Only the US and Somalia have not ratified the Convention on the Rights of the Child

Self Portrait - Chris, age 15

National Picture of Youth Involvement in Court

- 34 states consider children a party
- 33 states give children notice of hearings
  - 1/3 of these states have a minimum age requirement
- 32 states give children the right to attend hearings
  - Most of these states allow the child to be excluded if it is in the child's best interest
  - A few of these states limit the right to one specific type of hearing
  - A few of these states have a minimum age requirement

Mis Razas Mexicanas **Martin, age 17**

Examples of Statutes Providing Youth Involvement in Court

California – Legal Representation: Welfare and Institutions Code 317.5

(a) All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel. (b) Each minor who is the subject of a dependency proceeding is a party to that proceeding.

Florida: Fla.R.Juv.P. Rule 8.255 General Provisions for Hearings

(b) Presence of Child. The child has a right to be present at the hearing unless the court finds that the child's mental or physical condition or age is such that a court appearance is not in the best interest of the child. Any party may file a motion to require or excuse the presence of the child.

Idaho: RULE 40. Notice of Further Proceedings Including Parents, Foster Parents and Others

(b) After the adjudicatory hearing, a child eight (8) year of age or older, shall be provided with notice of, and have a right to be heard, **either in person or in writing**, in any further hearings to be held with respect to the child.

Youth Involvement in Court- California

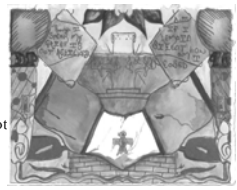
Untitled - Kathy, age 20

- Considers children in dependency cases to be parties (WIC 317.5)
- Gives children right to **notice**, to be **present**, to **address court** and to **participate** in the hearing (WIC 349)
- Gives children right to address court re placement and return home (WIC 399)
- If child is 10 or older and isn't present than court must determine if minor was properly notified of right to attend and given opportunity to attend; if not then a **continuance** is required *unless* court finds in child's best interest not to continue (WIC 349)

California Blue Ribbon Commission Recommendations

- Youth need to "have an opportunity to be heard and meaningfully participate" in court
- Judges and others encouraged to:
  - "remove barriers" that prevent children and others from attending hearings;
  - Schedule hearings at times that do not conflict with school
  - Ensure that local court practices facilitate and promote attendance

Similar recommendations to promote the voice of youth made a few years earlier by Pew Commission on Children in Foster Care

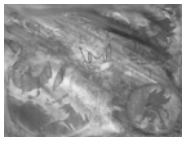


Though I Speak My Grief - Ronald, age 18

Youth are passionate about their desire and need to be an engaged participant…

"I was only six when I went into foster care. I remember vividly just sitting outside the courthouse…my birth mother crying. And then suddenly, I was living somewhere else, in some house I didn't know. No one told me anything. For five years, no one told me anything."

-- Luis



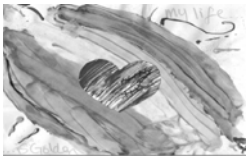
Untitled - Marcus, age 15

Why Does Youth Participation in Court and the Legal Process Matter?

Judges and the legal process will chart the child's future

"No child enters or leaves foster care without a judge's decision."

Bill Frenzel, Chair, The Pew Commission on Children in Foster Care



How I Feel About Foster Care - Valarie, age 14

A Fair and Inclusive Process Matters…

Court surveys consistently reveal that it is not the end result of the legal process that matter most, but rather what are regarded as "fair procedures."*

- Personal respect
- Fairness and neutrality of decision-makers
- Participation

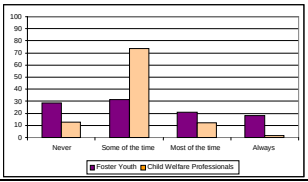
Untitled - Seymore, age 16

*California Commission Survey on the Future of the Courts

Do youth attend their court hearings? Results from a 2006 survey:

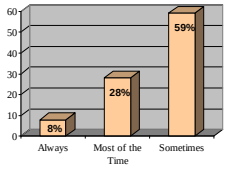
Foster Youth Responses:

- **27% reported they NEVER attended their hearings.**
- **58% reported they attended IRREGULARLY - - only some of the time or less.**
- **Foster youth perceptions differ dramatically from those of child welfare professionals**



Child welfare professionals believe age and maturity should help determine whether youth attend court.

- Just 8% believe youth should always be present in court.
- Approximately one quarter (28%) say children should be present most of the time.
- Majority (59%) say youth should be present only sometimes.



HAL survey

2006 survey shows that while professionals report *teens* are the right age to attend court, even this older population often is absent from hearings.

- **Just 29%** of child welfare professionals report that children 12 and older attend court most or all of the time.
- Very few (9%) of professionals believe the child's ***wishes*** about being present should be considered.
- The more experience the professional has, the more likely they are to advocate for regular youth presence in court. Of those with 10 years of experience or more, 42% agree children should be in court most or all of the time.

In contrast, the majority of current and former foster youth would like to attend court

- 46% state their experience in foster care would have been different had they attended court more often.
- Many youth were uninformed about the court process – 39% did not know they were allowed to go; over 40% did not know the dates of hearings.

Youth perspectives are heartfelt…

*"Listen to us. Find out what our style is. Talk to other people that know us, if we say it's okay. Check with us about things. Remember the motto, '**Nothing About Me Without Me!**' Don't make choices for us or make fun of us. Know that we have thoughts, feelings, and ideas just like you."*

Sara Erstad-Landis, "What I Would Like to Say to Lawyers," Youth Law News

Poetic - Ronald, age 18

Going to court was helpful because…

"It kept me informed of what was going to happen, it allowed me to be able to share my concerns and wishes, and it helped me better understand the legal aspects of being in care."

Former foster youth in New York

What Could Have Been - Scarlet, age 16

Attendance in court can be both empowering and intimidating…

"*It was scary, but it felt like I had some control.*"
Former foster youth in California

Of those who attended court at least some of the time, 60% say that it was helpful and their presence yielded real benefits - - from being able to take an *active role* in decisions being made about their lives to simply being able to be *present* and hear what transpires as decisions that impact their future are made.

Home At Last 2006 Survey

What happens when youth have no voice in their court hearings?

"I never went to court. I have been in and out of foster care since I was a baby and I really resent that I never got the chance to speak on my behalf, or even be present when my future was being discussed."
– South Dakota foster youth

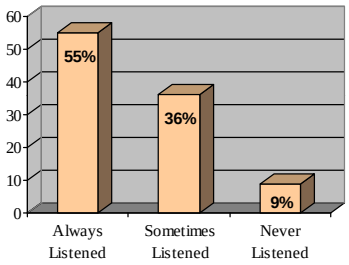
Untitled **– Noe, age 11**

Excluding Youth from the Court Process Leaves them Voiceless and Powerless

If youth are excluded from decisions that involve their family relationships, their physical safety, their health, and their very home, it is understandable that they feel frustrated and angry.

I Dream of a Happy Home - Mayra

Youth feel listened to by the judge. According to youth survey respondents:



Only Youth Can Truly Provide an Undistorted Voice and Perspective

"Children do not necessarily speak the language of the adults or the legal systems in which they are being given voice; thus their own voice is susceptible to interpretation and translation, i.e. distortion, by the adults – even their own lawyers."

"Children's Voice and Justice: Lawyering for Children in the 21st Century"

My Little Prayer **- Daniel, age 15**

Youth perspectives give an otherwise sterile record a "human face"

Having a child in court will benefit both the child, by increasing their participation and understanding, and the process, by forcing other players to deal with the child as an individual."

New York Child's Attorney

Family Forever – James, age 16

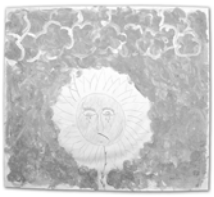
It matters…

Perspectives of Youth ….

What if Your Pictures Were Your Only Memories - Jennifer, age 14

Policy and Practice Considerations

- What are youth's wishes
- How old is the youth?
- What is the developmental level of th youth?
- Will attending court upse the youth?



What If? - Cierra, age 16

Policy and Practice Considerations

- Will attending court disrupt the youth's routine?
- Will court be confusing or boring to the youth?
- Who will transport the youth?
- Will the court need additional time for the hearings?
- What type of hearing is scheduled?

Tips for involving youth in court proceedings

- Have the youth present throughout the hearing
- Present the youth's testimony in chambers
- Arrange in advance visit to the courthouse
- Have the youth wait in a waiting area for the hearing
- Exclude the youth from court during harmful testimony
- Present the child's hearsay statements in court

Judicial Involvement

- **Time certain hearings**
  - **If not possible, call cases with youth present first**
- **Ask whether the child is present**
  - **If not, why not?**
  - **Was child given notice?**
  - **Was the child provided transportation?**
  - **Should the hearing be postponed so child can be present?**
  - **Document in court order**
- **Engage youth during the hearing**
- **Explain ruling in age appropriate language**
- **Encourage youth to attend future hearings**
- **Set hearings based on child's schedule**

Self Portrait - Nadia, age 16

GAL prepares the child

- **Provide the youth with at least 2 weeks notice of the hearing.**
- **Let the youth know that he may have to wait for a couple of hours and to bring school work or other things to occupy his time.**
- **Discuss who will be present at the hearing and what their roles are.**
- **Determine whether the youth wants a supportive person present during the hearing.**
- **Explain your role as guardian ad litem and that you have to advocate for the youth's best interests.**
- **Let the youth know what is in the GAL's report to the court.**
- **Tell the youth that you will tell the judge what she wants.**
- **Discuss what is expected to happen.**
- **Let the youth read the child welfare agency's report to the court (or tell the youth the pertinent portions) and find out whether the youth has any responses.**
- **Find out what the youth wants to the judge to know.**
- **If the youth's position is different that yours, request alternative counsel be appointed.**

GAL prepares the child (cont'd)

- Determine how and whether the youth wants to speak with the judge directly (i.e. during the court proceeding with parties present or in chambers (if possible)).
- Include in the report to court whether the youth will attend the hearing and any accommodations that should be made.
- Respond to the youth's questions about the hearing.
- Decide whether the youth should attend the entire hearing or be excused for certain portions.
- Decide with the youth whether he should speak directly to the judge during the hearing and discuss what he will say.
- Ensure arrangements are made to bring the youth to the hearing.

Child Representative's role when a youth comes to court

Confusion - Jonathan, age 16

- Inform the court of any issues
- Prepare client
- Ensure youth is aware of what's happening
- Allow the youth to speak
- Discuss the hearing afterwards

What role does social workers play in preparing the child?

- Provide the youth 2 weeks notice of the hearing.
- Let the youth know that he may have to wait for a couple of hours and to bring school work or other things to occupy his time.
- Discuss who will be present at the hearing and what their roles are.
- Arrange for a supportive person present during the hearing.
- Let the youth know what is in the social workers' report to the court.
- Help the youth write down what the youth wants the judge to know.

Social workers

- Tell the GAL what the youth's opinion is on placement, goals, services, visitation, etc.
- Tell the GAL whether the youth wants to speak with the judge in chambers.
- Tell the GAL whether the youth should attend the whole hearing or be excused for portions.
- Arrange transportation to the hearing with the youth's placement provider.

What role do foster parents play in preparing the youth?

- Arrange transportation.
- Make any schedule changes so the youth does not miss out on activities.
- Contact the school to inform them and get homework.
- Be available as a support person for the youth during the hearing

Systemic Changes to increase youth participation in court

- Statute and court rules
- Court administrative policies
- Youth's representative practices
- Accommodations for youth in court
- Agency policy
- Court orders
- School accommodations
- Education for youth

Untitled **- Pedro, age 18**

Foster Youth Have Tremendous Resilience and Optimism

"You can't go back and change what you've done, or what you've seen, but you can always dream; and that, along with determination, can accomplish anything."

Chelsea, age 16

Freedom of Power - Jonathan, age 16

"*Our children and our families are our future. How we treat them says much about us as a society – and will determine what our society will look like in the future.*"

California Chief Justice Ron George

My Future - Kayla, age 15

For more information on youth engagement issues please see: www.abanet.org/child/empowerment or contact Andrea Khoury ABA Bar Youth Empowerment Project KhouryA@staff.abanet.org or Miriam Aroni Krinsky, krinskym@yahoo.com

THURSDAY – JUNE 3, 2010

3:30 pm – 4:45

Workshop Session IV

IV.F.

education credit:
BBS
MCLE

target audience:
attorneys
CASAs
judicial officers
social workers

Indian Child Welfare Act (ICWA) and Tribal Customary Adoption

AB 1325 becomes effective July 1, 2010. It authorizes state courts in dependency proceedings to recognize adoption of Indian children through the law and custom of the child's tribe without termination of parental rights. It thus allows a new permanency option for Indian children, in a way that is respectful of and consistent with tribal values.

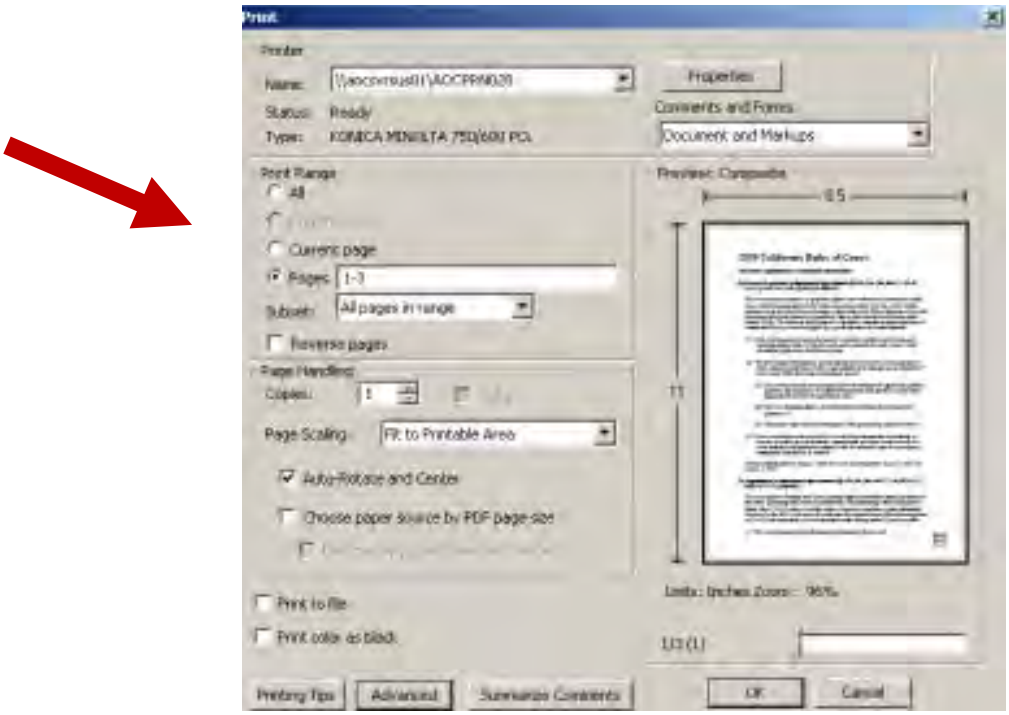
Learning Objectives:

- Appreciate the background to, need for and legal framework of tribal customary adoption.
- Understand the requirements and procedures for a tribal customary adoption.
- Understand some of the issues around tribal customary adoption.
- Understand how to use tribal customary adoption in their own cases.

Faculty:

- **Kimberly Cluff**
  Attorney, Forman & Associates
- **Nancy Currie**
  Director of Social Services, Soboba Band of Luiseno Indians
- **Nicolle Larkins**
  Child Welfare Policy Consultant, California Department of Social Service

Before you choose to print these materials, please make sure to **specify the range of pages**.



TRIBAL CUSTOMARY ADOPTION

A CULTURALLY APPROPRIATE OPTION FOR TRIBES AND INDIAN FAMILIES

Sponsored by:
The Soboba Band of Luiseño Indians

Presented by:
Nancy Currie, Director of Soboba Tribal Social Services
Kimberly Cluff, Attorney – Forman & Associates

California Customary Adoption Law

- On October 11, 2009, Governor Arnold Schwarzenegger signed AB 1325 into law
- The law goes into effect July 1, 2010
- Essential provision are found in Welfare and Institutions Code §366.24

HOW DID WE GET HERE?

Looking back is part of looking forward…

"Historically and traditionally, adoption has been practiced in most tribal communities through custom and ceremony. In general, tribes did not practice termination of parental rights. Unfortunately, adoption became a negative thing due to forced assimilation policies; it was used as a tool to destroy Indian families and culture. Due to this historical trauma, many tribes actively abhor adoption as understood by the larger culture's definition."

From the website of the National Indian Child Welfare Association (www.nicwa.org).

Permanency and Termination of Parental Rights

- Federal child welfare law and policy express clear preference for termination of parental rights and adoption of children who cannot return to their families (ASFA).
- $35 million allocated in September of 2009 by HHS for adoption incentive payments.

Termination Exceptions

- W&I Code §366.26 (f) allows for exceptions to terminating parental rights for Indian children when:
  - Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights.
  - The child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.
- Unfortunately, the Termination Exceptions are not an adequate protection for Indian Tribes or families. In Re A.A., 167 Cal.App.4th 1292

The Need to Include Customary Adoption in California State Law

Welfare and Institutions Code §366.24

The Definition

Customary adoption transfers the custody of a child to the care and protection of adoptive parents without the termination of parental rights.

Overview of the Process

Tribal Customary Adoption creates a tribal process utilizing the state court, in the absence of a tribal court, for the recognition of traditional adoption or "making relatives".

Why TCA?

- Tribes in California routinely contest adoption because it required TPR and TPR is culturally abhorrent for many tribes.
- Tribal children often, if the Tribe is successful in opposing TPR, remain in guardianship.
- Guardianship = Kin-GAP
- Kin-GAP is an inferior funding stream compared to AAP

Why TCA?

- TCA allows for AAP funding but without TPR.
- Tribes can avoid costly and difficult legal battles, and the risk of losing.
- TCA more closely resembles what Tribes traditionally have done -"**making relatives**" - honoring relationships and avoiding the punitive nature of TPR

Steps of Tribal Customary Adoption…

- An Indian child that is subject to a plan of Family Reunification in state court is identified, as part of concurrent planning, as eligible for customary adoption. All reports must include TCA as a concurrent plan option.
  See W&I 366.26(b)
- At the point the court orders that reunification services have not been successful, the Tribe can elect a permanent plan of Customary Adoption.
  See W&I 361.5(g)(1)(G)
  - However, the Tribe will know that the plan of TCA may be necessary before the .21(e) and/or .26 hearing and can be preparing in advance.

Steps…

Home Study Process: The home study process may begin at any point. The home study must be completed and approved by the Tribe prior to signing adoptive placement papers.

- **Background Checks:**
  - The home study will be completed by the Tribe or the tribe's designee.
    W&I 366.24(c)(1)-(2)
  - The background checks of the adoptive family will be completed by the state, county or the tribe's designee.
    W&I 366.24(c)(3)-(5)

Steps…

The Court shall continue the Permanency Planning Hearing for 120 days (an additional 60 days may be granted if needed) for the Tribe to file the Tribal Customary Adoption Order (TCAO) evidencing that a Customary Adoption has been completed.

W&I §366.24(c)(6)

Steps…

- The other parties may provide evidence to the Tribe regarding the TCAO and the child's best interests.
  W&I 366.24(c)(7)
- The Tribe must file the TCAO no less than 20 days prior to the continued .26 hearing.
  W&I 366.24(c)(6)

Steps…

- The County shall file an addendum report no less than 7 days prior to the continued .26.
  W&I 366.24(c)(6)
- The court will either afford Full Faith and Credit to the TCAO or does not. If FF&C is not offered, the Tribe, and possibly parties, must address the issue.
  - Some general standards for FF&C: No fraud, the entity issue the order had statutory authority to do so, due process provided, the Order does not offend a strongly held public policy.

Steps…

Once the court affords FF&C, the following steps are triggered:

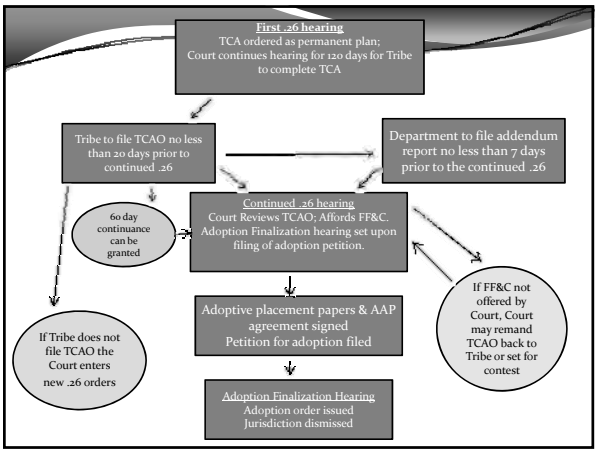
- The child is eligible for adoptive placement
- The TCA placement agreement and the Adoption Assistance Agreement shall be signed with the family
- The TCA parents may then file the petition for adoption
  W&I 366.24(c)(8)

Steps…

- After FF&C is afforded, the court shall set a hearing to finalize the adoption upon the filing of the adoption petition. W&I 366.26(e)(2)
- At the Finalization Hearing, the court shall order the adoption and terminate dependency. W&I 366.26(e)(2)
- Biological parents have no appellate rights therefore, finalization does not need to wait. W&I 366.26(j)

Steps…

- Under 366.26(b)(2) The court shall:
  - **"Order, without termination of parental rights, the plan of tribal customary adoption**, as described in Section 366.24…and upon affording the tribal customary adoption order full faith and credit at the continued selection and implementation hearing, order that a hearing be set pursuant to paragraph (2) of subdivision (e)."
- Under 366.26(e)(2) The court shall:
  - "In the case of an Indian child, if the Indian child's tribe has elected a permanent plan of tribal customary adoption, the court, upon receiving the tribal customary order will afford the tribal customary adoption order full faith and credit…The court shall thereafter **order a hearing to finalize the adoption be set upon the filing of the adoption petition…**The court shall **thereafter issue an order of adoption pursuant to 366.24."**



Mandatory Elements of a Tribal Customary Adoption Order

The TCAO must address the "mandatory" issues:

- Modification of the legal relationship of the birth parents/Indian Custodian and the child
- Contact between birth parent/Indian Custodian
- Responsibilities of the adoptive parents/birth parents/Indian Custodian
- Inheritance rights of the child
- The child's legal relationship with the Tribe
  W&I 366.24(c)(10)

The TCAO continued…

- The TCAO, in combination with the State court Order of Adoption, will represent the legal framework of the modified relationships of the Indian child. The TCAO will establish…
  - The legal relationship, responsibilities and privileges between the Indian child and the adoptive family.
  - The modified legal relationship between the child and the birth parents after TCA

Additional Thoughts and Information

- Access to the Title IV-E adoption subsidy, AAP, will be secured by the findings made by the state court and the Tribe.
- The background checks of the adoptive family will be completed by the state, county or the tribe's designee.
- The home study will be completed by the Tribe or the tribe's designee.

Additional Thoughts and Information

- It is not required or recommended that tribal customs and/or traditions, processes or ceremonies be disclosed in the TCAO, this is not necessary.
- Utilizing Customary Adoption is up to each individual Tribe. This permanent plan for native children is completely optional.
- Tribes utilizing this tool may need to review and update their own internal processes, governance, codes and social services systems. This will require time, energy and leadership.

Additional Thoughts and Information

- The Judicial Council is adopting rules of court and necessary forms to implement TCA.
- The Judicial Counsel is required under W&I366.24(f) to submit a report to the California Legislature regarding the # of families served via TCA, # of TCAs completed, length of time to complete TCAs, challenges faced in completing TCAs, benefits or detriments to Indian children of TCA.
- The TCA statute has a sunset provision which means that unless the Legislature passes a bill extending or deleting the sunset, TCA will remain in effect only until January 1, 2014.

Common Questions

- Do biological parents have any legal standing to undo the TCA after finalization?
  - No. The TCA order is final.
  - The parents can still set the termination of services for a contest and appeal the court's order and they can contest the selection of the permanent plan in Superior Court. However, the trigger for writ rights/appeal rights after the .26 is the TPR, which will not occur in a TCA.
  - Also see W&I 366.24(11)- No consent necessary

Common Questions

- Can County Counsel or minor's counsel contest TCA as the Permanent Plan for a child?
- The statute (W&I 366.24(c)(6)) does not provide for a "contest" of the selection of TCA. The language does not prohibit one but the intention of the drafters is the Tribe "elects" TCA and the other parties can "provide evidence" regarding the TCAO. (W&I 366.24(c)(7)).

Common Questions

- If there is a problem with visitation or other aspects of the TCAO, is there a way to address the issues?
- Yes, there is. The parties must show evidence of good faith efforts to resolve the dispute prior to seeking judicial relief. They may use either tribal or other dispute resolution services to address the problems, but failure to comply with the TCAO does not undo the TCA. (W&I366.26(i)(2))

Common Questions

- What if a party takes a position that the Court should not grant FF&C to the TCAO and the Court agrees and orders a TPR. What rights does the Tribe have?
  - Congress has mandated states give FF&C to the public acts, records & judicial proceedings of tribes, the court has limited discretion to deny FF&C.
  - So unless the TCAO cannot meet the FF&C standard, then the Court shall grant FF&C to the order.

Common Questions

- On what grounds could a judge not afford FF&C to the TCAO?
  - FF&C is a federal concept regarding when and how different sovereigns enforce each other's court orders.
  - If an order from sovereign #1 violates a generally accepted public policy of sovereign #2, sovereign #2 may not enforce the order.
  - So if the TCAO violates a general public policy (long standing, generally accepted, codified), the state court may find it cannot enforce it. There are also other grounds (lack of jurisdiction/statutory authority, failure to provide basic due process, fraud)

Common Questions

- Can a tribal child from an out-of-state tribe be the subject of a California Tribal Customary Adoption?
  - Yes! If the child is a California dependent and the Tribe elects a permanent plan of TCA.

Common Questions

- Who are "tribal designees" and why would we designate the responsibility for the home study and criminal background checks to someone else?
  - Tribal designees are the entity/agency that the Tribe chooses to fulfill the duties required in a TCA.
  - The Tribe may not have capacity and/or there may be an Indian agency/not-for-profit the Tribe utilizes, has an MOA/contract or is referred to.
  - Where the county does not have an adoptions dept., the tribe may ask that the state to be the "designee".

Common Questions

- What if a TCAO being issued by a Tribal Court and the tribal court rules for admission to practice in tribal court would prohibit a parent's or minor's attorney from appearing?
  - TCA was written in large part for tribes w/out courts.
  - If the tribe chooses to use their tribal court the tribe/tribal court officer should seriously consider a limited exception for an appearance (like a pro hac vice) so that a due process exception to the TCAO being afforded FF&C cannot be raised.

ACKNOWLEDGEMENTS

- Special thanks to…
  - Soboba Tribal Council for their support in making the bill a reality.
  - Assemblymen Cook and Beall for authoring the bill.
  - CWDA, specifically Kathy Senderling and Kathy Watkins.
  - Kathy Deserly, consultant, for her help and background information.
  - NICWA for their background information and research.
  - CDSS for their support and patience.

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We are especially thankful to all of the tribes for their support and input on this important issue.

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 30, 2010

Title
Juvenile Law: Tribal Customary Adoption

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 5.502, 5.690, 5.708, 5.715, 5.720, 5.722, 5.725, 5.726, 5.727, 5.728, 5.730, and 5.740; revise forms JV-300, JV-320, JV-321, JV-327, ADOPT-050, ADOPT-200, ADOPT-210, ADOPT-215, and ADOPT-220

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack Cochair
Hon. Susan D. Huguenor, Cochair

Agenda Item Type
Action Required

Effective Date
July 1, 2010

Date of Report
February 25, 2010

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Executive Summary

The Family and Juvenile Law Advisory Committee recommends amending rules and revising forms relating to juvenile dependency hearings and adoptions in order to implement the provisions of Assembly Bill 1325 (Cook; Stats. 2009, ch.287). AB 1325 is tribally sponsored legislation that allows the adoption of Indian children, who are dependents of the court, through the custom, traditions, or law of the child's tribe without requiring termination of parental rights. AB 1325 requires the Judicial Council to adopt implementing rules and forms by July 1, 2010.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that, effective July 1, 2010, the Judicial Council:

1. Amend rule 5.502 to add definitions related to tribal customary adoption;

2. Amend rules 5.690, 5.708, 5.715, 5.720, 5.722, and 5.725, which govern the disposition hearing, review hearings and selection and implementation hearing, to ensure that, as required by Assembly Bill 1325, tribal customary adoption is considered a permanency option in cases involving Indian children;

3. Amend rules 5.726, 5.727, and 5.728, dealing with the rights of prospective adoptive parents, to include individuals designated as adoptive parents under the tribal customary adoption procedures;

4. Amend rules 5.730, and 5.740, dealing with adoption and hearings subsequent to a permanent plan, to reflect tribal customary adoption as a permanency option; and

5. Revise forms JV-300, *Notice of Hearing on Selection of a Permanent Plan;* JV-320, *Orders Under Welfare and Institutions Code Sections 366.26, 727.3, 727.31;* JV-321, *Request for Prospective Adoptive Parent Designation;* JV-327, *Prospective Adoptive Parent Designation Order;* ADOPT-050, *How to Adopt a Child in California;* ADOPT-200, *Adoption Request;* ADOPT-210, *Adoption Agreement;* ADOPT-215, *Adoption Order;* and ADOPT-220, *Adoption of Indian Child* to implement AB 1325 and bring forms into conformity with rule changes.

The text of the proposed amended rules and forms are attached at pages 11–42.

Previous Council Action

The Judicial Council took a support position when AB 1325 was pending but has not otherwise considered the issue of tribal customary adoption.

Rationale for Recommendation

Under state and federal law, adoption is the preferred permanent plan for a dependent child who cannot be reunified with his or her parents in a timely manner. Adoption has a number of advantages over other permanent plans. Long-term guardianship is not seen as a permanent plan offering the same stability and permanence as adoption. Further, neither families nor counties receive the same level of federal support and reimbursement when a child's permanent plan is long-term guardianship rather than adoption.

Traditionally, adoption in California requires the termination of the parental rights of a child's birth parents. Termination of parental rights is a concept that many tribal communities find objectionable. Assembly Bill 1325 makes various amendments to the provisions of the Welfare and Institutions Code[1] to allow, in the case of an Indian child, adoption through the custom, traditions, or law of the child's tribe without requiring termination of parental rights.

[1] All further code references are to the Welfare and Institutions Code unless otherwise stated.

Implementing the provisions of AB 1325 requires various changes to Judicial Council rules and forms related to the formulation and selection of a permanent plan for an Indian child and the procedures for adopting an Indian child for whom the permanent plan is tribal customary adoption.

Rule 5.502. Definitions and use of terms

The committee recommends adding to the definitions contained in rule 5.502 definitions for the terms "modification of parental rights" and "tribal customary adoption" and, to provide clarity, amending the definition of "preadoptive parent" to include reference to individuals designated by an Indian child's identified Indian tribe as adoptive parents for the purpose of a tribal customary adoption.

Rule 5.690. General conduct of disposition hearing

Section 358.1(j), which was added by AB 1325, requires that in a case involving an Indian child all evaluations and reports beginning at disposition must, in consultation with an Indian child's tribe, consider and discuss whether tribal customary adoption is an appropriate permanent plan for an Indian child if reunification fails.

The committee concluded that ensuring compliance with this provision required revisions to rule 5.690 dealing with the conduct of disposition hearings.

Review hearings

AB 1325 added sections 366.21(i)(1)(H) and 366.22(c)(1)(G). These sections state that in all cases involving an Indian child, every assessment prepared for a status review hearing include discussion of whether tribal customary adoption should be considered, in consultation with the child's identified Indian tribe, as a permanent plan option if reunification fails.

Amendments to the rules governing review hearings were required to ensure that tribal customary adoption is considered and included as a permanent plan option in all of these hearings.

Selection and implementation hearing

The provisions of section 366.24 and 366.26 recognize tribal customary adoption, where parental rights have been modified rather than terminated, as a permanent plan option on a par with traditional adoption where parental rights have been terminated. As with the proposed amendments contained in rules 5.708, 5.715, 5.720, and 5.722, the committee also recommends similar changes to rule 5.725 to ensure that the social worker consults with the child's identified Indian tribe about whether tribal customary adoption is an appropriate permanent plan for the child.

In accordance with the procedure contained in new section 366.24 and amended section 366.26, the proposed amendments to rule 5.725 would also allow the court to continue a selection hearing involving a tribal customary adoption for, up to 120 days, with court discretion to permit

a further continuance of up to 60 days in order for the Indian child's identified Indian tribe to complete its own process for issuing a tribal customary adoption order. The tribe's customary adoption order would then be filed with the court at least 20 days before the continued hearing. If the tribe does not file the tribal customary adoption order, the court would make new findings and orders and select a new permanent plan for the child.

According to section 366.24(c)(8), (13), and (14), when the tribe's customary adoption order is filed, the state court, at the continued selection and implementation hearing, is to consider whether the order should be granted full faith and credit. If it is granted full faith and credit, the court authorizes the agency to make the tribal customary adoptive placement and sign a tribal customary adoptive placement agreement. Once the final adoption decree has been issued, the court issues an order of adoption incorporating the terms of the tribal customary adoption and terminates dependency jurisdiction.

Prospective adoptive parents

The committee recommends amendments to rules 5.726, 5.727, and 5.728, which define who qualifies as a prospective adoptive parent and accord certain rights to individuals who qualify as prospective adoptive parents. The proposed amendments would recognize that when a child's permanent plan is tribal customary adoption, individuals designated by an Indian child's tribe as the adopting parents qualify as prospective adoptive parents.

Consent of child not required

Family Code section 8600.5 was added by AB 1325. It provides that part 2 of division 13 of the Family Code does not apply to tribal customary adoptions under Welfare and Institutions Code section 366.24. Among those sections of the Family Code that are excluded from application to tribal customary adoption by section 8600.5 is section 8602, which requires the consent of a child over the age of 12 for an adoption. The committee agrees with the Assembly Bill analysis dated April 14, 2009, that the consent of a child over the age of 12 is not required for a tribal customary adoption under section 366.24. This conclusion was of great concern to the committee members, however, given the concern about respecting the wishes of children. Therefore, the committee looked at other relevant code sections and applicable law. Upon review the committee concluded that while the child's consent is not required, the views of the child are a relevant and important factor that the court can and should consider. In particular the committee noted that under Welfare and Institutions Code section 366.24(c)(7),"[t]he child, birth parents, or Indian custodian and the tribal customary adoptive parents and their counsel, if applicable, may present evidence to the tribe regarding tribal customary adoption and the child's best interest." Under section 317(c), for all children over 4, the attorney for the child must determine the child's wishes and advise the court of the child's wishes. Section 361.31(e) provides that "[w]here appropriate, the placement preference of the Indian child, when of sufficient age, … shall be considered." This is consistent with Guideline F-3 of the Guidelines for State Courts: Indian Child Custody Proceedings issued by the Bureau of Indian Affairs on November 26, 1979, which recognizes that the request and wishes of a child of sufficient age are important in making an effective placement. The committee concludes, therefore, that while the consent of a child over

the age of 12 is not required for a tribal customary adoption, the wishes of a child are still an important and appropriate factor for the court to consider when determining whether tribal customary adoption is the appropriate permanent plan for an Indian child. The committee has added an Advisory Committee Comment to rule 5.730 on this issue.

Postpermanency review hearings

The committee recommends changes to rule 5.740, which deals with hearings subsequent to a permanent plan, to reflect that tribal customary adoption is now among the permanent plans that may be selected for an Indian child.

Forms

Implementation of AB 1325 also requires revision to a number of forms. The committee recommends changes to mandatory form JV-300, *Notice of Hearing on Selection of a Permanent Plan,* to recognize that tribal customary adoption is among the options that may be selected as a permanent plan for an Indian child.

The committee also recommends changes to mandatory form JV-320, *Orders Under Welfare and Institutions Code Sections 366.26, 727.3, 727.31,* to recognize that tribal customary adoption is a permanency option for an Indian child and to authorize the specific procedural requirements in AB 1325 applicable to tribal customary adoption orders. The committee has also identified additional minor amendments to JV-320 necessary to implement Assembly Bill 938 (Committee on Judiciary; Stats. 2009, chapter 261). Form JV-320 was revised in the spring 2009 rules and forms cycle as part of the proposal titled "Appellate Procedure: Appeals and Writ Proceedings in Juvenile Dependency and Delinquency Cases." That proposal was adopted by the Judicial Council at its October 23, 2009, meeting, with an effective date of July 1, 2010. The current proposal seeks to further amend form JV-320, with a proposed effective date of July 1, 2010. If adopted by the Judicial Council, the proposed version of this form would supersede the version adopted in October and would incorporate the changes from that earlier version.

The committee recommends changes to mandatory forms JV-321, *Request for Prospective Adoptive Parent Designation,* and JV-327, *Prospective Adoptive Parent Designation Order,* to acknowledge that individuals identified by an Indian child's tribe as adoptive parents through the tribal customary adoption process qualify as prospective adoptive parents.

The committee recommends changes to forms ADOPT-050, *How to Adopt a Child in California;* ADOPT-200, *Adoption Request;* ADOPT-210, *Adoption Agreement;* and ADOPT-215, *Adoption Order* to include a discussion of, and reflect the specific requirements for completion of, a tribal customary adoption.

The committee recognizes that implementation of AB 1325 could benefit from the revision of several juvenile forms in addition to those listed here. In particular, the committee has identified three optional forms for future revision: JV-415, *Findings and Orders After Dispositional Hearing;* JV-421, *Dispositional Attachment: Removal From Custodial Parent—Placement With*

Nonparent; and JV-445, *Findings and Orders After Postpermanency Hearing—Parental Rights Terminated; Permanent Plan of Adoption*. Since these forms are optional and must be revised to comply with Assembly Bill 938 (Com. on Judiciary; Stats. 2009, ch. 261), which is effective January 1, 2011, the committee is recommending that they be revised later this year, thereby avoiding the additional expense of revising forms multiple times and minimizing the administrative burden on the courts.

Comments, Alternatives Considered, and Policy Implications

The proposed rules and forms were drafted with extensive input from the authors of the legislation, staff at the California Department of Social Services (CDSS), and representatives on the Statewide Indian Child Welfare Act working group convened by the CDSS.

Alternative actions considered

The committee considered adopting one rule that would deal specifically with tribal customary adoption rather than incorporating the requirements into existing rules. However, it was decided that that would risk having some overlook tribal customary adoption as it is a new and unfamiliar process. Therefore, instead of creating a separate tribal customary rule, the committee decided to incorporate into existing rules the mandate that tribal customary adoption be considered in all cases involving Indian children so that practitioners are made aware of and can find the new tribal customary adoption requirements.

Policy Implications

The legislation was intended to benefit tribes, Indian children, Indian parents, and families providing permanency to Indian children within the dependency system by providing an additional, culturally appropriate permanency option that offers the same benefits and has the same standing as traditional adoptions.

AB 1325 is novel legislation. While several other states legally recognize tribal customary adoptions conducted within tribal courts, Minnesota is the only state that specifically recognizes that customary adoption performed by tribal courts may be accomplished and recognized by a state court where parental rights have not been terminated. (See Minn. Stat. § 259.67 Subd. 4 (3)(iv) (West, Westlaw through 2010)) All implications of the law are not yet clear. The Legislature has acknowledged this in the sunset provisions of the legislation, which state that the law will remain in effect only until January 1, 2014, unless a later enacted statute deletes or extends that date.

The legislation also requires[2] the Judicial Council to "study California's tribal customary adoption provisions and their affects on children, birth parents, adoptive parents, Indian custodians, tribes, and the court, and … report all of its findings to the Legislature on or before January 1, 2013."

[2] See section 366.24(f), added by section 12 of AB 1325.

The committee discussed and considered the legislation's implications on a number of issues. Some of these issues such as the possible child support obligations of biological parents discussed in more detail below, had been raised and considered by the Legislature when the legislation was pending.

Comments

During the formal comment period,[3] the committee received eight written comments. Of those, five were in agreement with the proposed amendments, with three of those suggesting some revisions; two did not indicate a position, and one disagreed with the proposed rules and forms in their entirety, as well as with the underlying bill, AB 1325. The committee reviewed and analyzed the comments and, in response to many of them, made some revisions to the proposed rules and forms. A chart summarizing the comments received and the committee's responses is attached at pages 43–57. The comments related to:

- Defined terms;
- Hearing requirements;
- Interstate Compact on the Placement of Children;
- Child support obligations of biological parents; and
- Type of adoption information.

Overall, the comments were exceedingly supportive of the proposed amendments. However, several of the comments indicated concern about the implications of the law itself for social service agencies. One commentator noted that the legislation and rules require a social worker to interact with various tribes that may have different customs and traditions related to adoptions.

One commentator objected entirely to the proposal on the basis that providing a permanency option to Indian children that is not available to others is discriminatory. The committee concluded that both of these objections are actually objections to the underlying law itself rather than to the specific rules and forms proposals that are intended to implement the law.

As discussed in more detail in the comment chart, the courts have held that distinctions such as those found in the Indian Child Welfare Act between members of federally recognized Indian tribes and others are based on a political distinction rather than a racial or an ethnic distinction, and are not discriminatory.

The committee received two comments related to the proposed definitions and use of terms. In particular, the CDSS suggested adding to the definition of "tribal customary adoption" that the court may give full faith and credit to the tribal customary adoption. The committee revised the rule as proposed. California Indian Legal Services suggested adding a definition for the term

[3] The committee sought comments on the draft rules and forms from a wide array of persons interested in the subject matter, including justices, judges, attorneys, county counsel, California Department of Social Services staff, tribes and tribal advocates, and members of the public. The invitation to comment was posted on the California Courts Web site, and the comment period extended from December 18, 2009, through January 22, 2010.

"Indian child's tribe." The committee concluded that the concerns raised were sufficiently addressed by section 224.1(a) and (d) of the Welfare and Institutions Code and that further clarification in the rule was unnecessary.

The committee received several comments on the proposed amendments to the rules governing review hearings. In particular, the CDSS suggested changes to the findings and orders made following a determination that an agency did not consult with an Indian child's tribe in development of the child's case plan and asked that the committee add a reference to tribal customary adoption in rule 5.710, which deals with the six-month review hearing. After careful review, the committee decided against the suggested revisions. AB 1325 requires the active participation of the child's tribe before tribal customary adoption can be ordered as the child's permanent plan. The committee concluded that the proposed revisions would suggest that a plan of tribal customary adoption could be adopted by the court and social services agency without the active participation of the tribe.

The committee received several comments on the proposed amendments to rule 5.725. The CDSS suggested changes to the provisions in rule 5.725(d)(8)(D) dealing with orders after a finding that the social services agency failed to consult with an Indian child's tribe. For the reasons set out above regarding CDSS's comments on review hearings, the committee did not adopt these revisions. The Orange County Bar Association recommended that the committee amend rule 5.725(c)(4) to clarify that an additional continuance of the selection and implementation hearing "not exceed" 60 days for consistency with the statute. The committee revised the rule as proposed.

Regarding child support obligations of biological parents, one of the comments asked for clarification as to whether arrears of child support outstanding at the time of a child's adoption under the tribal customary adoption would still be collectible. Although no specific rule or form amendments contained in this proposal touch upon the issue of child support, the committee did look at this issue. Because the statute is silent on this particular point, the committee concluded that the general rules applicable in other adoptions would apply. The general rule is that arrears of child support outstanding at the time of the adoption can be collected, subject to limitation periods and other relevant rules. (*County of Ventura v. Gonzales* (2001) 88 Cal.App.4th 1120 [106 Cal.Rptr.2d 461]; *County of Orange v. Rosales* (2002) 99 Cal.App.4th 1214 [121 Cal.Rptr.2d 788]; Fam. Code, § 291(a).)

The committee received one comment from an adoption practitioner speaking on behalf of the National Family Law Advisory Council of the National Center for Lesbian Rights, requesting that the information on the type of adoption be removed from the form Adopt-215, *Adoption Order* because the information is causing difficulties for same sex couples. The commentator explained that same sex couples who are married or in registered domestic partnerships here in California, and who are having children together through assisted reproduction, must go through the adoption process (even though they are both listed on the original birth certificates due to marital presumptions), to assure that their parent-child relationships will be recognized outside

the borders of California. Yet when they are in other states that do not recognize their legal union or where adoption by same sex couples is against the laws of those states, they frequently encounter problems because the California adoption order specifies that they have a stepparent adoption. Since there is no legal requirement to identify the type of adoption on the order and no purpose served by requesting this information, the committee revised the form as proposed.

The Superior Court of San Diego County suggested substantive as well as grammatical and stylistic changes to the forms. The committee adopted most of these revisions as proposed.

Interstate compact on the placement of children

Among the concerns raised by the committee was the interaction between tribal customary adoption and the Interstate Compact on the Placement of Children (ICPC). AB 1325 makes no specific reference to the ICPC. Particularly in relation to Indian children, Family Code section 7907.3 says that the ICPC does not apply to any placement, sending, or bringing of an Indian child into another state pursuant to a transfer of jurisdiction to a tribal court under section 1911 of the Indian Child Welfare Act. (25 U.S.C. § 1901 et seq.) However, in a tribal customary adoption, the tribal court does not take jurisdiction of the case. The case remains under the jurisdiction of the state court, and, therefore, the committee concluded that section 7907.3 does not exempt these cases from application of the ICPC. If an out-of-state placement is identified as the child's adoptive home for the purposes of a tribal customary adoption, the ICPC will apply to the placement as long as the child remains a dependent of the juvenile court. The committee invited comments regarding the application of the ICPC. The comments received generally agreed with the committee's conclusions. In particular, the CDSS, the state agency charged with administering the ICPC, stated that "[t]he CDSS concurs with the conclusion of the committee that the ICPC would apply to such placements where the child remains a dependent of the juvenile court. Any disagreements regarding the results of home studies conducted pursuant to the ICPC would require resolution on a case by case basis according to existing ICPC rules and practices." CDSS's interpretation is entitled to great weight. (*In re H.A*. (2002) 103 Cal.App.4th 1206 [128 Cal.Rptr.2d 12,]; *In re Desiree F*. (2000) 83 Cal.App.4th 460, 474 [99 Cal.Rptr.2d 688].)

Child support obligations of biological parents

Section 366.24(c)(10) sets out certain requirements for a tribal customary adoption order. In particular it states that the "order shall not include any child support obligation from the birth parents or Indian custodian. There shall be a conclusive presumption that any parental rights or obligations not specified in the tribal customary adoption order shall vest with the tribal customary adoptive parents." This provision was added in response to concerns discussed in the legislative analysis dated April 28, 2009, at page 11, which states that ongoing support obligations for birth parents who have no substantive rights as a parent would "likely … be seen as extremely unjust to birth parents." The analysis goes on to state that "[g]iven these significant concerns, the authors have agreed to prevent a tribe from requiring child support from either the birth parents or the Indian custodian for a child adopted through customary adoption." The committee concluded that the intention of the statute is to preclude a local child support

enforcement agency from enforcing an action to collect child support against the biological parent of a child who has been adopted pursuant to a tribal customary adoption on the same terms as other adoptions. This conclusion is consistent with the position issued by the California Department of Child Support Services issued on March 1, 2010 http://www.childsup.ca.gov/Portals/0/resources/docs/policy/eblast/2010/eblast10-03.pdf which states that :

> Tribal customary adoptions do not require the termination of parental rights; however the biological parents cannot be pursued for current child support obligations (they may be held responsible for any arrears accrued prior to the adoption). … Upon receipt of proof of customary tribal adoption, enforcement actions for current support will cease immediately. Arrears, if applicable, will continue to be enforced.

Implementation Requirements, Costs, and Operational Impacts

The committee is not aware of any implementation requirements, costs, or operational impacts on the local courts arising out of the proposed amendments beyond the costs associated with reproducing the revised form.

The committee notes that section 366.24(f) requires the Judicial Council to report on the length of time it takes to complete tribal customary adoptions; the challenges faced by social workers, courts, and tribes in completing tribal customary adoptions; and the benefits and detriments to Indian children from tribal customary adoptions. The committee and AOC staff will ensure that the report includes an assessment of the costs and operational impacts of tribal customary adoptions.

Attachments

1. Cal. Rules of Court, rules 5.502, 5.690, 5.708, 5.715, 5.720, 5.722, 5.725, 5.726, 5.727, 5.728, 5.730, and 5.740, at pages 11–22
2. Forms JV-300, JV-320, JV-321, JV-327, ADOPT-050, ADOPT-200, ADOPT-210, ADOPT-215, and ADOPT-220, at pages 23–42
3. Chart of Comments, at pages 43–57
4. Attachment A: Excerpts from AB 1325

ADOPT-050 How to Adopt a Child in California

In California, there are several kinds of adoption. Learn about stepparent/domestic partner adoptions on page 1 and independent, agency, and international adoptions and adoption of an Indian child on page 2.

Stepparent/Domestic Partner Adoptions

If you want to adopt your stepchild or the child of your domestic partner, fill out and file the forms listed below. You can get them from the court clerk or from the California Courts Self-Help Center: ***www.courtinfo.ca.gov/selfhelp.***

1 Fill out court forms.

☐ ADOPT-200	*Adoption Request*	This tells the judge about you and the child you are adopting.
☐ ADOPT-210	*Adoption Agreement*	This tells the judge that you and the child, if over 12, agree to the adoption. Fill it out, but do not sign it until the judge asks you to sign it.
☐ ADOPT-215	*Adoption Order*	The judge signs this form if your adoption is approved.
☐ ICWA-010(A)	*Indian Child Inquiry Attachment*	This lets the judge know that you have asked whether the child may have Indian ancestry.
☐ ICWA-020	*Parental Notification of Indian Status*	This proves that the child's parents have been asked about Indian ancestry.

2 Take your forms to court.

Take the completed forms to the court clerk in the county where you live. The court will charge a filing fee. Or, take the forms to your lawyer or adoption agency, if you are using one.

3 The social worker writes a report.

In every adoption, a social worker writes a report. This report gives important information to the judge about the adopting parents and the child. The social worker will ask you questions. You may have to fill out forms. You may be required to pay a fee for this report. The social worker will file the report with the court and send you a copy. When you get the report, ask the clerk for a date for your adoption hearing.

4 Go to court on the date of your hearing.

Bring:

- ☐ The child you are adopting
- ☐ Form ADOPT-210
- ☐ Form ADOPT-215
- ☐ A camera, if you want a photo of you and your child with the judge
- ☐ Friends/relatives *(optional)*

Independent, Agency, or International Adoptions

If this is an independent, agency, or international adoption, fill out and file the forms below. You can get them from the court clerk or from the California Courts Self-Help Center: ***www.courtinfo.ca.gov/selfhelp.***

(1) Fill out court forms.

☐ ADOPT-200	*Adoption Request*	This tells the judge about you and the child you are adopting.
☐ ADOPT-210	*Adoption Agreement*	This tells the judge that you and the child, if over 12, agree to the adoption. Fill it out, but do not sign it until the judge asks you to sign it.
☐ ADOPT-215	*Adoption Order*	The judge signs this form if your adoption is approved.
☐ ICWA-010(A)	*Indian Child Inquiry Attachment*	This lets the judge know that you have asked whether the child may have Indian ancestry.
☐ ICWA-020	*Parental Notification of Indian Status*	This proves that the child's parents have been asked about Indian ancestry.

(2) The social worker writes a report.

In every adoption, a social worker writes a report. This report gives important information to the judge about the adopting parents and the child. The social worker will ask you questions. You may have to fill out forms. You may be required to pay a fee for this report. The social worker will file the report and send you a copy. When you get the report, ask the clerk for a date for your adoption hearing.

(3) Go to court on the date of your hearing.

Bring:

- ☐ The child you are adopting
- ☐ Form ADOPT-210
- ☐ Form ADOPT-215
- ☐ Form ADOPT-230
- ☐ A camera, if you want a photo of you and your child with the judge
- ☐ Friends/relatives *(optional)*

(4) Is this an "open" adoption?

If you want your child to have contact with his or her birth family, fill out ADOPT-310, which asks for an open adoption.

(5) If you are adopting an Indian child

In addition to the forms listed in (1), fill out and bring:

- ☐ Form ADOPT-220 *Adoption of Indian Child*
- ☐ Form ADOPT-225 *Parent of Indian Child Agrees to End Parental Rights*

If you are adopting through a tribal customary adoption:

- ☐ Attach a copy of the tribal customary adoption order to *Adoption Request,* ADOPT-200
- ☐ Attach a copy of the tribal customary adoption order to the *Adoption Order,* ADOPT-215

ADOPT-200 Adoption Request

If you are adopting more than one child, fill out an adoption request for each child.

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number if known:

Case Number:

1 Your name (adopting parent):

a. _____

b. _____

Relationship to child: _____

Street address: _____

City: _____ State: _____ Zip: _____

Telephone number: (____) _____

Lawyer *(if any): (Name, address, telephone numbers, and State Bar number):*

_____

_____

_____

2 Type of adoption *(check one):*

☐ Agency *(name):* _____

☐ Joinder has been filed. ☐ Joinder will be filed.

☐ Tribal customary adoption *(attach tribal customary adoption order)*

☐ Independent

☐ International *(name of agency):* _____

☐ Stepparent

☐ Relative

3 Information about the child:

a. The child's new name will be:

_____

b. ☐ Boy ☐ Girl

c. Date of birth: _____ Age: _____

d. Child's address *(if different from yours):*

Street: _____

City: _____ State: _____ Zip: _____

e. Place of birth *(if known):*

City: _____

State: _____ Country: _____

f. If the child is 12 or older, does the child agree to the adoption? ☐ Yes ☐ No

g. Date child was placed in your physical care:

_____

4 Child's name before adoption: *(fill out ONLY if this is an independent, a relative, a stepparent, or a tribal customary adoption.)*

_____

5 Does the child have a legal guardian? ☐ Yes ☐ No

If yes, attach a copy of the Letters of Guardianship *and fill out below:*

a. Date guardianship ordered: _____

b. County: _____

c. Case number: _____

6 Is the child a dependent of the court? ☐ Yes ☐ No

If yes, fill out below:

Juvenile case number: _____

County: _____

(To be completed by the clerk of the superior court if a hearing date is available.)

Hearing Date →

Hearing is set for:

Date: _____

Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

To the person served with this request: If you do not come to this hearing, the judge can order the adoption without your input.

Your name: _____

Case Number:

7 Child may have Indian ancestry: ☐ Yes ☐ No
If yes, attach Form ADOPT-220, Adoption of Indian Child.

8 Names of birth parents, if known:
a. Mother: _____
b. Father: _____

9 **If this is an agency adoption**
a. I have received information about the Adoption Assistance Program Regional Center and about mental health services available through Medi-Cal or other programs. ☐ Yes ☐ No
b. All persons with parental rights agree that the child should be placed for adoption by the California Department of Social Services or a licensed adoption agency (Fam. Code, § 8700) and have signed a relinquishment form approved by the California Department of Social Services. ☐ Yes ☐ No *(If no, list the name and relationship to child of each person who has not signed the relinquishment form):* _____
_____
c. This is a tribal customary adoption under Welfare and Institutions Code section 366.24. Parental rights have been modified under and in accordance with the attached tribal customary adoption order, and the child has been ordered placed for adoption.

10 **If this is an independent adoption**
a. A copy of the Independent Adoptive Placement Agreement, a California Department of Social Services form, is attached. (This is required in most independent adoptions; see Fam. Code, § 8802.)
b. All persons with parental rights agree to the adoption and have signed the Independent Adoptive Placement Agreement, a California Department of Social Services form. ☐ Yes ☐ No
(If no, list the name and relationship to child of each person who has not signed the agreement form):
_____
c. I will file promptly with the department or delegated county adoption agency the information required by the department in the investigation of the proposed adoption.

11 **If this is a stepparent adoption**
a. The birth parent *(name):* _____ ☐ has signed a consent ☐ will sign a consent
b. The birth parent *(name):* _____ ☐ has signed a consent ☐ will sign a consent
c. The adopting parents were married on **or** The domestic partnership was registered on *(date):* _____. *(For court use only. This does not affect social worker's recommendation. There is no waiting period.)*

12 ☐ There is no presumed or biological father because the child was conceived by artificial insemination using semen provided to a medical doctor or a sperm bank. (Fam. Code, § 7613.)

13 **Contact after adoption**
Form ADOPT-310, *Contact After Adoption Agreement,* ☐ is attached ☐ will not be used
☐ will be filed at least 30 days before the adoption hearing ☐ is undecided at this time
☐ This is a tribal customary adoption. Postadoption contact is governed by the attached tribal customary adoption order.

14 ☐ The consent of the ☐ birth mother ☐ presumed father is not necessary because *(specify Fam. Code, § 8606 subdivision)*: _____

15 A court ended the parental rights of *(attach copy of order):*
Name: _____ Relationship to child: _____ on *(date)* _____
Name: _____ Relationship to child: _____ on *(date)* _____

Your name: _____

Case Number:

16 The child is the subject of a tribal customary adoption order under Welf. & Inst. Code, § 366.24, which has modified the parental rights of *(attach a copy of order):*

Name: _____ Relationship to child: _____ on *(date):* _____
Name: _____ Relationship to child: _____ on *(date):* _____
Name: _____ Relationship to child: _____ on *(date):* _____

17 ☐ I will ask the court to end the parental rights of *(attach copy of* Petition to Terminate Parental Rights *or* Application for Freedom From Parental Custody, *if filed):*

Name: _____ Relationship to child: _____
Name: _____ Relationship to child: _____

18 Each of the following persons with parental rights has not contacted his or her child in one year or more. (Fam. Code, § 8604(b).) *(Attach copy of* Application for Freedom From Parental Custody, *if filed.)*

Name: _____ Relationship to child: _____
Name: _____ Relationship to child: _____

19 Each of the following persons with parental rights has died:

Name: _____ Relationship to child: _____
Name: _____ Relationship to child: _____

20 **Suitability for adoption**

Each adopting parent:

a. Is at least 10 years older than the child
b. Will treat the child as his or her own
c. Will support and care for the child
d. Has a suitable home for the child *and*
e. Agrees to adopt the child

21 ☐ I ask the court to approve the adoption and to declare that the adopting parents and the child have the legal relationship of parent and child, with all the rights and duties of this relationship, including the right of inheritance.

☐ This is a tribal customary adoption. I ask the court to approve the adoption and to declare that the adopting parents and the child have the legal relationship of parent and child, with all of the rights and duties stated in the attached tribal customary adoption order and in accordance with Welf. & Inst. Code, § 366.24.

22 If a lawyer is representing you in this case, he or she must sign here:

Date: _____ _____ ▶ _____
Type or print your name *Signature of attorney for adopting parents*

23 I declare under penalty of perjury under the laws of the State of California that the information in this form is true and correct to my knowledge. This means that if I lie on this form, I am guilty of a crime.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

ADOPT-210 Adoption Agreement

Clerk stamps date here when form is filed.

(1) Your name (adopting parent):

a. _____

b. _____

Relationship to child: _____

Address *(skip this if you have a lawyer):*

Street: _____

City: _____ State: _____ Zip: _____

Telephone number: (___) _____

Lawyer *(if any): (Name, address, telephone number, and State Bar number):* _____

_____

_____

_____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number if known:

Case Number:

(2) Child's name before adoption: _____

Child's name after adoption: _____

Date of birth: _____ Age: _____

(3) I am the child listed in (2) and I agree to the adoption. (*Sign at the hearing in front of the judge. Not required in the case of a tribal customary adoption under Welf. & Inst. Code, § 366.24.)*

Date: _____ _____ ▶ _____

Type or print your name *Signature of child (child must sign at hearing if 12 or older; optional if child is under 12)*

(4) *If there is only **one** adopting parent, read and sign below. Sign at the hearing in front of the judge.*

a. I am the adopting parent listed in (1), and I agree that the child will:

(1) Be adopted and treated as my legal child *(Fam. Code § 8612(b)) and*

(2) Have the same rights as a natural child born to me, including the right to inherit my estate.

Date: _____ _____ ▶ _____

Type or print your name *Signature of adopting parent (sign at hearing)*

b. I am married to, or the registered domestic partner of, the adopting parent listed in (1), and I agree to his or her adoption of the child.

Date: _____ _____ ▶ _____

Type or print your name *Signature of spouse or registered domestic partner (may be signed before hearing)*

Your name: _____

Case Number:

5 *If there are **two** adopting parents, read and sign below. Sign at the hearing in front of the judge.*
We are the adopting parents listed in **1**, and we agree that the child will:
(a) Be adopted and treated as our legal child *(Fam. Code. § 8612(b)) and*
(b) Have the same rights as a natural child born to us, including the right to inherit our estate.

I agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent (sign at hearing)*

I agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent (sign at hearing)*

6 *If this is a tribal customary adoption, read and sign below. Sign at the hearing in front of the judge.*
I/we are the adopting parents listed in **1**, and I/we agree that the child will:
a. Be adopted and treated as my/our legal child *(Fam. Code. § 8612(b)) and*
b. Have the same rights and duties stated in the tribal customary adoption order dated _____ *(copy attached).*
If two adopting parents, we agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent (sign at hearing)*

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent (sign at hearing)*

7 *For stepparent adoptions only:*
*If you are the legal parent of the child listed in **2**, read and sign below. Sign at the hearing in front of the judge.*
I am the legal parent of the child and am the spouse or registered domestic partner of the adopting parent listed in **1**, and I agree to his or her adoption of my child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent (sign at hearing)*

8 **Executed:**

Date: _____ ▶ _____
Judge (or Judicial Officer)

ADOPT-215 Adoption Order

Clerk stamps date here when form is filed.

1 Your name *(adopting parent):*
a. _____
b. _____
Relationship to child: _____
Street Address: _____
City: _____ State: _____ Zip: _____
Daytime telephone number: (___) _____
Lawyer *(if any): (Name, address, telephone number, and State Bar number):* _____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number if known:

Case Number:

2 Child's name after adoption:
First Name: _____
Middle Name: _____
Last Name: _____
Date of birth: _____ Age: _____
Place of birth: _____
City: _____ State: _____ Country: _____

3 Name of adoption agency *(if any):* _____

4 Hearing date: _____
Dept.: _____ Div.: _____ Rm.: _____ Judicial Officer: _____
Clerk's office telephone number: (___) _____

5 People present at the hearing:
☐ Adopting parents ☐ Lawyer for adopting parents
☐ Child ☐ Child's lawyer
☐ Parent keeping parental rights: _____
☐ Other people present *(list each name and relationship to child):*
a. _____
b. _____
If there are more names, attach a sheet of paper, write "ADOPT-215, Item 6" at the top, and list the additional names and each person's relationship to child.

Judge will fill out section below.

6 The judge finds that the child *(check all that apply):*
a. ☐ Is 12 or older and agrees to the adoption
b. ☐ Is under 12
c. ☐ This is a tribal customary adoption and the child's consent is not required.

Your name: _____

Case Number:

7 The judge has reviewed the report and other documents and evidence and finds that each adopting parent:

a. Is at least 10 years older than the child
b. Will treat the child as his or her own
c. Will support and care for the child
d. Has a suitable home for the child *and*
e. Agrees to adopt the child

8 ☐ This case is a relative adoption petitioned under Family Code section 8714.5.
☐ The adopting relative ☐ The child, who is 12 or older, has requested that the child's name before adoption be listed on this order. *(Fam. Code, § 8714.5(g).)*
The child's name before adoption was:
First Name: _____ Middle Name: _____ Last Name: _____

9 ☐ The child is an Indian child. The judge finds that this adoption meets the placement requirements of the Indian Child Welfare Act and that there is good cause to give preference to these adopting parents. The clerk will fill out **14** below.

10 ☐ The judge approves the *Contact After Adoption Agreement* (ADOPT-310)
☐ As submitted ☐ As amended on ADOPT-310

11 This is a tribal customary adoption, The tribal customary adoption order of the _____ tribe dated _____ containing ____ pages and attached hereto is fully incorporated into this order of adoption.

12 The judge believes the adoption is in the child's best interest and orders this adoption.
The child's name after adoption will be:
First Name: _____ Middle Name: _____ Last Name: _____

The adopting parent or parents and the child are now parent and child under the law, with all the rights and duties of the parent-child relationship or, in the case of a tribal customary adoption, all the rights and duties set out in the tribal customary adoption order and Welfare and Institutions Code section 366.24.

Date: _____

▶ _____
Judge (or Judicial Officer)

Clerk will fill out section below.

13 **Clerk's Certificate of Mailing**

For the adoption of an Indian child, the Clerk certifies:
I am not a party to this adoption. I placed a filed copy of:

☐ ADOPT-200, *Adoption Request*
☐ ADOPT-215, *Adoption Order*
☐ ADOPT-220, *Adoption of Indian Child*
☐ ADOPT-310, *Contact After Adoption Agreement*

in a sealed envelope, marked "Confidential" and addressed to:

Chief, Division of Social Services
Bureau of Indian Affairs
1849 C Street, NW
Mail Stop 310-SIB
Washington, DC 20240

The envelope was mailed by U.S. mail, with full postage, from:

Place: _____ on *(date):* _____

Date: _____ Clerk, by: _____, Deputy

ADOPT-220 Adoption of Indian Child

Clerk stamps date here when form is filed.

☑ This form is attached to *Adoption Request* (ADOPT-200).

1 Your name (adopting parent):

a. _____

b. _____

Relationship to child: _____

Address *(skip this if you have a lawyer):*

Street: _____

City: _____ State: _____ Zip: _____

Telephone number: (___) _____

Lawyer *(if any): (Name, address, telephone number, and State Bar number):* _____

_____

_____

_____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number if known:

Case Number:

Federal law says the state courts must send a copy of all adoption orders for an Indian child to the Secretary of the Interior within 30 days. The state court must also send the following information *Please complete the rest of the form.*

2 Indian child's name: _____

Date of birth: _____ Age: _____

3 Indian child's tribe (or tribe child is eligible for): _____

Enrollment #: _____ ☐ *Check here if you do not know.*

☐ *Check here if tribe does not have an enrollment number.*

4 Indian child's biological mother *(name):* _____

Street address: _____

City: _____ State: _____ Zip: _____

☐ *Check here if you do not know.*

☐ The biological mother attaches her request that her identity remain confidential.

5 Indian child's biological father *(name):* _____

Street address: _____

City: _____ State: _____ Zip: _____

☐ *Check here if you do not know.*

☐ The biological father attaches his request that his identity remain confidential.

Your name: _____

Case Number:

6 Indian child's biological Indian grandmothers *(names; include maiden names if you know them):*

_____ _____

☐ *Check here if you do not know.*

7 Indian child's biological Indian grandfathers *(names):*

_____ _____

☐ *Check here if you do not know.*

8 Name of any agency with information about this adoption: _____

_____

_____

9 Other people with information about the Indian child's ancestry:

	Name	Relationship to Child
a.	_____	_____
b.	_____	_____
c.	_____	_____

10 Parental rights *(check all that apply):*

a. ☐ A court ended parental rights on *(date):* _____

b. ☐ Parental rights were modified under a tribal customary adoption order on *(date):* _____

c. ☐ Parents voluntarily agreed in writing to end their parental rights.

(1) ☐ ADOPT-225 will be recorded in front of a judge and filed with the court before the adoption hearing on *(date):* _____

(2) ☐ ADOPT-225 was recorded in front of a judge and is attached to ADOPT-200 *(Adoption Request).*

(3) ☐ ADOPT-225 was signed at least 10 days after the birth date of the Indian child.

d. ☐ A judge has certified that he or she fully explained the terms and consequences of the parents' agreement to end parental rights and that the parents understood.

(1) ☐ This certificate was filed with the court on *(date):* _____; OR

(2) ☐ This certificate is attached to ADOPT-200 or will be filed before the adoption hearing.

11 *Note:* The court will notify the American Indian tribe of the child's adoption.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
NOTICE OF HEARING ON SELECTION OF A PERMANENT PLAN	CASE NUMBER:

NOTICE TO *(name and address):*

—IMPORTANT NOTICE—

A hearing under Welfare and Institutions Code section 366.26 has been set for the date and time below. At the hearing the court may terminate parental rights and free the child for adoption, order tribal customary adoption, establish legal guardianship, or place the child in a planned permanent living arrangement. You have the right to be present at this hearing and have an attorney represent you.

1. A hearing will be held

on *(date):*	at *(time):*	in Dept.:	Room:

located at ☐ court address above ☐ other *(specify address):*

2. At the hearing, the court will consider the recommendation of the social worker or probation officer and make an order concerning the following children *(names):*

3. **THE ☐ SOCIAL WORKER ☐ PROBATION OFFICER RECOMMENDS**
   a. ☐ Termination of parental rights and implementation of a plan of adoption.
   b. ☐ Tribal customary adoption.
   c. ☐ Establishment of a legal guardianship.
   d. ☐ Identified placement with a specific goal *(specify):*

4. **TO THE PARENTS, GUARDIANS, AND CHILDREN:**
   a. **You have the right to be present at the hearing, to present evidence, and to be represented by an attorney. In a dependency matter, the court will appoint an attorney for you if you cannot afford one.**
   b. Prior to the hearing, the social worker or probation officer will prepare an assessment report with recommendations. Parents and guardians must be provided with a copy of this report. The ☐ social worker's ☐ probation officer's report dated: ☐ is ☐ is not attached.
   c. If the court orders termination of parental rights, the order may be final.
   d. The court will proceed with this hearing whether or not you are present.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER)

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the proceeding. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (Form MC-410). (Civil Code, § 54.8.)

Form Adopted for Mandatory Use
Judicial Council of California
JV-300 [Rev. July 1, 2010]

Welfare and Institutions Code, §§ 366.24, 366.26, 727.3–727.4;
Cal. Rules of Court, rule 5.725
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME:	
ORDERS UNDER WELFARE AND INSTITUTIONS CODE SECTIONS 366.24, 366.26, 727.3, 727.31	CASE NUMBER:

Child's name:
Date of birth: Age:
Parent's name *(if known):* ☐ Mother ☐ Father
Parent's name *(if known):* ☐ Mother ☐ Father

1. a. Hearing date: Time: Dept.: Room:
   b. Judicial officer:
   c. Parties and attorneys present:

2. ☐ The court has read and considered the assessment prepared under Welfare and Institutions Code section 361.5(g), 366.21(i), 366.22(c), or 366.25(b) and the report and recommendation of the
   ☐ social worker ☐ probation officer ☐ and other evidence.

3. ☐ The court has considered the wishes of the child, consistent with the child's age, and all findings and orders of the court are made in the best interest of the child.

THE COURT FINDS AND ORDERS

4. a. ☐ Notice has been given as required by law.
   b. ☐ This case involves an Indian child, and the court finds that notice has been given to the parents, Indian custodian, Indian child's tribe, and the Bureau of Indian Affairs (BIA) in accordance with Welfare and Institutions Code section 224.2; the original certified mail receipts, return cards, copies of all notices, and any responses to those notices are in the court file.

5. ☐ **For child 10 years of age or older who is not present:** The child received proper notice of his or her right to attend the hearing and was given an opportunity to be present.

6. ☐ The court takes judicial notice of all prior findings, orders, and judgments in this proceeding.

7. ☐ The court previously made a finding denying or terminating reunification services under Welfare and Institutions Code section 361.5, 366.21, 366.22, 366.25, 727.2, or 727.3, for
   ☐ parent *(name):* ☐ Mother ☐ Father
   ☐ parent *(name):* ☐ Mother ☐ Father

Form Adopted for Mandatory Use
Judicial Council of California
JV-320 [Rev. July 1, 2010]

Welfare and Institutions Code, §§ 361.7, 366.24, 366.26, 727.3, 727.4;
Cal. Rules of Court, rules 5.485, 5.504, 5.590, 5.725, 5.810
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

8. a. ☐ There is clear and convincing evidence that it is likely the child will be adopted.

   b. ☐ This case involves an Indian child, and the court finds by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. *(If item 8a or 8b is checked, go to item 9* ***unless*** *item 10, 11, or 12 is applicable. If item 8a or 8b is not checked, go to item 14 or 15.)* **The fact that the child is not placed in a preadoptive home or with a person or family prepared to adopt the child is not a basis for concluding that the child is unlikely to be adopted.**

9. ☐ The parental rights of

   a. ☐ parent *(name):* ☐ Mother ☐ Father

   b. ☐ parent *(name):* ☐ Mother ☐ Father

   c. ☐ alleged fathers *(names):*

   d. ☐ unknown mother ☐ all unknown fathers
   are terminated, adoption is the child's permanent plan, and the child is referred to the California Department of Social Services or a local licensed adoption agency for adoptive placement.

   e. **The adoption is likely to be finalized by *(date):***
   (If item 9 is checked, go to item 17.)

10. ☐ This case involves an Indian child. The parental rights of

   a. ☐ parent *(name):*

   b. ☐ parent *(name):*

   c. ☐ Indian custodians *(names):*

   d. ☐ alleged fathers *(names):*

   e. ☐ unknown mother ☐ all unknown fathers
   are modified in accordance with the tribal customary adoption order of the *(specify):* tribe, dated and comprising pages, which is accorded full faith and credit and fully incorporated herein. The child is referred to the California Department of Social Services or a local licensed adoption agency for tribal customary adoptive placement in accordance with the tribal customary adoption order.
   (If item 10 is checked, go to item 17.)

11. ☐ The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship. Removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child. *(If item 11 is checked, go to item 15 or 16.)*

12. ☐ Termination of parental rights would be detrimental to the child for the following reasons *(If item 12 is checked, check reasons below and go to item 15 or 16):*

   a. ☐ The parents or guardians have maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship.

   b. ☐ The child is 12 years or older and objects to termination of parental rights.

   c. ☐ The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

   d. ☐ The child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment. Removal of the child from the physical custody of the foster parent or Indian custodian would be detrimental to the emotional well-being of the child. This clause does not apply to any child who is either
      (1) under the age of 6; or
      (2) a member of a sibling group with at least one child under the age of 6 and the siblings are or should be placed together.

CHILD'S NAME:	CASE NUMBER:

12. e. ☐ There would be substantial interference with the child's sibling relationship.

f. ☐ The child is an Indian child, and there are compelling reasons for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:

(1) Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights.

(2) The child's tribe has identified guardianship or another permanent plan for the child.

13. ☐ Termination of parental rights would not be detrimental to the child, but no adoptive parent has been identified or is available, and the child is difficult to place because the child *(if item 13 is checked, check reasons below and go to item 14):*

a. ☐ is a member of a sibling group that should stay together.
b. ☐ has a diagnosed medical, physical, or mental disability.
c. ☐ is 7 years or older.

14. a. ☐ Termination of parental rights is not ordered at this time. Adoption is the permanent placement goal, and efforts are to be made to locate an appropriate adoptive family. A report to the court is due by *(date, not to exceed 180 days from the date of this order):*
(Do not check in the case of a tribal customary adoption. If item 14a is checked, provide for visitation in items 14b and 14c as appropriate, and go to item 17.)

b. ☐ Visitation between the child and

☐ parent *(name):* ☐ Mother ☐ Father
☐ parent *(name):* ☐ Mother ☐ Father
☐ legal guardian *(name):*
☐ other *(name):*

is scheduled as follows *(specify):*

c. ☐ Visitation between the child and *(names):*
is detrimental to the child's physical or emotional well-being and is terminated.

15. ☐ The child's permanent plan is legal guardianship with a specific goal of *(specify):*
☐ Adoption
☐ Dismissal of dependency
☐ Other *(specify):*

(Name):
is appointed legal guardian of the child, and *Letters of Guardianship* will issue. *(Do not check in case of a tribal customary adoption. If item 15 is checked, provide for visitation in items 15a and 15b as appropriate, and go to item 15c or 15d.)*

a. ☐ Visitation between the child and

☐ parent *(name):* ☐ Mother ☐ Father
☐ parent *(name):* ☐ Mother ☐ Father
☐ legal guardian *(name):*
☐ other *(name):*

is scheduled as follows *(specify):*

b. ☐ Visitation between the child and *(names):*
is detrimental to the child's physical or emotional well-being and is terminated.

c. ☐ Dependency ☐ Wardship is terminated.

d. ☐ Dependency ☐ Wardship is not terminated. The likely date for termination of the dependency or wardship is *(date):* *(If this item is checked, go to items 17.)*

CHILD'S NAME:	CASE NUMBER:

The juvenile court retains jurisdiction of the guardianship under Welfare and Institutions Code section 366.4.

16. a. ☐ The child's permanent plan is an identified placement with *(name of placement):*
with a specific goal of *(specify):*
(1) ☐ Returning home
(2) ☐ Adoption
(3) ☐ Tribal customary adoption
(4) ☐ Legal guardianship
(5) ☐ Permanent placement with a fit and willing relative
(6) ☐ A less restrictive foster care setting
(7) ☐ Independent living with identification of a caring adult to serve as a lifelong connection

The child's specific goal is likely to be achieved by *(date):*

(If item 16a is checked, provide for visitation in items 16b and 16c as appropriate, and go to item 17.)

b. ☐ Visitation between the child and
☐ parent *(name):* ☐ Mother ☐ Father
☐ parent *(name):* ☐ Mother ☐ Father
☐ legal guardian *(name):*
☐ other *(name):*
is scheduled as follows *(specify):*

c. ☐ Visitation between child and *(names):*
is detrimental to the child's physical or emotional well-being and is terminated.

17. ☐ The child's placement is necessary.
18. ☐ The child's placement is appropriate.
19. ☐ The agency has complied with the case plan by making reasonable efforts, including whatever steps are necessary to finalize the permanent plan. If this case involves an Indian child, the court finds that the agency has made active efforts to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful.
20. ☐ The services set forth in the case plan include those needed to assist the child age 16 or older in making the transition from foster care to independent living. *(This finding is required only for a child 16 years or older.)*
21. ☐ The child remains a ☐ dependent ☐ ward of the court. *(If this box is checked, go to items 22 and 23 if applicable, and items 24 and 25.)*
22. ☐ All prior orders not in conflict with this order will remain in full force and effect.
23. ☐ Other *(specify):*

CHILD'S NAME:	CASE NUMBER:

24. ☐ Next hearing date: Time: Dept.: Room:
    a. ☐ Continued hearing under section 366.26 for receipt of report on attempts to locate an adoptive family
    b. ☐ Continued hearing under section 366.24(c)(6) for receipt of the tribal customary adoption order
    c. ☐ Six-month postpermanency review

25. The ☐ Parent *(name):* ☐ Mother ☐ Father
    ☐ Parent *(name):* ☐ Mother ☐ Father
    ☐ Indian custodian *(name):*
    ☐ Child
    ☐ Other *(name):*
    have been advised of their appeal rights (under Cal. Rules of Court, rule 5.590).

Date: _____

_____
JUDICIAL OFFICER

JV-321 Request for Prospective Adoptive Parent Designation

Clerk stamps date here when form is filed.

After filling out this form, bring it to the clerk of the court. If you want to keep an address or telephone number confidential, do not write the information on this form. Instead, fill out Form JV-322, Confidential Information—Prospective Adoptive Parent.

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:

Date of Birth:

Fill in case number:

Case Number:

1 Information about the person or persons you want to be designated as prospective adoptive parents:

a. Name: _____
b. Name: _____
c. Street address: _____
d. City: _____ State: _____ Zip: _____
e. Telephone number: (____) _____

2 If you are not a person in (1), fill out below.

a. Name: _____
b. I am the ☐ child ☐ child's attorney ☐ other *(specify role):* _____
c. Street address: _____
d. City: _____ State: _____ Zip: _____
e. Telephone number: (____) _____

3 If you are not the child's attorney and you know who the child's attorney is, fill out below.

a. Name of child's attorney: _____
b. Street address of child's attorney: _____
c. City: _____ State: _____ Zip: _____
d. Telephone number of child's attorney: (____) _____

4 ☐ The child is 10 years of age or older. Child's telephone number: _____
or ☐ Telephone number is confidential.

5 The child has lived with the person from *(date):* _____ to the present.
In order for the person in (1) to become a prospective adoptive parent, the child must be living with that person now.

6 Date of Welfare and Institutions Code section 366.26 hearing: _____
The person in (1) should not file this form with the court until a Welfare and Institutions Code section 366.26 hearing has been scheduled.

7 ☐ The person in (1) is committed to adopting the child.

Child's name: _____

Case Number:

8 The person in **1** has *(check all that apply):*

a. ☐ Applied for an adoptive home study
b. ☐ In a case in which tribal customary adoption is the permanent plan, been identified by the Indian child's tribe as the prospective adoptive parent.
c. ☐ Cooperated with an adoptive home study
d. ☐ Signed an adoptive placement agreement
e. ☐ Requested de facto parent status
f. ☐ Been designated by the juvenile court or the licensed adoption agency as the adoptive parent
g. ☐ Discussed a postadoption contact agreement with the social worker, child's attorney, child's Court Appointed Special Advocate (CASA) volunteer, adoption agency, or court
h. ☐ Worked to overcome any impediments that have been identified by the California Department of Social Services or the licensed adoption agency
i. ☐ Attended any of the classes required of prospective adoptive parent
j. ☐ Taken other steps toward adopting the child *(explain):* _____

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

If you need more space, attach a sheet of paper and write "JV-321, Item 8—Steps Toward Adoption" at the top. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the information in items 1 through 8 is true and correct, which means if I lie on this form, I am committing a crime.

Date: _____

_____ ▶ _____
Type or print your name *Sign your name*

_____ ▶ _____
Type or print your name *Sign your name*

JV-327 Prospective Adoptive Parent Designation Order

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:

Date of Birth:

Fill in case number:

Case Number:

1 This order was made:

a. ☐ On the court's own motion

b. ☐ At the request of

(name): _____

(relationship to the child): _____

c. ☐ The request was made:

(1) ☐ Orally at the hearing held on *(date):* _____

(2) ☐ In writing by filing Form JV-321, *Request for Prospective Adoptive Parent Designation,* on *(date):* _____

The court finds and orders:

2 ☐ The child's current caregiver or caregivers

(name): _____

(name): _____

☐ is ☐ are designated as the child's prospective adoptive parent or parents because:

a. The child has lived with the caregiver or caregivers for at least six months

b. The child's permanent plan is tribal customary adoption, and the tribe has identified the caregiver or caregivers as the child's prospective adoptive parent or parents

c. The caregiver or caregivers currently express a commitment to adopting the child *and*

d. The caregiver or caregivers have taken at least one step to facilitate the adoption.

3 ☐ The child's current caregiver or caregivers

(name): _____

(name): _____

☐ does ☐ do not qualify as the prospective adoptive parent or parents of the child, and the request for designation as the prospective adoptive parent or parents is denied, because:

a. ☐ The child has not lived with the caregiver or caregivers for at least six months.

b. ☐ The caregiver or caregivers do not currently express a commitment to adopting the child.

c. ☐ The caregiver or caregivers have not taken any steps to facilitate the adoption.

d. ☐ Other *(explain):* _____

4 ☐ The court thinks that the request for designation as a prospective adoptive parent will be contested or wants more evidence on the request, and orders a hearing on the request.

The hearing will be on *(date):* _____ at *(time):* _____ ☐ a.m. ☐ p.m.

in Department _____ of the superior court located at: _____

_____

Date: _____

▶ _____

Judge (or Judicial Officer)

TRIBAL CUSTOMARY ADOPTION ORDER OF THE
[CALIFORNIA TRIBE]

CASE. NO:

SUBJECT: IN THE MATTER OF THE _____ MINOR
[_____] COUNTY JUVENILE COURT NO. _____
TRIBAL CUSTOMARY ADOPTION ORDER

WHEREAS, the [California Tribe] is a federally recognized Indian tribe eligible for all rights and privileges afforded to federally recognized tribes; and

WHEREAS, the [California Tribe] Tribal Council is the governing body of the [California Tribe] under the authority of the Constitution/Customs and Traditions of the [California Tribe]; and

WHEREAS, the minor child/ren, _____, date of birth _____, is a member of the [California Tribe] or is eligible for membership and is the natural child/descendent of _____, who is/was a member of the [California Tribe]; and

WHEREAS, it has been determined that return of the above named minor child/ren to the birth parents would likely result in serious detriment to the child/ren, the [California Tribe] Tribal Council has met with the family and determined, after careful consideration regarding the best interest of the child/ren, birth parents, adoptive family and tribal community, that customary adoption is in the child/ren's best interest. To that end, the above named child/ren shall now be considered the legal child/ren of _____ and _____, who are the minor's _____.

WHEREAS, under California State law (Welfare and Institutions Code §XX), a permanent plan of Tribal Customary Adoption can and has been found to be in an Indian Child's best interest and the Tribe retains all rights and responsibilities for ordering the Tribal Customary Adoption,

NOW THEREFORE BE IT RESOLVED, the parental rights of _____ shall be suspended/modified as follows:

1. The Birth Parent/s: _____is/are no longer physically, legally, or financially responsible for the child. All such responsibilities are hereby transferred to the customary adoptive parents. However, under and pursuant to the customs and traditions of the Tribe and the inviolate nature of the connection between tribal children and tribal parents, the birth parents shall retain the following rights:

(a) Visitation:

Birth parents and/or child can have contact in a manner at a time that the adoptive family determines is in the child's best interest and as follows:

(b) Inheritance:

2. The Adoptive Family: Rights and obligations of the adoptive family, _____ and _____ are now the legal parents of _____. They shall have the following rights and obligations as defined below:

(a) Financial Support:

(b) Medical/Dental/Mental health care, including, but not limited to, the right to make all medical decisions:

(c) Educational rights:

(d) Inheritance:

(f) Receipt of benefits: For purposes of all tribal, state and federal benefits, including, but not limited to, financial, insurance, educational, cultural, and citizenship benefits, the child/ren is/are the children of the adoptive parents.

(g) Travel:

(h) Cultural support: The adoptive parents will endeavor to keep the minor child closely connected to his [California Tribe] heritage and will provide the child with every opportunity to develop a strong cultural identity as a member of the [California Tribe].

All rights not specified herein shall be invested to the adoptive family.

OTHER POTENTAIL ISSUES TO BE ADDRESSED:
-Clan, family, village, community, ceremonial affiliation
-Name Change

3. The Tribal Council, or any other tribal entity exercising authority specifically delegated to it by and through the duly exercised authority of the Tribal Council, retains jurisdiction to review and thereafter alter and/or modify this Order from time to time as necessary. Parties seeking such review, alteration or modification must utilize an available dispute resolution process prior to seeking Tribal Council review.

CERTIFICATION

We, the elected members of the Tribal Council of the [California Tribe] do hereby certify that the foregoing Order was adopted by the [California Tribe] Council at a duly held meeting convened on the [California Tribe] [Reservation/Rancheria] on _____, ____ by a vote of ____ "FOR", ____ "AGAINST", ____ ABSTAINING", and such Order has not been rescinded or amended in any way.

_____
_____, Chairman

_____ _____
_____, Vice-Chair _____, Treasurer

_____ _____
_____, Secretary _____, Member

Insert Name
Address
Etc....

In the Matter of

_____ DOB: _____
_____ DOB: _____

A Minor Child/ren

TRIBAL CUSTOMARY ADOPTION ORDER OF [TRIBE]

Case No:

This matter came before the X Tribe on the _____ day of _____, 20___. Formal appearances before the Tribal Council were/were not made. The Tribal Council has either reviewed or been briefed on all the documents of record received by the Tribe in the X County Superior Court Case No. _____, In the Matter of _____, Minor Child/ren, DOB: _____.

ALTERNATIVE I:

This matter came before the X Tribal Court on the _____ day of _____, 20___. Formal appearances before the Tribal Court were/were not made. The Tribal Court has either reviewed, been briefed, received oral argument on all the issues and documents of record

received by the Tribal Court in the X County Superior Court Case No. _____, In the Matter of _____, Minor Child/ren, DOB: _____.

The Tribal Council/Court received and reviewed (reports/declarations/legal memos) provided by the Tribe's ICWA representative(s), the Tribe's legal counsel and _____regarding this case and is also knowledgeable about (other cases, prior cases, sibling cases).

This matter comes before the Tribe for the purpose of considering the long term placement plan of the minor and after said deliberation the Tribe orders a plan of tribal customary adoption of the minor, _____.

History:

_____, DOB: _____, is the biological child/ren of his/her/their mother/father, _____, who is a member of the Tribe. The mother/father is also a biological parent of the child/ren. Mrs./Mr. _____is not a tribal member. The Tribe is the child's/ren's Indian tribe. The Tribe formally intervened in the court case in X County Superior Court. According to X County Superior Court documents, the child/ren was/were removed from his/her/their mother's/father's/parents' custody and care on or about _____. The mother/father/parents was/were allegedly _____ _____. at the time of the removal.

The mother/father/parents were provided a reunification plan. The mother/father/parents did not substantially comply with the reunification plan as she/he/they failed to_____ _____. Of particular concern to the Tribe is the failure to _____.

The Tribe is familiar with the proposed tribal customary adoptive parents_____. They are (tribal members, non-tribal native, non-native). The home does/does not comply with the placement preferences

of the Indian Child Welfare Act (25 U.S.C. §1915), state law (Welf. & Inst. Code §361.31) or the Tribe's preferences. The Tribe has agreed to this placement in an effort to keep the child/ren with (his/her siblings, his/her relatives, his her current school). On _____, the Tribe filed Tribal Resolution No. ____ in the X County Superior Court action which outlined the Tribe's custom regarding termination of parental rights and its commitment to a permanent placement for the child/ren.

Findings:

Based upon the X County Superior Court record, information from the Tribe's ICWA representative(s) and tribal legal counsel, and tribal customs and tradition, the Tribe makes the following findings:

1. As an exercise of its inherent sovereignty the Tribe, by and through its governing body/Tribal court, [perhaps cite the Tribe's constitution if it is written, or other tribal law] has the authority and jurisdiction to formally order a placement plan of tribal customary adoption of the child/ren, _____, DOB _____.

2. The Tribe possesses the inherent sovereign right to make decisions regarding the best interests of its children including who should provide care, custody and control of its children.

3. The Tribe is responsible to tribal children for their protection, safety, well-being and welfare, sense of belonging, preservation of identity as a tribal member and member of an extended family, preservation of the culture, religion, language, values, and relationships with the Tribe. The Tribe must embody and promote the traditional values of the Tribe regarding the protection and care of the Tribe's children. The Tribe believes that it is the responsibility of the Tribe, the tribal community and extended families to protect, care for and nurture tribal children.

4. The Tribe finds that children deserve a sense of permanency and belonging throughout their lives and at the same time they deserve to have knowledge about their unique cultural heritage including their tribal customs, history, language, religion, values and political systems.

5. The Tribe finds that based upon tribal custom and tradition, the Tribe does not

believe in the termination of parental rights and finds that the state law construct of termination of parental rights is inconsistent with tribal customs and traditions. The Tribe does support the process of joining individuals and relatives into family relationships and expanding family resources. The Tribe recognizes that the relationship between the child/ren and the Tribal Customary Adoptive family will be one of Tribal Customary Adoptive family. The Tribe also recognizes the child/ren's right to a continued relationship with her/his/their birth parents and extended families.

6. The Tribe finds that the child/ren will benefit from a relationship with his/her/their biological parents and encourages said relationship. The biological parents may have visitation with the child/ren provided the following conditions are met: [*insert requirements*; for example: the parents offer proof of sobriety from a recognized health facility and all visits take place in the presence of _____at a mutually agreed upon location.] At any time should the Tribal Customary Adoptive family have a reasonable belief that either parent is under the influence of drugs or alcohol a visit may be cancelled or terminated. Visitation between the child/ren and her/his/their extended family may take place upon consultation with

_____

_____and the Tribe and at the discretion of each.

7. The Tribe finds that the child/ren shall attend any and all holiday functions hosted by the Tribe. The Tribe or its designee shall assist the Tribal Customary Adoptive family with the development of regalia, language, cultural and ceremonial development of the child/ren.

8. The Tribe is confident the Tribal Customary Adoptive family have and will always provide the child/ren with all the love, caring, dedication and support they would provide to a biological child and it is the Tribe's intention that the child/ren be raised until the age of majority and beyond by the Tribal Customary Adoptive family.

9. The Tribe has and will continue to provide support, guidance and assistance to the child/ren and the Tribal Customary Adoptive family including offering tribal services and programs to the family. The services and programs which may be available to the Tribal Customary Adoptive family shall include, but not be limited to: medical care, dental care, and

behavioral health services at Indian Health Services centers; timely consideration for enrollment for the child/ren upon completion of his/her/their application form and its submission to the Tribe; The Tribal _____(name resources) are available to the child/ren and the Tribal Customary Adoptive family and will continue to be after the tribal customary adoption order is finalized and the case is dismissed by the X County Superior Court. The Tribe's ICWA/social services staff can assist by conducting traditional and culturally appropriate mentoring and activities, interfacing with mental health and medical providers, provide respite care, transportation and guidance to the child/ren and the Tribal Customary Adoptive family now and in the future.

10. The Tribe is committed to the permanent placement of child/ren with the Tribal Customary Adoptive family and believes the child/ren will thrive with the Tribal Customary Adoptive family and become [a] successful and meaningful member/s of the tribal community.

11. In an effort to protect and preserve the Tribal Customary Adoptive family structure the Tribe pledges its full commitment to this family and its continuing development and evolution with the child/ren including support for the child's/ren's legal name/s to be changed to reflect both his/her/their birth name and the Tribal Customary Adoptive family surname and recognition that, as the Tribal Customary Adoptive family they share all the rights and responsibilities as his/her/their parents including control over family visitation and his/her/their health, education and welfare. [*Name change is optional!*]

12. The Tribe finds that the child/ren may possess certain rights of inheritance which may be controlled by federal law pursuant to the American Indian Probate Reform Act of 2004, ("AIPRA") P.L. 108-374, or by state or tribal probate laws enacted now or in the future. The Tribe further finds that the child/ren will benefit from maintaining rights of inheritance by and between herself/himself/themselves and her/his/their biological parents and her/his/their Tribal Customary Adoptive Family.

13. The Tribe finds that the biological parents have no ongoing legal obligations to the child/ren and are not responsible for the child's/ren's care, custody or welfare. The parents may however contribute to his/her/their welfare by: [*for example*: purchasing age appropriate gifts,

school supplies and by providing culturally appropriate items to assist with his/her cultural and ceremonial development].

14. The Tribe finds that based on tribal custom and tradition the Tribe must support and protect the legal relationship between the child/ren and the Tribe, the child's/ren's current or future citizenship in the Tribe and therefore where the care, custody and control of the child/ren will be placed with the Tribal Customary Adoptive family the child/ren shall retain his/her/their legal relationship with the Tribe as a citizen/citizens or eligible for citizenship in the Tribe with all of the rights, duties and privileges that are inherent in his/her/their status as a citizen/citizens and member/s of a federally recognized tribe.

Therefore, the Tribe hereby orders the following:

The Tribe/Tribal Court hereby adopts findings 1 – 14 as its Tribal Customary Adoption Order in this case and will submit the final Order to the X County Superior Court to grant full faith and credit, and make this Order the Order of the X Court.

IT IS SO ORDERED, this _____ day of _____, 20___.

_____

Chairperson/Tribal Council/Tribal Judge

_____[TRIBE]

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • www.cdss.ca.gov

JOHN A. WAGNER
DIRECTOR

ARNOLD SCHWARZENEGGER
GOVERNOR

REASON FOR THIS TRANSMITTAL

[X] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[ ] Initiated by CDSS

March 24, 2010

ALL COUNTY LETTER NO. 10-17

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHIEF PROBATION OFFICERS
ALL CDSS ADOPTION DISTRICT OFFICES
LICENSED PUBLIC AND PRIVATE ADOPTION AGENCIES
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
ADOPTION SERVICE PROVIDERS
TITLE IV-E AGREEMENT TRIBES
ACADEMY OF CALIFORNIA ADOPTION LAWYERS

SUBJECT: ASSEMBLY BILL 1325, CHAPTER 287, STATUTES OF 2009
TRIBAL CUSTOMARY ADOPTION

REFERENCE: ASSEMBLY BILL 1325, CHAPTER 287, STATUTES OF 2009;
WELFARE AND INSTITUTIONS CODE 366.24, AND 366.26

The purpose of this All County Letter (ACL) is to provide introductory information to counties, adoption agencies, tribes and other interested individuals/organizations regarding the passage of Assembly Bill (AB) 1325, Chapter 287, Statutes of 2009. A more detailed ACL regarding implementing the provisions of AB 1325 statewide will be circulated in June 2010.

In an effort to meet the permanency needs of dependent Indian children, consistent with tribal culture, California enacted AB 1325. Effective **July 1, 2010**, this statute adds to state law "tribal customary adoption" as a permanency option for a child who is a dependent of the juvenile court and eligible under the Indian Child Welfare Act (ICWA). It defines tribal customary adoption as an adoption which occurs under the customs, laws or traditions of child's tribe. Termination of parental rights (TPR) is not required to effect the tribal customary adoption. While tribal customary adoption is unique, it is intended to be a seamless integration into the current process of conventional adoption. Aligned with the state's existing concurrent planning policies, when applicable, it allows, at the tribe's option, for tribal customary adoption to be included as an alternative permanent plan to family reunification throughout the dependency case.

This statute provides the Indian child's tribe the authority to recommend tribal customary adoption as the permanency option for the Indian child. Further, it provides that where the juvenile court finds that full faith and credit shall be extended to the tribe's tribal customary adoption order, the juvenile court will issue a state court order of adoption. It also permits an Indian child who is the subject of a tribal customary adoption to be eligible for Adoption Assistance Program (AAP) benefits.

This statute only applies to a dependent Indian child who is eligible under ICWA whose parents' rights were not terminated. It will not apply to independent or intercountry adoption, an Indian child who is a probation ward or has been voluntarily relinquished to an agency by his or her parents.

The AB 1325 becomes operative on July 1, 2010, and sunsets on January 1, 2014. This statute authorizes California Department of Social Services (CDSS) to develop emergency regulations and requires the Judicial Council's Administrative Office of the Courts to adopt rules of court and necessary forms to implement tribal customary adoption before July 1, 2010. The Judicial Council will publish forms with instructions on their website. The statute also requires the Judicial Council to complete a study of these provisions and to report its findings to the legislature on or before January 1, 2013.

BACKGROUND

The AB 1325 was the result of a gap between tribal cultural norms and existing state law, which did not include a culturally-appropriate means of achieving adoption for dependent Indian children. This statute originated from the CDSS ICWA Workgroup which includes representatives from tribes, counties and other stakeholders in Indian child welfare. It is consistent with CDSS' goal to sustain and enhance permanency for all court-dependent youth. In addition to a conventional adoption, AB 1325 gives an Indian child another permanency option by allowing the child to be adopted without the requirement of TPR, which conflicts with many tribal teachings and cultural values because it severs the child's tribal family systems, connections to extended family members, and to the tribe. Furthermore, TPR and severing family ties may also cause an Indian child to lose benefits afforded only to a member of the tribe. This statute allows Indian children and families to achieve permanency and adoption assistance benefits without TPR.

According to the National Indian Child Welfare Association, "Historically and traditionally, adoption has been practiced in most tribal communities through custom and ceremony. In general, tribes do not practice termination of parental rights. In a customary adoption, tribes are allowed to meet the permanency needs of their children while honoring their own tribal values and beliefs."

HOW THE BILL WORKS

The option of a tribal customary adoption is to be considered in all stages of the dependency case. The primary procedures and standards applicable to tribal customary adoptions are contained in the new section, 366.24, of the Welfare and Institutions Code (W&IC). They include the following:

- Provides the tribe to choose the option of tribal customary adoption as a permanency option for dependent Indian children eligible under ICWA in cases involving federally recognized tribes.
- Defines "tribal customary adoption" as an adoption which occurs under the customs, laws or traditions of an Indian child's tribe, but where TPR is not required.
- Excludes tribal customary adoption from the Family Code.
- Excludes probation wards, independent or intercountry adoptions, and Indian children that have been voluntarily relinquished by their parents from tribal customary adoption.
- Includes tribal customary adoption as a permanency option when noticing parents regarding a selection and implementation hearing.
- Affords tribal customary adoptive parents the same rights and privileges as any other adoptive parents.
- Requires the dependency social worker and the adoptions worker, in consultation with the child's tribe, to address in the court report for each review hearing, whether the tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful.
- Provides that when family reunification is unsuccessful, and a hearing is ordered to determine the appropriate permanent plan for a dependent Indian child, if the child's tribe recommends tribal customary adoption, the juvenile court may order, without termination of parental rights, tribal customary adoption as the permanent plan for that child.
- Provides requirements for cases in which tribal customary adoption is determined as the child's permanent plan, including:
  - The completion of an adoptive home study by either the Indian child's tribe or the tribe's designee;
    - If the tribe designates an agency to complete the home study, the agency must conduct the tribal customary adoption home study in consultation with the child's tribe.
    - The tribe's designee may include a licensed county adoption agency, CDSS when it is acting as an adoption agency, or a licensed adoption agency.

        - The tribe may choose to complete the tribal customary adoption home study. In that case the agency with placement and care responsibility for the child will complete the criminal and child abuse registry background checks.
    - The completion, by the child's tribe, of a Tribal Customary Adoption Order (TCAO) that includes a description of the modification of the legal relationship of the birth parents or Indian custodian and the child, and a description of the child's legal relationship with the tribe;
    - The filing of the TCAO evidencing that tribal customary adoption had been completed by the child's tribe within 120 days of the original 366.26 hearing with a court option to grant a continuance of up to 60 additional days;
    - Court discretion, if the child's tribe does not file the tribal customary adoption order within the timeframes specified for completion of the order, to alter the original order of tribal customary adoption as the child's permanency option.
    - The filing of an addendum to the continued W &IC 366.26 report by the licensed county adoption agency, or CDSS when it is acting as an adoption agency, to the court;
    - An opportunity for the child, birth parents, Indian custodian, tribal customary adoptive parents, and their counsel, to present evidence regarding the child's best interest.
- Provides that once the juvenile court affords full faith and credit to the TCAO received from the child's tribal court or council to the extent it would afford full faith and credit to the public acts, records, judicial proceedings and judgments of any other entity, the Indian child shall be eligible for tribal customary adoptive placement.
    - The completion of a tribal customary adoptive placement is contingent on the approval of the tribal customary adoption home study.
- Provides that once an adoption petition is filed, supervision is complete and the final report by the supervising agency is submitted, the court issues an order of adoption pursuant to section 366.24.
- Provides that once the adoption order is granted dependency is terminated.

Private Adoption Agency Reimbursement Program (PAARP)

The PAARP was enacted as an incentive for licensed private adoption agencies to recruit adoptive families for children who would otherwise remain in foster care. The PAARP is governed by W&IC section 16122, which requires CDSS to reimburse licensed private adoption agencies for otherwise unreimbursed costs incurred, for completing the adoptions of children who are eligible for the AAP benefits because of age, membership in a sibling group, medical or psychological problems, adverse parental background or other circumstances that will make placement of the youth(s)

especially difficult. With the passage of Senate Bill 84 the maximum PAARP rate, effective February 1, 2008, was increased to $10,000.

Effective July 1, 2010, licensed private adoption agencies can claim PAARP reimbursement for tribal customary adoptions. Some private adoption agencies have expressed concern as to whether PAARP eligibility would be impacted should any part of the TCA process be initiated prior to July 1, 2010. These cases will be eligible for PAARP reimbursement provided the tribal customary adoptive placement occurs on or after July 1, 2010.

Although AB 1325 was passed October 11, 2009, its provisions do not become law until July 1, 2010. Therefore, tribal customary adoption will not be recognized as a permanent plan until July 1, 2010. Should you have any questions regarding this letter, please contact the Permanency Policy Bureau at (916) 657-1858, or me at (916) 657-2614.

Sincerely,

Original Document Signed By:

GREGORY E. ROSE
Deputy Director
Children and Family Services Division

Rules 5.502, 5.690, 5.708, 5.715, 5.720, 5.722, 5.725, 5.726, 5.727, 5.728, 5.730 and 5.740 of the California Rules of Court are amended effective July 1, 2010, to read:

Rule 5.502. Definitions and use of terms

Definitions (§§ 202(e), 319, 361, 361.5(a)(3), 366(a)(1)(B), 628.1, 636, 726, 727.3(c)(2), 727.4(d); 20 U.S.C. § 1415)

As used in these rules, unless the context or subject matter otherwise requires:

(1)–(19) ***

(20) "Modification of parental rights" means a modification of parental rights through a tribal customary adoption under Welfare and Institutions Code section 366.24.

~~(20)~~(21)

~~(21)~~(22)

~~(22)~~(23)

~~(23)~~(24) "Preadoptive parent" means a licensed foster parent who has been approved to adopt a child by the California State Department of Social Services, when it is acting as an adoption agency, or by a licensed adoption agency, or, in the case of an Indian child for whom tribal customary adoption is the permanent plan, the individual designated by the child's identified Indian tribe as the prospective adoptive parent.

~~(24)~~(25) ~~(33)~~(34) ***

(35) "Tribal customary adoption" means adoption by and through the tribal custom, traditions, or law of an Indian child's tribe as defined in Welfare and Institutions Code section 366.24 and to which a juvenile court may give full faith and credit pursuant to 366.26(e)(2). Termination of parental rights is not required to effect a tribal customary adoption.

Rule 5.690. General conduct of disposition hearing

(a)–(b) ***

(c) Case plan (§ 16501.1)

Whenever child welfare services are provided, the social worker must prepare a case plan.

(1) ***

(2) The court must consider the case plan and must find as follows:

(A) The social worker solicited and integrated into the case plan the input of the child, the child's family; the child's identified Indian tribe, including consultation with the child's tribe on whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful; ~~and~~ and other interested parties; or

(B) ***

(3) ***

Rule 5.708. General review hearing requirements

(a)–(b) ***

(c) Reports (§§ 366.05, 366.1, 366.21, 366.22, 366.25)

Before the hearing, the social worker must investigate and file a report describing the services offered to the family, progress made, and, if relevant, the prognosis for return of the child to the parent or legal guardian.

(1) ***

(2) At least 10 calendar days before the hearing, the social worker must file the report and provide copies to the parent or legal guardian and his or her counsel, to counsel for the child, ~~and~~ to any CASA volunteer, and, in the case of an Indian child, to the child's identified Indian tribe. The social worker must provide a summary of the recommendations to any

foster parents, relative caregivers, or certified foster parents who have been approved for adoption.

(3) ***

(d)–(f) ***

(g) Case plan (§§ 16001.9, 16501.1)

The court must consider the case plan submitted for the hearing and must find as follows:

(1)–(4) ***

(5) In the case of an Indian child, the agency consulted with the child's tribe and the tribe was actively involved in the development of the case plan and plan for permanent placement, including consideration of whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful; or

(6) In the case of an Indian child, the agency did not consult with the child's tribe. If the court makes such a finding, the court must order the agency to consult with the tribe, unless the court finds that the tribe is unable, unavailable, or unwilling to participate; and

~~(5)~~ (7) ***

(h)–(o) ***

Rule 5.715. Twelve-month permanency hearing

(a) ***

(b) Determinations and conduct of hearing (§§ 361.5, 366, 366.1, 366.21)

At the hearing, the court and all parties must comply with all relevant requirements and procedures in rule 5.708, General review hearing requirements. The court must make all appropriate findings and orders specified in rule 5.708 and proceed as follows:

(1)–(4) ***

(5) If the child is not returned to his or her parent or legal guardian, the court must consider and state, for the record, in-state and out-of-state options for permanent placement~~.~~, including, in the case of an Indian child, whether:

(A) The agency has consulted the child's tribe about tribal customary adoption;

(B) The child's tribe concurs with tribal customary adoption; and

(C) Tribal customary adoption is an appropriate permanent plan for the child.

Rule 5.720. Eighteen-month permanency review hearing

(a) ***

(b) Determinations and conduct of hearing (§§ 361.5, 366.22)

At the hearing the court and all parties must comply with all relevant requirements and procedures in rule 5.708, General review hearing requirements. The court must make all appropriate findings and orders specified in rule 5.708 and proceed as follows:

(1)–(3) ***

(4) If the child is not returned to his or her parent or legal guardian, the court must consider and state, for the record, in-state and out-of-state options for permanent placement~~.~~, including, in the case of an Indian child, whether:

(A) The agency has consulted the child's tribe about tribal customary adoption;

(B) The child's tribe concurs with tribal customary adoption; and

(C) Tribal customary adoption is an appropriate permanent plan for the child.

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Rule 5.722. Twenty-four-month subsequent permanency review hearing

(a) ***

(b) Determinations and conduct of hearing (§ 366, 366.1, 366.25)

At the hearing, the court and all parties must comply with all relevant requirements and procedures in rule 5.708, General review hearing requirements. The court must make all appropriate findings and orders specified in rule 5.708 and proceed as follows:

(1)–(2) ***

(3) If the child is not returned to his or her parent or legal guardian, the court must consider and state, for the record, in-state and out-of-state options for permanent placement~~.~~, including, in the case of an Indian child, whether:

(A) The agency has consulted the child's tribe about tribal customary adoption;

(B) The child's tribe concurs with tribal customary adoption; and

(C) Tribal customary adoption is an appropriate permanent plan for the child.

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Rule 5.725. Selection of permanent plan (§§ 366.26, 727.31)

(a)–(c) ***

(d) Conduct of hearing

At the hearing, the court must state on the record that the court has read and considered the report of petitioner, the report of any CASA volunteer, the case plan submitted for this hearing, any report submitted by the child's caregiver under section 366.21(d), and any other evidence, and must proceed as follows:

(1) In the case of an Indian child, after the agency has consulted with the tribe, when the court has determined with the concurrence of the tribe that tribal customary adoption is the appropriate permanent plan for the child, order a tribal customary adoption in accordance with section 366.24; or

~~(1)~~(2) Order parental rights terminated and the child placed for adoption if the court determines, by clear and convincing evidence, that it is likely the child will be adopted, unless:

(A)–(B) ***

(C) The court finds a compelling reason to determine that termination would be detrimental to the child because of the existence of one of the following circumstances:

(i)–(v) ***

(vi) The child is an Indian child and termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights, or the child's tribe has identified guardianship, long-term foster care with a fit and willing relative, tribal customary adoption, or another planned permanent living arrangement as the appropriate permanent plan for the child.

~~(2)~~(3) ***

~~(3)~~(4) ***

~~(4)~~(5) If the court finds termination of parental rights to be detrimental to the child for reasons stated in ~~(1)~~(2)(B), the court must state the reasons in writing or on the record.

~~(5)~~(6) If termination of parental rights would not be detrimental to the child, but the child is difficult to place for adoption because the child (1) is a member of a sibling group that should stay together; (2) has a diagnosed medical, physical, or mental handicap; or (3) is 7 years of age or older and no prospective adoptive parent is identified or available, the court may, without terminating parental rights, identify adoption as a permanent placement goal and order the public agency responsible for seeking adoptive parents to make efforts to locate an appropriate adoptive family for a period not to exceed 180 days. During the 180-day period, in order to identify potential adoptive parents, the agency responsible for seeking adoptive parents for each child must, to the extent possible, ask each child who is 10 years of age or older and who is placed in out-of-home placement for six months or longer to identify any individuals who are important to the child. The agency

may ask any other child to provide that information, as appropriate. After that period the court must hold another hearing and proceed according to (1), (2), or ~~(6)~~(7).

~~(6)~~(7) If the court finds that ~~(1)~~(2)(A) or ~~(1)~~(2)(B) applies, the court must appoint the present custodian or other appropriate person to become the child's legal guardian or must order the child to remain in foster care.

(A)–(E) ***

~~(7)~~(8) The court must consider the case plan submitted for this hearing and must find as follows:

(A)–(B) ***

(C) In the case of an Indian child, the agency consulted with the child's tribe and the tribe was actively involved in the development of the case plan and plan for permanent placement, including consideration of whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful; or

(D) In the case of an Indian child, the agency did not consult with the child's tribe. If the court makes such a finding, the court must order the agency to consult with the tribe, unless the court finds that the tribe is unable, unavailable, or unwilling to participate; and

~~(8)~~(9) ***

~~(9)~~(10) ***

(e) Procedures ~~termination of parental rights~~ adoption

(1) The court may not terminate parental rights or order adoption if a review of the prior findings and orders reveals that at each and every prior hearing at which the court was required to consider reasonable efforts or services the court found that reasonable efforts had not been made or that reasonable services had not been offered or provided. If at any prior hearing the court found that reasonable efforts had been made or that reasonable services had been offered or provided, the court may terminate parental rights.

(2) An order of the court terminating parental rights, ordering adoption under section 366.26, or, in the case of an Indian child, ordering tribal customary adoption under section 366.24 is conclusive and binding on the child, the parent, and all other persons who have been served under the provisions of section 294. The order may not be set aside or modified by the court, except as provided in rules 5.538, 5.540, and 5.542 with regard to orders by a referee.

(3) If the court declares the child free from custody and control of the parents, the court must at the same time order the child referred to a licensed county adoption agency for adoptive placement. A petition for adoption of the child may be filed and heard in the juvenile court, but may not be granted until the appellate rights of the natural parents have been exhausted.

(4) In the case of an Indian child for whom tribal customary adoption has been ordered in accordance with section 366.24, the court may continue the hearing for up to 120 days to permit the tribe to complete the process for tribal customary adoption. In its discretion the court may grant a further continuance not exceeding 60 days.

(A) No less than 20 days before the date set for the continued hearing the tribe must file the completed tribal customary adoption order with the court.

(B) The social worker must file an addendum report with the court at least 7 days before the hearing.

(C) If the tribe does not file the tribal customary adoption order within the designated time period, the court must make new findings and orders under section 366.26(b) and select a new permanent plan for the child.

(f)–(h) ***

Rule 5.726. Prospective adoptive parent designation (§ 366.26(n))

(a) Request procedure

A dependent child's caregiver may be designated as a prospective adoptive parent. The court may make the designation on its own motion or on a

request by a caregiver, the child, a social worker, the child's identified Indian tribe, or the attorney for any of these parties.

(1) A request for designation as a prospective adoptive parent may be made at a hearing where parental rights are terminated or a plan of tribal customary adoption is ordered or thereafter, whether or not the child's removal from the home of the prospective adoptive parent is at issue.

(2)–(4) ***

(b) Criteria for designation as prospective adoptive parent

A caregiver must meet the following criteria to be designated as a prospective adoptive parent:

(1)–(2) ***

(3) The caregiver has taken at least one step to facilitate the adoption process. Steps to facilitate the adoption process include:

(A)–(C) ***

(D) In the case of an Indian child when tribal customary adoption has been identified as the child's permanent plan, the child's identified Indian tribe has designated the caregiver as the prospective adoptive parent;

~~(D)~~(E) ***

~~(E)~~(F) ***

~~(F)~~(G) ***

~~(G)~~(H) ***

~~(H)~~(I) ***

(c)–(f) ***

Rule 5.727. Proposed removal (§ 366.26(n))

(a) Application of rule

This rule applies, after termination of parental rights or, in the case of tribal customary adoption, modification of parental rights, to the removal by the Department of Social Services (DSS) or a licensed adoption agency of a dependent child from a prospective adoptive parent under rule 5.726(b) or from a caregiver who may meet the criteria for designation as a prospective adoptive parent under rule 5.726(b). This rule does not apply if the caregiver requests the child's removal.

(b)–(i) ***

Rule 5.728. Emergency removal (§ 366.26(n))

(a) Application of rule

This rule applies, after termination of parental rights or, in the case of tribal customary adoption, modification of parental rights, to the removal by the Department of Social Services (DSS) or a licensed adoption agency of a dependent child from a prospective adoptive parent under rule 5.726(b) or from a caregiver who may meet the criteria for designation as a prospective adoptive parent under rule 5.726(b) when the DSS or the licensed adoption agency has determined a removal must occur immediately due to a risk of physical or emotional harm. This rule does not apply if the child's removal is carried out at the request of the caregiver.

(b)–(g) ***

Rule 5.730. Adoption

(a)–(e) ***

(f) Consent

(1) At the hearing, each adoptive parent ~~and the child, if 12 years of age or older,~~ must execute *Adoption Agreement* (form ADOPT-210) in the presence of and with the acknowledgment of the court.

(2) If the child to be adopted is 12 years of age or older, he or she must also execute *Adoption Agreement* (form ADOPT-210), except in the case of a tribal customary adoption.

Advisory Committee Comment

Family Code section 8600.5 exempts tribal customary adoption from various provisions of the Family Code applicable to adoptions generally, including section 8602, which requires the consent of a child over the age of 12 to an adoption. However, under Welfare and Institutions Code section 366.24(c)(7),"[t]he child, birth parents, or Indian custodian and the tribal customary adoptive parents and their counsel, if applicable, may present evidence to the tribe regarding the tribal customary adoption and the child's best interest." Under Welfare and Institutions Code section 317(e), for all children over 4 years of age, the attorney for the child must determine the child's wishes and advise the court of the child's wishes. Welfare and Institutions Code section 361.31(e) provides that "[w]here appropriate, the placement preference of the Indian child, when of sufficient age, …shall be considered." This is consistent with Guideline F-3 of the *Guidelines for State Courts; Indian Child Custody Proceedings* issued by the Bureau of Indian Affairs on November 26, 1979, which recognizes that the request and wishes of a child of sufficient age are important in making an effective placement. The committee concludes, therefore, that while the consent of a child over the age of 12 is not required for a tribal customary adoption, the wishes of a child are still an important and appropriate factor for the court to consider when determining whether tribal customary adoption is the appropriate permanent plan for an Indian child.

(g) ***

Rule 5.740. Hearings subsequent to a permanent plan (§§ 366.26, 366.3, 391)

(a) Review hearings—adoption and guardianship

Following an order for termination of parental rights or, in the case of tribal customary adoption, modification of parental rights, or a plan for the establishment of a guardianship under section 366.26, the court must retain jurisdiction and conduct review hearings at least every 6 months to ensure the expeditious completion of the adoption or guardianship.

(1)–(4) ***

(b)–(d) ***