APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

December 2012 through June 2013

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In re I.J. (2013) 56 Cal.4th 766

California Supreme Court finally weighed in on the question of whether dependency jurisdiction is warranted over the male siblings of a daughter who is sexually abused by a father when no evidence is presented that he has any interest in male children. In an opinion limited to the facts, the Supreme Court held that given the severe sexual abuse of his 14-year-old daughter over 3 years, the juvenile court did not err in taking jurisdiction over not only the daughter & her sister but her 3 brothers as well. The daughters are 14 & 9 years old & the sons are twin 12-year-old boys & an 8-year-old. No evidence was presented to show father sexually abused or otherwise mistreated the boys & they were unaware of their sister's abuse. The sex abuse included fondling the child's vagina, digital penetration, rape & forced oral copulation. The Court of Appeal unanimously held the evidence was sufficient to support finding father sexually abused his daughter & her sister should be declared a dependent. It divided on the question of whether abuse also warranted court's further declaring her brothers dependents. The opinion discussed the split of authority on this issue reviewing the statutory language of section 300, subd. (j), *In re P.A*. (2006) 144 Cal.App.4th 1339 & *In re Rubisela E*. (2000) 85 Cal.App.4th 177. The court also reviewed section 355.1, subd. (d), which did not apply in this case but nonetheless evinced a legislative determination that siblings of sexually abused children are at substantial risk of harm & entitled to protection. The Supreme Court upheld the appellate court's judgement relying on 2 rationales. Initially, the court held that "[s]ome risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great" so the court must consider both the likelihood that harm will occur & the magnitude of potential harm. As the abuse becomes more serious, it becomes more necessary to protect the child from even a relatively low probability of that abuse. In addition, the court made clear that the absence of scientific evidence is not determinative holding "nothing in the statutes suggests a legislative intent to require a court to consult scientific authority or empirical evidence before it makes the 'substantial risk' determination." Finally, the court made clear it is not holding that as a matter of law the juvenile court must assume jurisdiction over all the children whenever one child is sexually abused. The court disapproved of several cases including *Rubisela E*. as inconsistent with its opinion. [C. Gabrielidis]

Los Angeles County Dept. of Children & Fam. Services v. Superior Court (May 9, 2013, B247519) ___ Cal.App.4th ___ [2013 WL 1768693]

Court of Appeal issued peremptory writ of mandate directing respondent juvenile court to vacate its order dismissing a dependency petition after finding step-father had molested his step-daughter for a number of years but dismissed the petition & refused to take jurisdiction over her younger half-sibling because she was biologically related to father & father last abused his step-daughter 5 or 6 years earlier. The agency appealed after the trial court dismissed the petition for 10-year-old sibling even after finding child's father abused his step-daughter for 5 years starting when she was 7 or 8 years old. The court noted appellate courts have rarely if ever been faced with a situation in which a father sexually molests one female

minor in the household & the juvenile court does not find another female minor in the household to be a risk. The court held that the length of time without reoffending did not provide sufficient evidence to support dismissal of petition & father was likely deterred by mother installing locks on the doors & keeping the keys rather than any change in his desire for sex with preteen girls. Further, since the parents no longer live together, the risk to the child is even greater since she may be spending time alone with her father away from mother's home. Finally, the juvenile court's distinction between a step-daughter & biological daughter is contrary to the holdings & language of case law – incest involves sexual relations between a child & an adult who has assumed a parenting role towards the child & not just a biological parent. The juvenile court was ordered to enter a new order sustaining the petition.

In re Ricky T. (2013) 214 Cal.App.4th 515 (2d Dist., Div. 3) [Los Angeles]
Where step-grandfather brazenly sexually abused his 12-year-old granddaughter at the mall where he worked, the Court of Appeal affirmed the trial court's finding the 3-year-old child living with grandfather was also at risk of sex abuse & he failed to rebut the presumption created by section 355.1 that was used by the agency to sustain the petition. Grandfather is maternal grandfather & guardian to Ricky T., who has autism & is a Regional Center client. He is accused of molesting A.G. & her sister D.G. & plead no contest to molesting A.G. These 2 children live with their mother along with grandfather's adult son & have known grandfather since they were 4 & 2 years old. A.G. admitted to a security guard the molestation after it was witnesses by other several other vendors at the mall. When grandmother arrived after being called to pick up A.G., she called A.G. a liar & the security guard then called the sheriff's office. Section 355.1 creates a presumption affecting the burden of producing evidence based on a conviction of sexual abuse as defined in Penal Code section 11165.1. The appellate court found grandfather was notified about the presumption in section 355.1, subd. (d), because it was triggered by a criminal conviction & grandfather did not request a continuance to obtain evidence to rebut the presumption. Court distinguished *In re A.S.*, (2011) 202 Cal.App.4th 237, which required the petition to state the reliance on section 355.1, subd (a). In discussing whether Ricky was at risk of being sexually abused, the court refused to follow the line of cases which distinguish risk based on the sex of the children involved. Further, the court found that since grandfather's molestation was witnessed by others at the mall it was likely that he would molest other children in Ricky's presence thus making Ricky a victim of sexual abuse even if he was not inappropriately touched. [R. Pfeiffer]

In re Madison T. (2013) 213 Cal.App.4th 1506 (4th Dist., Div. 1) [San Diego]
The Court of Appeal affirmed jurisdiction & removal from mother finding testimony from the social worker about a telephone message from mother's substance abuse counselor was not inadmissible hearsay &, even if testimony constituted error, it was not prejudicial to mother. Newborn child removed because of mother's untreated mental illness including chronic paranoid schizophrenia. After mother entered residential drug treatment, the social worker attempted to gain information from mother's drug abuse coordinator for the disposition hearing. The social worker listened to a phone message from the coordinator the day of the hearing & testified to the content of the message over hearsay objections. The appellate court found at the

disposition hearing, the social worker's testimony is usually largely based on hearsay. Consequently, if the social worker's recommendation at disposition is based on evidence that is hearsay but is otherwise not objectionable & is reliable, it is appropriate. As for whether the hearsay was prejudicial, the court held the uncontested jurisdiction findings provided substantial evidence that it was necessary to remove Madison. Mother had been sober for less than 3 weeks & mother had previously relayed to the social worker that her drug abuse coordinator believed mother should wait to have Madison placed with her in residential treatment. [N.Trop]

In re Noe F. (2013) 213 Cal.App.4th 358 (2d Dist., Div. 1) [Los Angeles]
Finding the incarcerated mother made appropriate plans for her child's care, the court reversed jurisdiction & further reversed the placement of the child with his father holding the trial court failed to make the statutorily-required findings for placement with a noncustodial parent. Both parents are active gang members &, based on a warrant, mother was arrested. Father was already incarcerated. Mother named the paternal & maternal grandmothers along with other relatives for placement of Noe while she remained in jail. Ultimately, the child was placed with his maternal great aunt – a relative suggested by mother. Since incarceration, without more, is not sufficient for jurisdiction, the court found there was no basis for jurisdiction based on mother's care choices. As for father, the court found he was a noncustodial parent at the time of mother's incarceration but failed to make a determination of whether placement with father was detrimental. Finding this was error, the court reversed the trial court's custody order with father. [M. Jarvis (MO), L. Rehm (respondent)]

In re John M. (2012) 212 Cal.App.4th 1117 (2d Dist., Div. 8) [Los Angeles]
Court of Appeal affirmed jurisdiction order holding mother's conduct in leaving her 11-year-old blind & autistic son alone in a car, along with other evidence of neglect, was sufficient to show a substantial risk of harm. Mother was homeless & violating a restraining order by visiting the maternal grandmother when child was found in the back of mother's SUV, naked except for his underwear, & visibly dirty & disheveled. Evidence also showed mother failed to consistently ensure John's attendance at a special school which was necessary to help John with his limited mobility & limited ability to express his needs & wants. After John was placed with his father it was discovered father had allowed mother to move into the apartment to take care of John while father was working. The court rejected mother's challenge to the sufficiency of the petition finding where jurisdiction is supported by substantial evidence, the adequacy of the petition is irrelevant & mother's claim was moot. The court held leaving John alone, asleep & undressed in a car while violating a restraining order & attempting to evade the police, placed John at risk of serious harm & affirmed. [M. Jarvis]

In re Marquis H. (2013) 212 Cal.App.4th 718 (4th Dist., Div. 1) [San Diego]
Where parents severely physically abused 2 grandchildren in their care, the court found section 300, subdivision (a), applied to abuse of grandchildren & not only siblings even though they are not specifically mentioned in the statute. Ten-year-old Marquis is living with his parents who are caring for their 13- & 9-year-old grandchildren. Evidence showed the parents beat the grandchildren with belts, extension cords, crutches, & fists leaving scars. In addition,

the grandchildren were burned with cigarettes & an iron & the oldest child was hit on her ear so much she had developed cauliflower ear. Further, both grandchildren indicated Marquis sometimes inflicted beatings with a baseball bat as well. The parents argued there was no evidence they ever abused Marquis. The court denied the agency's motion to dismiss as moot despite the fact Marquis had been returned to his parents & dependency jurisdiction over him was terminated. The appellate court found that to interpret the statute as suggested by the parents was absurd since it would prohibit the juvenile court from exercising jurisdiction over a child whose parents had severely physically abused their own grandchildren who were also living in the home & under their exclusive care.

In re Drake M. (2012) 211 Cal.App.4th 754 (2d Dist., Div. 3) [Los Angeles]
Appellate court reversed jurisdiction as to father & reversed orders for specific reunification services based on a lack of evidence of substance abuse instead of only drug use & lack of evidence father was unable to care for & supervise his young son. Father uses medical marijuana 3 to 4 times a week to treat his chronic knee pain, he has a medical marijuana card, smokes marijuana only in the garage when Drake is not in his care, & keeps the drug in a locked toolbox on a high shelve in garage. Based on these facts, the trial court found jurisdiction against father but placed the child with him with family maintenance services. The Court of Appeal found jurisdiction must be based on evidence sufficient to show a parent has been diagnosed as having a current substance abuse problem by a medical professional or meets the definition as defined by the DSM-IV-TR. Since the jurisdiction order was reversed as to father based on a lack of substantial evidence, the court also reversed the order requiring father to do drug tests, drug treatment & a parenting course. [L. Johnson.]

In re David R. (2012) 212 Cal.App.4th 576 (2d Dist., Div. 1) [Los Angeles]
Appellate court weighed in on issue of whether molestation of 6-year-old step-daughter is evidence of substantial risk of harm to her 3-year-old brother & found no evidence was presented that molestation of a female presents risk of harm to a male child. Citing outside authority, Court of Appeal relied on study which suggested only 9 abusers from 157 cases victimized both male & female victims. Without more than the abuse of the step-daughter, the appellate court held the trial court applied the wrong standard & reversed the jurisdiction & disposition order & remanded for the court to apply the correct standard. Dissent by Mallano to affirm.

In re Destiny S. (2012) 210 Cal.App.4th 999 (2d Dist., Div. 1) [Los Angeles]
Court of Appeal reversed jurisdiction finding mother's drug use & the 11-year-old Destiny's past tardiness to school were insufficient to provide substantial evidence Destiny was under a current risk of serious physical harm. Child removed after an investigation into unfounded allegations of sex abuse revealed mother used marijuana & methamphetamine on a regular basis. After mother tested positive for drugs twice the child was removed & placed with the maternal grandmother. Evidence showed child was happy, healthy preteen who had problems with tardiness in the prior school year but not currently & she was doing fine academically. Appellate court found tardiness was no longer a problem & report that child smelled marijuana

smoke sometimes was not sufficient to support jurisdiction. As with marijuana use, the court held that use of hard drugs alone, without more, does not bring the minor within dependency jurisdiction. [S. Davidson]

Uniform Child Custody Jurisdiction And Enforcement Act (UCCJEA)

In re Nelson B. (2013) 215 Cal.App.4th 1121 (5th Dist., Div. 1) [Alameda]
Where 16-year-old minor's unauthorized departure from Maryland does not change the analysis of where his home state is located under Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA), the trial court properly dismissed the dependency petition in California. Appellate entered the U.S. illegally on his own in 2009 & he was subsequently placed with an aunt in Maryland under an Immigration & Customs Enforcement (ICE) sponsorship agreement. In March 2011, Nelson ran away & was found in Oakland, California year later. He was living with his pregnant girlfriend & her mother. He was placed in a foster home & ran away but was subsequently arrested. He was placed in juvenile hall & was eventually placed into ICE custody. Appellant sought jurisdiction in hopes of obtaining "Special Immigration Juvenile" findings from the juvenile court in order to take advantage of federal provisions that create a path for abused & neglected unaccompanied minors to become lawful permanent residents. At a hearing for the court to consider whether it had subject matter jurisdiction per the UCCJEA, Nelson's attorney requested cross-examination of the social worker to testify about Nelson's situation in California. The juvenile court denied the request for testimony & dismissed the petition for lack of subject matter jurisdiction. Per the UCCJEA, the reviewing court held Nelson could not create home state jurisdiction in California when he ran away without permission from his guardian in Maryland. Since Maryland was Nelson's home state, the California court lacked subject matter jurisdiction. As for denial of cross-examination of the social worker, the court found the testimony about his connections to the state & his personal relationships in California are not relevant to the analysis of where his home state is located &, since the testimony was not germane to the issue, Nelson was not prejudiced by the denial of cross-examination. [V. Lankford]

In re Gloria A. (2013) 213 Cal.App.4th 476 (2d Dist., Div. 1) [Los Angeles]
Where no evidence was presented about when mother & child entered California, the juvenile court lacked subject matter jurisdiction to make custody orders pursuant to the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) & the court reversed the court's orders & remanded the case. Mother fled to the U.S. with the child who was born in Mexico to avoid prosecution for the murder of the child's father in Mexico. When arrested, mother left the child with her boyfriend in Pacoima. Mother was deported & eventually convicted of the murder. The child's paternal grandfather arrived to take custody of the child &, when the boyfriend refused to release the child, the agency became involved, placed Gloria in a foster home, filed a dependency petition, & eventually placed Gloria with a maternal cousin living in California. In the meantime, paternal grandfather filed a petition in family court in Mexico for custody of Gloria & the family court in Mexico awarded the grandfather temporary guardianship. In addition, the Mexican court send a rogatory letter demanding repatriation of

Gloria to Mexico stating California courts did not have jurisdiction over Gloria per the Inter-American Convention on Letters Rogatory to which the U.S. is a signatory. Preliminarily, the court denied the agency's motion to dismiss because grandfather did not have standing finding the challenge to subject matter jurisdiction in a fundamental sense means an entire absence of power to hear or determine the case. Finding no evidence of when mother entered California, the Court of Appeal found California does not qualify as a "home state" as described in the UCCJEA. As a result, the court reversed & remanded with directions to find an alternative basis for the court's jurisdiction &, if none is identified, to proceed in accordance with the provisions of the Act. [L. Vogel for respondent mother.]

DISPOSITION

Removal

In re Hailey T. (2012) 212 Cal.App.4th 139 (4th Dist. Div. 1) [San Diego]
The appellate court found the evidence of bruising to an infant's eye, along with disputed expert testimony, was insufficient to support a dispositional order removing the child's 4-year-old sibling from the home. Four-month-old Nathan was removed along with 4-year-old Hailey after he appeared at the hospital with bruising to his right eye & cheekbone & petechiae around his left eye. The parents' only explanation was Hailey caused the bruising while playing with her brother. The doctor believed the child was intentionally struck and/or strangled & Hailey was unlikely to have inflicted the harm. At the jurisdiction hearing, a doctor testified on mother's behalf & concluded the injuries could be accidental & could have been caused by Hailey. The Court of Appeal held jurisdiction was appropriate since the disputed evidence was sufficient for the burden of preponderance of evidence. However, the order removing Hailey was not supported by substantial evidence because no evidence was presented Hailey would be in danger & less drastic measures to removal were available. "Given all the circumstances presented here, the evidence [regarding Hailey] ...does not so clearly satisfy the requisite 'clear and convincing' standard of proof." [C. Peterson (FA) & S. Riopelle (MO)]

Placement Orders

In re A.J. (2013) 214 Cal.App.4th 525 (4th Dist., Div. 1) [San Diego]
Court of Appeal held the trial court could terminate dependency jurisdiction as part of its inherent authority & mother's concerns about the Interstate Compact on Placement of Children (ICPC) was not supported by the record when the child was placed with her father in Hawaii & jurisdiction was terminated. In 2011, then 7-year-old A.J. was detained because of excessive discipline by her step-father including beatings with a belt & mother's failure to protect her. After a 7-month delay in finding father despite his on-going child support payments, father was notified & immediately requested placement. A.J. was the result of a brief encounter between the mother & father & father immediately expressed he had made a grave mistake in not being an active part of his child's life earlier. He lived in Hawaii, was married & had 2 children. He immediately flew to San Diego for a visit & began planning with the agency for an extended visit with A.J. in Hawaii. After the extended visit, A.J. made clear she wanted to

live with her father. Father took immediate steps to parent A.J. including getting therapy, becoming acquainted with A.J.'s medical & emotional needs, locating a doctor & therapist for A.J., & enrolling her in school in Hawaii. The final hearing was procedurally complicated & was a new disposition hearing for father based on his previously granted 388 petition & a combined 6-month review & 387 petition hearing for mother. The court found return to mother would be detrimental, ordered A.J. placed with her father & found termination of jurisdiction was appropriate because there was no protective issue. In addition, the court set a hearing several weeks in the future to ensure everything was in place for A.J. in Hawaii & to allow the parties to work out custody orders. At the final hearing, the court found father was presumed, ordered joint legal custody & confirmed its order ending jurisdiction. Mother argued the court erred by failing to make specific findings per section 361.2 regarding whether continued supervision was unnecessary. Finding neither section 361.2 or 364 applicable, the appellate court found the juvenile court's orders were pursuant to its inherent authority to determine what would best serve & protect the child's interest & to fashion a dispositional order in accordance with this discretion. As for the ICPC issue, the court reiterated the ICPC does not apply in California to out-of-state placements with a parents. Further, mother's concerns were not raised by the record & Hawaii's approval of father's home as suitable for placement signaled that state's willingness to cooperate with the placement. [R. Bishop]

In re Michael E., Jr. (2013) 213 Cal.App.4th 670 (4th Dist., Div. 1) [San Diego]
Appellate court agreed trial court's interpretation of who qualifies as non-related extended family member [NREFM] was too narrow but refused to reverse finding it was not reasonably probably a result more favorable to appellate would have been reached in the absence of the error. Five-year-old child became a dependent because of domestic violence & mother's alcohol abuse. He was originally placed with maternal relatives but when this failed, he was moved to a foster home. Father had no contact with this son for more than 2 years. Father was jailed but wanted his fiancee & mother of his youngest child to be considered for placement as an NREFM. The trial court refused to have father's fiancee evaluated & father appealed. Using a de novo standard of review, the Court of Appeal held a person can be an NREFM even without a relationship with the child if the placement would further the legislative goals to allow the child to remain in familiar surroundings, facilitate family reunification, or provide a culturally-sensitive environment. The court held father's fiancee could be an NREFM despite having never met Michael. However, it found the juvenile court did not err in refusing to evaluate the fiancee for a variety of reasons including she did not request placement, maternal & paternal relatives were requesting placement, & she lived a distance from Michael's foster home which would disrupt his schooling & familiar surroundings. [N. Gold]

REASONABLE REUNIFICATION SERVICES

Fabian L. v. Superior Court (2013) 214 Cal.App.4th 1018 (4th Dist., Div. 3) [Orange]
Where incarcerated father was in substantial compliance with his reunification services by visiting with child monthly, keeping in touch with the social worker & engaging in a course of self-study for parenting, such compliance was "simply not enough to compel reversal of

the court's orders." The length of father's incarceration, along with an absence of available services in fire camp, meant the trial court properly found the agency provided reasonable reunification services & there was no substantial probability of return after another 6 months of services. The child was under 3 when detained & both parents were given reunification services. At the 6-month review hearing, reunification was ended & a section 366.26 hearing was set. Father filed a writ of mandate challenging the end of reunification. The court commended father on his efforts but found his incarceration prevented father from addressing the problems which lead to the dependency (domestic violence & drug abuse) & father would be unable to even start to address these problems until after his release from jail & the child had been a dependent for 18 months. As dicta, the court agreed with & embraced Seiser's book asserting trial courts should consider more often finding that reunification services for incarcerated parents is detrimental as provided by section 361.5, subd. (e)(1). [M. Jarvis]

J.A. v. Superior Court (2013) 214 Cal.App.4th 279 (3d Dist.) [Butte]
Appellate court granted father's writ petition challenging the denial of reunification services based on section 361.5, subd. (b)(10), finding the plain language of the statute limits its application & vacated the order denying reunification services & setting a section 366.26 hearing. In 2009, the then 16-month-old child was removed from her mother following mother's arrest for alcohol abuse & failing to supervise the child. During the prior dependency, father had a psychological assessment & was found to be severely emotionally disturbed, with an antisocial personality disorder, impulsive disorder & severe learning disability & these rendered him unable to make sufficient progress to be able to safely parent. The child was eventually returned to mother & father visited regularly. In May 2012, the child was detained when mother relapsed. Mother was denied reunification services based on section 361.5, subd. (b)(13), & father was denied services per subdivision (b)(10). The juvenile court relied on recent precedent found in *In re Gabriel K*. (2012) 203 Cal.App.4th 188. The Court of Appeal refused to follow *Gabriel K*. & instead found authority from *In re B.L*. (2012) 204 Cal.App.4th 1111, more persuasive. Based on the plain language of the statute, subd. (b)(10) applies only when a parent fails to reunify with a sibling or half-sibling & not the same child in 2 successive cases. The appellate court held it may not "rewrite the clear language of an unambiguous statute to broaden its application."

In re K.C. (2012) 212 Cal.App.4th 323 (6th Dist.) [Santa Cruz County]
Where father submitted to a psychological evaluation which indicated he needed a medication assessment, the agency failed to provide reasonable services when its only assistance was to direct him to a public mental health facility which declined to provide the assessment. The children were removed based severe on injuries inflicted in mother's home which could not be attributed to father. Father underwent a psychological evaluation; the evaluation recommended an assessment for psychotropic medication; the agency's only attempt to secure the medication assessment was to send father to a public mental health clinic; father visited the clinic 3 times & the clinic found father did not meets its criteria for treatment & declined to do the assessment. The agency made no other attempt to secure the assessment elsewhere. Under these facts, the appellate court found the agency had not provided reasonable

services, reversed the order terminating services, & remanded with directions to provide father with additional reunification services.

PRELIMINARY/CONTINUING CONSIDERATIONS

Paternity

J.R. v. D.P. (2012) 212 Cal.App.4th 374 (2d Dist., Div. 8) [Los Angeles]
Where trial court found biological father qualified as *Kelsey S.* father, the appellate court found no error in finding biological father was presumed father to the exclusion of competing father. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816.) Relying on the trial court's order setting aside mother's boyfriend's voluntary declaration of paternity, the court weighed competing presumption under Family Code section 7612 & found no error in juvenile court's identification of the presumption "which on the facts is founded on the weightier considerations of policy & logic." Mother & biological father completed DNA test before birth but mother never told her live-in boyfriend about the results & attempted to exclude the biological father from her life. Biological dad took mother for prenatal care prior to the birth &, after he learned of the child's birth, he took prompt legal action to seek custody [within 4 months of child's birth even though mother failed to notify him]. Trial court found bio-dad was the presumed father & ordered joint legal custody & visitation for father & appellate court affirmed.

Adoption of A.S. (2012) 212 Cal.App.4th 188 (1st Dist., Div. 2) [San Mateo]
Unwed, minor father was unable to show he qualified as a presumed father, he was a *Kelsey S.* father, or that retaining his parental rights were in the child's best interest in order to prevent adoption of his newborn child. Minor mother becomes pregnant following their 1st sexual encounter & all the parties agree mother will raise the child & father will help. Both parents are in high school & living with their parents. Accounts of what was said between the parties do not match &, thanks to Facebook, we have evidence of the parents' changing moods. At some point, mother "un-friended" father but later announced on Facebook that she planned to have the child adopted. Father did nothing during the pregnancy & did not respond to paperwork from the adoption agency. After the child's birth, mother signed away her parental rights & the child left New York for California with her new adoptive foster mothers. Father obtained a New York Order of Filiation adjudging him to be the father. The Court of Appeal rejected his claim the Order of Filiation is equivalent to voluntary declaration of paternity in California which bestows presumed father status. Good discussion re: difference between judgment of paternity & voluntary declaration of paternity in California (see p. 203) & requirements of *Kelsey S.* claim (see p. 208). Court also discusses child's best interest when a natural father attempts to block an adoption. Father strikes out on all three grounds & the order terminating parental rights is affirmed. [V. Lankford (FA); S. Gorman (MO).]

ICWA

In re A.M. (2013) 215 Cal.App.4th 339 (3d Dist.) [Yolo]
Where tribe failed to take any action to present a tribal customary adoption (TCA) to the

juvenile court prior to the section 366.26 hearing, the trial court did not err in choosing adoption by the guardians as the permanent plan & terminating parental rights. Mother & tribe appeal the juvenile court's orders. Child removed from mother in 2008, was enrolled as a member of the Tribe of Burney California &, after 18 months of reunification services, mother failed to reunify. The child's caretakers testified Native American heritage was a great part of their lives because of their professions as academics in Native American studies. In January 2011, the court found guardianship was in the minor's best interest based on evidence that termination of parental rights would result in the child losing his membership in the Tribe. The court wanted the tribe to consider TCA, but the tribe did not pursue this option stating it preferred return of the child to mother or guardianship. At the combined hearing for mother's 2d 388 petition & the final section 366.26, the court found mother's circumstances had changed but it was not in the child's best interest to grant the 388 petition seeking return of the child or renewed reunification services. The court continued to the permanent plan & commented that it had initially ordered guardianship to allow for a TCA which did not occur. The court held the caretakers actions ensured continued tribal contact for the child & accepted testimony from an Indian expert that adoption would not sever the child's connection to the Tribe. Finding guardianship was only appropriate as a transition to TCA, which was not available, the court terminated parental rights & ordered adoption as the permanent plan. The appellate court affirmed. [M. Vogelmann]

387 PETITION

In re T.W. (2013) 214 Cal.App.4th 1154 (4th Dist., Div. 1) [San Diego]
Appellate court affirmed jurisdiction & disposition of section 387 petition but reversed as to the juvenile court's order granting 6 months of reunification services to the parents finding the trial court failed to use a section 361.5, subd. (a), analysis which was error. Mother, father & child all appealed trial court's order – child challenged the grant of additional reunification services. Child detained in 2009 because of excessive discipline by mother, was placed with father, & mother was granted reunification services. In July 2011, child's 15-year-old sibling alleged father sexually molested her when she was 11 years old & the agency filed a section 342 petition. The child was ultimately placed with mother with reunification services to father. Several months later, following reports father was living with mother & their child, the agency filed a section 387 petition. Facts alleged in the petition stated father was homeless & mother allowed father to be in the home, father refused sex abuse treatment, mother refused to participate in therapy, & the parents declined services to prevent the child's removal. The parents challenged the jurisdictional findings on the 387 petition arguing no evidence was presented that father had unsupervised contact with his daughter & challenged the removal from mother asserting there was no evidence of substantial danger to the child. Based on the facts alleged in the petition, the reviewing court held substantial evidence supported the court's jurisdiction findings & removal order. As to the child's appeal for error in ordering 6 more months of reunification, the court held the limit of 12 months provided by section 361.5 did not begin until the child was removed from both parents at the section 387 jurisdiction hearing. Since the trial court ordered reunification on the finding of exceptional circumstances to warrant additional

services based on the child's best interest, the case was remanded for the trial court to use a section 361.5 analysis. [L. Fisher (FA), P. Dikes (MO), P. Saucier (T.W.)]

SECTION 366.26 ISSUES

Termination of Parental Rights

In re T.G. (2013) 215 Cal.App.4th 1 (1st Dist., Div. 5) [Alameda]
The Court of Appeal held the trial court erred in terminating father's parental rights when the juvenile court never made a finding father was unfit & thus violated his due process rights. Following the line of case which began with *In re P.A*. (2007) 155 Cal.App.4th 1197, the reviewing court noted the juvenile court removed the child from mother's custody only, father came forward at the beginning of the case, was found to be a biological father, was eventually deemed a presumed father, & the trial court never found detriment in placing the child with father. The appellate court found father had forfeited his argument but reviewed the issue as an important constitutional question. The appellate court refused to make an implied finding of detriment. The court reversed the order terminating father's parental rights & remanded to determine whether a finding of unfitness can be made by clear & convincing evidence. [M.Thue]

In re Marriage of E. & Stephen P. (2013) 213 Cal.App.4th 983 (2d Dist., Div. 5) [Los Angeles]
Where father's parental rights were terminated because of severe mental illness that would continue for the foreseeable future, father's claims on appeal that an investigation & report by a licensed social worker was required was forfeited & substantial evidence supported trial court's implicit findings that less drastic alternatives to termination of parental rights were not available. Mother & father married & adopted the minor while father was taking medication to control is pre-existing mental illness. After the adoption, father began to refuse to take his medications which lead to deterioration of his mental condition & restraining orders. Ultimately, based on his behavior, mother filed a petition to terminate father's parental rights. She withdrew the petition when father agreed to undergo treatment but he later again refused to take his medication. On appeal, father argued for the first time that an investigation & report by a licensed social worker was required by Family Code §§ 7850 & 7851. The appellate court found the issue was forfeited by father & that he did not receive ineffective assistance of counsel because the record did not establish counsel's conduct fell below prevailing professional norms. Further, the court found these sections did not apply to mother's petition because section 7827 alone specified the trial court must take expert evidence from 2 psychiatrists or psychologists & it may, in its discretion, take testimony from a licensed clinical social worker. In addition, father failed to demonstrate he was prejudiced by the absence of this evidence. As for whether the court considered less drastic alternatives, the trial court's finding that it was extremely likely father would continue to be mentally disabled for the foreseeable future, is a finding that implicitly rejected any alternatives based on father's future recovery. [C. Blake]

MISCELLANEOUS

In re Andrew J. (2013) 213 Cal.App.4th 678 (5th Dist.) [San Bernardino & Kern]
Where Kern County juvenile court accepted transfer of Andrew's case from San Bernardino County & immediately ordered the case transferred back, the appellate court held the Kern County court erred for 2 reasons – one procedural & the other substantive. Andrew is 17 year old child who has been a dependent in San Bernardino since 2005 but had lived in Kern County for more than a year at the time of the transfer-in hearing. Andrew has serious behavioral problems which will make emancipation difficult & caused his prospective adoptive parents to reject adoption. San Bernardino was not able to access services in Kern County for Andrew & this was the reason for the recommended transfer. Procedural posture of the case is unusual & convoluted involving appeals by Andrew & the San Bernardino County Children & Family Services, transfer by California Supreme Court from 4th District Court of Appeal to 5th District, & efforts to make Kern County Department of Human Services an indispensable party to the appeal. The procedural error is the Kern County Juvenile court has no authority to simply send the case back because it disagreed with other court's finding about where the child resided. To allow such an action, would be the "practical equivalent of mutual appellate jurisdiction over each other." Kern County could either set another transfer hearing based on a change of circumstances or additional facts or it could have appealed the transfer out order from San Bernardino County. The substantive error was finding the transfer back to San Bernardino was in Andrew's best interest. Finding no facts to support this order, the appellate court held it was in Andrew's best interest to have his case managed where he lives & not in some other county. [L. Rehm]