

APPELLATE DEFENDERS, INC.



RECENT TRENDS IN DEPENDENCY CASE LAW

January 2012 through May 2012

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JURISDICTION

Petition & Findings

In re Jordan R. (2012) 205 Cal.App.4th 111 (4th Dist., Div. 1) [San Diego]

Father appeals the court's finding he sexually abused his niece, found his daughter was a child described by section 300, subdivision (d), & refused to admit his expert evidence & positive results from his polygraph exam. The agency & father's son cross-appealed the court's finding the son was not at risk for sex abuse & dismissal as to the son. Father's niece was living with her aunt & uncle, regularly wrestled with father who touched her buttock & breasts while wrestling, & she testified father asked for oral copulation & she complied. The trial court found the niece credible, found father's polygraph results were inadmissible & rejected the testimony of his experts. **The appellate court held the trial court may rely solely on scientific literature in determining the polygraph results were not admissible as there remains a continuing controversy about the reliability of the polygraph exam.** The trial court properly found one of father's experts was not a disinterested witness as required by *Kelly/Frye* test (*People v. Kelly* (1976) 17 Cal.3d 24, *Frye v. U.S.* (D.C.Cir.1923) 293 F. 1013) and father's 2d expert would not provide relevant testimony. The Court of Appeal deemed any error in denying father's evidence was harmless. Finally, the appellate court affirmed the trial court's conclusion his son was not at risk for sex abuse because finding father was a risk to all children was "an overreaction."

In re Kaylee H. (2012) 205 Cal.App.4th 92 (4th Dist., Div. 1) [San Diego]

Where parents voluntarily place their child with a relative guardian in probate proceeding, and after an investigation by the agency where the social worker declined to file a petition, the dependency court erred in ordering the agency to file a petition. One-year-old Kaylee was placed with her paternal great-uncle by her parents who were struggling with substance abuse. The uncle filed for guardianship & the probate court granted temporary guardianship. The agency investigated whether dependency proceedings should be initiated, but the social worker recommended the guardianship proceed in probate court. The dependency court directed the agency to file a section 300 petition finding it was more appropriate to proceed in juvenile court because the court had the mechanisms to try to help the parents reunify, guardianship is not the preferred permanency for a child of Kaylee's age, & mother did not have access to court-appointed legal counsel in probate court. The agency filed a petition & recommended the court dismiss the petition. At the detention hearing, the trial court denied father's motion akin to a demurrer, found the petition stated a prima facie case & dismissed the guardianship. At the jurisdiction & disposition hearing, the trial court sustained the petition, removed Kaylee, placed her with her uncle, & ordered reunification services. The appellate court held the trial court must determine whether a dependency petition is necessary to protect the child. When, as in this case, the child has a guardian & the guardian is a suitable custodian who is able to protect the child from the risks posed by the parent's behavior, the intervention of the juvenile court is not necessary or authorized.

In re Ana C. (2012) 204 Cal.App.4th 1317 (2d Dist., Div. 8) [Los Angeles]

The court affirmed the sustained allegations that father presented a risk of sex abuse to his own adolescent sons who lived in the family home, but reversed the allegation about the teenage daughter who lived with her mother. Six children involved when the parents separated. Father had custody of his sons, Eric C. & Jose C., Jr. & father's daughter, Ana C., was living her mother (Angelica L.). Esmeralda is Kimberly A.'s parent (sex abuse victim) & her sister Jacqueline A. The families became involved with father moved in with Esmeralda & these parents share one child, Yesenia C. Kimberly alleged her step-father forced her to have oral sex with him when her mother was out of the home. The entire family denied Kimberly's claims & her mother claimed Kimberly never told her about father's inappropriate touching. Father was arrested but no criminal charges were filed. Father's sons were placed with their Angelica. Kimberly is a special education student diagnosed with moderate mental retardation but she was allowed to testify at trial. Father challenged Kimberly's competency to testify, her credibility, & argued ineffective assistance of counsel (IAC) for failing to challenge Kimberly's competence. The Court of Appeal affirmed the trial court's orders re: Kimberly's testimony & found no IAC. Father also challenged the finding that, even if he sexually abused Kimberly, he did not pose a risk of physical harm to his other children. Following *In re Karen R.* (2001) 95 Cal.App.4th 84, the court found father's conduct "so sexually aberrant" that every person in the home was at risk of sex abuse. However, the court found no substantial evidence to support the finding that Ana C., at 19 years old, who lived with her mother & never lived in the home, was at risk & reversed as to her.

In re Ashley B. (2011) 202 Cal.App.4th 968 (2d Dist., Div. 2) [Los Angeles]

The Court of Appeal disagreed with mother's arguments that jurisdiction under section 300, subdivision (j), requires, as a necessary predicate, a sustained count under one of the other subdivisions as to the child's sibling & that substantial evidence did not support the court's finding under subdivision (j). Three-month-old Jose was found not breathing during the night while co-sleeping with his parents & sister. Rescue workers were unable to resuscitate the child. Jose had been born premature & spent a month in the hospital. After his release, the parents were instructed to have Jose sleep in his own crib on his back. Father was the primary caregiver since mother worked long hours. Father alleged mother used serious physical discipline on the children including Jose's older sister & 6-year-old brother. The parents confirmed they engaged in domestic violence & described an incident when Jose was in father's arms during a confrontation. The petition alleged subdivisions (a), (b) & (j) applied & the court sustained three allegations - one for each subdivision. The appellate court found jurisdiction was proper since mother did not challenge jurisdiction under subdivisions (a) or (b). However, the court considered mother's argument & held where, as here, the abused or neglected sibling is deceased the trial court need not sustain predicate findings on behalf of the deceased sibling. An implied finding the deceased sibling was abused or neglected under one of the enumerated subdivisions is sufficient. Further, despite the coroner's conclusion that Jose died of sudden unexpected infant death, substantial evidence existed for jurisdiction because the parents ignored the hospital's instructions to place Jose alone in a crib & the trial court is allowed to consider the totality of the circumstances in determining whether the child was at a substantial risk of harm.

In re A.S. (2011) 202 Cal.App.4th 237 (4th Dist., Div. 1) [San Diego]

Where it is unclear who seriously injured an infant, & the parents cannot be excluded as perpetrators, substantial evidence supported finding child was at substantial risk of harm & removal was necessary. Because of work schedules, the parents had the paternal grandfather & paternal great aunt care for 8-month-old from Tuesday through Thursday. While in grandfather's care, child was rushed to the hospital & was diagnosed with a right subdural hematoma. Doctors concluded A.S.'s injuries were consistent with being shaken or slammed on a soft surface & could have just occurred or could be as old as a week. Further testing showed the injury would be more consistent with a recent event but did not rule out the possibility the injury occurred when the child was with his parents. The trial court sustained the petition finding "that an accident is the same thing as neglect, and for the purposes of this hearing, I will, I think it's sufficient." On appeal, the agency argued the petition was filed under section 300 & 355.1, subdivision (a), which raised a rebuttable presumption affecting the burden of producing evidence. Section 355.1 shifts to the parents the obligation to raise an issue about the actual cause of the injury or the fitness of the home. The appellate court held the petition did not cite section 355.1 &, consequently, the agency forfeited the issue by not giving the parents & the court sufficient notice of its reliance on section 355.1. The reviewing court held the conclusive identity of the perpetrator is not a prerequisite of jurisdiction which is designed to answer the basic question of whether the child is subject to a defined risk of harm at the time of the hearing. The appellate court agreed the juvenile court's reasoning was faulty when it equated an accidental injury with neglect & overstepped its role. However, the evidence supported a reasonable inference that one of the caretakers injured A.S. & that she was at substantial risk of serious physical harm. With the same reasoning, the court affirmed the removal of A.S. because the evidence supported a finding she may have been in her parents' care when she was injured.

DISPOSITION

Reunification

J.M. v. Superior Court (2012) 205 Cal.App.4th 483 (2d Dist., Div. 6) [Ventura]

Mother challenged the juvenile court's order bypassing reunification & setting a section 366.26 hearing. The appellate court denied mother's extraordinary writ because she was a substantial cause of her child's death. Mother is the parent of 7-year-old A.M., 4-year-old T.M. & was the parent of deceased 5-year-old I.M. After I.M.'s death from acute oxycodone intoxication, the agency filed a petition alleging neglect of I.M.'s siblings due to mother's drug abuse & criminal behavior. The evidence established mother resided at a known drug house with her boyfriend, associated with a criminal street gang, violated terms of her probation, & used illegal drugs. The night of I.M.'s death, mother's friend visited the apartment & brought illegal prescription drugs hoping to sell them at mother's apartment. A.M. saw his brother I.M. take a pill from the container of prescription drugs. The next morning, I.M. was in full cardiac arrest & could not be revived. Mother argued the bypass provision of section 361.5, subdivision (b)(4), requires proof of criminal negligence. The appellate court found the juvenile court's ruling was supported by overwhelming & compelling evidence that satisfied even the higher criminal

standard of neglect & causation. Mother's conduct was a substantial factor causing I.M. to ingest multiple pills of dangerous narcotics that lead to I.M.'s death.

In re B.L. (2012) 204 Cal.App.4th 1111 (4th Dist., Div. 1) [San Diego]

Parents were properly denied reunification services when the child was in a guardianship with the grandparents. The parents & child appealed the jurisdiction & disposition orders denying the parents reunification services & denying or limiting visitation. The initial dependency in 2009 involved violent confrontations in the family home & 4-year-old B.L. was placed with his paternal grandfather. The parents were offered reunification services. At the section 366.26 hearing, the court appointed the grandparents as the child's guardians & terminated jurisdiction. By the time of the 2d dependency, the grandparents had allowed the child to live with his parents & the parents were arrested for growing marijuana. The trial court removed the child from his grandparents & ordered reunification services. Reunification services were denied to the parents. Per section 361.5, subdivision (b)(10), the parents were not entitled to reunification services. This court disagreed with *In re Gabriel K.* (2012) 203 Cal.App.4th 188 & refused to follow the holding in that case. The appellate court held that although the juvenile court erred in denying reunification services on the basis of subdivision (b)(10), the court's conclusion the parents were not entitled to reunification services was correct. Since the child was not removed from the parents' custody because he was in the grandparents' custody, only the grandparents were entitled to receive reunification.

In re A.A. (2012) 203 Cal.App.4th 597 (4th Dist., Div. 2) [Riverside]

Finding mother was not a noncustodial, nonoffending parent, the Court of Appeal affirmed order denying mother' reunification services & that completion of various problems in prison did not represent changed circumstances sufficient for the grant of a hearing for her 388 petition. A.A. was originally removed from mother in 2008 when mother was arrested on a federal warrant & mother received reunification services. Later, A.A. was placed with father but was removed after she was physically abused by him. Father was given reunification services. Father failed to reunify & the court set a section 366.26 hearing. Prior to the hearing, mother filed a 388 petition requesting reunification services. The court denied mother's 388 & terminated parental rights & mother appealed arguing she was a noncustodial, nonoffending parent because A.A. was removed from father & she was entitled to arrange for custody of A.A. per section 361.2. First, the appellate court held mother forfeited any constitutional argument when she failed to request custody at 2 hearings. Next, the reviewing court found mother was not a noncustodial, nonoffending parent because A.A. had been previously removed from her & she had not reunified. Consequently, mother lost custody due to a removal in an earlier dependency on a finding of detriment but, to be entitled to consideration under section 361.2, a parent must be both nonoffending *and* noncustodial. Finally, the mother failed to present evidence of a material change of circumstances because she failed to remove or ameliorate the reasons for the original dependency when she remained imprisoned.

In re Gabriel K. (2012) 203 Cal.App.4th 188 (1st Dist., Div. 4) [Napa]

The statute authorizing bypass of reunification services when a parent fails to reunify with a child's sibling also applies to the failure to reunify with the child himself. At disposition, the juvenile court found the minors to be dependent children & denied mother's request for reunification services & mother appealed. The parents' tangled dependency history began in 2000 after allegations of mother's emotional abuse of the older child. In at least 2 dependency cases & involving 3 children, the oldest child (Levi) was under a guardianship with the maternal grandmother. Mother did not reunify with her 2d son (Gabriel) & the youngest child (Tyler) was placed with his biological father. Gabriel reunified with father & when father was jailed he allowed Levi & Gabriel to live with mother. The current dependency involved significant amounts of drugs, paraphernalia & weapons in mother's home. The court followed the California Supreme Court's decision in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735 finding the language of section 361.5, subdivision (b)(10), to be ambiguous, but the legislature did not intend for the juvenile court to be required to offer mother reunification services in the sibling's case when she failed to reunify with her child in an earlier dependency. When the reason is the same, the rule should be the same. The same rule for a sibling should apply when the child she failed to reunify with previously was the same child in the current case. As for whether mother made reasonable efforts to overcome the problems leading to the earlier dependency, the court found mother remained enmeshed in the drug life, had made no progress to alleviate the causes for removal, & had previously failed to participate in reunification services.

R.T. v. Superior Court (2012) 202 Cal.App.4th 908 (3d Dist.) [Shasta]

Court denied mother's writ of mandate & found the evidence supported the finding mother failed to make reasonable efforts to treat drug abuse problems that led to a sibling's removal despite some efforts at drug treatment. Three-year-old child was removed from his parents after father was arrested for domestic violence, the parents remained homeless, & mother admitted she & father had used methamphetamine the night before & drank alcohol. According to the petition, the parents failed to reunify with minor's sibling in 2006 based on the parents' substance abuse & chronic homelessness. The juvenile court sustained the petition & found the parents had not made a reasonable effort to treat the problem that led to removal of the sibling & mother appealed. The reviewing court held it was appropriate for the juvenile court to consider the duration, extent & context of the parent's efforts when evaluating the effort for reasonableness. The petition was denied when the appellate court found no evidence mother made any effort to address her substance abuse issues after the minor was returned to her from an earlier dependency until the child was again removed & bypass of reunification was recommended.

Placement Orders

In re M.L. (2012) 205 Cal.App.4th 210 (1st Dist., Div. 5) [Alameda]

Where placement is on an emergency basis, the agency can remove the child upon discovering a nonexemptible criminal conviction of one of the foster parents. After placing M.L. with her grandparents on an emergency basis, the agency discovered grandfather had a criminal history rendering the grandparents home ineligible for relative placement. The agency

moved the child & filed a 387 petition for a change of placement. The agency ultimately denied the criminal exemption request by grandfather. After a series of hearings over 17 months, the court dismissed the agency's 387 petition & ordered the child placed with the grandparents. The agency appealed & the Court of Appeal agreed & reversed. M.L. was detained at birth after she tested positive for opiates & alcohol. M.L. was declared a dependent in August 2008 & placed with her parents under family maintenance. By July 2009, the parents were living with the paternal grandparents but in December 2009, the agency filed a 387 petition to remove M.L. from her parents. The court detained M.L. from her parents but allowed her to remain with her grandparents in an emergency relative placement. In March 2010, the agency filed another 387 petition to remove the child from her grandparents based on grandfather's rap sheet. In addition, grandmother appeared to be suffering from some mental health condition. M.L. was removed from the grandparents. The grandparents requested & were granted de facto parent status in May 2010. On August 2011, the trial court dismissed the 387 petition & ordered M.L. placed with her grandparents finding the agency "had shown arrogance in denying the exemption." The appellate court held M.L. was placed with her grandparents on an emergency basis & could not be permanently placed without a criminal records exemption. Further, the juvenile court placed M.L. with her grandparents effectively granting a criminal records exemption & the appellate court held it lacked the power to do so. The discretion to grant a criminal records exemption lies exclusively with the agency. The appellate court held the trial court did not properly apply the abuse of discretion standard to the agency's denial of the exemption but rather substituted its own judgment by placing the child with the grandparents. Consequently, the court's order dismissing the 387 petition & placement order were reversed & remanded with directions to sustain the petition.

In re Alexis S. (2012) 205 Cal.App.4th 48 (2d Dist., Div. 4) [Los Angeles]

Following *In re Rubisela F.* (2000) 85 Cal.App.4th 177 & *In re Maria R.* (2010) 185 Cal.App.4th 48, the appellate court found that a male child does not face the same risk of sex abuse unless evidence is offered to demonstrate the perpetrator may have an interest in sexually abusing male children. Mother & father have been a couple since E.C. was a year old. When she was 13, she ran away & alleged sex abuse by her stepfather. Father denied any inappropriate touching & mother claimed she was never told of the misconduct. At jurisdiction, the court found true father sexually abused E.G. on numerous occasions & found jurisdiction per section 300, subdivisions (b) & (d). The trial court held the sons were not at physical risk, but at risk for emotional abuse. At disposition, minor's attorney, along with father, requested joint custody of Alexis & Alejandro by the parents. Mother & father were no longer living together & E.C. was living with mother & a "no contact" order prohibited contact by father. After a review of the cases addressing this controversy, the court cited the lack of any scientific authority or empirical evidence to support the conclusion that a person who sexually abuses a female child is likely to sexually abuse a male child. However, this conclusion can be overcome if supported by evidence concerning the specific actions of the abuser. Consequently, the disposition order removing the boys from appellant's custody was reversed.

Visitation

In re A.R. (2012) 203 Cal.App.4th 1160 (1st Dist., Div. 5) [Contra Costa]

Where a child's petition was dismissed, the juvenile court does not have jurisdiction to order sibling visits. The agency filed a petition alleging mother neglected 17-year-old A.M.'s medical care for life-threatening Crohn's disease, A.M. had been sexually abused by her step-father for a number of year, the parents neglected 5-year-old A.R.'s medical needs, & he was at risk of sexual abuse. Father is a biological parent to only A.R. although he lived with mother. The court found "not true" all the counts relating to A.R. & dismissed the petition as to A.R. At jurisdiction, the court found A.M. lies & manipulates people to get her way & her testimony contained numerous lies & inconsistencies. The court found her not credible & sustained only the allegation mother failed to provide medical care. The children appealed & the appellate court affirmed in an unpublished portion of the opinion. In the published portion, the court reversed the order providing A.M. with supervised visitation with A.R. after father. At disposition, A.R. was living with his parents & A.M. was residing with a nonrelated extended family member. The parents asked for no visitation between the minors. The parents had split up & father had moved to Texas with A.R. The court ordered twice monthly, supervised visits between A.M. & A.R. Finding the trial court lacked subject matter jurisdiction in ordering supervised visits between the children, the appellate court held that since A.R. was not under the court's jurisdiction at the time of the disposition hearing, the trial court acted in excess of its dependency jurisdiction.

PRELIMINARY/CONTINUING CONSIDERATIONS

Parentage & Uniform Parentage Act (UPA)

In re B.C. (May 14, 2012, B234419) __Cal.App.4th__ [2012 WL 1663425] (2d Dist., Div. 3) [Los Angeles]

When the court ordered a DNA test but required father to pay for the testing, the reviewing court held the juvenile court erred by not satisfying its obligation to determine paternity. Father had not been involved in 8-month-old B.C.'s life prior to the dependency case. Mother claimed she lived with father when the child was conceived, but he was not located until after mother failed to reunify. Two months after father was notified of the section 366.26 hearing, he requested genetic testing. The trial court ordered a DNA test but required father to pay for the test. Father filed a section 388 to request a continuance for genetic testing & he filed a JV-505 form to request genetic testing. The trial court found father's petition "extremely disruptive" for B.C. who was in an adoptive home & the court refused to modify its earlier order. The juvenile court was required to determine biological paternity if requested & the court's duty was mandatory & not discretionary. The appellate court held that because the court authorized testing but required father to pay for it, it failed to make a determination of biological paternity & reversed.

Adoption of H.R. (2012) 205 Cal.App.4th 455 (3d Dist.) [Placer]

Since father sought to establish his parental right before the child was even born, the appellate court reversed the trial court's termination of father's parental rights without an unfitness finding and despite its finding father was a *Kelsey S.* father. (*Adoption of Kelsey S.*

(1992) 1 Cal.4th 816.) The parents had a tumultuous relationship which ended shortly after mother became pregnant. After mother stopped seeing father, she decided to give up H.R. for adoption. Unaware of the plan for adoption, father instead petitioned to establish a parental relationship & sought a DNA test. Testing was ordered, father was found to be the biological father & he sought custody. The adoptive parents filed a request to adopt & to terminate father's parental rights. During the hearing on father's petition, the evidence showed father had other daughters aged 12 & 13 years, was more than \$18,000 in arrears in child support, had not seen his children in 3 years since they lived out of state, & had a history of substance abuse. The trial court terminated father's parental rights, found father to be a *Kelsey S.* father, & opined that a finding of father's unfitness was based on concluding living with father would cause actual harm or detriment. The appellate court found the parental rights of a *Kelsey S.* father cannot be terminated unless he is found statutorily unfit under section 232. The Court of Appeal found no case that denied a father *Kelsey S.* status solely on the basis of his failure to provide financial assistance to the mother or his less-than-ideal relationship with her. The judgment terminating father's parental rights was reversed & remanded.

In re D.A. (2012) 204 Cal.App.4th 811 (2d Dist., Div. 1) [Los Angeles]

Mother's boyfriend was named presumed father initially but the appellate court reversed finding the child's biological father qualified as a *Kelsey S.* father & directed the trial court to grant father's motion to be declared a presumed father. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816.) Six-month-old D.A. was detained & placed with mother's boyfriend, E.A. & the trial court designated him the presumed father. When the biological father, C.R., learned of the pregnancy, he wanted to be involved, requested a paternity test, & offered to help with pregnancy expenses. Mother ended contact with C.R. early in the pregnancy, but he continued to try to contact her through relatives. A few months after D.A. was born, mother contacted C.R. & found he was eager to see the child, introduced D.A. to family members as his child & repeated his request for a DNA test. After an altercation between mother & E.A., mother was arrested & D.A. was released to E.A. After E.A. learned he was not the biological father, he stopped attending court. C.R. attended the jurisdiction hearing & requested genetic testing. After the DNA test showed C.R. was the biological father, he requested presumed status, asked for visits, & filed a motion to be declared D.A.'s presumed father. E.A. opposed the motion. The trial court found father a mere biological parent, placed the child with mother & E.A. but, at a later hearing, ordered visits for C.R. even though E.A. continued to object. The appellate court found all the evidence weighed in favor of granting C.R. presumed father status under *Kelsey S.* & none weighed against. Further, the finding that E.A. was presumed was not supported by substantial evidence primarily because no signed voluntary declaration of paternity was found in the record & no evidence showed E.A. openly & publicly admitted paternity. The trial court's orders were reversed & the court was directed to find C.R. is the presumed father.

In re Cheyenne B. (2012) 203 Cal.App.4th 1361 (2d Dist., Div. 3) [Los Angeles]

Where two father's claimed presumed father status, the court affirmed the trial court's finding that the father with a prior child support order was not the presumed father. Cheyenne, then 12 year old, was detained after she & her mother assaulted another child &

mother was arrested. All 5 of mother's children were detained. Cheyenne's 9-year-old brother & 6-year-old twins were placed with their biological father, Dennis, in Nevada. Cheyenne's biological father was identified as Richard B. At the detention hearing, Dennis asked to be Cheyenne's presumed father & her younger sibling (D.H.), who had a different biological father. The court found Dennis to be Cheyenne's presumed father & released her to him allowing him to take the children to Nevada. At a paternity hearing, father moved to set aside the presumed finding. Cheyenne wanted to live with Dennis & continue to visit her father. The trial court found insufficient evidence to establish father was Cheyenne's presumed father & his visitation was not consistent enough to establish he received Cheyenne into his home as required under Family Code, section 7611, subdivision (d). At the conclusion of the paternity hearing, the court denied father's motion, ordered joint custody to mother & Dennis, sole physical custody to Dennis & terminated jurisdiction. The appellate court found the trial court erred as a matter of law in finding Dennis to be Cheyenne's presumed father because the section 7611, subdivision (d), presumption was rebutted by father's 2009 paternity judgement. However, rebuttal of the presumption in favor of Dennis does not mean father is the presumed father. Where, as here, the case involved a paternity judgement for child support, no authority was cited that the paternity judgement by itself required a man be declared a presumed father. Father's argument was expressly rejected by *In re E.O.*, (2010) 182 Cal.App.4th 722. Consequently, father failed to demonstrate he satisfied any of the requirements to be considered Cheyenne's presumed father because his involvement with Cheyenne is inadequate.

E.C. v. J.V. (2012) 202 Cal.App.4th 1076 (3d Dist.) [San Joaquin]

Former girlfriend of biological mother filed petition per Uniform Parentage Act (UPA) to establish a parental relationship with child. Trial court denied the petition & the girlfriend appealed. Appellate court found the girlfriend received the child in her home & the trial court was required to consider the girlfriend's relationship with the child. **The trial court incorrectly considered the girlfriend's relationship with mother & misapplied the UPA resulting in a reversal.** Improper factors considered included appellant did not register as domestic partners, did not participate in a commitment ceremony, did not live together with mother & child immediately after the child was born, she was not listed on the birth certificate, & did not claim the child on her taxes. These facts are not applicable to analysis under UPA. A presumed parent is someone who has entered into a familial relationship with the child & demonstrated an abiding commitment to the child. Appellate acted as a presumed parent when mother & child moved into appellant's home when the child was 3 months old; she secured shelter for the child while she was away in the military; she took the mother to prenatal appointments, was mother's Lamaze partner & was in the delivery room; she took the child to her doctor's appointments & extracurricular activities; she referred to the child as her daughter at work; & requested visits after mother & appellant ended their relationship.

S.Y. v. S.B. (2012) 201 Cal.App.4th 1023 (3d Dist.) [Sacramento]

Alleged parent filed petition seeking to be declared the 2d, same-sex parent of 2 children of adoptive mother. **The appellate court affirmed the order finding S.Y. is a presumed parent under Family Code section 7611, subdivision (d), because the adoptive mother (S.B.)**

allowed & encouraged S.Y. to function as the children's 2d parent from birth, S.Y. openly embraced the rights & obligations of being a parent, & the adoptive mother failed to rebut the parentage presumption. The mothers met in 1993 & were in a committed relationship for more than 13 years until 2009. It was S.B.'s dream to have children & after she couldn't become pregnant she attempted artificial insemination. Ultimately, she adopted 2 children – G.B. in 1999 & M.B. in 2004. Even though the mothers broke up for 2 and a half years in 2003, S.Y. continued to act as a parent at all times including helping with child care most evenings & every weekend. She continued to vacation with S.B. & G.B. & when S.Y. was promoted to rank of Colonel in the Air Force Reserves, S.B. & G.B. participated in the pinning of the epaulets ceremony – a privilege reserved for family. The parties reconciled in 2005 & S.Y. resumed spending most nights at S.B.'s home & spending time with the children regularly. S.Y. set up college savings accounts for the children & named the children as beneficiaries on "everything she had" including life insurance & mutual funds. The relationship ended for good in July 2009 &, in August 2009, S.B. informed S.Y. that she would not be allowed to have contact with the children. S.Y. immediately filed the petition for presumed parentage on September 24, 2009. The trial court found S.Y. showed by a preponderance of evidence she received the children into her home & held them out as her own. She not only accepted the rights & obligations of being a parent, she embraced them & demonstrated a full commitment to the children. S.B. appealed & the appellate court affirmed the trial court's finding that S.Y. acted as a parent by caring for the children, setting up college accounts, paying for their therapy, volunteering at their school, naming the children as beneficiaries & acting in a parental way in a myriad of other ways. Finally, the court held recognizing S.Y. as a parent did not infringe on S.B.'s fundamental right to rear her children. The court rejected S.B.'s claim that a woman's right to assert visitation rights – much less parental rights – to her former partner's children, is not widely protected by society even today.

Indian Child Welfare Act (ICWA)

In re A.G. (2012) 204 Cal.App.4th 1390 (1st Dist., Div. 3) [Alameda]

The Court of Appeal held the trial court did not comply with the ICWA & found father's request to terminate child support did not bar his appeal, father's failure to raise an ICWA claim in a prior dependency did not bar his claim as res judicata, & father was not required to provide genetic testing to trigger the ICWA. Father appealed termination of his parental rights & argued the agency failed to investigate his Native American heritage & the appellate court agreed. Father claimed he might have Indian heritage with 1 of the Choctaw Creek tribes. Father acknowledged he was the child's biological father. The agency did not dispute it failed to comply with the ICWA inquiry & notice requirements, but the appellate court found the agency's arguments were "long on novelty, but short on merit." The appellate court held this case is an example of the agency's noncompliance that needlessly delays a victimized child's ability to find security & stability in a permanent home. The judgment terminating father's parental rights was reversed & remanded for further investigation into possible Indian heritage.

REASONABLE REUNIFICATION SERVICES

Tracy J. v. Superior Court (2012) 202 Cal.App.4th 1415 (4th Dist., Div. 1) [San Diego]

The appellate court found the agency had failed to provide reasonable reunification services & unreasonably limited visitation services to developmentally disabled parents & reversed the juvenile court's finding the agency offered reasonable services. The agency detained the infant based on the parents' limitation from developmental delays to care for the child. Mother had a genetic disorder which limited her physical ability to care for T.J. & father tested in the lower range of mildly mentally retarded but compensated for mother's physical limitations. At the 12-month review hearing, the court found return would be detrimental, the parents had run out of time, & terminated reunification & set a section 366.26. The parents filed writ petitions. The appellate court found the agency unreasonably limited the parents' visitation without a showing of a protective issue during visits. Further, mother should have been given services at least comparable to the services offered in T.J.'s younger sibling's dependency. The record did not support a finding that the agency adequately identified mother's problems & provided services responsive to her needs.

SECTION 366.26

Beneficial-relationship exception

In re K.P. (2012) 203 Cal.App.4th 614 (2d Dist., Div. 7) [Los Angeles]

The appellate court affirmed the juvenile court's finding the beneficial-relationship exception did not apply when mother's visits were not consistent & mother refused to take responsibility for following any arranged visit schedule. K.P. was detained shortly after birth when drugs & firearms were found in the home & K.P. was placed with her maternal great-grandparents. Mother worked on remaining sober but in 2010, mother began testing positive for drug use. By then, K.P. demonstrated a strong emotional attachment to his grandparents. The section 366.26 hearing was held in June 2011 & the court found the beneficial-relationship exception did not apply & terminated parental rights. Court used a combined standard of review. The reviewing court affirmed the trial court's findings mother maintained regular visitation but the relationship was qualitatively insufficient to constitute a compelling reason to determine termination of mother's parental rights would be detrimental to the child.

In re Michael G. (2012) 203 Cal.App.4th 580 (4th Dist., Div. 1) [San Diego]

The Court of Appeal held that although it was error to not continue the section 366.26 hearing to allow for receipt of the child's psychological evaluation, the error was harmless & that neither the beneficial-relationship nor the siblings exceptions applied. The parents appealed the adoptability finding of child arguing the assessment report was inadequate. Michael is 1 of 3 brothers & was born positive for methamphetamine. He was detained & suffered withdrawal symptoms but was returned to mother under family maintenance. Four years later, mother brought Michael to the hospital with a "crooked right arm" that was broken & had been for 4 to 6 weeks. Mother was not interested in having Michael returned to her & wanted him

adopted to a good home. The juvenile court subsequently dismissed the brother's dependency cases & offered mother reunification for Michael. Michael had behavior problems including aggression & defiance. He was placed with relatives but quickly had 2 failed placements. Michael was then moved to a foster family & improved, but the fosters did not want to adopt because of health problems & their age. At the section 366.26 hearing, the social worker was expecting Michael's psychological evaluation within a week. Mother believed she was ready to handle Michael if he was returned to her. The agency admitted it might have been helpful to have an updated report from Michael's treating therapist & the psychological evaluation. The court agreed the agency should include as much information about the child's status in its assessment particularly when the agency has not yet identified as adoptive home for a child who may be considered difficult to place for adoption. Although the juvenile court abused its discretion when it did not continue the hearing, the error did not prejudice mother. Relying on the observations of child's kindergarten teacher & foster mother, the court found substantial evidence to support the adoptability finding. The court maintained the beneficial-relationship argument was frivolous.

Sibling exception

In re D.M. (2012) 205 Cal.App.4th 283 (4th Dist., Div. 1) [San Diego]

Appellant minor, Tomas L., appeals the judgment terminating parental rights over his younger half-siblings, D.M. & Noah M. Eleven-year-old Tomas challenged the sufficiency of the evidence to support the trial court's adoptability finding & inapplicability of the sibling exception. **The appellate court concluded substantial evidence supported the court's assessment Tomas failed to show the termination of the sibling relationship was sufficiently detrimental to preclude termination of parental rights & that Tomas did not have standing to challenge adoptability.** The siblings were detained when their mother assaulted her boyfriend & was arrested. D.M., her younger brother, & appellate Tomas were detained & made dependents of the court. Tomas was not placed with his siblings because of his behavior problems. Tomas was 5150'd & was placed in a licensed group home. Tomas filed a section 388 petition objecting to a permanent plan of adoption for his siblings because it would terminate his relationship with them & he requested standing to appear at the section 366.26 hearing. The siblings have weekly visits but could not be placed together because Tomas needed a higher level of care. The trial court granted Tomas' 388 petition. As to the sibling exception, D.M. & Noah said they wanted to be adopted even if they saw Tomas less frequently.

Post-Permanency Placement Orders

In re A.S. (May 15, 2012, G045896)___Cal.App.4th___ [2012 WL 1677259] (4th Dist., Div. 3) [Orange]

Where placement of siblings together conflicts with the need for permanence, the trial court did not abuse its discretion in separating siblings with a life-long attachment. Mother challenged the trial court's order allowing the siblings to be placed separately & the order approving psychotropic medications to one sibling. The sister (A) & brother (Ad), now aged 10 & 7 years old, have been dependents for more than 4 years, & have been placed in a sibling facility for more than 8 months searching for a placement together. The children were placed in

long-term foster care & were found not adoptable as no one was willing to accept guardianship. The court had previously approved psychotropic medication for A & her behavior gradually improved. Ad, however, continued to have severe behavior problems. After looking for a placement for the siblings together for more than 7 months, the agency determined it would be best to try to find separate foster homes. The children objected to the potential separation & mother requested a contested hearing. By the time of the contested hearing, the minor's counsel told the court Ad now agreed & understood that it might be appropriate for A to have a different placement. The juvenile court continued long-term foster care but rescinded an earlier order preventing their separation. Subsequently, Ad was given a dose of psychotropic medication on an emergency basis because his behavioral issues had increased dramatically. The agency filed an application seeking approval of the administration of psychotropic medications. Mother filed an opposition, but it was late per the two-day deadline. (Cal. Rules of Court, rule 5.640(c)(8).) Mother challenged the constitutionality of the short deadline & alleged it denied her due process. The court denied the agency's evidence of mootness. In addition, the court found mother had standing to challenge the orders re: sibling placements. The appellate court found the need to protect the sibling bond by keeping the sibling together directly conflicted with the need to find permanent homes. Consequently, there is no perfect solution. As a result, the court found no abuse of discretion. As to the deadline to object to psychotropic medication, the court found given the short time lines involved, the 2-day deadline is reasonable.

T.W. v. Superior Court (2012) 203 Cal.App.4th 30 (4th Dist., Div. 1) [San Diego]

The appellate court held the agency could not remove a children from a prospective adoptive home without a best interest finding by the juvenile court. T.W. sought review of the court's order denying the petition to remove him from the home of his prospective adoptive parent (Mr. B.) & the agency joined the child's petition asserting the juvenile court did not have jurisdiction to review or override its executive decision denying placement with the adoptive parent. The adoptive parent had previously adopted a highly traumatized foster child who was active in gang suppression, had committed an escalating series of violent crimes, & was adjudged a ward of the court per section 602 (David). When T.W. was placed with the adoptive parent, David was in juvenile hall & the agency did not think he was a problem. Eight months later, the social worker learned section 16514, subdivision (c), prohibits the placement of a dependent with a section 602 ward. The agency filed a petition to remove T.W. from Mr.'s B.'s home. The juvenile court held the agency did not meet its burden to show removal from Mr. B. was in T.W.'s best interest. The appellate court held section 366.26 , subdivision (n), limits the agency's authority to change the child's placement in post-termination cases. Consequently, the agency no longer had authority to remove T.W. from Mr. B.'s home without a finding by the juvenile court that removal was in T.W.'s best interests. Although the appellate court deferred to the juvenile court's findings of fact, the reviewing court cautioned the juvenile court did not give appropriate weight to the indisputable fact David had committed a series of increasingly violent offenses &, if he were an adult, his offenses would have been considered a disabling criminal conviction sufficient to prevent T.W.'s placement with Mr. B. as a matter of law. The petition was granted & directed the juvenile court to vacate its order placing T.W. with Mr. B. to & review the child's status.

MISCELLANEOUS

Disentitlement Doctrine

In re E.M. (2012) 204 Cal.App.4th 467 (2d Dist., Div. 5) [Los Angeles]

Mother's appeal was dismissed after the appellate court applied the disentitlement doctrine because mother absconded with the children & lived in Mexico attempting to avoid supervision by the agency for more than 2 and a half years. A petition was filed in May 2007 after a petition in another dependency case was sustained against father for sexually abusing his step-daughter for years. Mother did not believe the allegations even though they were sustained but admitted she learned about the sex abuse a year earlier. The children were detained from father & left in mother's care. By July 2007, mother had left the country & returned to Mexico with her 3 children, A.M., E.M. & J.M. For more than 2 years, the children were residing with their parents in Sinaloa, Mexico. Through DIF (Mexico's social service agency), the family was located in January 2010. DIF attempted to provide courtesy supervision of the family. At the June 16, 2011 review hearing, mother asserted the court lacked subject matter jurisdiction & requested the case be dismissed. The agency argued there was insufficient evidence of compliance with the case plan & requested continued jurisdiction. Minor's counsel stated she was unable to contact the children & could provide no information to the court. The juvenile court found continued jurisdiction was necessary & mother appealed. Based on the disentitlement doctrine, the appellate court found mother's continued absence from the jurisdiction undermined the dependency law procedures intended to protect & benefit the interests of her children. Mother was solely responsible for the court's inability to implement fully the procedures intended to protect the children & benefit their interest & she forfeited her right to challenge the orders from which she appeals.

De Facto Parents

In re Damion B. (2011) 202 Cal.App.4th 880 (1st Dist., Div. 2) [San Mateo]

The trial court denied the de facto parents request to call & cross-examine witnesses & the Court of Appeal affirmed. The twin minors Damion & Dominick were removed from their parents because of substance abuse problems. By the 18-month review hearing, the agency recommended the children be returned to their mother. The foster parents had been granted de facto status a month after the 12-month review hearing. The reviewing court held de facto parents have limited rights in dependency cases & while they have standing to participate as parties, their role is limited & they do not enjoy the same due process rights as parents. In the instant case, the appellants were not able to establish the proposed witness would elicit relevant evidence & the de facto parents provided detailed Caregiver Information forms stating their position on the agency's recommendations. In light of the totality of the circumstances, the appellate court could not conclude that curtailment of appellant's ability to respond to the agency's recommendations more fully requires reversal.

Termination of Parental Rights after Probate Guardianship

Adoption of Myah M. (2012) 201 Cal.App.4th 1518 (1st Dist., Div. 2) [Contra Costa]

After years of caring for their grandchild in a guardianship, the grandparents requested to adopt Myah & the appellate court held the trial court was not obligated to make a finding of parental unfitness & substantial evidence supported the termination of parental rights as in Myah's best interests. The parents stipulated to probate guardianship with the grandparents in 2006 as a result of their substance abuse problems. The guardianship was granted after the parents stipulated to same in July 2006. After a physical altercation between the paternal grandfather & father in July 2009, the grandparents filed a petition requesting to adopt Myah in September 2009. The parents objected but, following an investigation, the trial court found termination of parental rights was in Myah's best interest in October 2010. The parents separately appealed. The appellate court held that since the parents stipulated to the guardianship, a more complete investigation was not necessary & the lack of same did not violate the parents' due process rights. Further, the California Supreme Court has found that Probate Code section 1516.5 did not violate a parent's substantive due process by authorizing termination of a parent's legal rights without a finding of unfitness. Since the parents had already relinquished parental responsibility for at least 2 years, while the child & guardian developed interests in a stable placement, an unfitness finding was not required. The Court of Appeal reviewed Myah's best interest including her parents' inability to take custody & their failure to visit regularly or to address their drug problems.