

DEPENDENCY CASE LAW REVIEW

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What are We Going to Cover

Its been two years since the last Beyond the Bench Conference and in that time over 90 published decisions have issued from the appellate and Supreme Courts regarding some aspect of dependency law.

**WE CAN'T HOPE TO COVER
THEM ALL**

■ However: there have been a number of important decisions that have come down recently that we are going to highlight in the time we have.

Jurisdiction:

Sex abuse and risk to siblings
Substance abuse
Domestic Violence
Death Cases

Placement and Services

■ “non-offending/non-custodial parents”
■ Incarcerated parents
■ Reasonable services
■ Visitation

ICWA

- Baby Valerie U.S. Supreme Court case
- Notice
- Tribal Customary Adoptions

- Paternity
- Placement
- Evidence

JURISDICTION

Of course, first look to see if you have jurisdiction: In re Gloria A. (1/31/13) Second Dist. Div. 1 - 213 Cal. App. 4th 476

When did mother and child arrive in the state?

In re Rocco M. (1991) 1 Cal.App.4th 814

- Substantial risk of harm – Suffered severe physical (or emotional) harm or injury or at substantial risk of harm or injury.
- Split of authority on what that truly means.
- Has now been clarified by the Calif. Supreme Court.

In re J.J. (2013) 54 Cal.4th 766

- In the last three years many decisions have been issued on one side or the other regarding whether opposite-sex or step-siblings of the victims of sexual abuse are at risk.
- The Supreme Court has spoken.

■ "Some risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great. . . . Conversely, a relatively high probability that a very minor harm will occur probably does not involve a "substantial" risk. Thus, in order to determine whether a risk is substantial, the court must consider both the likelihood that harm will occur and the magnitude of potential harm."

■ Also relevant to the totality of the circumstances surrounding the sibling abuse is the violation of trust shown by sexually abusing one child while the other children were living in the same home and could easily have learned of or even interrupted the abuse.

■ "[S]exual ***or other serious physical abuse*** of a child by an adult constitutes a fundamental betrayal of the appropriate relationship between the generations. . . . When a parent abuses his or her child, . . . the parent also abandons and contravenes the parental role. Such misparenting is among the specific compelling circumstances which may justify state intervention, including an interruption of parental custody." (emphasis added)

- I.J. specifically does not hold that siblings are, *per se*, at risk. Rather, its sets the parameters for jurisdiction either under 300(d), or more properly, under 300(j).
- See, also, In re K.R. aka, LADCFS v. Superior Court 215 Cal.App.4th 962.
- Step-siblings similarly at risk.

- What Does This Mean?**
- Siblings may be subject to jurisdiction under 300(d) and (j);
 - Must assess the nature and severity of the abuse;
 - Exposure or risk of exposure to the abuse by the siblings;
 - Age of the siblings viz the age of the victim.

- Drugs**
- In re Destiny S (2012) 210 Cal.App.4th 999
 - Methamphetamine use
 - In re Drake M. (2012) 211 Cal.App.4th 754
 - Marijuana; Diagnosis of "drug addiction"
 - Contrast with In re Alexis E. 171 Cal.App.4th 538
 - Medical marijuana-children complain of feeling sick from smoke and father's anger.

In re Drake M.

Is the father's use of medical marijuana sufficient to sustain a §300(b) count against him?

No! Such a finding must be based on evidence sufficient to (1) show that the parent/guardian had been diagnosed as having a current substance abuse problem by a medical professional or (2) establish that the parent/guardian has a current substance abuse problem as defined in the DSM-IV-TR.

DSM IV

- The DSM-IV-TR definition of substance abuse is the following:
- “[a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period:
- (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household);

- (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use);
- (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct); and
- (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights).”

Prescription Medication

How do we address this issue?

More prevalent than illegal substances?

Up-front assessments?

Domestic Violence

In re John M. (2013) 217 Cal. App. 4th 410

■ The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances.

In re T.V. (2013) 217 Cal. App. 4th 126

■ Exposing children to recurring domestic violence may be sufficient to establish jurisdiction under section 300(b); "Domestic violence impacts children even if they are not the ones being physically abused, because they see and hear the violence and the screaming"; and, even though the child was not physically harmed, the cycle of violence between the parents constituted a failure to protect her from a substantial risk of encountering the violence.

Note on DV Restraining Orders

■ **In re C.Q.** (2013) 219 Cal.App.4th 355
When should the children be included in a restraining order where there has been DV perpetrated by one parent against the other?

Only where failure to issue the order might jeopardize the safety of the children.

Physical Abuse

■ **In re Marquis H.** (1/7/13) 212 Cal. App. 4th 718
Grandparents abuse of grandchildren places their own child at risk

Causing a Death Pursuant to 300(f)

■ **In re Ethan C.** (7/5/12) 54 Cal. 4th 610
Criminal negligence not necessary

● Unlike other bases for dependency jurisdiction under section 300, "the juvenile court may adjudicate dependency under section 300(f) without any additional evidence or finding that the circumstances surrounding the parent's or guardian's fatal negligence indicate a present risk of harm to surviving children in the parent's or guardian's custody."

■ See, also:

■ **L.A. DCFS v. Sup. Ct.** (11/15/12)
211 Cal. App. 4th 13

■ **J.M. v. Superior Court** (2012) 205
Cal.App.4th 483

Incarcerated Parents

Parent's designation of a caretaker is essentially unfettered absent the Agency's ability to **prove** the plan or the designee presents a risk to the child.

In re Noe F. (1/16/13) 213 Cal. App. 4th 358
Incarcerated parent and the ability to make an appropriate plan;

Maggie S. v. Superior Court (2013) 220
Cal.App.4th 662

Nothing in 300(g) requires the parent to prove the suitability of the designated caretaker.

Family Law

In re A.G. (2013) 220 Cal.App.4th 675

Where one parent presents a substantial risk of harm to the children if they were in mother's custody, but the other parent is capable of taking care of the children, the court should not take jurisdiction. The trial court should stay the proceedings pending a family law order.

Note: Pending rehearing request and possible writ petition to the S.C.

**Disposition;
Services;
Placement and,
Bypass**

Bypass

In re J.A. (3/7/13) 214 Cal. App. 4th 279. Can you be your own sibling under 361.5(b)(10)?

■ **In re Melissa R.** (7/10/12) 207 Cal. App. 4th 816. Reunification services terminated out of state not sufficient to bypass under 361.5(b)(10).

■ **In re A.G.** (6/14/12) 207 Cal. App. 4th 276. Under 361.5(b)(7), a court can bypass FR for all children even if the male siblings were not sexually abused. (*must have juris. Over sibs.!*)

Remember!

If the court bypasses FR (or terminates FR at a review hearing) the trial court **must** orally and in writing notice the parent(s) of the right to seek writ review of the court's setting of the 366.26 permanency hearing.

Maggie S. v. Superior Court (2013)
220 Cal.App.4th 662

Disposition and Removal

■ **In re Hailey T.** (12/19/12) **212 Cal. App. 4th 139**

- Even where suitable placement is appropriate for a physically abused child, the court must still determine by clear and convincing evidence that an older sibling is similarly at risk.
- Is that child differently situated, i.e., no history of abuse or neglect; otherwise well taken care of?

Registered Sex Offenders

WIC 361.5(b) amended as of 1/1/13 to include:

(16) That the parent or guardian has been required by the court to be registered on a sex offender registry under the federal Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. Sec. 16913(a)), as required in Section 106(b)(2)(B)(xvi)(VI) of the Child Abuse Prevention and Treatment Act of 2006 (42 U.S.C. Sec. 5106a(2)(B)(xvi)(VI)).

In re T.W., (2013) 214 Cal.app.4th 1154

Clarifies when the reunification clock starts ticking when a child has been initially placed with a parent, and only later removed from both parents.

The reunification clock doesn't start until the child has been removed from both parents.

Comparison of WIC 361.5 and WIC 361.2 -- the two separate statutory tracks for services. 361.5 contains the time limitations; 361.2 is the statute that lays out the options when the court removes the child from one parent and then places with the non-custodial parent.

The terms "detain" and "remove" are very different concepts.

■ Pay attention to the "date entered foster care." At dispo, when you remove from both parents, be sure to say it on the record, make sure everybody is on the same page about the date. (Remember, the hearing on the 12 month review per WIC 366.21(f) should be set 12 months from the "date entered foster care.")

■ Be clear at dispo if the services are being provided pursuant to 361.5 or 361.2. It could save you some headaches

In re Fabian L., (2013) 214 Cal.app.4th 1018

361.5(e) and incarcerated parents:

Seiser and Kumli, California Juvenile Court Practice and Procedure (2012) § 2.129[2][b], page 2-390, 361.5(e)(1) is "one of the underutilized dependency provisions."

Also an Incarcerated parent case regarding termination of reunification services.

Reunification and Reasonable Services

- **In re Christopher D.** (9/20/12) 210 Cal. App. 4th 60 – visits
- **In re K.C.** (12/20/12) 212 Cal. App. 4th 323 mentally ill parents. Even if parent difficult and non-compliant, the agency cannot just abdicate its obligation to tailor services to the clients.
- **In re Anthony T.** (8/22/12) 208 Cal. App. 4th 1019- reasonable proximity to home for visits

DEPORTED PARENTS

- (SB 1064) Children who cannot be reunited with their parents may be placed under custody of a relative without taking into consideration the relative's legal status.
- Places a reasonable efforts burden on the agency to determine what services may be available to a deported parent and the availability of those services. The court must consider those facts regarding the extension of FR services for six more months.

STAY TUNED

- Additionally, SB 1064 requires the California Department of Social Services to develop guidelines on best practices to establish Memorandums of Understanding between counties and foreign consulates and to assist in applying for specific protected status for dependents of the court.

Placement-Non-custodial Parent

In re Patrick S. (2013) 218 Cal.App.4th 1254

In re Abram L. (2013) 219 Cal.App.4th 452

361.2 requires that upon removal from the custodial parent, the court must place the child in the care of the non-custodial parent unless it finds by clear and convincing evidence the placement would be detrimental.

ICPC not required; the child's wishes, while to be considered, are not determinative; parent could arrange for appropriate services for the child.

**Placement with Alleged/Bio
Father**

In re E.T. (2013)217 Cal.App.4th
426

Only a presumed father is entitled to custody under WIC 361.2.

**Right to Placement With Parent
Post-Termination of Legal
Guardianship**

Depends on the nature of the guardianship.

If an out of state guardianship is terminated, agency must establish risk if returned to a parent. Thus, a WIC 300 must be filed;

If the LG arises from a closed Calif.

Dependency case, then WIC 366.3 applies and permanency continues.

In re Nickolas T. (2013) 217 Cal.App.4th 1492

Relative/NREFM Placement

- **In re Michael E.** (1/16/13) 213 Cal. App. 4th 670 – should they have examined NREFM
- **In re M.L.** (4/20/12) 205 Cal. App. 4th 210 – criminal records exemptions
- **In re H.K.** (2013) 217 Cal.App.4th 159
Sibling in Oregon had a manslaughter conviction.

CACI

- **Veronica Gonzalez v. Santa Clara County Department of Social Services** (10/8/13)
- 220 Cal. App. 4th 326
- CACI reporting case
- The court held that a genuine disciplinary intention could furnish a bar to a finding of child abuse under CANRA when the circumstances presented a reasonable occasion for discipline and the discipline imposed was reasonable in kind and measure.

Parentage

- **In re Brianna M.** (2013) Voluntary Declaration Of Paternity per FC 7570 is not a conclusive presumption in dependency actions. Cites to In re Jerry P.
- **J.R. v. D.P.** (12/21/12) 212 Cal. App. 4th 374 Judgment of paternity does not equal presumed- child's well being #1 consideration

- **In re D.M.** (10/24/12) 210 Cal. App. 4th 541 – counter to Jerry P.
- **In re B.C.** (5/14/12) 205 Cal. App. 4th 1306 – must determine biological parentage
- **In re D.S.** (7/18/12) 207 Cal. App. 4th 1088 -step-mother can't challenge mother's parentage

- ICPC**
- **In re B.S.** (2012) 209 Cal.App.4th 246
 - Although ICPC not required for placement with parent, court should consider the denial of the ICPC and the receiving state's refusal to supervise in considering placement with parent.

- 388**
- **In re Marcello B.** (9/24/12) 209 Cal. App. 4th 635
 - Extensive history of alcohol abuse

Evidence

■ **In re E.A.** (8/27/12) 209 Cal. App. 4th
787 General Objections are not valid

■ **In re M.L.** (8/27/12) 210 Cal. App. 4th
1457 Psychotherapist/patient privilege
WIC 5328

In re Madison T. (2/28/13) 213
Cal.App.4th 1506
Hearsay at admissible at disposition.

■ **In re Christian P.** (2012) 208 Cal.App.4th 437
– Agency not required to seek WIC 827
permission to use information from a separate
case.

■ **In re Mary B.** (2013) 218 Cal.App.4th 1474
– CCP not applicable to dependency re motion
for a directed verdict. WIC 350 applies once
agency and minor have presented their
evidence; court has inherent power to grant
motion to reopen if in the best interest of the
child.

■ **In re L.J.** (5/1/13) 216 Cal.App.4th 1125
– Disentitlement doctrine

ICWA

Adoptive Couple v. Baby Girl
133 S. Ct. 2552

- Highly publicized and complex case. Could spend all of our time dissecting the court's decision. Interpreting the South Carolina ICWA law.
- Law does not apply if parent had no "continued" custody; Since child never lived with dad, ICWA regarding TPR do not apply; Law only applies when the relationship already exists; ICWA does not apply when there is no alternative party seeking adoption.

In re D.N. (2013) 218 Cal.App.4th
1246

- Can a Court override an Indian Tribe's determination regarding eligibility of the child under ICWA?
- NO!
- Multiple notices to the tribe and multiple negative responses. Finally, tribe indicated they would not respond any further.

Tribal Customary Adoption

- Does the trial court have discretion not to order a tribal customary adoption?
- Yes.
- **In re A.M.** (2013) 215 Cal.App.4th 339
- **In re H.R.** (2012) 208 Cal.App.4th 757

■ **In re A.M.** is a roadmap as to how to handle an ICWA case from detention, through jurisdiction and disposition to permanency.

ICWA/ASFA

- **In re Autumn K.** (11/20/13)
- 1) The child the grandfather was accused of contributing to the delinquency of – was the grandmother.
- 2) When can the court find the Agency acted arbitrarily in denying the waiver?

Termination of Parental Rights

- **In re T.G.** (2013) 215 Cal.App.4th 1
- Cannot terminate parent's parental rights without a finding of detriment at some point during the pendency of the case.
- Alleged father raised to presumed during the pendency of the case

Non-Minor Dependents

Since a parent cannot reunify with an adult, FR terminates once the dependent reaches 18

In re K.L.(2012) 210 Cal.App.4th 632

Also, K.L. did not qualify for NMD status because she was not yet participating in a TILP nor was she in a permanent plan.

Termination of NMD Jurisdiction

■ **In re Nadia G.** (2013) 216 Cal.App.4th 1110

Court can only terminate for one of three reasons: 1) NMD does not wish to remain under court supervision; 2) NMD is not participating in a reasonable TILP; or 3) NMD cannot be located after reasonable efforts to locate;

In any event, WIC 391 applies to the termination of a NMD.

Thus the court must insure that the agency has made ever effort to provide all required documents and services called for in 391

In re Shannon M. (2013)

Miscellaneous

- **R.H. v. Sup. Court.** (8/21/12) 209 Cal. App. 4th 364

No right to counsel under 366.26(n)

- **In re Ryan K.** (5/31/12) 207 Cal. App. 4th 591

Unless the Court of Appeal conditionally reverses a matter, upon remand, all issues are before the court including 388 petitions or change of orders.

Intercounty Transfers

- **In re Andrew J.** (2/6/13) 213 Cal. App. 4th 678 , Kern County did not have authority to reject the transfer simply because it thought the other court was wrong about the minor's legal residence. Under CRC §5.612(a)(1), the receiving court may not reject the case. The Court could have held a transfer-out hearing for the purpose of determining whether new or different facts justify another transfer. Alternatively, either child welfare agency could have filed an appeal from the original transfer-out order.

THE END

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