

**In Re A. C.** - 7/15/10  
186 Cal. App. 4<sup>th</sup> 976  
6<sup>th</sup> Appellate District

Issue:

Whether a 387 or a 388 petition is the appropriate procedure to replace a freed, but not yet adopted child, to a more restrictive setting?

Facts

A. C. is freed and not yet adopted.

Dept. filed a 387 to replace her from foster home to a community care facility. (Although Dept. believed that a petition was not required, filing 387s was the local practice).

A. C. did not object to the replacement.

A. C. did object to the 387 because it required *negative factual findings* about her.

Holding:

387 is used to remove from a parent, guardian, relative or NREFM.

**It does not apply to a child freed for adoption.**

388 is the appropriate vehicle to change a child's placement based on changed circumstances.

388 is broader than the 387 and does not require negative factual findings regarding the child.

**In re Adam D. et al** (3/30/10)  
183 Cal. App. 4<sup>th</sup> 1250  
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 diet 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. 4<sup>th</sup> 1050; 107 Cal. Rptr. 3d 78  
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.4<sup>th</sup> 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 A.L.** (9/2/10)  
187 Cal. App. 4<sup>th</sup> 138  
4<sup>th</sup> Appellate District, Division 3

**Issue**

Did the trial court err by granting father family “enhancement” services rather than family reunification services when the child was placed in the home of the mother?

**Facts**

A, who was three months old at the time, was diagnosed as having a transverse fracture of her femur. At the time of the injury she was under the care of father, at his apartment. At the detention hearing, and subsequent jurisdictional and dispositional hearings, the child remained placed with mother. At dispo, the court ordered that reunification services not be ordered to father under 361.5 b(5) and also found that 362(b) was applicable. Father appealed claiming that because the child was left in the custody of the mother, 362 controlled and he was entitled to reunification services, rather than the more ambiguous “enhancement services”.

**Holding**

Since the child was left in the care of the mother at disposition 362 applies. 362 refers to “child welfare” services and does not mention reunification services. Reunification is a goal only when the child has been removed from both parents.

**In re A. L.** (11/17/10)  
190 Cal. App. 4<sup>th</sup> 75; 117 Cal. Rptr. 3d 723  
Fourth Appellate District, Division One

Issue

Were father's parental rights reinstated when the appellate court reversed the trial court's denial of Mother's 388 Petition even though Father did not appeal?

Facts

Following the failure of reunification after 18 months of FR services, a 26 hearing was set. Prior to the 26 hearing, mother filed a 388 Petition claiming she had completed her therapy goals and requested custody of the children. At the 26 Hearing, father withdrew his contest and stated he no longer wished to participate in dependency proceedings. The court granted his request. After taking evidence on Mother's 388 Petition, and then for the 26 hearing, the court denied the 388 Petition and terminated the parental rights of both mother and father. Mother appealed.

In an unpublished opinion the Appellate Court reversed the trial court's denial of mother's 388 petition. The reversal resulted in restoration of parental rights. Back in the trial court, the child's attorney requested a hearing to determine whether father's parental rights were also reinstated when the Appellate Court reversed the denial of Mother's 388 petition since father had not joined in the appeal. The child's attorney was concerned that if father's parental rights were not reinstated, and mother successfully reunited the children, mother would lose the right to child support and military benefits.

After hearing argument on this issue, the trial court determined that Father's parental rights had not been reinstated by the Appellate Court's reversal of the denial of Mother's 388 Petition.

Holding

Reversed. Father's parental rights were also reinstated. Being mindful that WIC 366.26(i)(1) provides that a court has no power to set aside, modify, etc. an order terminating parental rights except by appeal, and that California Rules of Court 5.725(a)(2) provides a court must not terminate the rights of one parent unless that parent is the only surviving parent or the rights of the other parent are also terminated, the Appellate Court here distinguished Los Angeles County D.C.F.S. vs Superior Court (2000) 83 Cal.App.4th 947, and held that since the 388 petition was antecedent to the holding of the 26 hearing, a reversal of the denial of the 388 petition vacated all findings made pursuant to the subsequent 26 Hearing. In this case the error occurred in the denial of Mother's 388 petition, and not in the order terminating parental rights.

Los Angeles County D.C.F.S. vs. Superior Court, supra, is distinguished from In re A.L. because in L.A. County D.C.F.S., supra, father, not mother, appealed the termination of parental rights.

The reversal of the order terminating father's parental rights did not reinstate mother's parental rights because mother did not appeal. A 388 Petition was not the subject of that appeal.



**In re Allison J.** (12/10/10)  
190 Cal. App. 4<sup>th</sup> 1106; 118 Cal. Rptr. 3d 856  
First Appellate District, Division Five

Issue

Does WIC 361.5(b)(12) violate a parent's right to substantive due process because it does not require a nexus between the specified criminal conduct and the ability to parent, thus rendering the section unconstitutional?

Facts

When Allison J. was born, San Francisco Human Services Agency filed a petition alleging that mother had mental health and substance abuse issues and that father was a registered sex offender with a long criminal history. He was a registered sex offender due to fondling a mentally delayed child. The Agency recommended no reunification services to father because of his previous robbery convictions, along with his extensive criminal history including his registration as a sex offender.

The child was declared a dependent of the court and father was denied reunification services. The judicial officer explained she was worried about the seriousness of the convictions, his lack of insight about them, and his unwillingness to discuss his part in those convictions, further noting that having good visits was not enough.

Father appealed.

Holding

The Appellate Court affirmed, finding that a parent does not have a fundamental right to reunification services, thus distinguishing terminating of parental rights from not offering reunification services to a parent in the first place. The court noted that the parent could override the no reunification recommendation by showing by clear and convincing evidence that reunification was in the best interest of the child. This could be done by showing the parent's current efforts and fitness or the strength of the parent-child bond. In other words, a parent could show some reason to conclude that reunification is possible and the best thing for the child.

Also the risk of error is minimized because father's convictions were from a beyond a reasonable doubt standard.

To put it succinctly, section 361.5(b)(12) does not deprive a parent of due process and it does not require termination of parent rights. It is a reasonable and rational means of advancing a prime purpose of juvenile court law- providing protection and stability to dependent children in a timely fashion by efficiently allocating scarce reunification services.

**In re A.M. (8/11/10)**  
187 Cal. App. 4<sup>th</sup> 1380  
Fourth Appellate District, Division One

**Issue:**

The father, D.M. challenged the sufficiency of the evidence to support the juvenile court's jurisdictional findings under WIC Section 300(f).

**Facts:**

In 2004, the father D.M., and the mother Tiffany's six day old newborn James died. Five years later, in 2009, the Agency in San Diego began investigating allegations of physical abuse and domestic violence by D.M. against Tiffany and their four children. As a result of the allegations, the Agency reopened the investigation of James' death.

During the investigation, D.M. made a statement. D.M. said that on the night James died, D.M. saw Tiffany asleep in the same bed as James and his sibling Nathan. D.M. also got into the bed, and during the night, James woke up crying. D.M. pushed James towards Tiffany, hoping she would wake up to care for the baby. D.M. then heard James making sounds like he was struggling to breathe, and said it did not sound like James was breathing normally. D.M. admitted knowing that the baby would not be able to breathe in that position on his stomach. D.M. listened to James having difficulty breathing for about two minutes, and then D.M. went to sleep. D.M. stated that although he knew James was having trouble breathing, he did not do anything to correct the situation, and did not intervene to turn James over from his stomach to his back, because D.M. was too tired.

As a result of the statement by D.M., the medical examiner issued an amended autopsy report changing the manner of James' death from "accidental" to "undetermined." The medical examiner testified that an "undetermined" cause of death can include instances of negligence. The juvenile court concluded that D.M. placed James at risk by moving him so close to Tiffany, and created a risk that someone could roll over onto James which would cause James to stop breathing. The juvenile court also recognized that D.M. did not do anything to help James even though he heard James struggling to breathe. The court concluded that when a parent knows of a risk to the child, and does not intervene, the parent contributes to the cause of death.

The Court of Appeal upheld the juvenile court's finding, and cited Section 300(f) which states, "the child's parent or guardian caused the death of another child through abuse or neglect." The fact that D.M. did not intervene to help James even though he heard James struggling to breathe, was sufficient to sustain the petition under 300(f).

D.M. also argued that because James died five years prior, and there was no evidence he posed a current risk to his children, the allegation under 300(f) should not be sustained. The Court of Appeal held that 300(f) does not mention, and does not require that a minor be presently at risk of harm for the court to sustain a petition under 300(f).

**Holding:**

A petition may be sustained pursuant to WIC Section 300(f) if the child's parent or guardian caused the death of another child through neglect. In addition, to sustain a petition under Section 300(f), the juvenile court is not required to find a current risk to the child.

**In re Amber M. et.al( 4/27/10)**  
184 Cal. App.4<sup>th</sup> 1223  
Fourth Appellate District, Division One

Issue:

Did the father's application for a stay of dependency proceedings meet the requirements of the Servicemember's Civil Relief Act (SCRA)?

Facts:

A petition was brought by the San Diego County Health and Human Services Agency alleging domestic violence between the mother and father occurring in the children's presence. The mother was alleged to be the aggressor and the father the victim. The children remained in the home of the mother.

Father was on military active duty. A letter from father's commanding officer stated that father was unable to attend the contested jurisdiction/disposition hearing scheduled for June 9, 2009 because he was to deploy to Iraq and was not expected to return until February 2010. The letter father submitted was meant as an application for a stay of the hearing. The court denied the stay, finding that it did not comply with the requirements of section 522(b) et seq of the SCRA. The court stated that the commanding officer did not demonstrate that the father's active military duty prevented his appearance at the proceedings. The court then entered a voluntary plan pursuant to WIC 360(b) and terminated jurisdiction.

The SCRA 522(b) et seq states that a military servicemember who is a party to a civil matter is entitled to a mandatory 90day stay of the proceedings. The application must state facts that show how the duty requirements materially affect the person's ability to appear and a date when the servicemember will be available. Also, a letter from the servicemember's commanding officer stating that the current military duty prevents appearance and that military leave is not authorized at that time. Additionally, a servicemember may apply for an additional stay based on the continuing material affect of military duty on the sevicemember's ability to appear.

Holding:

Juvenile court order reversed and remanded. Even if the letter from father's commanding officer did not technically meet all of the requirements of the SCRA, it substantially complied with the Act. It could be inferred from the letter that military leave would not be authorized.

The SCRA "must be construed to prevent any disadvantage to a servicemember litigant resulting from his or her military service". The Act "must be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation". ( George P., supra, 127 Cal.App. 4<sup>th</sup> at p. 225)

**In re Anna S.** (1/15/10)  
180 Cal. App. 4<sup>th</sup> 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)  
183 Cal. App. 4<sup>th</sup> 1518  
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)  
183 Cal. App. 4<sup>th</sup> 1405  
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.4<sup>th</sup> 177, In re Karen R.(2001) 95 Cal.App.4<sup>th</sup> 84 and In re P.A.(2006) 144 Cal.App.4<sup>th</sup> 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 A.O.** (5/28/10)  
185 Cal. App. 4<sup>th</sup> 103  
Second Appellate District, Division One

Issue

Whether an incarcerated parent's making a plan for the care of a child is applicable to a supplemental petition under 387?

Facts

300 petition sustained and child suitably placed.  
Family reunification services for father who was then in state prison.  
After father's release, the order was Home of Parent/father with family maintenance services.

Later father was arrested for burglary and parole violation and re-incarcerated. 387 petition filed. The Agency detained the child from the father and placed with the step-mother. Father moved to dismiss the 387 petition arguing that he had made a plan for the step-mother to care for the child.

Trial court denied father's request for dismissal and sustained the 387 petition and ordered suitable placement.

Holding-

Trial court was affirmed.

Father had a long criminal history. The prior disposition of Home of Parent father was no longer effective for A.O.'s protection.

While the child was on a Home of Parent father order, father only had physical custody. . He did not have legal custody over O.A. Therefore, he did not have the authority to make decisions regarding placement. A.O. had been placed with father *under the supervision of the Agency*.

An incarcerated parent's opportunity to make an appropriate plan is applicable to an original 300(g) filing and not at a 387 hearing to terminate a home of parent order.

**In re A.Z.** (12/13/10)  
190 Cal. App. 4<sup>th</sup> 1177; 118 Cal. Rptr. 3d 663  
Fourth Appellate District, Division Three

Issue

Does father=s death render appeal of termination of his parental rights moot?

Facts

The child was placed with the paternal aunt and uncle, and parental rights were terminated. Father appealed. Father=s appellate brief cited concerns that the termination of parental rights would cause the child to become ineligible for the father=s disability and veteran=s benefits. Subsequent to filing the brief, the father died. The Appellate Court appointed minor=s counsel, and all counsel asserted in supplemental briefs that the appeal was moot.

Holding

Although the death of a defendant results in criminal cases being abated, juvenile dependency cases are unique and permanent abatement would cause uncertainty for the child, therefore the father=s death renders the appeal of the TPR moot.

(The opinion notes that veterans= children are still considered their children even if adopted out of the family, but that even if this were not the case, the benefits of adoption of this child by the aunt and uncle B best interests B outweigh the risk of losing access to the financial survivor benefits.)

**In re Bailey J** ( 11/19/10)  
189 Cal. App. 4<sup>th</sup> 1308, 117 Cal. Rptr. 3d 568  
Sixth Appellate District

Issue

Should the trial court have granted the sibling party standing to participate in the WIC 366.26 hearing?

Facts

Many children were removed from parents over several years. All ended up in permanency. Angelina was half sibling to the child at issue, Bailey. At the WIC 366.26 hearing, Angelina showed up with her attorney and asked to be heard as a party, with counsel, on the sole issue of the sibling relationship and exception. The trial court provisionally held that the sibling was not a party, and could not sit at bar, but allowed full testimony from the sibling on her position.

Holding

The appellate court did not make a finding regarding the failure of the trial court to actually afford “party” status to the sibling during the WIC 366.26 hearing. The court noted that the trial court made every effort to ensure that the sibling and her attorney had a full opportunity to present evidence and argument at the hearing to establish a basis for the sibling’s position.

Regarding the standard of proof, the burden of proof of the exception is on the proponent, and the Court makes a factual determination by substantial evidence. However, in using that factual finding to determine permanency, the Court then uses its discretion to determine whether, based on the facts, there is a compelling reason to find termination detrimental. This standard is subject to review as abuse of discretion.

**In re B.F.** (12/5/10)  
190 Cal. App. 4<sup>th</sup> 811, 118 Cal. Rptr. 3d 561  
Fourth Appellate District, Division One

Issue

Did the court abuse its discretion in granting a Section 827 petition allowing a de facto parent access to the entire file, including the mother's court-ordered psychological evaluation?

Facts

The children, B.F. and R.R. were detained from their parents and subsequently suitably placed with the "D's". The D's later became the de facto parents of B.F. and R.R. The de facto parents asked for copies of the Agency's reports. The trial court ordered that the existing reports be made available to the D's. The court ordered that any report filed in the future be provided to the D's but allowed objections to be made within 10 days of the filing date. Absent an objection, the report would be given to the D's 10 days after its filing. At a subsequent hearing, mother's counsel objected to the release of confidential information concerning the mother, including the psychological evaluation being released to the de facto parents. The de facto parents cited to their need to know the children's "physical history as far as any congenital issues that may develop like heart disease or diabetes" and whether "there's anything that runs in [Sarah]'s line like manic depression, any kind of behavior disorder, so that I can provide the best mental and physical care to these children" as their reason for requesting mother's records. The trial court authorized the release of the records to the de facto parents. Mother filed a writ of supersedeas.

Holding

The appellate court held that the trial court abused its discretion granting a Section 827 petition filed by a de facto parent where there was no specific showing of the reasons the records were being sought or the relevancy to the proceedings.

The appellate court discusses at length the principles of dependency law, the rights of de facto parents and the procedures to be followed. De facto parent status is to ensure that all legitimate views, evidence and interests are considered. The role of a de facto parent is limited and they do not enjoy the same due process rights as parents (In re: Keisha E.) De Facto parents do not have an automatic right to receive the reports and other documents filed with the court. The court goes on to address Section 827 which does not include de facto parents in its persons entitled to inspect the file without a court order. De facto parents do have standing to petition the juvenile court to inspect or copy the case file. A Section 827 petition must identify the specific records sought and describe in detail the reasons the records are being sought and their relevancy to the proceeding or purpose for which the petitioner wishes to inspect or obtain records.

The appellate court also discusses that the children were represented by counsel who could have acted to protect the children's interests. "Release of a parent's psychological evaluation to persons who may prove to be only temporary caregivers could ultimately embarrass and distress the children." The Court indicated that the de facto parents did not need to see this evaluation to provide care for the children.

**In re C.B.** (9/27/10)  
188 Cal. App. 4<sup>th</sup> 1024; 116 Cal. Rptr. 3d 294  
Fourth Appellate District, Division Two

Issue:

Does ICPC apply to out of state placement with a parent?

Facts:

When the youngest child was born, mother tested positive for methamphetamine. Father was residing in Alabama. The Department believed father was aware of mother's drug use because he had been present 8 months earlier when she had been arrested for being under the influence. The Dept. filed a petition leaving the children with mother and detaining from father alleging father's failure to protect. The court approved this arrangement.

A month later, the children were detained from mother due to positive drug test.. This time, the Dept detained from mother and placed with father. At the jurisdictional hearing, the social worker did not believe that there was enough evidence to sustain the failure to protect by the father. However, the "Dept as a whole" disagreed with this statement by the social worker and the court sustained it.

At disposition, the father asked for custody of the children. The Dept argued that FA could not relocate to Alabama until the ICPC had been approved. AL also agreed with this position. Mother, father and the children all argued that the ICPC did not apply to parents. The court apparently believed that a crucial issue was whether or not father was non-offending in the petition, so it struck its own finding that FA failed to protect. It kept jurisdiction and allowed FA to relocate to Alabama.

Holding:

The appellate court held that ICPC does not apply to out of state placement with parents. The language in the ICPC refers to **placement in foster care or as a preliminary to a possible adoption**. Therefore, the notice requirements do not apply to a parent-either offending or non-offending.

Contrary views have been given by regulatory agencies, but if these rules or regulations conflict with statutes or decisional law, then the law controls. In this case CRC5.616(b)(1)(A) which required compliance with ICPC if a court retained jurisdiction or places a restriction or condition on the parent, conflicted with established CA case law. The CRC are designed to assist in effective administration of the court. Therefore it was not valid and the court did not err by failing to comply with the ICPC.

The appellate court did leave a number of practical questions unanswered such as: how California will supervise or provide services to a family in another state without an ICPC or how the agency or court would acquire information about an out of state parent without an ICPC?

**In re C.B.** (11/18/10)  
190 Cal. App. 4<sup>th</sup> 102; 117 Cal. Rptr. 3d 846  
Sixth Appellate District

Issues

- 1) In a case where the juvenile court terminated parental rights, did substantial evidence support the juvenile court's determination that the parent-child relationship exception did not apply pursuant to 366.26(c)(1)(B)(i)?
- 2) Did substantial evidence support the juvenile court's determination that the sibling exception did not apply pursuant to 366.26(c)(1)(B)(v)?
- 3) Was adequate notice given under ICWA?

Facts:

While the mother was incarcerated, and the father was serving a lengthy prison sentence, the mother made an inappropriate plan, and left her three children, C., M.B. and C.B., with an inappropriate caretaker with a significant criminal history, who maintained a filthy home. Additionally, mother had substance abuse problems and mental health issues. At disposition, the mother was granted family reunification services, and the father was not. At the 366.21(f) hearing, the mother's family reunification was terminated, and the matter set for a 366.26 hearing.

For the .26 hearing, in October 2009, it was reported that the minors, C.B. and M.B., ages 10 and 9, were doing well and thriving in the care of the prospective adoptive parents, their paternal aunt and uncle. Their older sister, C., had run away, and wanted to be with the mother. C.B. and M.B. had previously lived with the paternal aunt and uncle prior to the dependency case from November 2005 through February 2007, and had been placed with the paternal aunt and uncle during the dependency case, in January, 2009, nine months prior to the .26 hearing.

M.B. testified at the .26 hearing that although she liked living with her aunt and uncle, she would feel mad and sad if her mother could not contact her. Although M.B. and C.B. had moved to Bakersfield from Santa Clara County (where the mother resided) in January 2009, M.B. testified she looked forward to her mother's visits and loved her mother. M.B. also testified she would be sad if she could not see her older sister, C. again. C.B. testified at the .26 hearing that he was "okay" with being adopted as long as he could see his parents. He said he loved his mother, enjoyed her visits, and liked talking to her on the telephone. M.B. also stated that he would not like it if after he were adopted, he would not be able to see his mother and father again. M.B. testified that he missed his sister C.

Older sister C. testified at the .26 hearing that she did not want her younger siblings adopted. Mother testified that since C.B. and M.B. had moved to Bakersfield, she had seen the children approximately six times in nine months, and talked to them twice per week. Father testified that

he was against termination of his parental rights. The Agency worker testified that the paternal aunt and uncle had said in the past that the minors' visits with their mother were "toxic" and that the paternal aunt supported stopping visits and telephone calls with the mother. Nonetheless, the Agency worker also said she had been working with the paternal aunt and uncle, and that the paternal aunt and uncle would respect the minors' wishes and allow them contact with their parents after the adoption.

Holding:

1) The juvenile court did not apply the proper standard in determining that the parent-child relationship exception did not apply, and the court remanded to the juvenile court for application of the appropriate standard.

The appellate court followed In re Autumn H. (1994) 27 Cal.App.4th 567, 575, and found that under the (c)(1)(B)(i) exception, the court must find the parent-child relationship promotes the well-being of the child to such a degree as to outweigh the benefit of a stable adoptive home. The court quoted from In re Autumn H. 27 Cal.App.4th at 575, "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome."

The court held that the juvenile court properly found a substantial positive emotional attachment between the mother and C.B. and M.B. despite the lack of day to day contact. In terminating parental rights, the juvenile court said that the minors would "have the best of both worlds" the predictability, stability and nurturing of their adoptive home as well as the maintenance of the connection with their parents. The court held that juvenile court injected an inappropriate factor in determining whether or not to terminate parental rights, namely the adoptive parents' willingness to allow the minors continued contact with their parents. The juvenile court should not have been certain that continued contact would occur, because post-adoption, the adoptive parents could not allow the minors to see their biological parents.

The court remanded to the juvenile court to apply the appropriate legal standard: regular visitation and contact with the minors by the parent, a substantial positive emotional attachment between parent and child that promotes the well being of the child to such a degree as to outweigh the benefits of adoption, and great harm to the minor if the parent-child bond is broken. If the juvenile court finds this standard applies, it may not terminate parental rights just because it believes that the adoptive parents will allow the positive relationship between the minors and their parents to continue. On remand the juvenile court may not consider that the prospective adoptive parents will allow the parents to contact the minors.

2) The juvenile court properly found the sibling exception did not apply. The appellate court found that for the sibling relationship exception to apply to the termination of parental rights there must be a finding of detriment to the child to be adopted. The court must find a substantial interference with the sibling's relationship, taking into consideration the nature of the relationship, including but not limited to whether the child was raised in the same home with the sibling, shared significant common experiences with the sibling, had close bonds with the

sibling, and whether that outweighed the benefits of adoption. Here, appellate court upheld the juvenile court, and found that older sister C. had not established that exception.

3) The appellate court also remanded so that adequate notice could be given to the Seneca tribe. Although the juvenile court had found that ICWA did not apply to the case, the juvenile court also knew that there may be an ICWA issue so “out of an abundance of caution” it used the ICWA standard, and found that the Agency had made active efforts to prevent the breakup of an Indian family, and found beyond a reasonable doubt that continued custody with a parent is likely to cause serious emotional or physical damage to the children.

The appellate court also found that the Indian Child exception to termination of parental rights did not apply because the juvenile court properly found that termination of parental rights would not substantially interfere with the minors’ connection to their tribal community or tribal membership rights. Likewise, after much discussion, the appellate court held the Agency made reasonable efforts to pursue any necessary steps to secure the minors’ tribal membership in the Cherokee Nation.

The appellate court determined that notice to the Choctaw tribe was proper and that the Choctaw Nation had been provided sufficient information to determine the minors’ possible Choctaw heritage based upon the minors’ purported Choctaw great-great-great grandparents.

DCFS had made much effort to determine the correct information regarding the minors’ Seneca tribe heritage, and had noticed the Seneca tribe on several occasions. Nonetheless, the appellate court found notice was defective because the Agency had not included information about the minors’ great-great grandfather.



**In re Christopher C ( 2/2/10)**  
182 Cal.App.4<sup>th</sup> 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.4<sup>th</sup> 961) there are situations where juvenile court intervention is necessary.

**In re Desiree M. (1/26/10)**  
181 Cal. App. 4<sup>th</sup> 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 D.R.**, (6/15/10)  
185 Cal.App.4th 852  
First Appellate District, Division Four

In June 2008, a supplemental petition was filed when 12 year old dependent D.R. was removed from the home of his uncle C.S. with whom D.R. had lived since he was an infant. Since 1997, C.S. had been D.R.'s de facto parent. In November 2008, the juvenile court sustained a petition against C.S. for physical abuse of D.R. The juvenile court then sought to reunify D.R. with C.S., and C.S.'s partner, K.F.

At the end of the hearing on the supplemental petition, the agency made an oral motion to set aside C.S.'s de facto parent status based upon the court's physical abuse findings. The juvenile court denied the motion. A month later, in December, 2008, the agency filed a written motion to terminate C.S.'s de facto parent status. C.S. opposed the motion.

Between January 2009 and April 2009 there were several hearings on de facto parent status issues. In March 2009, C.S.'s partner, K.F. sought a court order to determine his de facto parent status. The agency opposed K.F.'s request.

At a hearing on April 6, 2009, the agency argued that once the juvenile court had found physical abuse had occurred, C.S. automatically forfeited his de facto parent status. The juvenile court however, found that a psychological bond existed between C.S. and D.R. and that terminating C.S.'s de facto parent status would not be in D.R.'s best interests. The juvenile court denied the agency's motion to terminate C.S.'s de facto parent status and granted K.F.'s application for de facto parent status. The agency appealed these two rulings.

Preliminarily, on appeal, C.S. and K.F. asserted that the agency did not have standing to appeal the juvenile court orders. C.S. and K.F. argued that de fact parent status existed to benefit the juvenile court and did not adversely impact any legally cognizable interest held by the agency. The court rejected that argument finding the agency was aggrieved by the juvenile court's rulings.

The court then addressed whether termination of de facto parent status was compelled. The court found that to formally terminate de facto parent status, the agency has the burden of establishing a change of circumstances that no longer supports the status. Examples of such change of circumstances are that a psychological bond no longer exists, or that the de facto parent no longer has reliable or unique information about the child that could be useful to the juvenile court. The agency argued that the serious physical abuse findings sustained in the supplemental petition constituted a change of circumstances warranting automatic termination of de facto parent status.

The court here distinguished the case of Kieshia E. (1993) 6 Cal.4th 68 in which the California Supreme Court held that by committing an intentional act, the perpetrator had rejected the ongoing parent-nurturer function that is crucial to the privilege of participation as a de facto parent. Kieshia E. also held that when there is an adjudication that a nonparent caretaker

commits a substantial harm such as sexual or other serious physical abuse, then the perpetrator's interest in the juvenile dependency proceedings are extinguished.

The court in D.R. found that in Kieshia E., the Court held that a nonparent may not obtain de facto parent status if the juvenile court determined there had been sexual abuse or serious physical abuse by the nonparent. Here, C.S. had been D.R.'s de facto parent since he was 18 months old, and D.R. was detained when he was 12. The court in D.R. found that an initial application for de facto parent status raises different concerns than does a motion to terminate that status.

At a motion to terminate de facto parent status, the agency bears the burden of proving a change of circumstances to demonstrate the merit of termination. The juvenile court could properly take into account the lifelong relationship between D.R. and C.S. as well as the depth of that relationship, i.e. the psychological bond. In addition, while it is true an applicant for de facto parent status is automatically disqualified if he or she caused harm to the minor, since that applicant's actions caused the minor to come into the dependency system, here D.R. was already in the system when C.S. became the de facto parent.

The court found that given D.R.'s many challenges and problems, he would have continued to be a dependent even if the juvenile court had not sustained the petition against C.S. In addition, the court recognized that C.S. had offered him a home and provided for him for almost his entire life.

After distinguishing Kieshia E., the court in D.R. then found that even if it had followed Kieshia E., the juvenile court committed no legal error. The single incident of physical abuse the juvenile court sustained against C.S. did not rise to the level of serious physical abuse necessary to terminate de facto parent status under Kieshia E.

The agency also argued that the juvenile court abused its discretion in denying the motion to terminate C.S.'s de facto parent status. The court held that the juvenile court did not abuse its discretion if substantial evidence supported its underlying factual findings. Here, the court agreed with the juvenile court that there was substantial evidence to determine that there was not a change of circumstances warranting termination of the de facto parent. The juvenile court found there was a psychological bond, and that the physical abuse had not lessened that bond. In addition, because C.S. had cared for D.R. almost his entire life, C.S. still had information about D.R. that could be useful to the juvenile court.

The court also considered whether the juvenile court abused its discretion, i.e. if there was substantial evidence, to support granting K.F.'s application for de facto parent status. The court held that in considering an application for de facto parent status, the juvenile court considers such factors as the psychological bond between the applicant and the child; whether the applicant has assumed the role of a parent on a day-to-day basis for a substantial period; whether the applicant has unique knowledge of the child; whether the applicant attends juvenile court hearings; and whether the juvenile proceedings could result in an order permanently foreclosing future contact between the child and the applicant. Based upon these factors the court upheld the de facto parent status of K.F.

**In re E.B.** (4/9/10)  
184 Cal. App. 4<sup>th</sup> 568; 109 Cal. Rptr. 3d 1  
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.4<sup>th</sup> 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. 4<sup>th</sup> 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 Ethan C.** (9/24/10)  
188 Cal. App. 4<sup>th</sup> 992  
Second Appellate District, Division One

Issue

- 1) Did the trial court need to find that his abuse or neglect causing the death of the child rose to the degree of culpability encompassed within the concept of criminal negligence?
- 2) Did the parent's history of domestic violence and mother's cognitive limitations support the trial court sustaining a WIC 300(b) allegation?
- 3) Did the trial court need to sustain the corresponding 300(b) allegation when it sustained a (j) allegation as to the deceased child's siblings?

Facts

On June 17, 2009 18-month old Valerie died in an automobile accident when she flew out of her father's car landing on her head. While her father did not cause the accident, Valerie had been unrestrained in the car. A subsequent referral resulted in an investigation by the Agency which revealed that Valerie's siblings, Ethan and Jesus were residing in a filthy home and that their hygiene was poor. Ethan the three-year old was developmentally delayed. In addition, the mother had been diagnosed with borderline personality disorder, had a history of suicide attempts and generally functioned at a level no greater than 13 years old. The parents had engaged in acts of domestic violence in the home with the mother acting as the perpetrator when she hit the father with objects, cursed, threatened and slapped him. The father had been taking painkillers for back pain. After a trial, the court sustained a count stating that Ethan and Jesus were at substantial risk of suffering serious harm due to the mother's inability to provide regular care, as a result of her mental impairments or developmental disability, that the parents history of domestic violence endangered the children's physical and emotional health and safety and the mother had significant cognitive impairments which would require extensive services in order to enable her to appropriately care for and supervise her children. The court also sustained a subdivision (f) based on the child Valerie's death.

Holding

The court of appeal held that the juvenile court properly sustained allegations under WIC 30(f) based on the father's failure to secure the deceased child in a car seat. The court rejected the father's argument that it was necessary to find that his actions rose to the level of criminal negligence. The language of WIC 300(f) was simple and clear. A child was within juvenile court jurisdiction if the actions of a parent caused the death of another child through neglect. There was no indication that the legislature intended to require a finding of criminal negligence. The court noted that, in fact, in 1996, the Legislature changed the language of 300(f) eliminating

the need for a criminal conviction of causing another child's death through abuse or neglect clearly indicating their desire to lower the burden of proof.

The court also held that sufficient evidence supported findings sustaining allegations as to the father under WIC 300(b) regarding the risk of harm to the children due to historical domestic violence between their parents and the mother's cognitive limitations, even though the parents were not together at the time of the hearing. The court noted that even though the parents were living apart at the time of the dispositional hearing, fewer than four months had passed since the last event and the mother was clearly still desirous of reuniting with the father. "Thus it is not unrealistic for the juvenile court to conclude that William's claims the parties were permanently separate was premature. The effects of domestic violence in the home form a sufficient basis for jurisdiction under section 300 (b), even if a child is not physically harmed." "Domestic violence in the same household where children are living *is* neglect; it is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect *causes* the risk." (In re Heather A (1996) 52 Cal. App. 4<sup>th</sup> 183, 194.

Finally, the court found that it was error to dismiss allegations under WIC 300(b) as to the father's neglect of the toddler resulting in her death. Those allegations were a necessary predicate to sustain the allegations under WIC 300(j), as to the children at issue.

**In re Giovanni F.** (5/11/10)  
184 Cal. App. 4<sup>th</sup> 594; 108 Cal. Rptr. 3d 885  
Fourth Appellate District, Division One

Issue

Can exposure to domestic violence fall under WIC §300(a)?

Facts

The trial court sustained a WIC §300(a) count and found true that the father and mother exposed Giovanni to the risk of serious physical harm and there was a substantial risk Giovanni would suffer serious physical harm inflicted nonaccidentally. This was based on the facts that while driving with Giovanni and the mother in the car, the father punched the mother several times in the face and choked her to the point of unconsciousness. The mother sustained bruises to her forehead, both eyes and her neck. At one point, when they reached their destination, the parents struggled over Giovanni's car seat with Giovanni in it. The car seat slammed into a window and broke the window. The parents had been involved in several verbal and violent physical confrontations over the past three years, some of those occurring in Giovanni's presence. The parents had not complied with the safety plan including moving back into together after they promised to separate and moved without telling the Agency. Father appealed the sustaining of the §300(a).

Holding

The appellate court concluded that the application of section §300(a) is appropriate when, through exposure to a parent's domestic violence, a child suffers, or is at substantial risk of suffering, serious physical harm inflicted nonaccidentally by the parent. In this case, the court found that the father's horrendous violence amply supported the juvenile court's §300(a) jurisdictional finding.

**“Domestic violence is nonaccidental.”** The appellate court pointed out that the father's conduct in the car put Giovanni at increased risk of physical harm. “Any harm Giovanni suffered would have resulted from Joel's nonaccidental conduct. Joel's assertion that his behavior did not endanger Giovanni is incorrect. *His assertion that he did not intend to hurt Giovanni is immaterial*” The appellate court noted that at least on three occasions, father's conduct placed Giovanni at risk, the violence in the car, the struggle over the car seat and attacking the mother on another occasion while Giovanni was in her arms. “The risk to Giovanni from Joel's violence on these occasions was increased by his history of violent attacks on R.F. and others, some of which occurred in Giovanni's presence; the repeated and serious injuries Joel inflicted on R.F.; Joel's denial that he was violent; his refusal to comply with the safety plan; and his violation of the TRO. The requirements for jurisdiction under section 300, subdivision (a) were met.”

**In re G.M. (1/27/10)**  
181 Cal. App. 4<sup>th</sup> 552; 105 Cal. Rptr. 3d 32  
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.)

**In re Grace C.** (12/8/10)  
190 Cal. App. 4<sup>th</sup> 1470; 119 Cal. Rptr. 3d 474  
First Appellate District, Division Four

Issue

- 1) Should the court have maintained jurisdiction in order to oversee visitation orders with mother?
- 2) Did the court improperly delegate authority regarding visitation to child's legal guardians and therapist?

Facts

This case had been through the system a couple of times. On the last time, the parents waived their rights to reunification and agreed to let the maternal grandmother and maternal aunt become guardians of the children. The guardianship was granted and a hearing set to contest the Agency's recommendation to terminate jurisdiction because an agreement could not be reached on the specifics of visitation. The court terminated the court's jurisdiction after granting a legal guardianship. The court issued a DETAILED visitation order. Mother appealed.

Holding

- 1) The court found that the juvenile court's conclusion that the legal guardians supported continued visitation was supported by substantial evidence. The evidence did not establish that the legal guardians failed to comply with visitation orders. At the time of the post-permanency review hearing, they were providing the mother with regular visitation as ordered. Accordingly, the court rejected the mother's argument that jurisdiction should have been maintained to oversee visitation, pursuant to WIC 366.3(a).
- 2) In light of the procedural posture of the case when the visitation order was entered and all the relevant circumstances, including the fact that it was essentially undisputed that visits were going well and were expected to continue indefinitely despite the provision granting some discretion to the legal guardians, the juvenile court's visitation order was not an abuse of discretion. The visitation order did not impermissibly delegate discretion over visitation to the minors' therapist and legal guardians. The juvenile court properly considered the need for flexibility and allowed for adjustments if necessary after the termination of jurisdiction.

**H.S. et al v. Superior Court of Riverside County** (4/22/10)

183 Cal. App. 4<sup>th</sup> 1502

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 H.S. (9/2/10)**  
188 Cal. App. 4<sup>th</sup> 103; 114 Cal. Rptr. 3d 898  
(Third Appellate District-Sacramento)

Issue:

Does the later submission of a new expert's opinion, based on evidence that was available at the jurisdiction hearing, constitute "new evidence" within the meaning of WIC 388(a)?

Facts:

Children sustained serious physical injuries. Expert medical opinions were submitted by both sides at the jurisdiction hearing. At the conclusion of the contested jurisdiction and disposition hearings, the court sustained the petition and later denied FR services to the parents finding that FR was not in the minors' best interests.

Three months later, the father filed a WIC 388 petition seeking to have the petition dismissed and the minors returned home. The 388 petition was based on purported new evidence, an opinion by another alleged expert (who was not a medical doctor) who reviewed the medical records admitted at the original trial and opined that there were explanations for the injuries other than intentional abuse. His opinion conflicted with both medical expert opinions presented at the jurisdiction hearing. The trial court denied the 388 petition without an evidentiary hearing reasoning that the new expert's opinion was based on evidence available at the jurisdiction and disposition hearings and, thus, there was **no new evidence** presented.

Father appealed the denial of the 388 petition without an evidentiary hearing. Affirmed.

Holding:

Analogizing to CCP 1008(a) (request for reconsideration) and CCP 657(4) (request for new trial), both of which require that not only must there be new evidence, the applicant must also demonstrate why the evidence could not, with reasonable diligence, have been discovered and produced at the trial. The court, therefore, held that the term "new evidence" in WIC 388 must be construed to include the three element found in CCP Sections 657 and 1008: new evidence, reasonable diligence, and materiality.



**In re Jackson W.** (4/29/10)  
184 Cal. App. 4<sup>th</sup> 247  
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)  
184 Cal. App. 4<sup>th</sup> 539; 108 Cal. Rptr. 3d 846  
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.4<sup>th</sup> 125 and Alyssa F 112 Cal.App.4<sup>th</sup> 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.4<sup>th</sup> 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.4<sup>th</sup> 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 Jonah D.**(9/10/10)  
189 Cal. App. 4<sup>th</sup> 118  
Second Appellate District, Division One

Issue

Was there reason to know that the child would fall under the Indian Child Welfare Act?

Facts

On May 6, 2008, the court found Mother does not have any Native American Heritage. In connection with the section 366.26 hearing, the Department noted that the court had not made an ICWA finding as to J.D.'s father. The Department spoke to Adam C.'s mother, Claudia C. who told the social worker that she had been informed by her own maternal grandmother that Claudia had Native American ancestry, but Claudia did not know whether it was from her maternal grandmother or maternal grandfather, advising the Department that "I can't say what tribe it is and I don't have any living relatives to provide additional information. I was a little kid when my grandmother told me about our Native American ancestry but I just don't know which tribe it was." Claudia C.'s relatives did not live on a reservation or attend an Indian school but lived on a farm in Arkansas. At the October 26, 2009 section 366.26 hearing, the court found it had no reason to know that J.D. would fall under ICWA. The court did not order any notices to be sent to anyone including the BIA.

Holding

The trial court was affirmed. "Here the child's paternal grandmother had told the Department that 'I can't say what tribe it is and I don't have any living relatives to provide additional information. I was a little kid when my grandmother told me about our Native American ancestry but I just don't know which tribe it was.' **This information is too vague, attenuated and speculative to give the dependency court any reason to believe the children might be Indian children.**"

**In re Jose C. (September 2, 2010)**  
188 Cal.App.4<sup>th</sup> 147; 114 Cal. Rptr. 3d 903  
Second Appellate District

Issues:

- (1) Did the trial court err in finding that Jose C. was likely to be adopted?
- (2) Did the trial court err in failing to consider “presumed father” status for Jose C.’s grandfather?

Facts:

Jose and his mother are Regional Center clients. In November 2006, DCFS filed a petition detaining Jose from his mother when he was 7 years old due to physical abuse. The trial court found that the mother used inappropriate discipline and that she was developmentally delayed and unable to provide appropriate care and supervision for Jose. The mother has the cognitive ability of a 5 year-old and functions socially at the level of an 11 year-old. Dr. Kramon found her relationship with her son to be that of a peer type relationship as opposed to a mother-son one. The mother subsequently failed to reunify with Jose.

The mother’s father has been involved with Jose from his birth. The MGF sought de facto parent status and the trial court eventually granted the request. The MGF did not request for Jose to be placed with him due to the MGF’s living condition but did visit with Jose. Throughout the case, Jose was placed with foster parent A.A., who took great care of him.

At the §366.26 hearing, the trial court found Jose to be adoptable and did not find that the “continuing beneficial relationship” exception applied and terminated parental rights. The trial court recognized the MGF’s relationship with the child but did not find any legal basis not to terminate parental rights.

On appeal, Jose and the MGF argued that Jose’s attachments to his mother and MGF will cause him grief and trauma if TPR occurred, that the trial court failed to take into consideration Jose’s age (11 yrs old), and that the trial court failed to find the MGF was Jose’s presumed father.

Holding:

- (1) The trial court did not err in finding Jose to be adoptable. It is mere speculation that Jose may be affected emotionally in the future once he understands that adoption means the loss of his relationship with his MGF and mother. The Court of Appeal will not disturb the trial court’s ruling based on speculation about what “may” happen. The evidence supported Jose’s adoptability.
- (2) The trial court did not err in not considering the MGF’s request for presumed father status. The MGF argued that if he were found to be a presumed father, he could assert the continuing beneficial relationship. However, the MGF did not seek such status in the juvenile court and cannot raise the issue on appeal. Additionally, the MGF failed to present evidence that

he qualifies as a presumed father under Family Code §7611 in that he cannot establish that he openly and publicly acknowledged paternity of Jose.

Lastly, the Court of Appeal also noted in dicta that there is no “best interests” exception to termination of parental rights.

**In re Karla C.**, (7/21/10)  
186 Cal. App. 4<sup>th</sup> 1236, 113 Cal. Rptr. 3<sup>rd</sup> 163  
First Appellate District, Division Five

Issue

1) At disposition, may the Court temporarily place with a noncustodial parent in another country without knowing the enforceability of court jurisdiction.

Facts:

The Court sustained allegations that 5-year-old (at the time of disposition) Karla had been sexually abused by her stepfather, and her mother had failed to protect. Originally the Agency was recommending out of home placement with discretion to place with relatives; the Agency was concerned about not knowing the level of the father=s ability to support the child, and the agency believed that the child=s emotional trauma could be better addressed in the United States than in Peru. At the time of the contested disposition, the child was with relatives, and the Agency and the therapist believed that it would be highly traumatic to move her to the father in Peru. County Counsel and the mother argued that it was not clear if the Court would be able to exercise jurisdiction to have the child returned to California at a later date. The father sought custody, and minor=s counsel concurred. The Court could not find clear and convincing evidence of detriment if placed with the father, so the Court ordered placement with the father in Peru, granted the father legal and physical custody, and set a 3-month date for a report updating Karla=s status and placement.

Reversed only as to the placement with the father and remanded with direction.

Holding:

1) Prior to placing a child with a noncustodial parent in another country with ongoing court supervision, the Court must determine the recognition and enforcement of the Court=s continuing jurisdiction by that country, and impose any measures necessary or appropriate to ensure enforceability. (AAAt minimum, the juvenile court should require Father to expressly concede the juvenile court=s jurisdiction throughout the pendency of the dependency case, as Father has indicated he is willing to do.≡)

2) If the Court is retaining jurisdiction, then the court should place, but not grant Alegal and physical custody.≡

\*\*\*The unpublished portions of the case affirm the findings that there was not a showing by clear and convincing evidence of detriment if placed with the father, nor was a home study required prior to placement with the father.



**In re K.C.** (4/26/10)  
184 Cal. App. 4<sup>th</sup> 120  
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. 4<sup>th</sup> 1388

Third Appellate District

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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.

**Kevin R. v. Superior Court of San Diego** (12/10/10)  
191 Cal. App. 4<sup>th</sup> 676; 120 Cal. Rptr. 3d 549  
Fourth Appellate District - Division One

Issue

- 1) Whether Court unlawfully delegated its authority to order visits for FA to the Parole Officer?
- 2) Whether there was a substantial probability of return to the father by 12 month date, such that reunification services should be continued?
- 3) Whether reasonable services were provided?

Facts:

Juv. Ct. ordered visits to occur with concurrence of FA's Parole Officer. FA is a registered sex offender with a parole condition of no contact with children. This was later modified to allow supervised visit with *his* child. Parole agent indicated that no additional modifications would be made.

Since FA's release from custody, he attempted to comply with Ct. Orders. At the 6 month hearing, Juvenile Ct found he made good, but not substantive progress. The 12 month hearing would be in only 2 months after the 6 month hearing. The Ct terminated FR and set a .26 hearing. Child under age 3 at disposition.

Holding:

- 1) Juvenile Ct may not order visitation that contravenes a lawful condition of parole. The *parent* seeking a parole modification **must** petition the Board of Prison Terms or file a habeas petition. The CSW is *not* obligated to intercede in such a parole petition.
- 2) The court was affirmed in finding no substantial probability of return to father by 12 month date. Aside from the uncorroborated hearsay that there would not be further parole modifications (ie: child could not be left alone with FA), FA had not completed parenting, did not demonstrate an understanding of basic child care, lived in his car for part of the review period, and there was no evidence he could safely care for child within 2 months.
- 3) Reasonable Efforts: Due to misunderstanding, CSW stopped the supervised visits for 2 months. Given the totality of the services, the Ct's finding of reasonable services is supported by substantial evidence.

**In re Kyle E. (6/22/10)**  
185 Cal. App. 4<sup>th</sup> 1130; 111 Cal Rptr. 3d 199  
3rd Appellate District (Sacramento)

Issue:

May the court delegate to the Department the discretion to determine the frequency of visitation, depending upon what the Department finds is consistent with the well-being of the child?

Facts:

The published portion of this opinion concerns Father's appeal of the juvenile court's visitation order. At disposition the court's oral orders for Mother's visitation incorporated by reference the Department's recommendations. The oral orders for Father's visitation, on the other hand, were short and sweet: "[W]ith regard to father's visits, those will be supervised only at this point." Instead of reiterating the court's exact orders regarding Father's visitation, the Minute Order for the proceeding incorporated the additional language the Department had recommended for **Mother's** visits: "The father shall have supervised visitation with [the minor] as frequent as is consistent with the well-being of [the minor]. [The Department] shall determine the time, place and manner of visitation, including the frequency of visits, length of visits, and by whom they are supervised. [The Department] may consider [the minor's] desires in its administration of the visits, but [the minor] shall not be given the option to consent to, or refuse, future visits." In his appeal, Father contended the court had improperly delegated to the Department the responsibility to determine whether visitation with the minor would occur at all.

Holding:

The Court of Appeal agreed with Father and found fault with the visitation order on two grounds: the oral pronouncement was too vague, and the written order providing for visits "as frequent as is consistent with the well-being of [the minor]" improperly left it up to the Department's discretion to decide whether visits would occur at all. Citing In re Moriah T. (2004) 23 Cal. App. 4<sup>th</sup> 1367, 1371, the Court of Appeal found the order should have set a minimum number of visits or at least should have provided that Father could visit the minor "regularly." On the other hand, it is not improper for the court to delegate the details of visitation, including the time, place, and manner. The appellate court remanded the matter for the juvenile court to clarify the terms and conditions of Father's visitation including, but not limited to, reciting a minimum number of visits or an order that visitation is to occur regularly.

**In re L.Z.** (9/17/10)  
188 Cal. App. 4<sup>th</sup> 1285  
First Appellate District, Division Three

Issue

Did the trial court err when it denied FR to the mother?

Facts:

Baby ZZ was born to teenage parents. Both parents abused alcohol, and domestic violence was an issue in this relationship. Baby ZZ lived with her parents and her maternal grandmother. When the baby was two months old, she was found to have non-accidental injuries while in her parents care, including a spiral fracture to her left humerus and nine broken ribs. The case was filed under WIC section 300 (e).

Mother noticed the baby was in pain for about a week, but the injuries were not discovered until she brought the baby in for a regularly scheduled doctor's visit. Following discovery of the injuries Mother said the father may have injured the baby. After an argument, he went into the baby's room and came out with the baby screaming. Ever since then, mother noticed the baby did not use her arm. Mother asked the father to admit to hurting the baby and to move out of the home. She obtained a restraining order against the father.

While the child was in foster care, Mother visited almost every day and attended to the child's needs. The baby was eventually placed with the paternal aunt and Mother's visits were limited to one hour a week in a DCFS office. Paternal aunt reported that the mother was not able to calm the baby and that mother could not read the baby's cues. Social worker testified that based upon the difficult visits, it was the Dept's position that the Mother could not relate to or care for the baby and the baby had no significant attachment to the Mother.

The trial court denied FR and stated that "either parent may have caused these injuries, ...neither parent...has assumed responsibility for their actions...until they acknowledge responsibility and are treated for it...there is a serious risk this could happen again." The trial court sustained the petition, the child remained suitably placed and the parents were denied reunification services. The case was set for a .26 hearing.

Holding:

Yes. In order for the court to deny FR to the mother pursuant to 361.5 (b)(5) and Section 300 (e), the Dept. had to show that the mother knew or should have known that she had an abused baby. The parties stipulated that medical testimony would establish that if someone caused rib injuries to a young infant, another person "would not know about the injuries and would just see a fussy, crying baby." Thus, the rib injuries cannot support a conclusion that Mother should have known. Although there was evidence that there was something wrong with the baby's arm, Dept did not show that Mother should have known that it was caused by abuse. Finally, it is not fair to require that one parent admit they physically abused the baby in order for the other to be eligible for services.

**Manual C. v. Superior Court** (1/26/10)  
181 Cal. App. 4<sup>th</sup> 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. 4<sup>th</sup> 369; 105 Cal. Rptr. 3d 505  
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: Maria R. (5/27/10)**  
185 Cal. App. 4<sup>th</sup> 48  
Fourth Appellate District

Issues:

1. What does WIC 300(j) cover B Does it have to be based upon the same sustained finding for a sibling?
2. What is the Arisk of sexual abuse≅ to a child of opposite sex, when the sibling has been Asexually abused,≅ for purposes of WIC 300(d)?

Facts:

This is a fact-specific case, and really not material to the legal holdings. In short, Dad sexually abused oldest daughters, as defined by 300(d). No evidence that he sexually abused son or had any inclination to do so. Court found that son was at risk of sexual abuse under subdivision (j). COA reversed that finding.

Holdings:

1. WIC 300(j) is Abroadly≅ defined. It does not require a finding that the sibling has been described by the *same* subdivision. A child is described under 300(j) when that child is at Asubstantial risk that the child will be abused by subdivisions (a), (b), (d), (e) *or* (I). In other words, if the child is at risk in any of those subdivisions, there is no requirement that the child=s sibling is also described by that subdivision. Subdivision (j) does not limit the grounds to a child to the same subdivision to which his/her sibling was described.
2. There must be more evidence to suggest that the sexual perp may have an interest in molesting children of the opposite sex, other than the mere fact that the child is Aapproaching the age or at the age≅ of the sibling/victim. This conflicts with the holdings of *In re P.A.* and *In re Andy G.*

ANALYSIS:

1. AThe broad language in subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in subdivision (j).≅ ASubdivision (j) *does not* state that its application is limited to the risk that the child will be abused or neglected *as defined by the same subdivision* that described the abuse or neglect of the child=s sibling.≅

[Ed=s note: Does the court have to identify the specific subdivision(s)?]

2. A We cannot agree with prior cases to the extent that they have held or implied that the risk the brothers face may Bin the absence of evidence demonstrating that the perpetrator of the abuse may have an interest in sexually abusing male children B be deemed to be one of Asexual abuse≅ within the meaning of subdivision (d).≅ [Note the requirements of subdivision (d) as defined by Penal Code section 11165.1.]

**In Re M.B.** (3/22/2010)  
182 Cal. App. 4<sup>th</sup> 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 M.M.** (8/9/10)  
187 Cal. App. 4<sup>th</sup> 302  
Fifth Appellate District

Issue:

Does the Department have to comply with notice under the Hague Convention for a supplemental or subsequent petition when parent was properly served for the original petition, thereafter makes a general appearance for the supplemental petition and later is deported to Mexico?

Facts:

Father appears for the initial hearing and petition. Thereafter, a subsequent petition is filed and Father appears for the hearing on a subsequent petition and is later deported to Mexico. Father claimed that the Department had to notice him pursuant to the Hague Convention for the subsequent petition

Holding:

No. A subsequent petition is filed with new, independent allegations of dependency after the juvenile court has already declared the child to be a juvenile dependent. Although the court takes jurisdiction over children, not parents, it also gains personal jurisdiction over a parent when the parent is properly noticed. This jurisdiction continues as long as the best interests of the child so require. Note—even if the court had found that compliance was necessary, here the father made a general appearance which is equivalent to personal service

**In re N.V.** (9/8/10)  
189 Cal. App. 4<sup>th</sup> 25  
Fourth Appellate District, Division One

Issue

Did the trial court err when it excluded evidence regarding the Agency's refusal to grant placement in the home of a relative based on previous child welfare referrals?

Facts

The Agency filed a petition alleging severe physical abuse of the child A.V. At the time of the detention, the mother and father asked for the children to be placed with the maternal grandmother, Christy. Although the grandmother's physical home was appropriate at that time, the Agency declined placement based on four prior child welfare referrals including two substantiated referrals. At disposition, the parents asked the court to consider evidence about the Agency refusing to place the children in the grandmother's home including allowing cross-examination of the social worker. Between the detention hearing and the dispositional hearing, the grandmother had moved to a new home, had not given the Agency a new address and therefore the Agency had not inspected the grandmother's new residence. The court indicated that the maternal grandmother had a grievance proceeding and had not exhausted her administrative remedies. The court proceeded to disposition and set a progress report on the grievance process and relative placement.

Holding

The appellate court held that the trial court did err when it excluded evidence concerning the Agency's reasons for refusing to approve the maternal grandmother's home. "When the Agency deems a relative's home unsuitable due to a previous child welfare referral, "the juvenile court must exercise its independent judgment rather than merely review [the Agency's] placement decision for an abuse of discretion." (Cesar V. v. Superior Court (2001) 91 Cal.App. 4<sup>th</sup> 1023, 1027, 1033, citing WIC 3061.3(a)) This is different than if the prospective relative placement had a criminal conviction which the Agency refused to waive where the court does not have the authority to grant an exception or place the child in the relative's home. (In re Esperanza C. (2008) 165 Cal. App. 4<sup>th</sup> 1042, 1057)

The appellate court reasoned that the since "Once a child is placed in the home of a nonrelative at the dispositional hearing, the relative placement preference does not arise again until "a new placement of the child must be made."" (WIC 361.3(d) quoted in In re Lauren R. (2007) 148 Cal.App.4<sup>th</sup> 841, 854), that it is important for the trial court to hear that evidence at the dispositional hearing and not wait until the grievance procedure is complete. "Postponing the juvenile court's review of the Agency's decision for an indefinite period pending completion of administrative proceedings would undermine judicial review."

In this case, however, the trial court's error was harmless because the maternal grandmother's new home had not yet been inspected and so the children could not be placed with her anyway.



**In re Pedro Z., Jr.** (11/16/10)  
190 Cal.App.4<sup>th</sup> 12; 117 Cal. Rptr. 3d 605  
Second Appellate District, Division One

**Issue:**

Did the trial court err in denying a father's request for family reunification services under WIC §361.5 where the child is placed with his mother?

**Facts:**

The Agency filed a petition, and the trial court sustained language regarding: methamphetamine being found in the home, father's possession of drug paraphernalia in the home within access of the child, father's 10-year history of drug abuse and current use of meth, and father's inappropriate discipline of the child. (The trial court also found the mother was unaware of the father's drug relapse.) At disposition, the father requested family reunification (F/R) services. The trial court released the child to the mother on the condition that the father not reside in the home. The trial court ordered family maintenance services for the mother and denied the father's request for F/R. The father appeals and argues that he is entitled to reunification services under WIC §361.5 as a matter of law unless an exception applies.

**Holding:**

The trial court did not err in denying the father's request for F/R. WIC §361.5 does not apply when a child is returned to a parent at disposition. Rather, the applicable statute is WIC §362(b) which states:

“When a child is adjudged a dependent child of the court, on the ground that the child is a person described by Section 300 and the court orders that a parent or guardian shall retain custody of the child subject to the supervision of the social worker, the parents or guardians shall be required to participate in child welfare services or services provided by an appropriate agency designated by the court.”

Such services in §362(b) are not reunification services but family maintenance services in order to maintain the child in his home.

**In re Precious D. (11/8/10)**  
189 Cal. App. 4<sup>th</sup> 1251; 117 Cal. Rptr. 3d 527  
Second District, Division One

Issue:

May the juvenile court assert jurisdiction over an "incorrigible" teenager where there has been no showing that the parent is either unfit or failed to protect from risk?

Facts:

Precious, age 16, began to consistently run away from home, hang out with the "wrong crowd," miss classes, become disrespectful at home and her mother believed she was engaging in prostitution. The Agency received a referral after the police picked up Precious as a runaway. At that time, Precious claimed she was being physically abused by her step-father and refused to return home.

Upon investigation, the Agency determined that the abuse allegations were untrue. Mother asked that Precious be returned to her care but asked for assistance to address her issues. Mother agreed to a voluntary reunification agreement and the child was placed in a foster home. The next day, Precious AWOLed. She was sneaking boys into the foster home and contracted a STD.

Although mother and child spoke daily on the phone, Precious refused to visit her family, continued to act out, disrupt school, threaten to harm herself and, on one occasion, was hospitalized. A safety plan was initiated including intensive services and placement in a group home. When those services failed to remedy the problems, the Agency filed a 300(b) petition. Mother told the Agency that she wanted "Precious to get help before she comes home."

By the time of the jurisdiction hearing, mother requested that the petition be dismissed in that the agency had failed to establish the elements of 300(b). The court denied the motion, finding that the child's AWOLing, and other actions placed her at risk of serious physical harm. The court did indicate that the "issue is Precious, not the [Mother]."

Holding:

Reversed. The Court of Appeal found that there was not sufficient evidence to establish that the mother was either negligent or unfit. She had agreed to participate in any and all services offered and it was Precious refusal to participate, not the mother's actions, which were at issue.

As the C of A noted, the mother's due process rights to the care and companionship of her child cannot be impinged where her *inability* to protect her child is not as the result of either neglect or unfitness. Such a finding is inconsistent with the dependency scheme taken as a whole.



**In re Rebecca S** ( 2/8/10)  
181 Cal. App. 4<sup>th</sup> 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 R.R.** (8/30/10)  
187 Cal App 4th 1264  
Second Appellate District, Division Eight

Issue

This case presents the question of whether a parent in a dependency proceeding who claims he is not abusing drugs thus tenders his past drug use in issue and, as a result, forfeits his physician-patient privilege regarding that drug use.

Facts

The dept files an amended petition after father makes a belated appearance and has a history of drug use. County Counsel subpoenas the medical records of the father just before the adjudication.

The trial court found the motion to quash as not timely and allowed the records into evidence.

Holding

The Court of Appeal affirmed the juvenile court's order. The court concluded that the juvenile court properly admitted the father's medical records at the jurisdiction and disposition hearing. Although the father contended his motion to quash a subpoena duces tecum should have been granted because the county department of children and family services failed to comply with the notice requirements set forth in Code Civ. Proc., § 1985.3, any error in not granting the motion to quash was harmless. Because the father tendered his lack of drug use as an issue in the case, he had no privilege to keep his medical records from being considered by the juvenile court. The court did not have to determine whether the medical records were admissible under the business records exception to the hearsay rule, because even if they were hearsay, they were admissible at the jurisdictional hearing under Welf. & Inst. Code, § 355. Substantial evidence supported the juvenile court's finding that the daughter was a person described by Welf. & Inst. Code, § 300, subd. (b). The juvenile court could reasonably find that the father's drug use compromised his ability to care for his child. The juvenile court did not abuse its discretion in requiring monitored visits.

We conclude that under the circumstances of this case the answer is, "Yes," and hold that the juvenile court properly admitted father's medical records at the jurisdiction and disposition hearing. For this and other reasons, we affirm the juvenile court's order.

The appellate court's opinion is an excellent primer on subpoenaing medical records and their admissibility.

**In re S. A. (3/15/10)**  
182 Cal. App. 4<sup>th</sup> 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.

**San Joaquin County Human Services Agency v. Marcus W. (6/2/10)**

185 Cal. App. 4<sup>th</sup> 182  
Third Appellate District

Issue

Does the Juvenile Court have jurisdiction to order a 16 year old child to undergo blood transfusions to prevent him from suffering a stroke or death in the treatment of sickle cell disease against the child's wishes.

Facts

The Agency filed a petition with the Juvenile Court seeking permission for the child's treating physician to "administer blood transfusions to the child without parental consent as medically necessary until October 1, 2009 at which time a progress report would be provided addressing the need for further transfusions.

The child, who was a Jehovah's Witness, as were his parents, testified that opposing blood transfusions was part of his personal religious beliefs. He understood the nature of the disease and the risks associated with refusal of blood transfusions, but was adamant that he would continue his refusal. He was a junior in high school with above average grades. He had been a practicing Jehovah's Witness along with his parents for his entire life. His doctor wrote a letter to the court stating that the child had suffered 2 strokes as a result of the sickle cell disease and that blood transfusions were the "only definitive therapy for stroke in sickle cell disease". Alternative therapies had been tried and been unsuccessful.

The Juvenile Court granted the request and issued the order. The child and parents appealed.

Holding

The Juvenile Court lacked jurisdiction to issue the order. WIC 369 sets forth the procedure to obtain a court order for necessary medical, surgical, dental or other treatment involving children. Section 369 did not apply in this case because a Juvenile Dependency petition had not been filed and the child was not taken into temporary custody. Nor was the child a current dependent of the court. Since none of these subdivisions applied, this was not an emergency situation as defined by the statute.

The Agency should have filed a petition under 300b alleging that the child was at substantial risk of suffering serious physical harm as a result of his parent's refusal for religious reasons, to provide him with necessary medical treatment.

This was an adequate remedy at law and other provisions of the Civil Code do not apply. WIC section 300 provides the means for affording all parties due process of law. Attempts to circumvent this law, while well intentioned, do not comply with the statutory scheme and results in the juvenile court acting without subject matter jurisdiction.

**In re Scott B.**, (9/10/10)  
188 Cal. App. 4<sup>th</sup> 452  
Second Appellate District

**Issue:**

Does the fact that a mother and her special needs son have a strong emotional bond outweigh the preference for adoption?

**Facts:**

In July of 2006, when Scott was 7, a 300 petition was filed alleging neglect and abuse. Scott was diagnosed by the school district with ADHD, and Regional Center diagnosed Scott with “autism that is substantially disabling”. The court declared Scott a dependent and placed Scott Home of Parent – Mother.

A court appointed special advocate (CASA) reported in January of 2007 that mother was overwhelmed with Scott’s needs and was unable to provide the care and supervision Scott required. A 342 petition was filed after Scott was found shoeless riding a bus for hours by himself, smelling of urine and wearing dirty clothes. In July 2007, the court adjudicated the 342 petition and denied reunification services because mother had not made reasonable efforts to treat the problems that led to the removal of Scott’s siblings. The court did continue monitored visits for the mother. Mother appealed the jurisdictional and disposition findings, and the Court of Appeal affirmed the trial court.

Scott thrived in his foster home, was found to be “high functioning” as an autistic child and the foster mother requested to adopt Scott. Although Scott’s behavior often regressed after visits with mother, including growling and biting, the CASA continued to believe the visits were important to Scott. Scott was very concerned about his mother, who had serious health problems. Scott indicated he did not want to be adopted. The CASA eventually recommended adoption, but also recommended continued visitation for mother as the child had a strong emotional bond with her. At the 366.26 hearing in November of 2009, Scott spontaneously stated he wanted to be adopted so he could “go somewhere fun” with the foster family and his mom. In the ten months previous to parental rights being terminated, the foster mother gave different indications about how often she would allow Scott to visit with his mother after adoption.

The trial court found that mother did have a parental role, but that her parental role and relationship did not outweigh the benefit and permanence of adoption, and terminated parental rights. The court stated that whether or not the foster mother would permit further visits with the mother was within the foster mother’s discretion. Mother appealed.

**Holding**

The strong mother-child relationship, coupled with the child’s emotional instability and his repeated preference to live with mother, presented a compelling reason for finding that termination of parental rights would be detrimental to the minor.

(cont)

The Court's opinion states that it is clear that returning Scott to live with his mother might never be in his best interests, but that there was a very good chance Scott would have a meltdown if his frequent visits with mother did not continue. And since the trial court had indicated visitation would be at the discretion of the foster mother, the only way to insure Scott's visitation with mother would be by court order, and the only way to accomplish that was through a plan of guardianship, not adoption.

In a footnote, the Court points out that Scott was one year younger than the statutory minimum age for considering whether a minor's objection to termination of parental rights can be found to be a compelling reason to finding that termination would be detrimental. However, because of Scott's emotional and developmental status, his feelings about adoption are necessarily considered when determining whether the parent-child exception to termination of parental rights applies.

**In re S.M. (May 25, 2010)**  
184 Cal.App.4<sup>th</sup> 1249  
Fourth Appellate District

Issue:

Did the trial court abused its discretion by issuing a domestic violence restraining order pursuant to Family Code §6300 against the father due to the father' argumentative behavior in a family law matter?

Facts:

[This is a very fact specific case.] The mother E.P. and father S.M. had an on and off relationship prior to conceiving the child C.M. The mother was from Iowa and gave birth there before returning to California to work on her relationship with the father. About 8 months after C.M. was born, the father filed a paternity and custody action in California. [Meanwhile, the mother had filed a custody and support action in Iowa as well.<sup>1</sup>] The mother filed a motion to quash service of summons in the CA action and sought a restraining order against the father.

At the restraining order hearing, the trial court heard the following facts:

- The couple had argued early one morning when the mother told the father she wanted to move back to Iowa with C.M. The mother eventually called the police. The mother testified that the father ripped off the covers of her bed, said he would kill her, and called her names. She also stated the father never threatened to hurt her before and had never been physical with her.
- When the police came, the father did not obey what the police were saying and they arrested the father.
- The father testified that he never tried to stop the mother from leaving and that when the police came, they were hostile with him. He was not angry but the police would not let him speak. The father felt he did everything the police wanted him to do.
- The father's sister, who was on the phone with the father during the argument and when the police was there, testified that she did not hear the father curse the mother.
- The police report indicated the father continually interrupted the officers, stated how unfair the laws were against men, and became irate.

The trial court granted a restraining order for 6 months. However, the trial court made comments that the Court of Appeal quoted from extensively which showed the trial court did not believe the father's conduct was abusive or met the requirements of DV. The trial court also found that Family Code §3044, which creates a presumption against awarding custody to a party who the court has found to have committed domestic violence against the other party seeking custody, did not apply.

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<sup>1</sup> The Court of Appeal did not have to address the UCCJEA jurisdictional issue because the parties agreed that the Iowa court may proceed with custody issues.



Holding:

Yes, the trial court abused its discretion in granting the restraining order. The father's conduct did not rise to the level of abuse under the Family Code §6320(a). Family Code §6306 requires reasonable proof of a past act or acts of abuse. The evidence presented in this case did not establish that the father engaged in conduct that placed the mother in reasonable fear of serious bodily injury or that he committed any type of other abusive behavior. Badgering behavior is not enough to warrant the issuance of a restraining order.

Also, the trial court's belief that Family Code §3044 did not apply is misplaced. The code section does not allow a court to ignore a prior finding of domestic violence between the parties.

**In re T.C. et al** (12/21/10)  
191 Cal.App.4th 1387; 120 Cal. Rptr. 3d 569  
Third Appellate Dist

**Issue:**

Was there an actual conflict for minors' counsel where the permanent plans for two-year-old T.C. and her 13-year-old half-sister were different?

**Facts:**

T.C. and R.B. were detained based on their mother's drug use and mental health problems, and were soon placed together with a non-relative extended family member. Throughout the reunification period, the sisters lived together, and R.B. seemed to take on a caretaker role with T.C. During visits with the mother, T.C. preferred to be held by R.B., and would cry when taken from her. Although the foster parents supported reunification, they were also willing to provide a permanent home for the girls.

Reunification services were terminated in December of 2009, and in May of 2010, a contested WIC §366.26 hearing was held. The caretakers, social worker and minors' counsel were in favor of adoption for T.C. and legal guardianship for R.B. given R.B.'s difficulty in deciding whether she wanted to reunify with her mother. Mother disagreed with the proposed permanent plan because she was concerned that if T.C. were adopted, R.B. would not want to leave T.C. and return to her.

The court terminated parental rights as to T.C. and ordered a plan of legal guardianship as to R.B. Mother appealed.

**Holding:**

The juvenile court's order was affirmed, as the appellate court found no actual conflict of interest.

A court must only relieve counsel from representation of siblings where there is an actual conflict of interest. In re Celine R. (2003) 31 Cal.4<sup>th</sup> 45, 58. In order for an actual conflict to be present, "there must be a showing that the siblings have different interests that would require their attorney to advocate a course of action for one child which has adverse consequences to the other...the fact that siblings have different permanent plans does not necessarily demonstrate an actual conflict of interest." In re TC (2010)191 Cal.App.4th 1387 (citing CRC 5.660(c)(1)(C)(v); In re Zamer G. (2007) 153 Cal.App.4<sup>th</sup> 1253, 1268).

The core of the mother's argument was that T.C.'s best interest/adoption would have adverse consequences for R.B. Thus, counsel could not advocate for R.B.'s interest in maintaining the sibling relationship while advocating for T.C.'s interest in adoption.

**In re T.G. (August 31, 2010)**  
188 Cal.App.4<sup>th</sup> 687  
Fourth Appellate District

**Issue:**

Did the juvenile court err in finding that reasonable reunification services were provided to an incarcerated father at the 6-month review hearing?

**Facts:**

In December 2008, the Riverside DPSS detained T.G., J.G. and a half-sibling of T.G. because of the mother's drug abuse and the father's failure to provide and his criminal history relating to drugs and domestic violence. At the jurisdiction/disposition hearing, the juvenile court sustained the allegations and ordered the father to participate in a substance abuse program with random testing, anger management program, and individual counseling.

At the 6-month review hearing on September 9, 2009, the DPSS report indicated that the father had been incarcerated since April 2009 but that the social worker was not aware of such status until July 31, 2009 when the children's caregiver gave her the father's address in prison. Once she found out, the social worker left a message for the father's prison counselor on August 26, 2009. The juvenile court found DPSS had provided reasonable services and continued family reunification services for the father.

The father appealed the juvenile court's finding of reasonable services.

**Holding:**

As a side note, DPSS argued on appeal that the juvenile court's 6-month review finding is not appealable because the father only challenges this finding in isolation and cannot show he was aggrieved by the finding. The Court of Appeal rejected this argument and found that the reasonable services finding is adverse to the father's parental interest in reunification.

The Court of Appeal then affirmed the juvenile court's finding of reasonable services. The reviewing court found that the social worker prepared an appropriate case plan at the time of disposition given that the father was out of custody. That case plan indicated that the father needed to "notify the Social Worker of any changes in where you live...within 72 hours of the change." The court of Appeal noted that while it is a social worker's duty to maintain reasonable contact with the parents during reunification, the parents must also cooperate. The record did not show that the father informed the social worker of his incarceration until she was told of such by the caregiver several weeks before the 6-month hearing. As a result, the social worker would not have had time to reformulate a new case plan for the incarcerated father.

**In re T.H.** (11/16/10)  
190 Cal. App. 4<sup>th</sup> 1119; 119 Cal. Rptr. 3d 1  
First Appellate District, Division Five

Issue

Whether the juvenile court had abused its discretion in allowing an exit order containing an order that allowed supervised visitation for the father “to be determined by the parents”.

Facts

Father had a history of drug and alcohol abuse and domestic violence committed against the mother. A prior dependency case had given the father primary custody at termination (Jan.2008) and the mother had visits on Wednesdays and Holidays. In the present case, (filed July 2008?) the mother reunified with the children and the court terminated Family Reunification Services for the father due to his non-compliance which included dirty and missed tests. The father was also ordered to provide six clean tests before resuming unmonitored visits. The father actually provided six negative tests for drugs but one test was positive for alcohol. Father and Mother were separated at the time of termination.

At the 364 hearing held in March 2010, the court terminated jurisdiction and the exit order gave joint legal & sole physical custody to mother. The court also ordered supervised visits for the father to be “determined by the parents”. The court declined father’s counsel’s request for mediation because the mother did not want to attend. The court also declined to hold a hearing regarding the exit orders.

Holding

The Appellate Court reversed the visitation order and remanded the case for further proceedings. The Court held that the juvenile court can not delegate its power to a third party. This case represents more than just delegating setting the time, place & manner. As the custodial parent the mother could conceivably agree to only one visit a year or even less. “While the exit orders in this case recognized father’s right to supervised visitation, that right was illusory when left solely to the “agreement” of a parent who was not likely to agree”.

**In re Vanessa Q. (8/4/10)**  
187 Cal.App.4<sup>th</sup> 128  
Second Appellate, Div. Seven

**Issue:**

Once a party makes a general appearance either in person or through counsel, s/he has consented to jurisdiction. Thus, even if that party resides in a country that is a signatory to the Hague Convention, notice via the convention is not required. Notice as set forth in the code will suffice.

**Facts:**

This is step-parent adoption case (Fam. Code §§ 7822 and 7841). Step-father filed a petition to terminate parental rights of the bio-father due to abandonment. Mother reported that she had two children with the bio-father before she ended the relationship. Thereafter the father and his family members kidnapped the mother and two children at gunpoint and took them to Mexico, where father raped the mother, resulting in the pregnancy and birth of a third child. Mother was allowed to leave and upon her return she reported father to the FBI. One year later she met and married the step-father and they raised the children together from 2001 until the petition was filed in 2008. Mother reported she had difficulty locating father but believed he was incarcerated in Mexico. The court appointed counsel for father. Father's counsel requested a continuance to work with the Mexican consulate to locate and speak with the father.

The petitioners cited father, c/o the prison in Mexico where father was incarcerated and the father wrote a letter to the court indicating he could not appear but wished to consult with his attorney. The court stated that it "appeared" father was properly served and his attorney did not object. Father's attorney advised the court after consultation with the father, his client was asking for an "indefinite" continuance as he would be incarcerated for some time and did not know when he could appear in person. The request was denied and counsel for father stated he was ready to proceed.

Ample evidence having been presented that father had not been in contact with the children for eight years and had provided no support, the court found father had "abandoned" the children and pursuant to FC 7822, declared the children free from the care, custody and control of the father.

Father appealed, claiming that he was not properly served via the Hague Convention.

**Holding:**

Affirmed. Although a party residing in a foreign country which is a signatory to the Hague Convention must be served with notice consistent with the Convention (*In re Jorge G*, 164 Cal.App.4<sup>th</sup> 125), once father made a general appearance through his attorney, the requirements of the Hague Convention do not apply. Father submitted to the jurisdiction of the court through that general appearance and the failure to object to the court's notice findings at trial.

Note: Although this was a step-parent adoption case pursuant to the Family Code, the Court of appeal stated that the same rules apply to dependency terminations of parental rights.

**V.C. v. The Superior Court of Santa Clara County**

(filed 8-18-2010 & published 9-15-2010)

188 Cal.App.4<sup>th</sup> 521

Sixth Appellate District

Issue:

Whether family reunification services should have been terminated at the eighteen month hearing for a father who had been incarcerated and who alleged that he was making significant and substantive progress at the time of the hearing.

Facts:

Father filed a Writ of Mandate asserting that he should be given six more months of family reunification services. The child was a newborn infant when initially detained from the parents in November 2008. Father was incarcerated for fourteen of the eighteen months of the family reunification period granted to him. Before his incarceration the father inconsistently and sporadically visited the child. He did not participate in any court ordered programs. Although he testified that he was not always allowed to participate or had limited access to the programs while incarcerated, he did not participate in all of the programs available to him. He also did not send cards to the child while in prison even though he was allowed to do so.

After father's release from custody in March 2010, he began a Parenting class, drug testing, counseling and a 12 step program. He was also regularly visiting the child who was placed with a paternal cousin. At the contested hearing in May 2010, (two months after father's release) the court deemed it the 18<sup>th</sup> month hearing. Neither father nor child's counsel objected. The recommendation was to terminate reunification services and set a .26 hearing. The trial court stated that although it was "really impressed at all father has done since he's gotten out and being unfettered by the rules of being incarcerated" the court could not find that there had been significant consistent progress in the prior 18 months. Further, the court found that even with six additional months the child could not be returned to the father's home.

The court also found that the child was now in a good, stable home with a caregiver who wanted to adopt and that it would be detrimental to remove the child from that home.

Holding:

Writ of Mandate denied. Reunification failed because the father failed to avail himself of services offered to him before and during his incarceration. Although he was incarcerated for 14 of the 18 month reunification period, his incarceration was due to his felonious conduct, which was not an external factor over which he had no control.

**In re V.M.** (12/22/10)  
191 Cal. App. 4<sup>th</sup> 245; 119 Cal. Rptr. 3d 589  
Second Appellate District, Division Eight

Issue

May the juvenile court assert jurisdiction over a child for which the only finding was that the child's father had "abdicated his role of father for his daughter all his life."

Facts

V.M. is seven years old. Mother and father were married but separated shortly after the child was born. The mother died in 2006 and the child lived with her maternal grandparents all her life. The child did have visits with the father and his new family. Although he recognized the child's strong attachment to the maternal relatives, he wished to raise his daughter along with his family. He stated that he had no intention of denying the relatives contact.

After the child was injured at school, father became more involved, accompanying the child and the grandparents to the doctor. Thereafter, he claimed the grandparents made it ore difficult for him to visit. By that time, the grandparents had made a report to the Agency that the father had an alcohol problem and had neglected his child. The grandparents also hired an attorney to seek a probate guardianship.

At the jurisdictional hearing, after hearing testimony and receiving the reports from the Agency, struck all of the allegations regarding alcohol abuse and related neglect claims. The court further found that although the father had provided for some financial support, he had otherwise never parented the child and that the child was so bonded to the grandparents that she would be traumatized if returned to the father's care.

Holding

Reversed with directions to dismiss the petition. The Court of Appeal stated that "the dependency court cannot assert jurisdiction where there is no evidence of parental abuse or neglect." The court declined to opine on the issue of the appropriateness of any probate guardianship petition.



**In re V.V.** et al. ( 9/8/10)  
188 Cal. App. 4<sup>th</sup> 392  
Third District ( Sacramento)

Issue:

- 1) What constitutes good notice for subsequent hearings?
- 2) What constitutes the parent-child exception and the sibling exception to termination?
- 3) Is the Marsden procedure the correct one when addressing discharging retained counsel?
- 4) Should the court have granted a continuance to allow new retained counsel to prepare?

Facts:

In February, 2008, petition was filed alleging drug use and domestic violence. Children were never detained and remained with mother. Father refused to sign the maintenance plan, and in fact, waived services. In July, 2008, a WIC 387 was filed, alleging positive tests for mother for meth. In August, 2008, a new baby was born, and filed on. Mother tested positive in 2008, and 2009. In April 2009, the court recommended stopping reunification services for father. In May 2009, a WIC 388 motion was filed to stop services for mother. This was granted in June 2009, and a WIC 366.26 hearing was set. After a contested hearing, parental rights were terminated. This appeal followed.

Holding:

Affirmed on all counts. Mother had moved around from place to place, but had never officially changed her official mailing address. The address she had given last was her official mailing address, and service was good.

The parent-child exception was overcome by the need for permanency, and the court cited the child's statement as part of their finding that regular visitation was not enough. The sibling relationship was extremely well discussed, and determined to be non-existent.

Finally, there was a long Marsden hearing where the Judge refused to allow retained counsel off the case. The court said this was between the client and retained counsel. The court concluded that the Marsden procedure did not apply because the father sought to discharge retained counsel, not appointed counsel. However, the error was harmless because the juvenile court separately addressed the father's request to discharge retained counsel and substitute another retained counsel of his choosing. The juvenile court would have allowed the father to proceed with substituted counsel if that counsel was ready to proceed. However, the court did not abuse its discretion in denying a continuance which would have substantially delayed the termination hearing to allow new counsel to prepare.

**In re X.S.** (11/17/10)  
190 Cal. App. 4<sup>th</sup> 1154; 119 Cal. Rptr. 3d 153  
Second Appellate District, Division One

Issue

Should the trial court have sustained a WIC 300(b) or (g) allegation based on father's failure to provide for the child prior to finding out for sure that he was the biological father?

Facts

The four month old child, X.S. was removed from his mother's care based on a physical altercation that the mother had with the maternal grandmother. At that time the mother reported that the father, Matthew, had denied paternity. The Agency filed a petition alleging the physical altercation for the mother and a failure to provide count for the father. As to the father, this failure to provide count was pled as both a WIC 300 (b) and (g). At the detention hearing, Matthew requested a DNA test to determine whether he was indeed the biological father. Matthew did not visit the child while the DNA tests were pending. When the DNA tests came back positive, the court found that he was the biological father. At that point, the father began to visit and even had the child for weekends. Although appearing to be pressured by the paternal grandparents to do so, the father had "stepped up". At adjudication, the father asked that the counts against him be dismissed and the child released to him. The juvenile court sustained the (b) allegation, dismissed the (g) allegation and suitably placed the child with the maternal grandmother. This appeal followed.

Holding

In spite of the fact that the father failed to provide for the child from the child's birth until the results of the HLA tests (about 8 months later) were returned, the appellate court held that such failure to provide did not rise to the level of sustaining a 300 (b) or (g) allegation because the child did not suffer serious, or for that matter *any*, physical harm as a result. In addition, no evidence indicated that father's failure to provide for the child before learning that he was the biological father created a substantial risk that the child would suffer serious physical harm in the future.. (The child however remained a dependent based on the mother's actions)

**In re Z.N.** (1/22/10)  
181 Cal. App. 4<sup>th</sup> 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.<sup>2</sup> Mother was also facing criminal charges for welfare fraud and her refusal to provide information on Benjamin's whereabouts.<sup>3</sup>

Mother was appointed counsel at the initial hearing but she either refused or 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.<sup>4</sup>

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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<sup>2</sup> Each child was subject to a separate petition and the trial court maintained a separate file for each child.

<sup>3</sup> 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.

<sup>4</sup> 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.