APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

March 2019 through August 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

JURISDICTION

In re L.C. (2019) 38 Cal.App.5th 646 [2d Dist., Div. 1] (Los Angeles)
Where a guardian was an occasional user of methamphetamine but such use did not result in neglect of L.C., the Court of Appeal held substantial evidence did not support the juvenile court's finding of jurisdiction. Pedro has been L.'s guardian since 2015 and cared for her since 2013. Pedro tested positive for methamphetamine two times but claimed he used the drug at most seven times. When he used methamphetamine, he was at a party, stayed in a hotel and arranged for another adult to care for L. He stopped using the drug after his positive drug tests, he enrolled in a drug awareness class, and drug tested on his own to show his sobriety. The juvenile court sustained the allegation of the section 300, subd. (b), petition finding Pedro used profanity at a social worker, he was dishonest when he initially denied drug use, and he was unavailable on the nights he was at a hotel. The appellate court reversed, finding the juvenile court erred in assuming jurisdiction over L. because substantial evidence did not show Pedro abused methamphetamine and it also did not show L. was at substantial risk of serious physical harm. [L. Barry – guardian.]

UCCJEA

In re E.W. (2019) 37 Cal.App.5th 1167 [2d Dist., Div. 8] (Los Angeles)
Since family court orders were issued in California for E.W., California has exclusive, continuing jurisdiction even though E.W. has lived in South Carolina with his mother for some time. California issued orders in 2014 granting the parents joint legal custody and visits with father in California for the summers. Just before he was to return to South Carolina in 2018, E.W. disclosed physical abuse by mother. A petition was filed in California for E.W., who was then 13 years old. Mother appealed the orders finding E.W. was a dependent, removing him from mother, releasing E.W. to his father, and granting father sole custody. Mother's only challenge on appeal contended the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) prevented California's from taking jurisdiction because E.W.'s home state was South Carolina where he lived for more than six months before he visited California. The Court of Appeal held mother misconstrued the UCCJEA and California continued to have jurisdiction until a court here, or in another state, determined the child or the parents had no significant connection with California or no longer resided in California. Neither of these has occurred. The child's home state when the dependency began did not matter because California made the initial custody determination and it continued to have exclusive jurisdiction. The trial court's orders were affirmed. [N. Williams – mother.]

In re C.W. (2019) 33 Cal.App.5th 835 [1st Dist., Div. 2] (Sonoma)
Mother appealed the juvenile court's orders terminating dependency jurisdiction over 16-year-old C.W. and awarding sole custody to father who lives in Louisiana because California lacked jurisdiction under the UCCJEA. C.W. entered the dependency system at 10 years old because of mother's drug abuse and homelessness. Mother left C.W. with his maternal grandparents and the dependency began a year later when the grandparents initiated guardianship proceedings. The petition alleged C.W. was described by sections 300, subds. (b) and (d) because of mother's substance abuse and father's history of sexually inappropriate behaviors. In 2004, father was accused of sexual abuse of the four-year-old daughter of his girlfriend, the rape of a 14-year-old relative six years later, and rape of a 17-year-old girl. The parents were given six months of reunification services but neither parent accomplished much. At the section 366.26 hearing, the court selected slightly conflicting orders finding C.W. would likely be adopted but he had no identified adoptive parents and was difficult to place because he was 12 years old and had lost one placement because of inappropriate sexual acting out. Five months later, the trial court found C.W. was not adoptable and his permanent plan was a planned permanent living arrangement. Over the next three years, mother addresses her parenting issues and strengthened her bond with C.W. Father visited C.W. for the first time in years during the dependency case and then he disappeared for a year. During father's absence, C.W. had developed a close and supportive relationship with his mother and the two shared a strong bond. However, when C.W. was sent to Louisiana, mother was not informed. After he was sent, the juvenile court held a section 366.3 review hearing and referred to C.W.'s visit as a vacation. Sixteen days later, mother was informed that C.W. was placed with father and would not be returning to California. Over mother's repeated objections and attempts to hold a hearing, the operating assumption appeared to be that C.W.'s permanent plan would be custody with father with family maintenance but no orders to that effect were ever entered. While living with his father, C.W. deteriorated including getting into trouble at school, conflict with father, sexual misbehavior, and eventually trouble with the law. Father kicked C.W. out of his home and sent him to a group home in Louisiana. At this point, the California trial court terminated jurisdiction over C.W. and awarded sole custody to father even though C.W. was living in a group home.

At the hearing to terminate jurisdiction, mother testified she had made dramatic changes in her life and was working full time, had been sober for two years, had been released from probation, and had attended therapy. Before C.W. went to Louisiana, she had regular unsupervised overnight visits with him and partial custody of her younger eight-year-old son. After his move to Louisiana, mother was only allowed infrequent phone calls with C.W.

Mother appealed and challenged the orders for a trial home visit with father, the later order turning the visit into a family maintenance placement, the order allowing C.W. to be placed in a residential treatment program in Louisiana and dismissing jurisdiction, and awarding sole custody to father. The appeal implicated the UCCJEA and forfeiture issues since Louisiana also made dependency orders and mother did not appeal the earlier orders that were entered prior to the termination of jurisdiction. In addition, the agency argued the appeal was moot because Louisiana asserted jurisdiction over C.W. while the appeal was pending, depriving the California court of subject matter jurisdiction.
The Court of Appeal held California has continuing, exclusive jurisdiction over C.W. because it made the initial determination. That did not change even though Louisiana intervened while the appeal was pending. The appellate court did not address all of mother's arguments but focused on the most significant, overriding reason to reverse: the award of sole custody of C.W. to father. The Court of Appeal held the trial court's finding that the conditions which initially existed to justify jurisdiction no longer existed was not supported by substantial evidence since father had never received treatment of any kind to address his sexually inappropriate behavior toward children and there was no evidence that father's past history no longer posed a risk to his son. The award of sole custody to father was an abuse of discretion and the case was reversed and remanded. The trial court's order dismissing jurisdiction was unreasonable and internally contradictory and no judge could reasonably have made the order. The juvenile court's implied finding that father no longer posed a danger to C.W. was baffling. Further, the error was compounded by the fact that mother was ready and willing to take custody and C.W. wanted to return to his mother. [N. Williams – father]

DISPOSITION

In re A.E. (Aug 21, 2019, E070578) ___ Cal.App.5th ___ [2019 WL 3942916] (4th Dist., Div. 2) [San Bernardino]
In this minors' appeal, where the parents were granted reunification services despite the applicability of the bypass provisions, the Court of Appeal reversed finding the exception to the bypass provisions in section 361.5, subds. (c)(2) and (3) were not supported by substantial evidence showing reunification was likely to prevent reabuse or that failure to try reunification would be detrimental to the children. The case involves six adopted children ages 10, eight-year-old twins, five, four [A.E.1], and three years old. They were adopted in two groups in 2012 and 2017. The case began when four-year-old A.E.1 was taken to the hospital with serious injuries including a scalp hematoma, a nondisplaced frontal and temporal fracture, and a concussion. All the children but the youngest confirmed the A.E.1's injuries were caused by what they called

"big scary trouble" – discipline involving throwing the child on the floor and against the wall. More than one of the children witnessed the event, the older children said it had happened to them before, father also used similar discipline and all the children confirmed the use of a spanking spoon (a wooden kitchen spoon). Mother said A.E.1 had been injured when he fell onto his face more than once because of balance problems. The petition was sustained under section 300, subds. (a), (b), and (e). The juvenile court held the bypass provisions applied pursuant to section 361.5, subds. (b)(5) and (6). Despite this, the trial court ordered reunification services for both parents under subdivisions (c)(2) and (3).

The Court of Appeal held the denial of reunification services is mandatory with respect to nearly all the bypass provisions unless the court makes certain countervailing factual findings. These findings could be that reunification is in the best interest of the child, services are likely to prevent reabuse or continued neglect, or the failure to try reunification services will be detrimental to the children because of the close bond they have with their parents. The appellate court found mother's reliance on the Fifth Amendment to validate her continued denial of inappropriate discipline did not show it was in the children's best interest for mother to receive reunification. Mother had begun services and was able to discuss appropriate discipline but the appellate court held this evidence had no tendency to show services were likely to succeed. The Court of Appeal, in a matter of first impression, held that competent testimony is required to show either that services will prevent further abuse or that the abused child has such a positive bond to his parents that a failure to try reunification would be detrimental. Finding no testimony in the record other than a single, unexplored statement that the children "adore their parents," the court found this did not constitute substantial evidence to support the trial court's findings. The orders granting reunification services were reversed and the case was remanded for the trial court to enter new orders. [L. Fields – children; E. El Habiby – mother; M. Thue – father.]

In re A.M. (2019) 37 Cal.App.5th 614 [2d Dist., Div. 2] (Los Angeles)
Finding that father groomed and sexually abused his 13-year-old daughter over many years, and that the nature of the abuse progressed, the Court of Appeal affirmed the trial court's issuance of a restraining order at the disposition hearing preventing any contact between father and daughter. Mother and father periodically lived together but never married. A.M.'s first report of possible sexual abuse happened when she was almost two years old. She next told her mother of possible abuse when she was four years old. Mother forced father out of the home but father continued to have overnight visits. In 2016, when A.M. was approximately 11 years old, mother and father began dating again and produced a son. That same month, mother found a note in A.M.'s

pocket accusing father of raping her. A.M. had not earlier reported the abuse because she did not want her brother to grow up with separated parents and she did not want her mother to be stressed and lose the pregnancy. Mother filed a police report and a petition was filed. A.M. reported father touched her sexually while she was clothed, she pretended to be asleep, and she was scared and confused during the abuse which lasted up to an hour and a half each time. The agency filed a petition as to A.M. and her brother alleging sex abuse of A.M. and section 300, subd. (j) for G.M., the baby brother. The trial court found the allegations true, detained the children from father, and released them to mother. The court found A.M. to be consistent and credible every time she described the sexual abuse and that father's conduct was a total abrogation of his role as a father and very, very detrimental to his child. The juvenile court was informed that A.M. did not want visitation with father. The trial court granted the restraining order prohibiting father from having any contact with A.M. directly or indirectly for two years. Father appealed.

Father argued a dependent child who was subjected to non-severe sexual abuse can be adequately protected without completely restricting the child's contact with the offending parent and an order for reunification services must include some form of visitation. Father conceded he was not entitled to reunification services because mother retained physical custody but he argued the sex abuse was not severe. The appellate court also held father's argument was flawed because, although it did not involve penetration as described by section 361.5, subd. (b)(6)(B), father manipulated and penetrated A.M.'s vagina and the fact he did so over her clothing did not discount such heinous invasions. The court also held father's argument was waived below. The evidence was sufficient to establish that a restraining order was necessary to ensure A.M.'s safety. [J. McGowan – father.]

In re Harley C. (2019) 37 Cal.App.5th 494 [2d Dist., Div. 7] (Los Angeles)
Where local court rules are applied in such a way so as to exclude all of mother's evidence, the sanction is disproportionate and the trial court's orders terminating jurisdiction and awarding sole custody to father must be reversed and remanded. Mother waived her right to a jurisdictional hearing, requested a contested disposition hearing, and sought return of the children. Minor's counsel initially recommended continued jurisdiction with reunification services but, by the time of the contested disposition hearing, had changed positions to urge custody with father. The trial court ordered father be given custody, terminated jurisdiction, and ordered monitored visits for mother. Because mother failed to file a joint trial statement, the trial court denied her request for a continuance to file a joint trial statement to testify, denied her request for her child to testify, and denied her request to testify.

The Court of Appeal reviewed all the requirements for the establishment of local rules including that proposed rules must be published and submitted to the local bar, distributed for comment, published in a specified format and manner, made available to the public, and submitted to the Judicial Council in advance of their effective date. Further, local rules may not be inconsistent with law or with the rules adopted and prescribed by the Judicial Council. The Court of Appeal found none of these requirements were fulfilled and so the local rule is invalid. Aside from the validity, the rule conflicts with California law. The rule was applied to prevent mother from presenting relevant evidence, thereby rejecting evidence the court was statutorily obligated to receive and consider at disposition. Also, mother cannot be denied the opportunity to present relevant evidence for a goal of expediting proceedings as was done here. In addition, since the local rules did not indicate what penalty would be imposed for failing to comply, precluding live testimony as a sanction was improper. Finally, the sanction was disproportionate to the conduct it punished. In the absence of a demonstrated history of litigation abuse, an order based on a curable procedural defect which effectively results in a judgment against a party is an abuse of discretion. The juvenile court's application of its local rule improperly impaired mother's ability to present her case thereby prejudicing her and requiring reversal. [C. Booth – mother.]

In re L.W. (2019) 32 Cal.App.5th 840 [2d Dist., Div. 8] (Los Angeles)
Despite finding it was undisputed there was no evidence of a specific finding of past harm to L.W. because of mother's drug use, the Court of Appeal held substantial evidence supported jurisdiction. Thirteen-year-old L.W. never saw any drugs or paraphernalia in the home, never saw mother abuse drugs, she felt safe living with mother, was well-fed, groomed, and regularly attended school. The referral alleged mother smoked crack cocaine in front of L.W. Mother took a myriad of prescription medications and over-the-counter drugs including Norco, Valium, Ibuprofen, and Tylenol to treat her health problems including chronic sciatica and hypertensive peristalsis [a contracting esophagus]. Mother confirmed she used cocaine for the last six months but never in front of L.W. Mother sought help from a doctor because she no longer wanted to use drugs. Mother agreed to stop using cocaine, to enroll in a drug abuse program, and submit to drug tests as part of a safety plan but she did not comply. The agency then learned mother had a long criminal history dating back to 1993 and she was charged with driving under the influence (DUI) six months before the case began. A petition was filed and, after the detention hearing, mother tested positive for cocaine. The juvenile court found the allegations true and held L.W. could remain with mother on the condition that mother comply with the case plan. Mother appealed. The appellate court found that even though L.W. had not experienced harm from mother's drug use, the trial court need not

wait until a child is seriously abused or injured to assume jurisdiction. The Court of Appeal found this was not a case of drug use without more. Mother had been arrested twice for driving under the influence and mother's drug use was now spilling over into areas that will pose a substantial risk of harm to L.W. The recent DUI arrests and conviction for reckless driving provided a nexus between mother's drug use and risk of future harm for L.W. The appellate court affirmed the formal supervision of the family finding the juvenile court's belief that formal supervision and oversight was more efficacious was supported by mother's unfortunate downward trajectory. [A. Greenleaf – mother.]

387 PETITION

In re D.D. (2019) 32 Cal.App.5th 985 [3d Dist.] (Sacramento)
Where mother continued to use inappropriate discipline, had a history of abusive discipline, had previously received extensive services throughout the pendency of the case, refused to cooperate with service providers, and cancelled much-needed services, the trial court's order sustaining the 387 petition and removing the children from mother was supported by substantial evidence and was affirmed. During the proceedings, the children were 16, 14, 12, and 5 years old. A section 300 petition was filed in March 2016 and, after reunification services, the children were returned to mother in May 2017. Shortly after their return, the agency received two referrals alleging mother made the youngest child consume chili peppers as a form of punishment. When the social worker attempted to investigate, mother refused to allow access to the children. The social worker also received a text message from the 12-year-old begging to be removed from mother and accused mother of forcing a bar of soap into her mouth as punishment after the chili pepper method was not effective. Also, the child was forced to sit outside the home for an extended period in 99-degree weather, along with other allegations. A 387 petition was filed. The court found the allegations true, sustained the petition, removed the children from mother, and denied her reunification services. The juvenile court found mother made little progress and remained willing to use inappropriate discipline when her children disobeyed her and that the children's behavior was becoming more oppositional. The court had every reason to believe another explosion would be imminent if the children remained with mother. Mother appealed and challenged the sufficiency of the evidence to support some factual findings but also that the conduct shown was insufficient to establish the requisite findings under section 387. Mother contended the discipline she used was no abusive or harmful because it did not cause bruises, marks or substantial pain.

The Court of Appeal found the record contained substantial evidence supporting the trial court's factual findings including the text message and mother's own testimony. The Court of Appeal ruled the trial court could reasonably infer that mother intended to cruelly inflict inappropriate physical pain when she used chili peppers as punishment since the child was around five years old and because he cried and screamed hysterically. Mother herself acknowledged that using chili juice or soap as punishment was not appropriate. The appellate court found the trial court could consider the totality of mother's inappropriate discipline and her history of physical abuse in rendering its judgement. As for disposition, the Court of Appeal found substantial evidence supported removal based on the continued use of inappropriate discipline when the children challenged mother, the family was in crisis, mother refused to cooperate with service providers, cancelled services for the family, and had previously been provided numerous services. No other reasonable means existed by which the children's physical health could be protected. [R. Knight – mother.]

PRELIMINARY/CONTINUING CONSIDERATION
ICWA

In re A.W. (2019) 38 Cal.App.5th 655 [3d Dist.] (Sacramento)
M**aternal grandfather is a member of an Indian tribe and he lived on the tribe's reservation. Mother was found to be a Indian child when she was a dependent of the court. But the tribe was not timely noticed of the pre-jurisdiction hearing or any subsequent hearings. Accordingly, the termination of parental rights was conditionally reversed to comply with notice pursuant to the ICWA**. A petition was filed for then one-year-old A.W. for domestic violence. Mother informed the agency the maternal grandfather was a member of the Picayune Rancheria of the Chukchansi Indian tribe. Notice had been sent to the proper agent of the tribe but, at the time of the pre-jurisdiction hearing, the notice was unclaimed. Although notice was resent after the pre-jurisdiction hearing, it did not contain information about upcoming hearings but only the prior hearing. Almost two months later, at an ICWA compliance hearing, the juvenile court found A.W. was not an Indian child and no further notice was required. Of note, when mother was a dependent herself, the tribe intervened in her case. A.W.'s parents were given 18 months of reunification services but were unable to reunite with him. At the time of the section 366.26 hearing, A.W. had been in his foster-adoptive home for almost two years. The parents visited somewhat consistently and A.W. was disappointed when visits ended and would fall to the floor and cry. At the section 366.26 hearing, the juvenile court considered the beneficial-relationship exception but terminated parental rights. Mother and father appealed and challenged the ICWA notice.

The agency argued lack of jurisdiction, ripeness, standing, an appeal was not the proper remedy, and forfeiture because the ICWA findings could have been appealed earlier. The Court of Appeal held notice must be sent for every hearing until such time as it has been determined the ICWA does not apply. The appellate court rejected the agency's arguments about jurisdiction, ripeness, and standing. The agency argued a petition to invalidate prior orders is the only proper remedy for an ICWA violation but this was rejected. The appellate court declined to reexamine the policy that a parent may challenge an ICWA finding even if the order could have been appealed earlier. Here, the tribe received notice less than 60 days before the hearing that held the ICWA did not apply and was not specifically noticed of the date of the hearing. The tribe responded to the non-compliant notice by confirming mother and A.W. are eligible for membership. The agency's error in not providing notice to the tribe prior to the juvenile court's findings may have led to erroneous findings and prevented further notice of subsequent hearings. Accordingly, the order terminating parental rights was conditionally reversed and the matter remanded. [R. Keller – mother.]

PATERNITY

In re J.P. (2019) 37 Cal.App.5th 1111 [6th Dist.] (Santa Clara)
After determining that mother's ex-boyfriend did not qualify as a presumed father because he did not qualify as a third parent, the trial court nonetheless ordered visitation with J.P. over mother's objections. The Court of Appeal held the juvenile court had the authority to order visitation and the evidence was sufficient to support the determination that visitation with the ex-boyfriend was in J.P.'s best interest. The case began when mother was arrested for driving under the influence with J.P. and his younger half-brother A.A. in the car. Mother, boyfriend Albert, and the children had previously lived with Albert's stepmother. Albert is A.A.'s presumed father but J.P.'s presumed father is his biological father who was not involved in the case. Mother and Albert were no longer a couple and at the six-month review hearing, J.P. was returned to mother and A.A. was returned to both mother and Albert with family maintenance. Seven months after the children were returned, Albert requested to be J.P.'s presumed father and for visitation. The juvenile court held Albert did not qualify as a third parent and could not be J.P.'s presumed father. Despite this, the court found there was a bond between J.P. and Albert and ordered weekly visitation because it was in J.P.'s best interest to maintain his relationship with Albert. The Court of Appeal affirmed. [L. Barry/M. Jarvis – mother]

388 PETITION

In re J.F. (Aug. 26, 2019, E072301) ___ Cal.App.5th ___ [2019 WL 4010769] (4th Dist., Div. 2) [San Bernardino]
Where the notice of appeal does not specifically identify the denial of a 388 petition, the Court of Appeal has no jurisdiction to address the issue even if the notice was timely filed. Father filed a notice of appeal from the termination of parental rights but, 44 days before the section 366.26 hearing, his section 388 petition was denied. At disposition, the juvenile court held the children were dependents, bypassed reunification services for the parents, and set a section 366.26 hearing. The hearing was continued for DNA testing and, when father was found to be the biological parent, he filed a section 388 petition requesting to be the twins presumed father. The 388 petition was denied but he filed a second 388 petition requesting reunification services and increased visitation. This petition was denied and father did not immediately appeal. The juvenile court subsequently held the section 366.26 hearing and terminated parental rights. Father personally filed a notice of appeal. The appellate court found the second 388 petition was unquestionably appealable because it was timely filed less than 60 days after the denial. But since the notice clearly and unambiguously appealed the termination of parental rights, the court could not liberally construe the notice to include the 388 petition. The Court of Appeal held it had no jurisdiction over an order not mentioned in the notice of appeal and affirmed the termination of father's parental rights. [L. Serobian – father.]

M.L. v. Superior Court (2019) 37 Cal.App.5th 390 [1st Dist., Div. 1] (San Mateo)
Even when the trial court's orders are not procedurally correct, the trial court has inherent powers to make orders that are in the best interest of the children. The parents challenged the trial court's orders granting minors' section 388 petition that requested removal of the children. The proceedings began in 2014 after the police encountered mother wandering aimlessly with her two children for over 12 hours. The children were then six [K.B.] and three years old. The petition alleging homelessness, domestic violence, and drug use was sustained and the parents were granted reunification services. The children were returned to mother more than a year later and after mother had given birth to a third child. Family maintenance services continued for several years. During those years, K.B. was psychiatrically hospitalized after he expressed suicidal ideation and was prescribed medication. Mother gave birth to another child but the agency continued to have concerns about physical abuse, the children being hungry, and psychotic symptoms in father. Mother admitted drinking alcohol, shelter staff noticed the infant crying without being attended for an extended time, and mother continued to forget to give K.B. his psychiatric medications. K.B. filed a section 388 petition requesting the

children be detained. The trial court found the situation volatile and dire, that the parents were resistant to services, and they had already received 55 months of services. Based on the parents' past performance, the trial court detained the children, found the parents failed to make substantial progress, and set a section 366.26 hearing. The parents appealed.

The appellate court found the parents' due process rights were not violated because they received notice of the hearing, were given an opportunity to be heard, and participated in the hearing. As to whether the agency was required to file a 387 petition to remove the children, the Court of Appeal held that the use of a defective procedural mechanism such as a section 388 petition did not affect the validity of the court's ruling. The juvenile court was well within its inherent and statutory authority to modify the disposition and remove the children since the 388 petition showed it was in their best interest. The court found no procedural defect and denied the parents' petitions on the merits. [J. Tavano – mother; L. Barrie [Barry] – father.]

MINOR'S ATTORNEY AND RFA INFORMATION

In re Charlotte C. (2019) 33 Cal.App.5th 404 [4th Dist., Div. 1] (San Diego)
In a matter of first impression, the Court of Appeal described the need to weigh the competing interests of the child, the duty of the child's attorney to investigate a possible placement for their client, and the interests of the resource family in confidentiality. Charlotte appealed the juvenile court's denial of her counsel's request for her relatives' Resource Family Approval Program (RFA) assessment information. During the RFA investigation process, the agency inadvertently disclosed three pages of confidential RFA information. The aunt and uncle filed a formal objection to the release of their RFA records. The released documents contained a copy of an application for a domestic violence restraining order filed by the aunt against the uncle. The application disclosed the uncle had hit his father during an argument where his children were present and the uncle had been using methamphetamine for at least nine months and was uncharacteristically aggressive and paranoid. Minor's counsel's request for further information was based on these disclosures. A special hearing was held and the trial court acknowledged that section 317 permits minor's counsel to access all records relevant to the child's case maintained by state or local public agencies. However, the Legislature contemplated that RFA information would remain confidential to facilitate honest communication. The juvenile court declined to conduct an in camera review and requested the inadvertently released material be returned or destroyed. Subsequently, the aunt and uncle were cleared for placement and Charlotte was placed in their care. During a relative placement hearing under section 361.3, which continued for five days, the uncle

and aunt testified along with the social worker. The uncle invoked the Fifth Amendment when asked about his methamphetamine use. The aunt testified about the restraining order and its removal. The juvenile court sustained a number of objections when two RFA social workers were testifying since the answers would have required disclosure of confidential information. The trial court ordered Charlotte placed with her aunt and uncle. The court then proceeded to the section 366.26 hearing and found Charlotte adoptable and terminated parental rights. Minor's counsel filed an appeal of the relative placement hearing and asserted minor's counsel may receive or inspect RFA information under sections 317, 827, or Civil Code section 1798.24, subd. (k).

The Court of Appeal reviewed the RFA program, the confidentiality of the investigation materials, and the role of minor's counsel. The opinion held the trial court must balance the interests of the child and other parties and the interests of the resource family to determine if the need for discovery outweighs the policy considerations favoring confidentiality. After an in camera review, the court must determine whether all or a portion of the confidential file may be disclosed. The appellate court acknowledged the limited resources in juvenile court and saw no need for minor's counsel to duplicate, at taxpayer expense, elements of an investigation the taxpayer has already funded through RFA. Finally, after some analysis, the appellate court determined that the release of personal information to minor's counsel does not violate the separation of powers doctrine. The Court of Appeal reversed the trial court's finding that it did not have authority to allow minor's counsel to access the confidential information of a relative seeking placement under section 361.3. [N. Gold – minor.]

SECTION 366.26

In re B.D. (2019) 35 Cal.App.5th 803 [1st Dist., Div. 4] (Contra Costa)
Where the agency has left out serious and significant negative information about the foster parents from the section 366.26 report, the omission is an error of federal constitutional magnitude and a breach of due process requiring reversal of the section 366.26 orders and a remand for a new hearing. Barely a month after the juvenile court terminated parental rights in reliance on the agency's recommendation, B.D. was removed from his foster parents. The agency discovered B.D. had suffered physical abuse when the foster father threw an eraser hard enough to draw blood. During the hearings on the foster parents' objection to B.D.'s removal, the court learned that a year before the agency had conducted an investigation into possible sexual abuse. The information from the investigation was not included in the section 366.26 hearing. The social worker who wrote the report testified she never received a copy of the investigator's report and was told only that the investigation was inconclusive. However,

as a result of the investigation, a safety plan was instituted authorizing only the foster mother to be alone with the B.D. In a summary provided by the agency, the trial judge learned the foster father had spent seven years in state prison for home invasion burglary; his three adult sons were not only victims of sexual abuse as minors but had committed sexual offenses against other juveniles; the three sons were declared wards and placed in a group home; one of the sons, now an adult, was living in the foster parents' home while B.D. lived there; the foster father's parental rights to his sons were terminated while he was incarcerated; and the foster father's adult nephew, who was also a victim of sexual abuse, was sharing a bedroom with B.D. When the juvenile court learned about these facts, Judge Hardie was furious. The judge said it was unconscionable that the information was not provided to the trial court and minor's counsel. As a result of testimony, it was confirmed that not only were the foster parents violating their safety plan, thus putting B.D. at risk of sexual abuse, but that he had been physically abused by others in the home for some time. The agency apologized and accepted responsibility for the incomplete section 366.26 report. The agency's practice had been to "silo" investigative material within the investigative unit so as not the "cross-contaminate" the foster placement. Judge Hardie said "I don't appreciate being treated like a rubber stamp based on someone's belief that I don't need this type of information and that I should make these orders because you say so. That is not how it works." The trial court refused to return B.D. to the foster parents. Mother and father appealed.

Mother filed a Code of Civil Procedure section 909 motion asserting the transcript of the post-termination proceedings made abundantly clear the trial court would never have found B.D. adoptable had the court known all the pertinent facts. The Court of Appeal found that, on the record presented to the juvenile court, it would have had no trouble affirming. However, given the new facts, the Court of Appeal reviewed *In re Zeth S.* (2003) 31 Cal.4th 396 and *In re Elise K.* (1982) 33 Cal.3d 138, and granted mother's motion to receive additional evidence but denied the agency's motion to strike. Finding B.D. is a high-needs child, has a history of mental instability, requires psychotropic medications and intensive therapy, and has struggled to progress in school, he is specifically adoptable. For specifically adoptable children, an accurate determination of adoptability is particularly critical. B.D.'s current fosters have no interest in adoption thus placing B.D. in the position of being a legal orphan. The Court of Appeal declined to accept the stipulated reversal to resolve the appeal because it would mask the agency's error and because it left vague any reference to the legal basis for reversing. The appellate court held the agency breached its statutory obligations to provide a full, fair and even-handed preliminary assessment of adoptability and that breach violated B.D.'s due process rights. Judge Hardie's comments, made after three days of evidentiary hearings, made clear she would never have found B.D. to be specifically adoptable had she known

the true facts. Where an investigative report is required prior to a dependency decision, and it is completely omitted, due process may be implicated because a cornerstone of the evidentiary structure upon which both the court and parents are entitled to rely has been omitted. The court held the agency's violation was so egregious that, although it did not deprive the parents of due process, it was a denial of due process for B.D. As the minor, B.D. was entitled to view the agency as his champion, to place complete faith in its expert analysis of adoptability, and he had no incentive to probe or challenge the agency's litigation position. The Court of Appeal held it could not be sure beyond a reasonable doubt that Judge Hardie would have found B.D. generally adoptable had the agency filed a fully compliant section 366.22 report. The case was remanded with directions for a new section 366.22 report and a new section 366.26 hearing. [J. Tavano – father; L. Barry – minor.]

In re Caden C. (2019) 34 Cal.App.5th 87 [1st Dist., Div. 1] (San Francisco)
In an agency appeal, the appellate court reversed the application of the section 366.26, subd. (c)(1)(B)(i), exception and ordered a new permanency planning hearing be held at which parental rights should be terminated. In early 2018, the trial court determined mother had established a beneficial relationship with then seven-year-old Caden and ordered a permanent plan of long-term foster care instead of adoption. The agency appealed. Mother's contact with the agency began in 1986. Over the next 30 years, each of mother's six children were removed, often more than once, because of mother's chronic substance abuse, inability to care for her children, and domestic violence. Mother would enter residential rehabilitation, stabilize temporarily, and then relapse. By the time Caden was a toddler, the agency had received 11 referrals about mother's drug use. Caden was finally detained at four years old. Mother previously disclosed she smoked methamphetamine daily for two years and tested positive for PCP. Caden was not bathing, did not appear to eat regularly, was not in Head Start, and only sporadically attended his speech therapy. Caden was diagnosed with disruptive behavior disorder and PTSD and was aggressive, and had impaired social relationships, tantrums, regression, and emotional dysregulation. Caden was declared a dependent in 2014, removed from mother, and mother was granted reunification services and visits. He was returned to mother seven months later and had stabilized emotionally but was developmentally delayed. Mother continued to miss drug tests and test positive for methamphetamine. Caden was detained again in 2016. He appeared exhausted, worried, and anxious in school and said he wanted to kill himself because he had been removed from his mother. Two months later, the court sustained the supplemental petition and terminated reunification services since mother had received more than 28 months of services. Mother continued to work at her sobriety with little success. Caden was moved

through four foster homes because mother sabotaged the placements with poor boundaries and impulsive behaviors which were exhausting for the caregivers. The agency contended Caden had a connection with mother but it was not healthy and it sabotaged his stability and, in 2017, the juvenile court reduced mother's visits and set a section 366.26 hearing.

Caden was eventually returned to his first foster home and was adjusting well. His foster mother was committed to him and Caden had developed a solid relationship with her and her two children. Despite this, Caden continued to state he wanted to return to live with mother. A bonding study found Caden's best chance for emotional support was to remain with his foster mother. She was Caden's secure base and he perceived her as a reliable protector at times of uncertainty and fear. Mother also presented a second bonding study which held Caden was strongly connected to his mother and missed seeing her consistently. Caden was unchanging in his desire to return to her, his bond with his mother was substantial, rose to the level of maternal attachment, and the loss of contact with mother would be traumatic and harmful to Caden. At the section 366.26 hearing, the trial court heard from mother, the social worker, both experts, and various character witnesses. The court quashed a subpoena of Caden finding it would cause substantial trauma to him to be forced to testify. The hearing was continued to determine if Caden's foster mother would be willing to be a guardian for Caden. She declined. The court then ordered a permanent plan of long-term foster care finding mother had shown the beneficial-relationship exception applied. The agency and Caden appealed contending the trial court erred in applying the exception and the Court of Appeal agreed.

The opinion set out the exception found in section 366.26, subd. (c)(1)(B)(i), but appeared to add a third element – whether the existence of that relationship constitutes a compelling reason to determine that termination would be detrimental to the child. The Court of Appeal found it cannot be seriously disputed that Caden had a significant relationship with mother the termination of which would cause him detriment [described as beneficial]. The court then focused its analysis on the third element – whether that relationship provided a compelling reason to not terminate parental rights. The appellate court found that the juvenile court's application of the exception amounted to an abuse of discretion and that, on this record, no reasonable judge could have concluded that a compelling justification was made to forgo adoption. Mother had not substantially complied with her case plan. Caden had suffered years of trauma and instability as a direct result of mother's entrenched and unresolved substance abuse and she had been unable to maintain sobriety. Also, long-term foster care was not in Caden's best interest. Such a placement had already proved itself to be destabilizing with Caden's removal from four different homes due to mother's constant interference. Caden's attachment to his mother was unhealthy and involved a damaging mixture of preoccupation and anger and

the overwhelming evidence was that, while mother's bond with Caden was undeniably strong, it was not of a quality that justified disrupting a plan of adoption for Caden. His best chance at stability and emotional health is adoption by his current foster mom. The Court of Appeal reversed the application of the exception to adoption and remanded for a new section 366.26 hearing. [N. Williams – mother.]

FAMILY CODE

In re C.M. (2019) 38 Cal.App.5th 101 [2d Dist., Div. 5] (Los Angeles)
In a matter of first impression, the Court of Appeal found that the Family Code's rebuttable presumption against awarding sole or joint custody of a child to the perpetrator of domestic violence does not apply in dependency court. Mother has two children and is in a relationship with the father of the younger child. The case began when mother was arrested for domestic violence with her boyfriend and a petition was filed under section 300, subds. (a) and (b). Father-appellant is the biological father of the older child. He ended the relationship with mother when mother started hitting herself and threatened to call the police. Eventually, the older child was placed with father. The agency recommended terminating jurisdiction and granting father sole custody with monitored visits for mother. Father raised the presumption under Family Code section 3044 to argue joint legal custody is presumptively not in the child's best interest because of the history of domestic violence. The trial court maintained its joint legal custody order and father appealed. The Court of Appeal held the Family Code presumption is inapplicable to dependency proceedings under Welfare and Institutions Code. In dependency, the juvenile court has been intimately involved in the protection of the child and is best situated to make custody determinations based on the best interests of the child without any preferences or presumptions. [J. Moran – father.]

In re H.D. (2019) 35 Cal.App.5th 42 [4th Dist., Div. 2] (Riverside)
Mother underwent treatment to address her drug addiction for 14 months but, when she attempted to regain joint custody with father, the trial court held mother had abandoned her daughters because she failed to communicate with them or provide financially for them for at least one year. The trial court terminated mother's parental rights under family code section 7822 and mother appealed. The Court of Appeal agreed with mother that her failure to communicate and provide financial support was not due to an intent to abandon and reversed the orders terminating parental rights. Mother diligently treated her addictions before trying to regain custody and the record contains uncontradicted evidence of her abiding desire and plan to reunify with her children. Recognizing her need to seek treatment, mother agreed to let her ex-husband assume full

custody of their two daughters. The children are now 10 and seven years old. In 2016, father began to suspect mother was using methamphetamine, mother acknowledged the problem, and agreed to a stipulated custody order for father to assume full custody temporarily. Mother was to have visitation but when she attempted to arrange a visit or to speak to the daughters, father refused. Mother underwent drug treatment for a full year and, at the end of 2017, she sought a shared custody arrangement. Two weeks later, the stepmother filed a petition to free the girls from mother's custody under family code section 7822. Mother opposed the petition. The older daughter wanted the stepmother to adopt her and could not remember the last time she spoke to mother. The probation officer recommended against terminating parental rights finding mother did not intend to abandon her children. Mother testified she would be able to resume caring for the girls if she treated her addiction and she had not been able to provide child support because she was unemployed. Mother's fiancé testified he knew reunifying with the children was important to her. Mother's great-aunt also testified that mother had never intended to abandon her daughters. The appellate court found that if mother had not been as diligent as she was in seeking treatment, their conclusion that she did not intend to abandon her children would have been different. The law should not penalize those parents who acknowledge and then earnestly address their addictions by deeming their agreement to seek treatment as desertion of their child. Accordingly, the Court of Appeal reversed.