Dependency Case Law Update

Beyond the Bench
Dec. 2019

Hon. Shawna Schwarz

Santa Clara County Superior Court

January 1 – December 2, 2019

ICWA

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- Brackeen v. Burnhardt
- In re A.W.

UCCJEA / Hague

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In re L.D.

32 Cal.App.5th 579 | Sixth District | Santa Clara

Facts
- 9 year old child, maybe Alaskan ancestry
- Ct found ICWA notice was proper
- Subsequent RO protecting child from mom
- Gun surrender hearing: mom violated RO by possessing gun
- Mom appealed from gun surrender hearing, but briefing does not address RO; instead challenges ICWA finding
- Dept conceded bad ICWA notice

Discussion
- Reminder: per *Isaiah W.* (2016) 1 Cal.5th 1, parent can argue ICWA at .26 appeal even if didn't argue at jx/dispo
- But orders at gun surrender hearing are not premised on ICWA finding. ICWA notice is required "for hearings that may culminate in order for foster care placement, TPR, preadoptive placement, or adoptive placement." (§224.3(a))

Finding
- Challenge to ICWA notice untimely
- But: given Dept. concession that notice was deficient, Juv Ct must revisit ICWA finding before 366.26 hearing.

ICWA notice is not required for restraining order hearing.

Notes:

Brackeen v. Bernhardt

937 F.3d 406 | Fifth Circuit | TX / LA / IN

Facts
- Plaintiffs = fost adopt pars, states of TX, LA, IN; defendants = USA, Dept. of Interior, BIA, HHS; intervenors = Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morengo Band of Mission Indians, Navajo Nation.
- Plaintiffs argue ICWA and 2016 administrative rule (Final Rule) are unconstitutional.
- District Ct granted summary judgment for plaintiffs: ICWA and Final Rule violated: equal protection, Tenth Amendment, nondelegation doctrine, and Administrative Procedure Act.
- Defendants appealed.

Decision
- Affirm district ct ruling that plaintiffs have standing to appeal.
- Reverse grant of summary judgment, render judgment for defendants.

ICWA is constitutional and does not violate the Tenth Amendment anticommandeering doctrine.

Holdings
- Definition of "Indian child" is political classification subject to rational basis review, does not violate equal protection.
- ICWA preempted conflicting state law
- ICWA provision allowing tribes to establish different placement order is not unconstitutional delegation of Congressional legislative power to tribes

Notes:

In re A.W.

38 Cal.App.5th 655 | Third District | Sacramento

Facts
- Child removed at age 1 for DV; pars indicated eligible for enrollment in Picayune Racheria of Chukchansi tribes
- At hearing, ct found child not Indian child
- At .26, TPR; no beneficial relationship; pars appeal
- County: petition for invalidation is exclusive remedy for notice, inquiry violations; pars have no stand to file petition for invalidation, it is only for parents of Indian children, not potential Indian children.

Holdings
- Appeal has traditionally been found to be appropriate vehicle to raise notice/inquiry violation, even for "potentially" Indian children
- Will not re-examine forfeiture doctrine. Parent is not foreclosed from bring up ICWA on appeal even if could have been raised earlier.
- Error not harmless when notice sent for hearing that already passed.

Appellate Court has jurisdiction over appeal; parents have standing to assert ICWA violation; noncompliance with notice requirements is not harmless.

Notes:

In re E.W.

37 Cal.App.5th 1167 | Second Dist. Div. 8 | Los Angeles

Facts

- Mom & dad divorced in Orange County in 2014.
- Mom & EW have lived in South Carolina from 2014 to present, dad continues to live in California (Los Angeles).
- While on summer visit to dad, EW alleges physical abuse by mom.
- Trial court found UCCJEA did not apply, declared dependency, removed from mom, placed with dad, terminate jurisdiction.
- Mom appealed, said court should have held evidentiary hearing to determine which state was home state, and that CA was not home state when dependency began.

Discussion

- UCCJEA takes a "first in time" approach to jurisdiction.
- Once court of appropriate state has made child custody determination, that state obtains exclusive, continuing jurisdiction, unless: 1) CA determine neither child, nor child and one parent have significant connection w/ state and substantial evidence is no longer in state, or 2) any state determines that child and pars no longer live in the state.
- Neither of those circumstances apply.
- CA maintains exclusive, continuing jurisdiction because of the 2014 order of dissolution, and dad still lives in state.
- Home state when dependency started did not matter because CA had exclusive, continuing jurisdiction.

The state that made the initial custody determination has exclusive, continuing jurisdiction.

UCCJEA

Notes:

In re D.R.

39 Cal.App.5th 583 | Second Dist., Div. 8 | Los Angeles

Facts

- Petition filed for DR & ZR
- Mom reported dad deported to Mexico; dad's whereabouts unknown.
- Agency had phone number and "Facebook information" from adult kids who reported to be in contact with dad.
- Agency's efforts to notice dad: called phone number, went to and sent mail to old address, did Facebook search, searched 21 governmental databases; eventually gave notice by publication.
- At.26 hearing, court is made aware that adult daughter has been in touch with dad, dad is appointed counsel, counsel filed § 388 petition to vacate jx/dispo findings/orders for lack of notice.
- Ct denies 388 petition. Dad appeals.

Discussion

- Juv Ct erred in finding agency used reasonable diligence to find dad.
- Agency did not follow up with adult kids, who were in contact w/ dad
- Agency did not follow most likely means of being able to notify dad
- Service by publication is sufficient only when person's whereabouts remain unknown despite "reasonably diligent inquiry."
- Agency failed to comply with Hague Service Convention, which was required because dad was resident of Mexico.
- All findings as to father are reversed, with instructions to commence de novo with adjudication after proper notice.

Notice by publication was invalid because there was no due diligence inquiry. Because the Hague Service Convention applies and its requirements were not met, automatic reversal.

Hague

Notes:

County of Riverside v. Estabrook

30 Cal.App.5th 1144 | Fourth Dist. Div. 2 | Riverside

Facts

- County filed complaint vs. alleged dad for child support and healthcare expenses for child J.L.
- Alleged dad responded: I'm not dad, child was born into a marriage, husband should be joined.
- Alleged dad & atty filed declarations indicating child born into marriage, mom & dad cohabiting at time of child's birth.
- Alleged dad wanted judgment of non-paternity.
- County: only husband and mom can assert marital presumption; alleged dad cannot use §7540 marital presumption as shield.
- Fam Ct: marital presumption applied automatically, did not order genetic testing, granted judgment of non-paternity.

Arguments on appeal

- Ct erred by not ordering genetic testing.
- 7540 presumption was not supported by substantial evidence.
- Error to let dad assert 7540; can be asserted only by spouse w/in marriage.
- Judgment of non-paternity not supported by substantial evidence.

Judgment

- No evidence of solid value: dad's declaration doesn't provide necessary facts; attorney didn't say how he got knowledge of facts; no authenticated birth certificate, marriage certificate or VDOP
- Can non-spouse assert marital presumption as affirmative defense in child support case, or in support of request for judgment of non-paternity? Issue is moot.

Error to not order genetic tests when Fam Code §7551 factors are met. No substantial evidence that marital presumption applied. Judgment of non-paternity is not supported by substantial evidence.

Notes:

County of L.A. v. Christopher W.

B292570 | Second Dist. Div. 1 | Los Angeles

Facts

- Chris is bio dad – present when MD was born, did not sign VDOP; has had only three interactions w/ MD, did not provide financial support.
- Mom started relationship w/ Colin when pregnant, moved in together when MD was age 2. Colin had positive, loving relationship w/MD, but did not represent himself as MD's father.
- County filed complaint re parental obligations vs. Chris.
- Chris wanted to join Colin as party, saying Colin is 7611(d) presumed.
- Trial ct: Colin is 7611(d) presumed, Facebook comments; Chris is "presumed" per §7555 based on genetic testing. Chris' presumption easily overcome based on lack of relationship. No child support due.

Discussion

- Error to find that Chris' presumption of biological paternity was overcome by lack of relationship.
- Presumption of bio paternity rebutted by: 1) showing dad was infertile or not there at conception, or 2) DNA tests show another man was father.
- Quality of relationship between MD & Chris , or between MD & Colin, has no bearing on § 7555 presumption.
- Error to appoint unwilling man as presumed father. Obligation of fatherhood should not be forced upon unwilling candidate who is not biologically related.
- Chris' bio paternity rebutted any 7611(d) presumption of Colin's.
- Error to relieve bio dad of paternal responsibility by appointing unwilling presumed father.

Bio father cannot assert §7611(d) presumption to force mom's boyfriend to be adjudged presumed father.

Notes:

In re Roger S.

31 Cal.App. 5th 572 | Second Dist. Div. 1 | Los Angeles

Facts

- Referral alleging neglect from mom because 12 year old Roger was extremely dirty, had foul odor, had disruptive behavior at school.
- Mom wouldn't cooperate w/ SW, declined to drug test.
- SW observed Roger being dirty, having foul odor.
- Juv Ct ordered Roger detained from mom, placed him w/ dad; terminated jurisdiction w/ custody to dad, monitored visits to mom.
- Mom appealed, challenged sufficiency of evidence.

Discussion

- 300(b) requires that child suffered, or there is substantial risk child will suffer, serious physical harm or illness…."
- Undisputed that Roger never suffered physical harm ore illness as result of mom's conduct.
- No nexus between mom's conduct and substantial risk of physical harm or illness – so jurisdiction and disposition findings/orders reversed.
- Matter is remanded to family court for hearing on custody and visitation.
- Pending hearing in family court, the current custody arrangement (joint legal custody, physical custody to dad, monitored visits to mom) shall remain in place– to avoid undue confusion and disruption in Roger's life.

Foul body odor and smelly undersized clothing do not place a child at substantial risk of suffering serious physical harm or illness.

Notes:

In re L.W.

32 Cal.App.5th 840 | Second Dist. Div. 8 | Los Angeles

Facts

- LW is 13 year old. Kaiser makes referral.
- Mom has medical probs, uses Norco, Valium, Ibuprofen, Tylenol w/shot of vodka. Used cocaine to help w/ mobility, every other day or when had money for it. Wanted to "detox."
- Safety plan was created; LW felt safe w/ mom.
- DCFS then learned of mom's criminal history from 1993-2017, including two DUI, reckless driving, possession of paraphernalia.
- DCFS filed petition. Court does not remove. Mom tested positive.
- Ct sustains petition, no removal.
- Mom appeals jx/dispo, says no evidence substance abuse caused substantial risk of harm; court should have ordered IS.

Discussion

- DCFS needs preponderance of: 1) neglectful conduct, 2) causation, 3) serous harm or substantial risk of serious harm.
- All agree no past harm based on mom's substance abuse.
- This is not "substance abuse without more" per *Drake M.*
- Court doesn't accept argument that "risk to child of being cared for by under influence parent is not speculative" – where is causation?
- Cannot presume physical harm from parent's substance abuse.
- But LW at risk of future harm. Recent DUI arrests and reckless driving provide nexus between risk of future harm and mom's SA.
- Reasonable to infer that safety problems posed by mom's SA will continue to multiply until her SA is resolved.

Jurisdiction is correct based on mom's admitted use of cocaine and a reckless driving conviction and DUI arrests shortly before dependency petition.

Notes:

In re L.C.

38 Cal.App. 5th 646 | Second Dist. Div. 1 | Los Angeles

Facts

- 6 year old LC lived w/ legal guardian Pedro since 2013.
- 300(b)(1) petition alleged Pedro's meth use interfered w/ his ability to provide regular care, placing LC at risk of serious physical harm.
- SW: Pedro under influence at home visit: he slurred & swore; he denied using, tested pos for meth twice, later admitted he lied.
- Pedro testified: used meth at hotel party, used at most 6 or 7 times; when he used, arranged for care of LC; never purchased meth; willing to drug test; and did not have substance abuse problem.
- Doctor testified: tests showed Pedro used within 3-5 days of tests, but don't show if Pedro was impaired; chronic meth user has sleep deprivation, weight loss, inability to function normally. Pedro was obese, weighed 360-370 pounds.
- Court: jx per 300(b)(1), removed LC from Pedro. Pedro appealed.

Discussion

- 300(b)(1) requires evidence of serious physical harm or substantial risk thereof.
- Substance abuse shown by medical diagnosis or evidence of criteria recognized by medical profession as indicative of SA disorder.
- Drug use, w/o more, insufficient ground to assert dependency jx.
- No substantial evidence of SA: Pedro used, didn't abuse. No indicia of abuse – only used 7x in 9 months, didn't crave, didn't buy; did all caretaking of LC; was obese.
- No substantial evidence LC at risk of serious physical harm – Pedro arranged for LC's care when he used; didn't keep meth in the home; homework issues are not physical harm..

Occasional methamphetamine use outside the home, when child is in care of another adult, does not support jurisdiction.

Conclusion:

- Drug use or SA, w/o more, cannot support jx.
- §300.2 (home free from SA is necessary for well-being of child) – doesn't apply here because no evidence of substance abuse.

Interesting….

No mention of Rocco M., but lots of Alexzander C. (300 substance abuse means diagnosis or indicia)

Notes:

In re J.M.

40 Cal.App.5th 913 | Second Dist. Div. 5 | Los Angeles

Facts

- Referral because parents physically fighting, selling drugs, yelling at 3 and 2 year old kids (fall 2017)
- DCFS files petition, kids stay with mom. Mom tests positive for drugs. Court issues detention order. Mom meets SW at Dept., absconds w/ kids when learns of removal order.
- Mom, kids' whereabouts unknown for 9 mos. When back, mom & dad uncooperative: refused to communicate w/ SW, not available for unannounced home visits; didn't drug test.
- Jx hrg held (10/18): ct thought evidence stale, need current risk; dismissed petition. DFCS requested stay, filed writ of supersedeas.

Discussion

- General rule re current risk: if petition alleges (b)(1) jx based solely on risk of harm to minor (rather than harm already suffered), ct must find risk of harm exists at time of jx hearing.
- But parent cannot use the "at the time of hearing" rule as sword, rather than as shield.
- "The position the parents take strikes us as a bit rich."
- The "at the time of the hearing rule" should not apply to frustrate jurisdiction when parent's wrongful conduct is cause of the delay.
- This rationale would encourage parents to defy court orders and resident Dept efforts to monitor children
- In any event, there IS evidence of current risk. After kids back, mom missed four drug tests; viewed in context of prior pos tests, admission of use, and absconding w/ kids. Kids older, still tender."

It is error to dismiss a petition based on lack of current evidence of harm when the lack of evidence is due to parent absconding with children and wrongfully preventing Dept. from monitoring children's welfare.

Notes:

In re Harley C.

37 Cal.App.5th 494 | Second Dist. Div. 7 | Los Angeles

Facts

- Mom submitted to jx, contested dispo – wanted kids placed w/ her.
- At hearing, mom wanted one of minors to testify re info in report; court denied request, citing recent policy, requiring trial statement indicating what witnesses would be called be submitted.
- Mom's counsel asked for brief continuance to prepare joint trial statement, requested mom be able to testify.
- Both requests denied by Juvenile Court; ct terminated jurisdiction over kids, gave dad sole physical custody, joint legal. Mom appeals.

Discussion

- At issue is validity of rule and application to this case.
- CA cts have inherent and statutory rulemaking authority to exercise reasonable control over all proceedings w/ pending litigation.
- However, that authority is not boundless.
- Legislature requires that courts may institute only rules/policies not inconsistent w/ law or rules of court, and must carefully weigh impact on litigant's constitutional rights.
- Trial court rule requiring joint trial statement for contests was adopted in violation of state law and Rules of Court, hence is unenforceable.
- In determining validity of local rules, reject procedures that exalt efficiency over fairness.
- Here: litigants had no notice that penalty for noncompliance was bar from presenting evidence. Violation of CCP575.2, notice.
- Efficiency is not end in itself, is outweighed by strong public policy favoring resolution of case on merits.
- Rule as applied conflicts with WIC 358(a), requiring court to consider material evidence at disposition. Ct's application of rule deprived mom of fairly adjudicated disposition hearing.

Excluding all of mom's evidence because she didn't follow a local rule regarding the filing of a witness list was a disproportionate sanction.

Notes:

In re A.E.

38 Cal.App.5th 1124 | Fourth Dist. Div. 2 | San Bernardino

Facts

- Serious physical injury to AE by adoptive parents; 6 kids, ages 3-10.
- Kids had special needs, multiple placements before adoption.
- After contested Dispo, ct found (b)(5) bypass for AE, (b)(6) bypass for siblings; then found in kids' best interests for parents to get FR.
- All six kids appealed.

Discussion

- Court has broad discretion to determine if reunification is in kids' best interest, but abuse of discretion if no substantial evidence.
- Here, evidence showed parents continued to deny abuse despite overwhelming evidence to contrary. Continued denial shows it is unlikely parents will make substantive progress in treatment.
- Mom's claim that denials rooted in 5th amendment right rejected.
- No substantial evidence that reunification services were likely to prevent reabuse of kids or that failure to try FR would be detrimental because child closely attached to pars.
- First impression: provision requiring bypass unless there is "competent testimony" that services would be likely to prevent reabuse -- "competent testimony" refers to in-court oral statements of live witnesses, no other forms of evidence.

"Testimony" referred to in §361.5(c)(3) – regarding whether services were likely to prevent reabuse to overcome bypass – refers to in-court, live testimony.

Parents' complete denial of abuse (where there was overwhelming evidence to contrary) may be evidence that services are unlikely to prevent re-abuse.

(b)(5), (b)(6) bypass

Notes:

In re I.A.

40 Cal.App.5th 19 | Fourth Dist. Div. 2 | San Bernardino

Facts

- 2015: IA, IsA removed from mom, placed w/ dad
- 2017: IA, IsA, removed from dad, placed w/ mom
- 2018: IA, IsA, AA removed from mom
- Dept recommends 361.5(b)(10) bypass
- Juv Ct did not feel FR services in childrens' best interest
- Juv Ct begrudgingly ordered FR for IA and IsA per reading of (b)(10)
- IA & IsA did not have sibs whose FR was terminated in past
- AA's first dependency, had sibs (IA & IsA) whose FR was terminated
- Juv Ct asks someone to appeal, noting split in authority

Discussion

- Appellate Ct find 361.5(b)(10) ambiguous on its face. Can IA and IsA count as sibs of each other? If so, only-children can't fall w/in (b)(10)
- Legislative intent favors bypass for all three: "We give …(b)(10) a reasonable, commonsense interpretation consistent with legislative intent, and apply the provision in a practical rather than technical manner by choosing wise policy over an absurd result."
- But, split in authority.
  - (b)(10) may apply to "same child" (*Gabriel K*, First District, 2012; and *In re IA*, Fourth District, Div. Two, 2019)
  - (b)(10) may NOT apply to "same child" *(In re BL*, Fourth District, Div. One, 2012; and *In re JA*, Third District, 2013) – but no siblings in these cases…

Bypass per §361.5(b)(10) may apply to the "same child." But split in authority….

(b)(10) bypass

Notes:

In re M.S.

D075278 | Fourth Dist. Div. 1 | Imperial

Facts

- Baby MS born pos tox; during initial investigation, mom gave Mexicali address, friend's phone number. Following month Dept reaches out to DIF & Mexican consulate, but doesn't follow up.
- Detention Hearing: mom appears, MS detained.
- Juris/Dispo continued for UCCJEA, UCCJEA hearing held, Juris/Dispo hearing continued again, then again – mom appears, verifies Mexicali address (12/17).
- Juris/Dispo held 6/18, 11 months later, Dept recommends (b)(1) bypass. Dept claims due diligence: tried to call mom once 9/17, twice 5/18, searched in jails/hospitals 5/18.
- Juv Ct said due diligence, (b)(1) bypass, set .26; at .26, TPR.

Discussion

- Appellate Ct reversed ALL decisions.
- Mom's whereabouts were not unknown: appeared multiple times in court, provided valid address and usable phone number; Dept failed to work w/ DIF & Mexican consulate; showed up for some visits, supervised by Dept.
- Juv Ct should not have set .26 hearing. If sole basis of bypass is (b)(1), ct is supposed to set 6 month review, not .26 hearing
- Juv Ct should not have terminated mom's parental rights. Harmless error standard inapplicable since mom deprived of fundamental right; even so, not harmless.
- Solution: Appellate Ct reverses and remands with instructions to vacate all orders, provide FR for at least six mos – even though past 24 mos.

A parent's whereabouts are not unknown for (b)(1) bypass, when Dept. had mom's address & valid phone number, mom showed up to some hearings and some visits, and Dept. never asked DIF to help contact mom.

(b)(1) bypass

Notes:

N.T. v. H.T.

34 Cal.App.5th 595 | Fourth Dist., Div. 3 | Orange

Facts

- Wife got TRO vs. husband, sought DVRO for acts violating TRO (H refused to give child to W unless W interacted w/ H; requested intimate physical contact; wrote letter to W and put in diaper bag; drove to W's apartment)
- Court denied DVRO on ground that technical violation of TRO was not act of DV; said no DV unless violation of TRO constitutes DV.

Discussion

- Abuse includes Fam Code §6320 behavior, which includes "disturbing the peace" – which means conduct that destroys mental or emotional calm of other party.
- H's actions were in violation of TRO, therefore acts of abuse
- H's conduct would still constitute abuse independently of TRO
- Trial ct failed to make necessary factual findings re issuance of DVRO, so appellate ct must remand instead of just reverse.

Technical violation of RO is an act of domestic violence. Per DVPA, abuse is not limited to acts inflicting physical injury.

Notes:

In re A.M.

37 Cal.App.5th 614 | Second Dist., Div. 2 | Los Angeles

Facts

- Age 2, AM indicated dad touched her by pointing; age 4 AM claimed dad molested. Mom forced dad to leave but allowed overnight visits.
- When AM age 10, mom started dating dad again. When AM 12, mom found AM's note saying dad raped her. Mom got DV TRO.
- DCFS got order to remove AM from dad, then filed petition.
- At Dispo, ct granted WIC 213.5 RO, no visits, no contact at all
- Dad appealed, said no evidence need order restricting all communication to ensure safety; also, AM has mental resiliency, despite sexual abuse. If FR, have some visits; not enough for bypass.

Discussion

- Sufficient basis to conclude AM's safety at risk but for RO proscribing all contact because dad groomed, sexually abused over years; nature of molest progressed. When it came to light, dad denied, indicating he doesn't understand damage he caused and suggesting high risk grooming and manipulation would continue if dad had access at all.
- No FR for dad bc mom getting FM, so "bypass" argument fails
- Dad's argument that abuse was not "severe" because done over clothing waived because he didn't raise issue below.
- Even if not waived, what dad did here was not non-severe, but meets definition of severe sexual abuse.

Dad's long history of grooming minor over many years justifies RO enjoining all contact; dad cannot cite daughter's resiliency as reason she is not at risk.

Notes:

IRMO Ankola

35 Cal.App.5th 560 | Sixth District | Santa Clara

Facts

- W filed TRO vs. H, denied. Year later, W's 2nd RO granted for 5 yrs.
- 2 mos later, H filed TRO vs. W. At trial on dad's RO, ct granted mutual restraining orders.

Discussion

- No DVPA mutual RO's unless Fam Code §6305: 1) Both parties appear personally; 2) each party presents written evidence of abuse in DV application using mandatory Judicial Council RO forms (written evidence in responsive pleading does not count), and 3) ct makes detailed findings of fact that both parties acted as primary aggressors and neither acted primarily in self defense.

No mutual restraining orders unless compliance with Family Code §6305.

Notes:

Reasonable Services

In re M.F. | 32 Cal.App.5th 1 | Fourth Dist. Div. 1 | San Diego

Facts
- MF born pos tox; mom bypassed; dad got FR.
- Dad needed housing, child care, health services; needed therapy to address lots.
- Agency gave list of 44 therapists, short list of 4 African American; dad has no luck finding therapist.
- New SW doesn't discuss w/ dad for 5 mos; dad did many services.
- 12 Mo Rev trial; 18 Mo Rev in 16 days; ct gives 6 more mos of services, finding no reasonable services.

Discussion
- Where no reasonable services, juv ct not required to assess likelihood of reunification before it extends services.
- Juv Ct may continue services to 24 Mo Rev date on finding of no reasonable services.
- Juv Ct is not required to proceed under §352 to extend services upon finding of no reasonable services.

Court can extend reunification past the 18 month review to the 24 month date where there were no reasonable services – even for child under the age of 3.

Notes:

Visitation

In re J.P. | 37 Cal.App.5th 1111 | Sixth District | Santa Clara

Facts
- JP and sibling AA placed w/ mom in FM. Mom had contentious relationship w/ Albert (mom's ex-bf), father of JP's sibling AA.
- Juv Ct ordered weekly visits between JP & Albert, a nonparent, finding there was a bond and visits in JP's best interest.

Discussion
- §362(a) grants Juv Ct considerably broad authority to make any and all reasonable orders for care, supervision, custody, conduct and maintenance of child. §362(d) says Juv Ct may direct any reasonable orders to parents as court deems necessary, proper.
- Only two statutes expressly discuss visitation (§§361.2(a) & (i)) – visits with parents, siblings, grandparents. But that doesn't mean court cannot order visits w/ others.
- Visits w/others, if in child's best interest, promotes overarching goal of dependency, to maximize child's opportunity to develop into stable, well-adjusted adult.

Court had authority to order visits between child and mom's ex-boyfriend where minor had significant relationship with the ex-boyfriend and visitation is in child's best interests.

Notes:

Non-Minor Dependent

In re Nicole S. | 39 Cal.App.5th 91 | First Dist., Div. 4 | Alameda

Facts
- Nicole S. was NMD, asserted Category 5; retained Bay Area Legal Aid for writ of mandate re patient-litigant exception; writ granted.
- In this case, Nicole wanted to recover $89,804 in attorney's fees based on CCP §1021.5, private attorney general statute.

Discussion
- Juv Ct lacked jurisdiction to reopen dependency after NMD turned 21, but had ancillary jurisdiction to hear motion for attorney fees.
- Authorizing private participants to pursue §1021.5 fees would subvert legislative plan for provision/compensation of competent counsel in dependency proceedings
- Role played by social services is hardly analogous to that of opposing party in public interest litigation.

CCP statute authorizing attorney fees to prevailing party in action resulting in enforcement of important right affecting public interest does not apply to dependency.

Notes:

In re Charlotte C.

33 Cal.App.5th 404 | Fourth Dist. Div. 1 | San Diego

Facts

- Charlotte, born 3/12, was in concurrent FH prior to .26 hearing.
- Maternal relatives started RFA process for placement. There was info that aunt/uncle had DV history, uncle history of meth use.
- Minor's counsel filed motion to get RFA-related info, court denied, finding legislature contemplated RFA info would be confidential.
- Limited statutory exceptions to RFA confidentiality do not include minor's counsel; however, per §317(f), minor's counsel has access to all records relevant to the case that are kept by state or local public agencies.

Discussion

- Juv Ct's finding prohibiting release of any RFA records was reversed.
- Info related to RFA process becomes part of juvenile case file when they are relevant to 361.3 relative assessment.
- Because RFA file is confidential per state law, minor's counsel must file §827 petition to seek access to RFA portions of juvenile case file.
- Court may permit disclosure of confidential info only insofar as is necessary, and only if minor's counsel shows by preponderance of evidence that records requested are necessary and have substantial relevance to legitimate needs of child.
- In this type of situation, minor's counsel could not fulfil legal and ethical duties by relying on social worker assessment without further inquiry.
- Juv Ct must decide if policy considerations favoring confidentiality of RFA process are outweighed by interest of child and other parties.

Court is authorized to provide confidential RFA information to minor's counsel; to do so is not a violation of separation of powers.

Notes:

In re K.T.

E072082 | Fourth Dist. Div. 2 | San Bernardino

Facts

- Agency removed KT from mom when KT 9 months old; nurse noticed enlarged head.
- KT was placed w/ distant relatives, Mr. & Mrs. B., who had KT's older half brother.
- Further testing showed KT had subdural hematoma; B's began refusing to communicate w/ SW or her "friends" in same office, claiming she had discriminated against and insulted them.
- Agency detained KT, placed in special needs fost home, filed 387 petition to remove from B's.
- B's filed 388 petition asking KT be returned to them.
- Juv Ct denied B's 388 petition, granted Agency's 387 petition.
- Agency argues B's lack standing to appeal 387 removal.

Discussion

- Appellate court agrees w/ *Miguel E.* (2004) 120 Cal.App.4th 521 that person from whom child has been removed under §387 lacks standing to challenge removal. But when that person is relative, appellate court disagrees w/ *Miguel E.* because under §361.3, relative has standing to appeal refusal to place child w/ him/her (an argument *Miguel E.* did not consider).
- Distant relatives who had been caring for child had standing to appeal grant of county's petition to remove child from their custody, even if they were not permitted to participate in proceedings, as removal was in effect a decision not to place child with them.

Relatives had standing to appeal §387 removal because removal was in effect a decision to not place with them per §361.3.

Notes:

M.L. v. Superior Ct

37 Cal.App.5th 390 | First Dist. Div. 1 | San Mateo

Facts

- Initial removal of kids in 2014 for DV and drugs, kids returned to mom after FR, FM reviews held for several years.
- Lots of issues: family struggled to be safe and stable, to engage in services; DV, drugs, inappropriate discipline continued.
- One of kid's (KB) attorney filed 388 asking kids be "detained."
- Juv Ct held combined FM and 388 hearing, said situation is volatile and dire, no remedy but to detain all kids – kids were detained and removed from home; .26 hearing set.
- Parents appealed, saying removal order procedurally defective because it went beyond scope of modification request before ct; 388 petition requested "detention", not "removal;" also, there were reasonable means short of removal to protect minors.

Discussion

- Orders issued at hearing in which TPR or guardianship hearing is set must be reviewed by writ to expedite appellate review before .26 hearing held.
- Removal order did not go beyond scope of modification request, though petition asked to detain rather than remove – where petition stated kids were "at risk of harm" and "it is in their best interests to be removed." Even so, per §385, it is w/in court's inherent and statutory authority to modify or set aside its orders sua sponte as circumstances warrant, so long as notice and opportunity to be heard.
- No problem for attorney of one child to ask for removal of both kids, give that second child's attorney confirmed she joined motion.
- Parents were afforded due process: had notice and opportunity to challenge removal request, including right to present evidence and confront witnesses.

A 388 petition is the appropriate tool for a party other than SW to seek removal of children. Court was entitled to conclude a request to "detain" encompassed both detention and removal. Parents were accorded adequate due process.

Notes:

In re J.F.

39 Cal.App.5th 70 | Fourth Dist., Div. 2 | San Bernardino

Facts

- Ct bypassed reunification for parents of twins, JF and CF.
- While .26 pending, dad filed 388 seeking FR and more visits.
- Juv Ct denied dad's 388, ordered TPR.
- Dad filed notice of appeal, saying he was appealing TPR; did not mention 388.
- But on appeal, dad's focus was on denial of 388 petition for FR and more visits; appeal did not mention TPR.

Discussion

- Appellate Court lacked jurisdiction to review dad's challenge to denial of 388 petition for FR and more visits, where dad's notice of appeal was from order terminating parental rights, and dad did not identify, in notice of appeal, order denying petition as order for which he sought review.
- Appellate Court's jurisdiction on appeal is limited in scope to notice of appeal and the judgment or order appealed from.
- There are limits to appellate court's ability to liberally construe a notice of appeal; policy of liberally construing notice of appeal in favor of its sufficiency does not apply if notice is so specific it cannot be read as reaching a judgment or order not mentioned at all.

A notice of appeal should be liberally construed, but there are limits. Where notice of appeal specifically mentioned TPR order and did not mention 388 order, Appellate Court lacked jurisdiction to review the 388 order.

Notes:

In re Caden C.

34 Cal.App.5th 87 | First Dist. Div. 1 | San Francisco

Facts

- Caden, born in 2009, was removed in 2013, returned, removed again in 2016. Mom engaged sporadically in treatment, visited; but behaved in ways to disrupt C's placements.
- Agency recommended TPR, mom contested, argued beneficial relationship exception.
- Juv Ct determined beneficial relationship applied, no TPR.
- Agency and Caden appealed.

Discussion

- Standard of review not settled…. recently, courts have taken hybrid approach.
- First: beneficial relationship existed because mom visited and was a strong bond – primarily a factual issue, subject to substantial evidence test.
- Second: for beneficial relationship exception to apply, court must find also that the relationship is a compelling reason to deny TPR – a quintessentially discretionary decision, subject to abuse of discretion standard.
- Here, mom's regular visitation and beneficial relationship were not a compelling reason for concluding that TPR should not be pursued despite Caden's adoptability, where mom struggled with addiction, was unable to maintain her sobriety, and was not engaged in treatment to address addiction and mental health.
- Abuse of discretion to find beneficial relationship applied.

Consistent visitation and beneficial relationship are not enough; court must determine that the relationship constitutes a "compelling" reason to forgo TPR.

Beneficial relationship

Notes:

In re B.D.

35 Cal.App.5th 803 | First Dist., Div. 4 | Contra Costa

Facts

- Parents appealed TPR, finding beneficial relationship didn't apply.
- Juv Ct found minor adoptable based on info from Bureau, bc BD, age 8, was in home with committed caretakers who wanted to adopt.
- After .26, BD removed from home due to abuse from fost parent.
- During removal hearings, Juv Ct learned of history of significant safety issues in fost home, not previously reported: investigations related to sexual abuse, ongoing physical abuse, fost par's criminal history for violent offense, and that fost pars' parental rights for their own three sons were terminated.
- Three sons were victims of sexual abuse, committed sexual offenses vs. other juveniles, and were permitted in household in violation of safety plan. Info not included in .26 report, considered it "old news" and polity to silo confidential investigative info.
- On appeal, mom filed CCP 909 motion to include this info on appeal.
- On appeal, parties stipulated to reversal, Bureau filed motion to strike mom's 909 motion.

Discussion

- Mom's 909 motion granted, .26 orders reversed.
- Info withheld from court completely undermines legal underpinnings of .26 judgment, making this rare/compelling case where Appellate Ct considers evidence not available when Juv Ct rendered its judgment.
- Appellate Ct does not accept stipulated reversal due to risk that public trust in judiciary will be eroded; case decided on merits.
- Failure of Bureau to include required info about adoptive parent resulted in due process violation for minor; it destroyed evidentiary foundation for minor's adoptability and deprived minor of assistance of fully informed counsel. Constitutional error not harmless.
- .26 findings/orders reversed, case remanded for new .26 hearing.

Agency's failure to disclose report detailing foster parent's criminal history violated minor's due process rights and undermined legal underpinnings of the court's TPR order. No stipulated reversal due to risk to public trust in judiciary.

Notes:

In re L.M.

39 Cal.App.5th 898 | Fourth Dist., Div. 1 | San Diego

Facts

- LM removed at birth, placed with Kate/Jamie in San Diego.
- The E's in Florida had LM's older bio sister, immediately requested placement when contacted about LM.
- Pars of LM denied services, court proceeded to .26 hearing
- Prior to .26, E's filed 388 asking for placement of LM; Agency also requested placement of LM with E's in Florida.
- W/out designating Kate/Jamie as prospective adoptive pars, Juv Ct allowed them and E's opportunity to present evidence on which placement would be in LM's best interest.
- Both possible homes would be exceptional; Juv Ct heard testimony from multiple experts, agonized over difficult decision, decided LM's best interests would be served by living w/ E's and biological sister.
- Kate/Jamie appeal, argue court applied incorrect standard under 366.26(n), making best interest determination instead of first determining if LM should be removed from them; also argue they should have been designated prospective adoptive parents.

Discussion

- Harm from not being designated PAPs harmless because Kate/Jamie afforded all rights of PAPs – notice of issue, allowed to examine witnesses, offer expert testimony, give closing arguments.
- Best interest standard is what drives decision re whether to remove under 366.26(n)(3)(B). Court does not look at removal in vacuum, but must decide best interests based on information before it and minor's current circumstances.
- Legislative history shows that legislature intended to provide judicial oversight of agency's recommendation to remove and place child w/ different person.
- Juv Ct's best interest decision was not unduly speculative.

Failure to designate foster parents as PAPs was harmless, where they were given same rights in proceedings as PAPs. Using best interest standard at §366.26(n) hearing was not improper.

Notes:

In re H.D.

35 Cal.App.5th 42 | Second Dist., Div. 6 | Los Angeles

Facts

- Family law case. After divorce, dad sought to limit mom's access to kids due to her substance abuse issues. Mom agreed to temporary sole custody to dad and visitation as agreed upon.
- Mom entered treatment, asked for visits, was denied due to therapist belief it would be stressful for kids. Mom was ordered to pay child support, rarely could afford it. After finishing treatment, mom petitioned for custody and visitation.
- Stepmom filed to terminate mom's parental rights based on abandonment, freeing kids so stepmom could adopt.
- Fam Ct found mom's actions met requirements for Fam Code §7822 abandonment: left kids w/ other parent for year w/ no communication or financial support w/intent to abandon.
- TPR. Mom appealed.

Discussion

- Par's failure to support child when par does not have ability to do so is not abandonment.
- No intent to abandon when mom made attempts to contact kids but was denied, paid $2000 in child support as soon as she was able, was diligent in treating her addictions, and attempted to regain custody after she got clean and sober.

A parent who demonstrates responsible action to resume a parental role in her children's lives by making attempts to contact children, paying nominal child support, and diligently treating her addictions cannot be said to have abandoned her children under Family Code §7822.

Notes:

In re N.O.

31 Cal.App.5th 899 | Fourth Dist. Div. 1 | San Diego

Facts

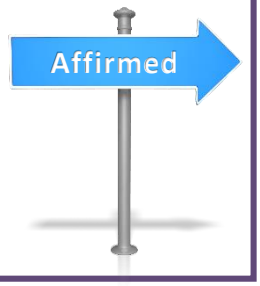
- Minor 15 month old NO detained when mom arrested at US-Mexico border; NO placed w/ maternal grandmother in Mexico.
- After release, mom back to Mexico; did services w/ DIF, NO back to mom on FM.
- Possible problems: DV incident w/ NO's dad after return, unclear if DV services through DIF; and no contact with mom and NO for 9-12 months.
- Several continuances, Agency recommended dismissal.
- Juv Ct terminated jurisdiction over objection of minor's counsel, who appealed.

Discussion

- Evidence showed NO thriving in mom's care, NO and mom had healthy bond, NO was happy child, and mom continued to use parenting skills learned through services.
- Mom complied w/ case plan and services.
- No evidence that mom maintained relationship w/ NO's dad, all evidence showed they had separated.
- Despite lack of contact, NO's counsel cannot show that as matter of law, case must be reversed.
- NO was not deprived of right to counsel due to counsel not being able to contact NO, as counsel was strong advocate and any error was harmless.
- Dissent: Juv Ct abused it discretion by terminating jurisdiction and not granting continuance, as Agency could have taken reasonable steps to try to locate family.

Court did not inappropriately terminate jurisdiction where agency and minor's counsel had lost contact with minor, given that evidence showed minor was thriving in mom's care, mom and child had healthy bond, and mom had complied with her case plan. Any denial of minor's right to counsel is harmless error.

Notes:



In re C.W.

33 Cal.App.5th 835 | First Dist., Div. 2 | Sonoma

Facts

- 10 year old CW removed from mom, who had addiction issues; found at risk if placed w/ dad in Louisiana, who faced several allegations of sexual assault w/underage minors resulting in multiple arrests, convictions, removal of kids from another marriage.
- Both pars got FR, failed, case to permanency.
- Prior to postpermanency hearing, CW went to stay w/ dad.
- No evidence dad had addressed history of sexual abuse; no order from Juv Ct approved the move or addressed change in permanent plan; status quo was maintained at every hearing.
- While w/ dad, CW's behavior deteriorated: acted out sexually, struggled in school, put back on psych meds, clashed w/ dad.
- After year w/ dad, agency recommended dismissal; Juv Ct dismissed.
- After dismissal, dad arrested for sexual battery of wife's 9-year-old daughter, Louisiana CPS removed CW from dad, placed w/ mom in CA, terminated jurisdiction.

Discussion

- Appeal not entirely moot. Per UCCJEA, CA has continuing, exclusive jurisdiction, so Louisiana could assert only temporary emergency jurisdiction.
- Court of Appeal reverses custody order placing CW w/ dad.
- Juv Ct abused discretion, strayed significantly from statutory framework of 366.3.
- Nothing in record addressed issues that led to initial assumption of jurisdiction and removal of CW from dad, noncustodial parent. Abuse of discretion where there is no evidence that dad ameliorated issues.

Abuse of discretion for court, in postpermanency, to award sole physical and legal custody to dad and dismiss the case, where there was no evidence that dad had ameliorated safety issues.

Notes:

In re J.R.

C088052 | Third District | Sacramento

Facts

- 12-year-old JR removed due to mom's alcohol issues; placed w/ grandparents; JR had strong opinions about mom's issues.
- Mom's FR terminated; .26 hearing set; mom opposed guardianship because grandparents moving to South Carolina; wanted case kept open for Juv Ct to monitor visitation.
- At .26, guardianship to grandparents, jurisdiction terminated.
- Mom appealed.

Discussion

- After guardianship granted, court shall terminate jurisdiction unless relative guardian objects or upon finding of exceptional circumstances.
- Mom argued exceptional circumstances, since JR often refused to visit; but JR's refusal due in part to mom's continued substance abuse and that JR didn't feel safe w/ mom.
- Evidence showed that Department and grandparents made efforts to facilitate visits and encouraged JR to visit.
- There was evidence that JR sought to preserve relationship w/ mom – he opposed TPR, and had sincere desire to visit after dismissal, making it more likely visits would occur as long as mom maintains sobriety.
- 388 petition is adequate remedy if noncompliance of visit order.
- Mom forfeited argument that court failed to ensure enforcement of visit order during FR because mom didn't file writ petition.
- Court properly relied on mom's most recent JV-140 address form to send writ rights

The court did not abuse its discretion in dismissing dependency jurisdiction over the minor in guardianship given that minor had a sincere desire to visit mother when she was sober and that there was no evidence that guardians ever discouraged or prevented minor from visiting.

Notes:

In re C.M.

38 Cal.App.5th 101 | Second Dist., Div. 5 | Los Angeles

Facts

- Mom engaged in DV; CM placed w/ maternal grandmother.
- Parents did FR; concern mom & grandma coaching CM against father.
- Dad got FM w/CM, mom and grandma monitored visits.
- Mom continued coaching after CM to dad; dad worried about dismissal because mom had controlling tendencies, would probably not follow court orders.
- At hearing, DCFS recommended dismissal, sole physical custody to dad, joint legal custody.
- Dad opposed joint legal, cited Fam Code §3044, presumption that joint legal custody not in child's best interest where DV.
- Juv Ct hesitant to exclude mom from healthcare and education decisions, ordered joint legal. Dad appealed.

Discussion

- Juvenile and family court both have authority to make orders regarding custody and visitation, but have separate statutory schemes and serve distinct purposes.
- Fam Ct presumes parental fitness; no such presumption in Juv Ct.
- Fam Code provisions do not apply to Juv Ct unless expressly stated.
- Dad gives no authority to support argument for departure from this line of reasoning.
- Joint legal custody to mom was not abuse of discretion. Yes, mom tried to actively undermine father. But mom was CM's primary caretaker for most of his life, and there was evidence that mom and CM shared a close bond.

Family Code §3044, the rebuttable presumption against awarding sole or joint custody of a child to a perpetrator of domestic violence does not apply to dependency proceedings.

Notes:

In re D.D.

32 Cal.App. 5th 985 | Third District | Sacramento

Facts
- Four kids removed from mom; 387 petition due to physical abuse: mom used chili peppers, fought to get phone and bus pass from child, used soap in mouth, put foot on child.
- Mom not cooperative during investigation, refused access to kids.
- Child sent text message to SW, later denied sending it.

Discussion
- 387 requires bifurcated hearing: adjudicatory to determine if allegations are true and whether previous disposition not effective, and disposition to determine if removal is warranted.
- Juv Ct reasonably inferred that mom intended to cruelly inflict inappropriate physical pain by using chili pepper on young child
- Juv Ct not required to view each incident in isolation, could look at totality of circumstances and family's history.
- Test message from child to SW documenting incidents admissible under rule providing that social study, with hearsay evidence contained in it, is admissible.

Hearsay

Text messages recounting abuse are admissible hearsay.

Notes:

People v. Keo

40 Cal.App.5th 169 | Second Dist., Div. 7 | Los Angeles

Facts
- Dad killed mom, then tried to kill himself.
- As part of investigation into child welfare, SW interviewed dad in hospital; dad explained what happened and why he did it; dad had criminal lawyer but no dependency lawyer yet.
- DA became aware of dad's statements year later, used dad's statements in criminal trial. Dad guilty of second degree murder.
- Dad appealed: argued admission of statements to SW violated 5th & 6th Amendments, WIC §355.1(f), and due process.

Discussion
- CA courts have limited Miranda to law enforcement officials, their agents, and agents of court while suspect in custody.
- Fact that SW is government employee and mandated reporter does not require Miranda where SW was not agent of LE.
- SW investigation is done independently of law enforcement for purpose of determining best interest of children.
- WIC §355.1(f) reference to testimony does not include statement to SW; testimony is oral statements made under oath in court.

A statement to social worker conducting a dependency investigation does not require a *Miranda* warning, and due process does not provide immunity for such statements.

Notes:

Miranda

In re A.C.

37 Cal.App.5th 262 | Second Dist., Div. 6 | Los Angeles

Facts
- AC is ward of JJ Ct, on home probation. Made statement to Ana, "child and family counselor" with "Family Preservation," that he will stab kids who are bullying him.
- Ana reported statements; Juv Ct found violation of probation.

Discussion
- Ana not a therapist, so her testimony didn't fall w/in psychotherapist-patient privilege.
- Even if Ana was a therapist, still admissible due to therapist duty to warn. No violation of right to privacy because Ana provided warning regarding limits of confidentiality.
- Reversed because insufficient evidence of VOP. "Mere angry utterances or ranting soliloquies, however violent, do not by themselves constitute criminal threats." "One may, in private, curse one's enemies, pummel pillows, and shout revenge for real or imagined wrongs."

In-home counselor who is not therapist may testify about threats. Even if in-home counselor *is* a therapist, testimony admissible due to therapist duty to warn. Reversed due to insufficient evidence of probation violation.

Notes:

Psychotherapist-patient privilege

B.H. v. Manhattan Beach Unified S.D.

35 Cal.App.5th 563 | Second Dist., Div. 4 | Los Angeles

Facts

- BH, former foster child, adopted, got AAP. Lived in LA County, Manhattan Beach Unified School District, also had IEP.
- Struggled emotionally and educationally.
- Eventually placed at TLC residential treatment center and Journey NPS in Napa County, paid for by DCFS through AAP. Parents arranged for placement, agreed by MBUSD, consistent with IEP.
- After learning of financial assistance parents got through AAP, MBUSD refused to implement IEP, said not responsible for cost of BH's education.
- Who pays for parents' transportation to Sonoma?

Discussion

- IDEA says all students get FAPE (free appropriate public education).
- CA law determines which LEA (local education agency) is responsible for FAPE and IEP. Usually, county of parent's residency.
- School districts have formed consortiums to provide special education services, called SELPA (Special Educ Local Plan Area).
- Exception: if child placed in licensed institution by court, regional center or public agency other than education agency, then SELPA, not district of parents' residence, responsible for providing FAPE to children in licensed institutions in area covered by SELPA.
- AAP purpose: to encourage foster pars to adopt by not reducing funds & providing additional financial assistance for special needs.
- AAP stipend to TLC was not placement of BH by noneducational agency that excuses MBUSD from usual rule that school district responsible for kids whose pars are in district's boundaries.

AAP stipend for student's placement at residential treatment center, which adoptive parents received from agency, is not "placement" by noneducational public agency that relieves school district of its obligation to comply with IDEA.

Notes:

CA Dept. of Social Services v. Marin

34 Cal.App.5th 328 | Second Dist., Div. 6 | Santa Barbara

Facts

- Dad adopted three special needs children
- Initial AAP agreement Dec. 2004.
- 2014, dad learned of CA State Foster Parent Assn. v. Wagner holding that foster care maintenance amount allotted by CDSS did not cover certain costs, violating federal law. CDSS ordered to implement new rate structure. CA State Foster Parent Assn. v. Lightbourne ordered immediate implementation of new rate structure.
- Dad requested increase in family's AAP, County denied, ALJ denied. Trial court granted writ of mandate, CDSS appealed.

Discussion

- CDSS interpretation of AAP statutes/regulations afforded great weight and deference.
- AAP not intended to pay for specific good or service, it is to assist adoptive parents in meeting child's needs.
- After Wagner and Lightbourne decisions, legislature amended WIC §16122 to clarify that maximum AAP rate could equal the eligible foster care maintenance rate and to confirm that new rate would not be retroactive.
- Legislature has authority to limit "an overruling judicial decision to prospective application."
- Legislature clearly established Wagner ruling did not apply retroactively, so dad's claim for retroactive payments fails.
- Trial court order granting writ of mandate is reversed.

AAP stipend increases are not retroactive.

Notes: