APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

August 2018 through February 2019

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JURISDICTION

In re Roger S. (2018) 31 Cal.App.5th 572 [2d Dist., Div. 1] (Los Angeles)

Mother challenged the sufficiency of the evidence supporting jurisdiction contending the child's body odor and wearing dirty clothes to school did not place Roger at substantial risk of serious physical harm or illness. The Court of Appeal agreed and reversed and remanded with directions. Roger is 12 years old and the referral alleged mother was neglecting him because his body and clothes were extremely dirty and he had a foul odor. The school also reported Roger had behavior problems and they were unable to contact mother. The social worker located mother but she declined to allow the social worker in the home or to cooperate with drug testing. Roger was interviewed but claimed he showered most days and he always had clean clothes. Roger had been the subject of numerous referrals starting with testing positive for drugs at birth. Referrals included mother's drug use, domestic violence with a boyfriend, Roger having hygiene issues, and mother failing to pick up Roger from school which left him wandering the streets alone. However, the only allegation in the petition stated mother failed to provide appropriate parental care in that Roger is continuously found dirty with a foul body odor of urine and sweat and mother created a detrimental home environment which placed Roger at risk. The juvenile court detained Roger from mother and released him to his father at the detention hearing. At the jurisdiction hearing, the trial court sustained the petition, declared Roger a dependent, removed him from mother, placed him with father, and terminated jurisdiction with joint legal custody and physical custody to father. The Court of Appeal held that having body odor or wearing clothes that are dirty or too small did not place Roger at substantial risk of physical harm or illness. The allegations did not provide a nexus between Roger's hygiene and any medical or dental conditions. The appellate court reversed jurisdiction as it was not supported by sufficient evidence of substantial risk or harm, reversed the disposition order and custody order, and remanded the case to family court for a hearing on custody and visitation. [M. Chaitin]

In re Israel T. (2018) 30 Cal.App.5th 47 [2d Dist., Div. 4] (Los Angeles)

Where the trial court found the parents did not pose a risk of harm to their children, no evidence was presented of abuse or neglect, and the court released the children to the care of their parents, the trial court failed to make the requisite findings for jurisdiction and its orders and findings were reversed. Father fled from police when they tried to stop him on suspicious of drug activity. The parents were arrested and during a house search the police found baggies with trace amounts of substances thought to be drugs on the floor. The children were then five and three years old. At the jurisdiction hearing, the trial court amended the petition to remove "substantial" before the word "risk" and the word "serious" before "physical harm." In reversing, the appellate court concluded that by striking the language of substantial risk and serious harm, the court made clear it did not believe the parents posed the level of risk that must be found to warrant assertion of jurisdiction. Further, the trial court commented that it did not believe

father and mother posed "any…risk" to the children. Where the record does not disclose the court made the requisite findings it is immaterial whether the evidence might have supported such findings. Based on this record, the Court of Appeal cannot confidently say the trial court made the findings required by statute and reversed the jurisdiction findings. [M. Keiter]

In re G.B. (2018) 28 Cal.App.5th 475 [2d Dist., Div. 3] (Los Angeles)
Where the trial court crafted, asserted, and then adjudicated the allegations against father based on a factual and legal theory not raised in the original dependency petition and opposed by the agency, the trial court violated father's due process rights and its orders and findings are reversed and remanded. The original petition alleged sex abuse against mother's boyfriend and mother's failure to protect. The juvenile court found the agency had not met its burden in proving these allegations after the mother, father and seven-year-old G.B. testified. The trial court found father was not credible and G.B. could not be truth-qualified because she had been so abused by father. The juvenile court's theory was that father coerced G.B. into making false accusations. The family had previously been involved in a family court proceeding and around that time, the family was investigated three times based on allegations by G.B. The child, then about five years old, claimed she was sexually abused by mother, she was physically abused by mother including a black eye, and she was allowed to watch pornographic movies. After each of these claims, G.B. admitted they were not true and she made them up. After the initial jurisdiction hearing, the trial court indicated that if it concluded the allegations against mother and her boyfriend were false, it would amend the petition to have father be the offending parent for causing false allegations and would order sole custody to mother. The juvenile court continued the hearing a few times and at least once to allow father sufficient notice of the new allegations. True to its word, the trial court amended the petition, found one allegation for emotional abuse true against father, declared G.B. a dependent, ordered her placed with mother, and awarded father unmonitored visits with G.B. Father and G.B. appealed. The appellate court held the trial court should have dismissed the petition when it found the agency had failed to meet its burden. Further, the agency is the only party who can file a petition. The trial court is allowed to amend the petition to proof but only if it corrects or makes more specific the allegations but it cannot change the very nature of the charges. Finally, the juvenile court erred in creating new allegations against father because it displaced the agency and eliminated any distinction between the roles of advocate and impartial arbiter. Based on this, the court's jurisdiction findings as to father and its disposition orders were reversed and remanded and all orders after the disposition hearing were vacated. [J. McGowan - father; M. Coffey - child]

In re D.Y. (2018) 26 Cal.App.5th 1044 [2d Dist., Div. 4] (Los Angeles)
The Court of Appeal reversed and remanded the trial court's denial of a continuance and the termination of dependency jurisdiction finding the trial court erred in denying a continuance for a more complete agency report and to allow for the minor and his guardian to be present. The juvenile court placed appellant D.Y. in a guardianship with his maternal grandmother in 2001 when he was an infant. Since then the court had maintained jurisdiction and held hearings every six months. The guardian appeared to prefer continued jurisdiction believing the family benefitted from agency oversight. During the last two hearings, the trial court mentioned possibly terminating jurisdiction. Prior to the hearing appealed from, the agency recommended continued jurisdiction and the agency was working on obtaining orthodontic care for D.Y. and to resolve a schooling issue. At the hearing, the agency agreed its report was incomplete. After a discussion off the record, the trial court announced its plan to terminate jurisdiction. Minor's counsel argued the case should not be closed because the guardian was not present and because the agency report was incomplete. Counsel also requested a contested hearing. The trial court found no basis for jurisdiction and terminated jurisdiction. Minor D.Y. appealed. The appellate court found that contrary to the minor's argument, the trial court had discretion to terminate jurisdiction even if the guardian objected. Instead, the reversal was based on the trial court's error in failing to grant the continuance. Even though continuances are discouraged in dependency cases, the juvenile court did not have a full picture of D.Y.'s best interest when the status report was missing important information. In addition, D.Y. and his guardian did not receive notice of the change in the recommendation. Finally, neither D.Y. or his grandmother were an afforded an opportunity to be heard at the hearing. For these reasons, the case was reversed and remanded. [M. Coffey]

In re D.B. (2018) 26 Cal.App.5th 320 [(4th Dist., Div 1] (San Diego)
Where the allegations of physical abuse are very serious, the removal of the sibling is proper even if the probability of similar abuse to the sibling is low after the parents started services and pledged they would not use corporal punishment on the younger child. The children were removed from the parents for serious physical abuse of six-year-old Jordan and the parents appealed jurisdiction and disposition orders. They argued the court erred in removing 18-month-old D.B. because they had never abused him and would not in the future. The case began after Jordan was limping badly at school with blood seeping through his jeans. An examination revealed numerous linear marks in different stages of healing. The parents confirmed their regular use of corporal punishment and admitted they hit Jordan up to 20 times for eating four doughnuts without permission. By the time of the jurisdiction hearing, the parents had begun services with positive feedback from providers. The parents claimed they had never used physical discipline on D.B. and, after parenting classes, mother said she would never resort to corporal punishment again. Contrary to the parents' arguments, the Court of Appeal found

the trial court properly considered the totality of D.B's circumstances and correctly concluded a risk of harm remained if D.B. was returned to his parents. This was partly because D.B. was about to enter his terrible two's and would raise the risk of the parents resorting to physical discipline. On appeal, the court found the parents did not meet their burden to show there was no evidence of sufficient substantial nature to support the jurisdiction findings. The record showed the parents admitted to routinely using a belt to discipline Jordan, they disciplined Jordan approximately four times a months and struck him between five and 15 times depending on the circumstances, Jordan said he was also disciplined with a clothes hanger, Jordan's wounds were in different stages of healing, and Jordan refused all contact with his parents saying he was afraid. As for disposition, the appellate court found that based on parents' credibility issues and the severity of the abuse of Jordan, the juvenile court reasonably found there would be a substantial danger to D.B.'s physical health if returned home. [M. Conroy - father; S. Davidson - mother]

Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)

W.M. v. V.A. (2018) 30 Cal.App.5th 64 [2d Dist., Div. 8] (Los Angeles)

In a child custody proceeding involving an unwed father, the Court of Appeal determined that a lack of notice to father was the reason the trial court erred in granting mother's motion to quash father's California ex parte request for temporary emergency orders for child custody and visitation. The appellate court reversed the trial court finding that notice of the Belarus action was insufficient under UCCJEA and thus the California court had jurisdiction. Mother is a professional tennis player who was born in Belarus and is a resident of Belarus and Monaco. Father is a U.S. citizen and met mother in Hawaii. The parents had a baby born in California in December 2016. In March 2017, the family traveled to Belarus where they stayed until June 7, 2017 when they left for Mallorca for a tennis tournament and then to London for Wimbledon. In May 2017, mother filed an application in Belarus court to determine the baby's place of residence. The court issued a letter to father at mother's Minsk apartment notifying him of a hearing for June 7, 2017 – the day the family left for Mallorca. The parents were not at the hearing but the Belarus court determined the baby's place of residence is at mother's address in Minsk. The parents ended their relationship after a terrible disagreement in London in July 2017. On July 20, 2017, father filed an ex parte petition in Los Angeles seeking temporary emergency orders on child custody and visitation. Mother was at her home in Manhattan Beach with the baby in July 2017. Mother responded that the California court did not have jurisdiction because neither party lived in California and all issues should be decided in Belarus. Several hearings were held in both California and Belarus until January 2018 when the California court granted mother's motion to quash finding the Belarus court had jurisdiction substantially in conformity with the UCCJEA. The Court of Appeal reversed and remanded finding the trial court erred because the UCCJEA takes a strict first-in-time approach to jurisdiction. Despite the fact mother's filed the first child custody action, the appellate court found that since

father was not properly notified in conformity with the UCCJEA, that the California action was first in time. Belarus did not have jurisdiction to make a child custody determination because it did not give father proper notice and an opportunity to be heard. The court found the letter sent to father at mother's Minsk apartment when the family was not in residence was not sufficient for notice and was not reasonably calculated to give actual notice.

R.B. v. D.R. (2018) 28 Cal.App.5th 108 [4th Dist., Div. 2] (Riverside)
The Court of Appeal relied on the differences between the prior law and the current UCCJEA to determine the trial court was correct in finding India could be the more appropriate forum for a child custody dispute. Both parents are citizens of India. In 2013, their daughter was born in California. In December 2016, father allegedly slapped the child and hit the mother. In February 2017, mother discovered father was involved with another woman and she immediately left with the child to India. The same month, in India, mother obtained a restraining order against father and an order granting her sole custody. Less than two weeks later, father obtained an ex parte order in California giving him sole custody. Mother filed a responsive declaration asking that the case be heard in India and requested to quash service of summons. At the evidentiary hearing in California, the trial court found California had home state jurisdiction under the UCCJEA but that California was an inconvenient forum and stayed father's petition. Father appealed and contended the court could not apply the inconvenient forum doctrine unless India already had concurrent jurisdiction but California had exclusive jurisdiction so India had no jurisdiction at all. Finding this argument was based on outdated law from the UCCJA [predecessor statute], the Court of Appeal affirmed the trial court's finding. The court explained that UCCJEA ensures only one state has jurisdiction to make child custody determinations. If California is the home state it has exclusive jurisdiction but if the California court finds California is an inconvenient forum, the other state gains exclusive jurisdiction. If India declines to take jurisdiction, then California can resume its proceeding. In the published sections of the opinion, the appellate court concluded the trial court could properly find India was a more appropriate forum even if it did not have concurrent jurisdiction under UCCJEA.

In re E.R. (2018) 28 Cal.App.5th 74 [2d Dist., Div. 6] (Ventura)
Where the home state declined jurisdiction and California courts have extensive knowledge of the family from an earlier dependency case, California properly took jurisdiction. Twin children were born in Nevada and tested positive for methamphetamine. The Nevada court took jurisdiction over the children but, after Nevada and California courts conferred, Nevada declined to exercise further jurisdiction. California then filed a dependency petition based on the parents' drug use, extensive criminal history, and continued domestic violence. The case proceeded in California and parental rights were eventually terminated. The parents appealed and argued the

California court lacked subject matter jurisdiction because the home state for the children was Nevada. The appellate court agreed that Nevada was initially the home state but Nevada declined to exercise jurisdiction and, even though Nevada did not make specific findings that California was the more convenient forum, the decision to decline jurisdiction authorized California to take jurisdiction. As for why California is the better forum, the agency argued and the appellate court agreed, the California court recently heard a dependency case involving the children's half-siblings, California was familiar with the family, mother said she lived in Oxnard and went to Nevada only to give the newborn to her cousin, and the extended family lived in California. As for whether the juvenile court prevented the parents from presenting evidence on the more convenient forum, the parents objected to California exercising jurisdiction at the initial hearing in California but they did not appeal. Further, they did not challenge jurisdiction during the next 10 hearings thus forfeiting their claim. (See also under the ICWA.) [K. Lee – mother; M. Keiter – father]

DISPOSITION

In re Bruno M. (2018) 28 Cal.App.5th 990 [2d Dist., Div. 3] (Los Angeles)

Where the children witnessed domestic violence between the parents but had not yet been involved, the trial court properly issued a restraining order which protected the children. At the disposition hearing, the trial court declared now seven-year-old Bruno and three-year-old Allison dependents, removed them from father, ordered reunification services, placed the children with mother, and issued a three-year permanent restraining order against father. Father appealed the restraining order specifically contending it was unnecessary for the order to include the children since he was never aggressive with them and they were never in the "line of fire" during his assaults on mother. The appellate court disagreed with father's assertion that although the children were present during the domestic violence they were never involved in the melee. The record showed that during one incident, father pushed mother to the ground while she was removing Allison from her car seat and Allison could easily have been hurt. The Court further observed a restraining order can be issued if the restrained person disturbed the peace of the protected child. Here, the facts supported the conclusion father disturbed the children's peace. Bruno had witnessed his father assault his mother as much as three times a month starting when Bruno was two years old. Bruno reported the attacks scared him, he yelled at father to stop, and at one point, Bruno believed his unconscious mother was dead after father choked her. Finally, the appellate court determined the restraining order is necessary to protect the children from both mother's tendency to return to father despite earlier protective orders and father's threat to abscond with the children – a threat the juvenile court found credible. [C. Booth - father; P. Saucier - children]

S.V. v. Superior Court (2018) 28 Cal.App.5th 671 [4th Dist., Div. 2] (San Bernardino)
Bypass of reunification services under subdivision (b)(3) can apply even if the abuse was inflicted on a sibling or half-sibling and not on the specific dependent child.
Mother filed a petition for extraordinary writ challenging the trial court's denial of reunification services under section 361.5, subd. (b)(3), because the child was not abused in th earlier dependency or in the instant case. In a prior appeal, the child M.C., was removed because of serious physical abuse of a half-sibling including a second degree burn, a fractured skull and a broken leg. Mother was granted reunification services and the family was reunited. Three months later, a new petition was filed alleging serious physical abuse of two of M.C.'s half-siblings including pulling on their ears, dropping them, grabbing a child by the shirt and throwing him to the floor, slapping a child in the face, and hitting her hand with a hanger causing her to bleed. The trial court found section 361.5, subd. (b)(3), applied and denied mother reunification services. The court also found reunification services were not in the child's best interest after concluding that section 361.5, subd. (b)(6), applied as well. On appeal, mother argued that subd. (b)(3), only applies when the minor, who was previously removed and subsequently returned, was the direct victim of physical or sexual abuse by the parent. The abuse in the second removal must have been perpetuated on the child and not their siblings. The Court of Appeal disagreed relying on the plain language of the statute to conclude the statute does not specify the additional abuse must have been inflicted on the child who is being removed. The legislature could have, but did not, include the phrase "to that child." The legislature chose not to include limiting language which is in keeping with the statute's goal to protect children against recidivist abusive parents even if the abuse is directed at a sibling or half-sibling. Here, the trial court found reunification was not in the child's best interest and the Court of Appeal agreed. The mother was provided reunification services in the first dependency and within mere months the court sustained the instant petition alleging physical abuse again. The opinion found mother clearly did not benefit from services and it would be fruitless to provide her with more.

PRELIMINARY/CONTINUING CONSIDERATIONS

Indian Child Welfare Act (ICWA)

In re L.D. (Jan. 24, 2019, H045544) ___ Cal.App.5th ___ [2019 WL 910996] (6th Dist.) [Santa Clara]
Finding the appeal from the ICWA orders was untimely and did not involve a hearing which could lead to foster care or termination of parental rights, the Court of Appeal dismissed the appeal as moot. The juvenile court found true the allegations that mother sexually abused L.D., mother failed to protect L.D. from sexual abuse by her boyfriend, she physically assaulted the maternal grandfather, and her boyfriend brandished a gun and threatened the grandfather with it. Mother waived her reunification services and the case was set for a section 366.26 hearing. The trial court also issued a three-year restraining order which protected L.D. and prohibited mother from having a

gun. Finding mother owned or had access to a gun the juvenile court set a gun-surrender hearing. At the hearing, the court found mother failed to show she had surrendered the gun in violation of the restraining order. Mother appealed from the gun-surrender hearing but her only claim was violation of the ICWA. In declining to find *In re Isaiah W*. (2016) 1 Cal.5th 1 applied, the appellate court found the hearing appealed from did not implicate an order that could culminate in an order for foster care placement or termination of parental rights. The court held mother's appeal of the ICWA was untimely because the ICWA findings were made at the disposition hearing which was not appealed. [J. Moran]

In re J.Y. (2018) 30 Cal.App.5th 712 [3d Dist.] (Shasta)
Where mother objected to a change in placement prior to the section 366.26 hearing and where the trial court gave full faith and credit to an amended tribal customary adoption (TCA) order, the Court of Appeal held mother had no standing to challenge the change in placement and the trial court had authority to give full faith and credit to an amended TCA at any time prior to the court's issuance of a final decree. Three children, aged five and two years old and a newborn, were removed from mother because of mother's mental illness, substance abuse, and domestic violence. Mother was granted 12 months of reunification services but was unable to reunify. Father was a member of Pit River Tribe and the children were recognized Indian children. Originally, the youngest was placed in a separate foster placement. The agency and the Tribe wanted the children placed together and the court granted the proposal to place the children in the same home. Mother appealed this order. Shortly after the change in placement, the trial court gave the Tribe's initial TCA full faith and credit including a visitation order with a minimum of one visit per month. A few months after the home study was approved, the Tribe filed a 388 motion requesting the juvenile court withdraw the full faith and credit of the initial TCA and give full faith and credit to an *amended* TCA which changed the visitation order. At the section 366.26 hearing, mother was absent. Mother objected to the TCA but not the amended version specifically. The court granted the Tribe's 388 petition, ordered mother's parental rights modified in accordance with the amended TCA, and set a permanent plan review hearing. Mother appealed again. The appeals were consolidated. The appellate court held that in general a parent does not have standing to raise placement issues after reunification services have been terminated. Since the placement change did not alter the selected permanent plan of a TCA, mother did not have standing to appeal the placement order. As for the TCA, until it is final, the Tribe and the court have the authority to modify the TCA in the child's best interest. The Court of Appeal affirmed.

In re E.R. (2018) 28 Cal.App.5th 74 [2d Dist., Div. 6] (Ventura)
When the agency did not interview extended family members about possible Indian heritage, and the agency conceded its error, the trial court erred in finding the ICWA did not apply. The twin children were born testing positive for methamphetamine

and were removed because of the parents' drug use, extensive criminal histories, and past domestic violence. The parents were denied reunification services and parental rights were eventually terminated. Father claimed membership in a federally-recognized Indian tribe through his paternal great-grandmother and he provided contact information for grandmother. The agency did not interview the grandmother and conceded it had not substantially complied with the ICWA notice requirements. The Court of Appeal conditionally reversed and remanded with instructions for the juvenile court to interview the grandmother about possible Indian heritage and determine whether the ICWA applies. [K. Lee – mother; M. Keiter – father] (See also under Jurisdiction)

In re A.S. (2018) 28 Cal.App.5th 131 [4th Dist., Div. 1] (San Diego)
The parents argued they were denied their due process rights because they were not able to present evidence to the tribe prior to the trial court's award of full faith and credit to the tribal custody adoption (TCA) order but the Court of Appeal disagreed and affirmed because the parents did not offer any evidence of detriment in ordering the TCA at the section 366.26 hearing. The parents had three children removed in a series of dependency cases based on serious domestic violence. The children were identified as Indian children and the Mesa Grande Band of Mission Indians intervened. The parents were granted six months of reunification services but were unable to reunify. Prior to the section 366.26 hearing, the agency recommended TCA for the children in placement with the caregivers approved by the Tribe & the Tribe agreed. Prior to the section 366.26 hearing, minor's counsel filed a motion in limine seeking to narrow the issues at the hearing. The attorneys for both parents concurred with the analysis of the relevant issues. The scope of the hearing was limited to adoptability and whether the TCA would be detrimental to the minors. Mother testified that she had not been given an opportunity to provide information to the Tribe regarding her progress in services and she opposed the TCA. Father argued the TCA was detrimental because it would impede the parents' visitation which would be left to the discretion of the caregiver. Father also testified he had not had any contact with the Tribe about the TCA. The Tribe testified they had many contacts with the parents during the case. The opinion found due process required that the parents be given an opportunity before the adoption of the TCA order to present evidence to the tribe. However, even if the parents had not been given a specific opportunity to communicate with the tribe about the TCA before, the parents were allowed to testify. More importantly, the parents proffered no evidence of adverse consequences to the children from this form of adoption, such as a bonding study, and provided no argument as to how the benefit from their relationship would outweigh the benefits of the TCA. [P. Swiller - father; E. Alexander - mother]

In re N.G. (2018) 27 Cal.App.5th 474 [4th Dist., Div. 2] (Riverside)
Where the agency failed to interview available paternal relatives or ask mother about possible Indian heritage, the Court of Appeal held the agency and the court failed to comply with the requirements of the ICWA and conditionally reversed the termination of parental rights for mother. Father claimed Indian heritage in either the Blackfeet or Navajo tribes and the agency spoke to the paternal grandfather who believed his father was in a tribe "out of Michigan." Later in the case, father told the agency he believed his paternal cousins were registered members of the Cherokee tribe. From the record, after this disclosure no other paternal relatives were asked about possible heritage and paternal grandfather's information was incomplete in the notices already sent to the Blackfeet and Navajo tribes because his current address was missing. Father died in a motorcycle accident the next year. The opinion held the agency failed to comply with the ICWA and related California law because it did not interview extended family members or ever send notice to the Cherokee tribes. On remand, the juvenile court must ensure the agency investigates paternal lineal ancestry, gives new ICWA notices including all previously known and newly discovered identifying information, and it must take reasonable steps to ascertain whether the child has maternal Indian ancestry. The Court of Appeal rejected the agency's argument it was not required to provide evidence in the record of its investigation finding that where there is a deficient record, such as here, the appellate court cannot conclude substantial evidence supports the finding that adequate ICWA notices were given or that the ICWA did not apply. The appellate court also rejected the agency's claim that mother's challenge was untimely finding the ICWA contains a continuing and affirmative duty of inquiry for the agency and the trial court. [R. Knight]

In re K.L. (2018) 27 Cal.App.5th 332 [3d Dist.] (Siskiyou)
Placement with a noncustodial, nonbiological presumed parent does not trigger the protections of the ICWA and the Court of Appeal affirmed the trial court's orders. K.L. was removed from mother for drug abuse and was placed with his half-sibling in the home of the half- sibling's father. Believing he was likely K.L.'s biological father, the sibling's father took K.L. into his home where he lived for several months and the trial court eventually held this father to be K.L.'s presumed father. DNA tests later showed appellant A.A. to be the child's biological father. A.A. is a enrolled member of the Karuk Indian tribe but has no relationship with K.L. The Tribe intervened. Father and the Tribe argued that placement with a nonbiological father was akin to guardianship and triggered the heightened requirements of the ICWA including the need for the testimony of an Indian expert. The Court of Appeal found that the lack of a biological connection did not change the status of a presumed father to be anything other than a parent. Since the case moved K.L. from one parent to another, the ICWA did not apply. [M. Thue]

In re E.H. (2018) 26 Cal.App.5th 1058 [4th Dist., Div. 1] (San Diego)
Where the agency failed to provide identifying information of the child's great, great grandfather and the likely source of Indian heritage, the Court of Appeal found the agency failed in its duty to inquire of relatives about lineal ancestors and could not say the failure to thoroughly investigate the child's Indian heritage constituted harmless error. Mother claimed Indian heritage with the Tohono O'Odham Nation and the maternal grandmother was interviewed about her ancestors. In the ICWA notice sent to the tribe, an ancestor named Bruno Y. was identified as the great, great, great grandfather. It is likely, however, that Bruno is the great, great grandfather. Further, the grandmother's father [or great, great grandfather] was not identified at all. The appellate court agreed with mother's argument that since Bruno Y. was the ancestral link, his designation as some other person torpedoed the tribe's review. The Court of Appeal disputed the agency's claim that it was only required to list ancestors back to great, great grandparents finding the list of information in 25 Code Federal Regulations is not intended to be exclusive and, where a great, great grandparent is known, they are also a direct lineal ancestor and must be named correctly in the notice. The agency is required to provide notice of direct lineal ancestors if such notice is potentially relevant to determine whether a child is an Indian child under the ICWA. [D. Temko]

In re Collin E. (2018) 25 Cal.App.5th 647 [4th Dist., Div. 1] (San Diego)
Where parents' history of opioid addiction and on-going denial of drug abuse presented a substantial risk of relapse, three-year-old Collin's special needs required his parents to be sober, and the Indian expert concluded continued custody by the parents represented a risk of serious emotional or physical damage, substantial evidence supported the trial court's ICWA detriment finding. The case began when mother left Collin unattended in a car while she was under the influence of prescription narcotic medication. The parents had previously finished drug treatment but continued to struggle with sobriety for the entire 23 months of reunification services. In addition, Collin presented with a list of difficult behaviors including biting, scratching, and tantrums and appeared to be delayed in walking and speech. The Cherokee Nation declared Collin an Indian child and intervened. The trial court terminated parental rights and the parents appealed challenging the Indian expert's conclusions that Collin was not safe returning to his parents. The parents argued the Cherokee Nation disagreed with the Indian expert and Collin's younger sibling remained in the parents' care. Father also asserted the juvenile court was required to consider whether continuation of legal custody and not just physical custody would likely cause emotional or physical damage to Collin. The appellate court concluded there was no distinction between physical and legal custody in the context of the ICWA determination and affirmed. (See also under c-1-B-i.) [J. Tavano - mother; L. Fisher -- father]

Federal

Brackeen v. Zinke (N.D.Tex. 2018) 338 F.Supp.3d 514

In summary judgment challenge to the constitutionality of sections of the ICWA, the district court granted all but one claim. In 1979, the BIA promulgated the Guidelines for State Courts. The BIA intended the guidelines to assist in the implementation of the ICWA but were not intended to have binding legislative effect. The phrase "good cause" was designed to provide state courts with flexibility in determining placement. Thirty-seven years later in 2016, the BIA promulgated the Final Rule to ensure uniformity in implementation of this particular phrase and these challenges are entirely about the Final Rule. Plaintiff are foster and adoptive parents and the states of Texas, Louisiana, and Indiana who brought a motion for summary judgment challenging the mandatory preference for placement, the authority to the Indian tribes to reorder adoption placement preferences, and the requirement that state courts apply federal standards to state-created claims. Challenges to the ICWA included Fifth Amendment equal protection claim (granted), Article 1 non-delegation claim (granted), Tenth Amendment anti-commandeering claim (granted), Administrative Procedure Act claim (granted), and the Indian Commerce Clause claim (granted). The district court granted all but one of the claims. The only claim denied was a Fifth Amendment Due Process claim brought by the individual plaintiffs asserting the ICWA's racial preferences disrupt intimate familiar relationships based on the arbitrary fact of tribal membership. The plaintiff's motion for summary judgment was denied because the fundamental rights to custody and to keep the family together recognized by the Supreme Court have never applied to foster families, prospective adoptive parents, or adoptive parents whose adoption is open to collateral attack such as adoptions involving Indian children.

Welfare & Institutions Code

Amendments to §§ 361, 361.2 and 361.31

These sections have been amended effective January 1, 2019 to include “guardians or Indian custodian” to most places were parents are mentions. In addition, § 361.31 appears to add the good cause language created in the Final Rule promulgated by the BIA in 2016. (See *Brackeen v. Zinke* (N.D.Tex. 2018) 338 F.Supp.3d 514.)

Parentage

C.A. v. C.P. (2018) 29 Cal.App.5th 27 [3d Dist.] (Placer)

Where biological father was emotionally and financially involved in his child’s life for her first three years, the trial court properly found he was a presumed father along with mother’s husband and, under FC section 7612, subd. (c), this is the “rare” case when it is appropriate for the child to have three parents because removing her biological father would be detrimental. Mother and husband remain in an intact marriage but the child was conceived with mother’s co-worker. For the first

three years of the child's life the married couple (defendants) allowed the coworker (plaintiff) to act in an alternate parenting role. Defendants do not dispute the plaintiff is the biological father and a DNA test later confirmed. Plaintiff had regular overnight visits with the child every other weekend, all three parents participated in autism screening and therapy when the child was 18 months old, plaintiff provided child support payments, and openly held out the child as his own. When plaintiff filed the instant petition seeking legal confirmation of his paternal rights, the defendants excluded plaintiff from the child's life. The opinion quickly reviewed the history and purpose of paternity law starting centuries ago with the adage that spouses could not claim a child born *during* a marriage was not *of* the marriage. With the advent of technology and the ability to identify a biological father, the law has changed but has expressed a consistent desire to preserve stability for the innocent children who have no control over what their parents chose to do with their lives. The appellate court rejected defendants' claim that the husband's unrebuttable claim of presumed father through marriage extinguished the biological father's rebuttable claim of presumed father by taking the child into his home and openly holding out the child as his natural child. Defendants did not challenge the sufficiency of the evidence proving plaintiff satisfied the requirements for presumed father. The Court of Appeal also rejected the claim that the statute allowing for three parents was not meant to be applied where a stable marriage exists. Instead, the legislative history of section 7612, subd. (c), shows it applies only in a very narrow situation when necessary to prevent detriment to the child. Here, the facts showed the child had a strong bond with plaintiff that was not broken even during the separation caused by the defendants. Defendants allowed plaintiff, and his family, to establish a bond with the child, and it would be detrimental to the child and her progress to not allow both men to participate in legal custody decisions such as health and education. The child would benefit greatly from the continued love, devotion and day-to-day involvement of three parents. The appellate court concluded the judgment does not attack the institution of marriage and does not interfere with the defendants' ability to exercise their parental rights.

12-MONTH REVIEW HEARING

In re M.F. (Jan. 11, 2019, D074260) ___ Cal.App.5th ___ [2019 WL 442033] (4th Dist., Div. 1) [San Diego]

Where the agency failed to provide reasonable services to a parent, the Court of Appeal found the trial court has authority to extend services to the 24-month date and is not required to make a determination under the statute governing continuances. (§ 352.) M.F. appealed from the 12-month review hearing extending services for six months which was a continuation of services to almost 24 months after M.F. was detained. The juvenile court determined the agency had not provided father with reasonable services based in part on the court's questioning of the social worker's credibility and the agency's report which was misleading and omitted information about father's case plan. M.F. appealed the order for continued reunification and argued the

juvenile court abused its discretion because the agency provided or offered many services to father for almost 18 months and no evidence showed that an unwarranted, extended reunification period would resolve the persistent risk factors and allow M.F. to safely return to his father's custody. Also, the court committed reversible error when it extended the reunification period well beyond the time limit applied to a child under three years old, which is usually six months. The appellate court found substantial evidence supported the trial court's finding that reasonable services were not provided to father because father completed his case plan except for therapy and the only protective issue remaining was his ability to protect M.F. from mother who was actively using drugs and his lack of understanding of domestic violence which was supposed to be addressed in individual therapy. The agency provided father a list of therapist but the appellate court found this was merely a starting point since therapeutic services for father were inaccessible and the error was compounded by the social worker's delayed response. The trial court ordered the agency to revise its case plan at the six-month review hearing in September 2017 to include therapy. In November 2017, father's attorney sent two emails to the social worker about father's difficulty in finding a therapist. The social worker did not speak to father about therapy until months later in March 2018 and did not provide any further assistance to father in obtaining therapy. In addition, the social worker unreasonably cancelled a planned 60-day visit because father's electricity was shut off. Instead of offering assistance to resolve the problem, the agency simply cancelled the visit. The trial court found the lack of electric was not a protective risk to M.F. at that time of year in San Diego. As for whether the trial court has authority to extend reunifications services to the 24-month date, the Court of Appeal found that where reasonable services have not been provided to a parent of a child under three years of age the statutory scheme governing reunification services specifically authorizes the juvenile court to extend services beyond 18 months without considering section 352. The opinion reviewed the split of authority in case law and the tension inherit in the statutory scheme and found that a section 366.26 hearing cannot be set if a parent has not been offered reasonable services and this will itself justify granting an extension of services. [N. Gold - child; M. Conroy - mother; M. Pena - father]

SECTION 364

In re N.O. (2019) 243 Cal.Rptr.3d 206 (4th Dist., Div. 1) [San Diego]

Where the agency was unable to locate mother or child and could not raise a response from DIF, the Court of Appeal held the trial court properly terminated jurisdiction over minor under section 364 because the minor failed to establish by a preponderance of evidence that the conditions still existed which would justify initial assumption of jurisdiction. The case began when mother was arrested at the international border attempting to smuggle marijuana from Mexico into the U.S. and N.O. was in the car. The juvenile court took jurisdiction after Mexico declined under the UCCJEA. While working with DIF, over the course of 18 months, mother completed her

case plan and the juvenile court ordered N.O. returned to mother with family maintenance. When the case was about to close, the maternal grandmother reported father had hit mother and gave her a black eye. The agency thought mother should receive domestic violence treatment. The agency repeatedly requested that DIF check on mother and child and provide domestic violence services. N.O. was placed with mother in December 2016 on a 60-day visit. The report of the domestic violence was made in March 2017 but the event had occurred in late December 2016. Subsequently, mother left father and they were no longer living together. Mother was often living with maternal grandmother who helped mother and provided financial support. Mother last appeared by phone at the 18-month review hearing on May 30, 2017. After this, the agency made many attempts to contact mother, maternal grandmother, or DIF. DIF last assessed child and mother during a visit on September 28, 2017 but it was unclear if DIF offered domestic violence services to mother. At the section 364 hearing held May 23, 2018, minor's counsel objected to the agency's recommendation to terminate jurisdiction and requested another continuance in order to locate N.O. and assess her safety. The social worker testified he did not know the child's circumstances or whereabouts, he did not believe the child was at risk, and, when last assessed, N.O. appeared very bonded to mother and was healthy. The agency had searched for the child in the U.S. about a year earlier without success. Minor's attorney acknowledged that another continuance might not lead to any further information. The trial court terminated jurisdiction May 23, 2018 and the minor appealed. The Court of Appeal found minor carried the burden to show continued jurisdiction was necessary since the agency recommended terminating jurisdiction. Section 364 establishes a statutory presumption in favor of returning children to their parents and terminating jurisdiction. Since the minor bore the burden of proof under section 364 because she was the party seeking to establish the existence of conditions justifying continued jurisdiction, the standard of review is whether the evidence compels a finding in favor of appellant as a matter of law. After a detailed review of the facts, the appellate court disagreed with minor's arguments that the juvenile court ordered mother to "complete" domestic violence services or that mother failed to make N.O. available to DIF to conduct welfare checks. The appellate court concluded that under the unique facts of the instant case, any error by the court in not allowing minor's counsel to assess the minor's well being in May 2018, despite multiple continuances of the review hearing, was harmless. The child was not available for assessment and because all the reports regarding N.O. showed she was thriving in the care of her mother. The trial court's orders were affirmed. DISSENT: Justice Dato filed a dissent. He contended that since mother had been living with and relied on maternal grandmother in Mexico and, since grandmother had moved to the U.S., the agency should have been required to search for grandmother, mother, and child in the U.S. before the court terminated jurisdiction. [P. Saucier – child; K. Clark - mother; M. Conroy - father]

SECTION 366.26

Adoptability

In re J.W. (2018) 26 Cal.App.5th 263 [2d Dist., Div. 6] (Ventura)

The trial court held school-aged J.W. is adoptable because he was bonded to his fost-adopt parents who have cared for him for 10 months and were committed to providing J.W. with a stable home. In addition, the juvenile court found the beneficial-relationship exception did not apply. The adoptability analysis is odd. The trial court found J.W. specifically adoptable and the Court of Appeal affirmed. However, the opinion focuses on facts which support a finding of generally adoptable. J.W. is in school but, at the start of the case in 2013, he was found to suffer from attention deficit disorder, anxiety, or reactive attachment disorder. The Court of Appeal rejected the notion that a child suffering from reactive attachment disorder is unadoptable. The opinion provides the difference between generally adoptable, where the focus is on the child's attributes, and specifically adoptable, where the focus is on the specific caregiver who is willing to adopt. The opinion affirms the finding of specifically adoptable but then focuses on J.W.'s many positive attributes which would support a finding of generally adoptable. In the 10 months J.W. had been in his adoptive home he had settled down, adjusted to home and school life, received a Student of the Month award, had no developmental problems, had made significant progress in stabilizing his emotions, was healthy, and was academically on grade level. As for the c-1-B-i exception, the appellate court found it was not a close case and the permanency and stability of an adoptive placement far outweighed a continued parent-child relationship. Little analysis is provided about this except that mother's visits were found detrimental at some point, a restraining order was issued, and mother sabotaged the last joint placement of the brothers by staging public protests near the foster home.

Beneficial-Relationship Exception

In re E.T. (2018) 31 Cal.App.5th 68 [1st Dist., Div. 3] (Alameda)

Mother argued the trial court erred in failing to apply the beneficial-relationship exception to adoption and terminating parental right when mother had overcome her addiction and was dedicated to the child's best interest and the Court of Appeal agreed. Mother's efforts and sobriety and her commitment to her children along with her bond with her twin children showed the relationship with mother outweighed the benefits of adoption. The fraternal twins, a boy and a girl, were removed from mother at four months old because of mother's mental health issues and drug addiction in April 2014. Mother began services and her children were returned to her in October 2015 with family maintenance. More than a year later, in February 2017, mother told the social worker she had relapsed and she needed help. The social worker and mother came up with a safety plan to temporarily place the twins with the godparents and former caregivers while mother sought drug treatment. Shortly afterwards, the agency filed a supplemental petition, and the trial court sustained the petition, detained the children, bypassed

reunification to mother, and ordered a section 366.26 hearing. Mother filed a 388 petition in November 2017 requesting the children be returned or, in the alternative, additional reunification services. At the section 366.26 hearing held in January 2018, the court denied mother's section 388 petition, refused to apply the c-1-B-i exception, and terminated parental rights. Mother appealed. The Court of Appeal found the agency believed mother should always be a presence in the children's lives and that mother had given birth to another baby in January 2018 and had retained custody. The record showed no question that the twins have a substantial and positive attachment to mother such that terminating their familial relationship would cause great harm. Mother maintain regular visitation and contact and she also met her burden of showing a beneficial relationship. Mother efforts at continued sobriety must be entitled to more credit than the trial court recognized. Mother had 104 drug tests and only three of them were positive. Mother also showed she had the children's best interest in mind when she self-reported the relapse. The record showed that as soon as she disclosed drug use, her "die was cast" but that should not have been the result. The appellate court could not condone making mother pay the severe price of loss of parental rights when she worked so hard to overcome her addition, acquired such insight into her parental responsibilities, and had been so attentive to her children's best interests. The order terminating parental rights was reversed and remanded. Since the disposition effectively rendered mother's appeal from the denial of her 388 petition moot, it was dismissed. [L. Serobian]

In re Collin E. (2018) 25 Cal.App.5th 647 [4th Dist., Div. 1] (San Diego)
The parents argued the beneficial-relationship exception applied at the section 366.26 hearing because they had cared for Collin for his first 13 months and he was bonded to them, the parents demonstrated a parental role during consistent visitation, and the Indian expert concluded Collin would benefit from continued visitation with the parents but the Court of Appeal disagreed. Collin is an Indian child and the Cherokee Nation intervened. The Court of Appeal affirmed the trial court's findings that when he was removed Collin had unaddressed serious issues which required speech, occupational, and physical therapy. Collin also exhibited challenging behaviors and the parents were not involved in his extensive appointments for supportive and remedial services during the 25 months Collin had lived with his paternal grandparents. The parents also did not demonstrate a commitment to Collin by participating in reunification services to overcome their serious addiction to prescription medications. Given these, the juvenile court properly terminated parental rights after finding the beneficial-relationship exception did not apply. (See also under the ICWA.) [J. Tavano - mother; L. Fisher -- father]

Relative Placement

In re Cody R. (2018) 30 Cal.App.5th 381 [4th Dist., Div. 1] (San Diego)

The Court of Appeal found mother did not have standing to raise the issue of relative placement in an appeal from the section 366.26 hearing when such an argument did not advance her argument against the termination of parental rights. (See *In re K.C.* (2011) 52 Cal.4th 231.) Further, the appellate court held a writ of habeas corpus is an extraordinary remedy of limited scope in dependency cases and cannot be used to challenge relative placement. Mother argued she had standing to appeal because the juvenile court did not advise her of the right the challenge the dispositional findings by writ. The Court of Appeal held mother filed a notice of intent so any error by the trial court in failing to advise her was harmless error. The appellate court also rejected mother's claim that, if Cody had been placed with a relative, the relative would not have been able to adopt and the court would have ordered guardianship. The opinion held this claim is too speculative to provide standing. Finally, mother claimed standing because the agency failed to meet its statutory obligation to give preferential treatment to relatives. The court also rejected this claim finding the record did not support mother's claims there were relatives willing to provide a home to Cody. Finally, in not bringing the placement issue to the juvenile court's attention, mother forfeited her claim of error. The appellate court dismissed the appeal.

As for the habeas petition, the Court of Appeal held the habeas writ can only be used in limited circumstances in a dependency case including to enforce an existing right to physical custody, to protect a child from imminent danger, to raise an action where the parent's consent to an adoption was required but not obtained, to collaterally attack a prior child custody order where the court lacked jurisdiction, or to make a claim of ineffective assistance of counsel for trial or appellate counsel. Mother's habeas petition raised the relative placement issue but did not claim ineffective assistance of counsel. The appellate court held that habeas corpus may not be used to collaterally attack a final nonmodifiable judgment in an adoption-related action where the trial court had jurisdiction to render the final judgment. This is also so because a habeas writ is not available where there is an alternative remedy. In dependency cases, a 388 petition is available to seek modification of a prior placement order. The opinion found that mother was informed in August 2017 that her writ under rule 8.452 had been dismissed but the section 366.26 hearing was not held until December 2017. This gave mother ample time to bring any claim about relative placement to the trial court's attention by filing a section 388 petition. Mother's habeas writ was denied. [W. Caldwell]

NON-MINOR DEPENDENT

In re M.W. (2018) 26 Cal.App.5th 921 [4th Dist., Div. 2] (San Bernardino)

Where the trial court misunderstood the law, it abused its discretion in finding M.W.'s former foster home could not be a supervised independent living placement

(SILP) and discharged M.W. as a nonminor dependent. When M.W. was seven years old, he and his twin sister were removed from their parents in Nevada because of mother's mental illness. M.W. kept in touch with his foster mother in Nevada. Father obtained custody but afterwards, for unknown reasons, the twins were placed with relatives in a series of guardianships. Eventually, at 14 years old, M.W. was removed from his father and placed in a planned permanent living arrangement. For the most part after that, M.W. lived in a group home. As he neared his 18th birthday, the agency recommended extended foster care and M.W. and the social worker signed a mutual agreement and identified his transition plan as a lower level of care with M.J.L. (former foster mother in Nevada) as his housing goal and to submit an ICPC to Nevada or transfer to Nevada. At the nonminor dependent hearing in March 2017, M.W. was found eligible to remain under its jurisdiction. The agency submitted an ICPC to Nevada and was informed Nevada did not participate in the ICPC for nonminor dependents. After M.W. left his group home, he moved to Nevada into M.J.L.'s home. The agency informed M.W. he would have to opt out of extended foster care if he chose to live in Nevada and subsequently requested the court dismiss and discharge M.W. as a nonminor dependent as he had voluntarily left placement and had moved out of state. M.W. filed an objection and argued he did not have opt out of extended foster care if he stayed in Nevada. The trial court granted the agency's request to discharge M.W. as a nonminor dependent finding M.J.L.'s home did not qualify as a SILP. M.W. appealed. The Court of Appeal held that a room rental from a former caregiver qualifies as a SILP according to all-county letter 14-33 relied on by M.W., which was published as part of the California Fostering Connections to Success Act, and the form offered by the agency and relied on by the trial court identified as Dept. Of Social Services form SOC157A regarding SILP's. One of the many options on the form includes room rental from a former caregiver. M.W. was renting a room from M.J.L. The appellate court reviewed the trial court's order under an abuse of discretion and found the court abuses its discretion when it misinterprets or misapplies the law. Here, the juvenile court misinterpreted the law and such error was not harmless. Based on the trial court's comments at the hearing, the opinion held it is reasonably probable M.W. would have obtain a more favorable result if the court had realized M.J.L.'s status as a former caregiver did not disqualify her home as an SILP. The trial court said it would definitely reconsider if he (M.W.) is able to find what would otherwise be a SILP placement. The Court of Appeal reversed the court's termination order and remanded with instructions for the trial court to consider the jurisdictional issue. [K. Lee – nonminor]

POST-PERMANENCY RELATIVE PLACEMENT

In re Maria Q. (2018) 28 Cal.App.5th 577 [4th Dist., Div. 1] (San Diego)

In a case of first impression, the Court of Appeal found that when a relative requests placement of a child in continued foster care pursuant to section 366.26, subd. (b)(7), the request is essentially a request to modify the child's permanency plan and must

be heard under the statutory framework of sections 366.26 and 366.3. Mother has four children in two placements. Maria Q. And J.M. are daughters and have been placed in the same foster home since August 2013 with the Z.'s. Mother identified appellant aunt as a possible placement in May 2014 but for some reason the aunt was not assessed and she was told the maternal grandmother would be assessed first. The parents received reunification services but were terminated in December 2014. The section 366.26 hearing was not held until July 2016. Prior to the section 366.26 hearing, the foster care license of the Z.'s was being reassessed along with their ability to adopt the girls. At the section 366.26 hearing, the court found the permanent plan was continued foster care with a goal toward adoption, guardianship, placement with a fit and willing relative, or return home. A year later, in August 2017, the maternal great-aunt (aunt) filed a section 388 requesting placement of all four children. The agency supported the aunt's petition for the girls but not for the two brothers, who were in an adoptive foster home. The juvenile court declined to apply the relative placement preference under section 361.3 and found it was not in the children's best interest to be placed with the aunt. The aunt and mother appealed the denial of the aunt's section 388 petition. The appellants argued the juvenile court erred when it applied the generalized best interest of section 388 instead of evaluating the placement under the factors listed in section 361.3. Respondent agency argued, and the Court of Appeal agreed, appellants forfeited any argument regarding application of section 361.3 and contended that when the child is in post-permanency foster care then section 366.3 and 366.26 govern the juvenile court's consideration. The opinion concluded the trial court did not consider the aunt's 388 petition as a request to modify the prior order continuing the children's placement in foster case and to select a new permanency plan for the children. Instead, the trial court proceeded solely under section 388 but, even so, any error was harmless. For the boys, who were in a home that planned to adopt, the juvenile court was required, as a matter of law, to select adoption as the boys' permanency plan and properly summarily denied aunt's 388 petition. For the girls, who remained in foster care, the trial court declined to apply the relative placement preference in section 361.3. However, the juvenile court's remarks indicated it conducted a multi-factorial assessment of Maria's and J.M.'s best interests and not the "generalized" best interest standard found in section 388. In deciding any error was harmless, the Court of Appeal found substantial evidence supported the trial court's decision to deny the aunt's 388 petition. The girls had lived with the foster family for 5 years, J.M. had lived with them since she was 3 weeks old and would be traumatized if she were moved, Maria and J.M. were a bonded sibling group, and Maria had been traumatized by her maternal family. Finally, although the aunt truly cared about Maria and J.M., the children did not have a current attachment to the aunt and Maria did not want to live with the aunt. Consequently, any error in proceeding under section 388 was harmless. [R. Knight - mother; M. Conroy - aunt]