APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

May 2015 through August 2015

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Dependency vs. Family Court

In re Nicholas E. (2015) 236 Cal. App. 4th 458, as modified on denial of reh'g (May 7, 2015), reh'g denied (May 12, 2015), reh'g denied (May 27, 2015) (2d Dist., Div. 2) [Los Angeles]
The Court of Appeal concluded the juvenile court may not dismiss a petition on the basis of the pending family court case without giving the agency the opportunity to prove risk. The agency filed a petition for 4 children alleging risk of emotional & physical harm. Mother moved to dismiss petition arguing custody was already being determined in an existing family court proceedings. The petition was filed for children now aged 14, 11 [twins], & 8 years old alleging mother complained, & prompted others to complain, that father physically and/or sexually abused the children. These false complaints caused the children to be subjected to repeated sex assault exams & interviews resulting in detrimental effects including all the children had expressed suicidal ideation, 2 had been placed on involuntary mental health holds, & the children were chronically absent or tardy to school. Father & all the children joined mother's motion to dismiss. The trial court dismissed jurisdiction prior to taking evidence on the petition & the agency appealed.

The appellate court reviewed the issues de novo as questions of statutory interpretation. Initially, the Court of Appeal held the order of dismissal is an appealable order per section 395 finding is was not in the nature of a demurrer or a rejection of the petition & the petition was dismissed prior to adjudication. Since the dismissal ended the litigation entirely, the order is appealable. The Court of Appeal distinguished the case authority relied on by the trial court finding nothing authorized the trial court to skip an evidentiary hearing on jurisdiction or to abstain because a non-offending parent could gain custody in a family court proceeding. The agency must have its day in court to prove whether dependency jurisdiction is proper. The appellate court reversed & remanded for adjudication. [L. Fields]

Petition

In re I.C. (2015) 239 Cal.App.4th 304 (1st Dist. Div. 2) [Alameda]
Appellate Court upheld finding presumed father sexually abused his 4-year-old daughter despite the lack of any corroborating evidence & that I.C. was not competent to testify & held a year intervening between the jurisdiction & disposition hearing did not prejudice father. Opinion includes a dissenting opinion by J. Stewart disagreeing with the majority's conclusion that substantial evidence supported the trial court's orders. Initially, the appellate court found it would not dismiss the appeal even though mother did not challenge jurisdiction based on the subd. (d) allegation ensuring

jurisdiction will continue. Finding the allegations of sex abuse against a child against father offer no greater stigma. As for the delay in making the disposition orders, jurisdiction was found on Mar 27, 2013 but the dispo hearing was concluded Feb 2014. The court found the delay did not violate § 352 because father did not object to the numerous continuances & because he bore considerable responsibility by delaying to obtain experts.

In finding substantial evidence supported the finding father sexually molested his daughter, the appellate court relied on the spontaneous declarations of the young I.C. even though she was not old enough to distinguish truth from a lie & made some confusing & obviously untrue statements. I.C. spontaneously & consistently repeated "daddy put penis on me" to mother, the day care center staff, & during a child abuse interview. The court found the child was not prompted by any adult & it could find no evidence she had a motive to lie in her statements. Despite some statements which were not believable & were unreliable, the trial court held the evidence that supported reliability was more compelling. The Court of Appeal agreed.

In re M.W. (2015) 238 Cal.App.4th 1444 (2d Dist., Div. 4) [Los Angeles]
Where the agency amended the petition based on details of father's criminal history & alleged mother failed to protect her children without substantial evidence, the appellate court struck 3 of the allegations & affirmed the petition as modified.
Mother challenged the jurisdiction & disposition findings where the trial court found a 2007 domestic violence incident endangered the children & mother failed to protect the children because she knew or should have known about father's criminal history. Mother conceded jurisdiction is proper based on her substance abuse but argued the allegations in a subsequent petition were not supported by substantial evidence & the appellate court agreed. In 2013, Mother drank quite a bit of alcohol & ingested pain pills & psychotropic medications before getting into her car with the children, now aged 9 & 8 years old. When mother became dizzy & began to vomit, she called 911. She was hospitalized & treated for depression & acute alcohol intoxication & the children were detained.

Six months after the original petition, the agency filed a subsequent petition pursuant to § 342. The petition alleged father has convictions for rape, kidnaping & failure to register as a sex offender. The allegation of domestic violence was 1 incident in 2007 where father was alleged to have slapped mother on the side of her face. Father demurred & the petition was dismissed without prejudice. The amended § 342 petition included § 300, subds. (b) & (d) allegations. The new allegation alleged father sexually assaulted a minor child in 2009 for which he was awaiting trial. In addition, mother knew or should have known of father's criminal conduct but allowed father access to the children. The (d) allegation further charged that mother failed to protect the children from sex abuse. In its opinion, the appellate court addressed the issue finding review of the merits was warranted. The Court of Appeal found the domestic violence incident was a single occurrence that happened more than 7 years before. Mother's failure to obtain a protective order did not place the children in danger. As for whether mother knew of father's criminal conduct, the court found no evidence mother actually knew of father's alleged

crime. Further, father was not even arrested for the 2009 assault until 2013 so mother could not have known of father's conduct until recently. [C. Gabrielidis]

In re D.P. (2015) 237 Cal.App.4th 911 (6th Dist.) [Santa Clara]
Where the newborn child's siblings were removed for domestic violence 6 months before, mother continued a relationship with father & father continued to argue & drink alcohol on a daily basis, substantial evidence supported the allegations in the petition. The allegations of the petition asserted D.P. was at substantial risk of harm due to father's repeated domestic violence against mother. Shortly before the petition was filed, mother called the police after father assaulted her & then she relocated to another city. However, mother allowed father to move back in a several days later. In the sibling case, mother had previously completed a domestic violence support group but despite prior agency intervention mother continued in a relationship with father & did not recognize the risk this posed to her children. One of the allegations asserted that even though D.P. was an infant & was not exhibiting symptomology such an anxiety or depression, he was nonetheless at risk of suffering emotional harm pursuant to subd. (c). At the juris/dispo hearing, mother submitted to the court's jurisdiction under subds. (b) & (j) but she objected to the allegation under subd. (c).

On appeal, the court reviewed the merits finding the juris/dispo orders could have consequences for appellant beyond jurisdiction. The appellate court distinguished the case cited by mother & relied on a different case for its conclusion. Finding D.P. had already been exposed to constant arguments, domestic violence between the parents, & to father's alcoholism since the day of his birth, he was at risk of emotional harm. Given the evidence, the Court of Appeal affirmed the juris/dispo orders.

In re Briana V. (2015) 236 Cal. App. 4th 297 (2d Dist., Div. 2) [Los Angeles]
Where father challenges the sufficiency of the evidence only as to his conduct, & not against mother, jurisdiction is not justiciable since no relief is available to father. Father was the primary caregiver for his 3 daughters now aged 14, 11 & 10 years old while he lived with the paternal grandmother. Mother & father were separated. The allegation involved a physical abuse allegation against father & grandmother for slapping the oldest child (Briana) as punishment for leaving the house without permission.
The agency discovered father was a registered sex offender based on a conviction for rape, kidnaping, robbery & oral copulation in 1994 & he remained on probation. The agency filed a petition alleging physical abuse, father was a registered sex offender but cared for the children, he exposed his penis to the youngest child, & father had failed to protect the children from the paternal uncle who used marijuana regularly & lived in the home. Father was found presumed. The dependency court took jurisdiction, removed the children & ordered reunification service for father including sex abuse therapy. Father appealed jurisdiction & the order to sex offender therapy.

The Court of Appeal held the father's challenge to jurisdiction is not justiciable because father did not challenge the allegations against mother including her use of methamphetamine. Jurisdiction against 1 parent is good against both. In addition, no practical relief is available or would change father into a non-offending parent because of

his status as a registered sex offender. The appellate court declined to address the jurisdictional evidence. As to the sex offender treatment, the court held the trial court has broad discretion to order services designed to protect the child's best interest. The appellate court conceded there was no evidence of current sex abuse but, considering the evidence as a whole, the trial court was within its discretion to order treatment based on father's status as a registered sex offender. [M. Jarvis]

Termination of Jurisdiction

In re D.B. (Aug 6, 2015, G051319) ___ Cal.App.4th ___ [2015 WL 5025227] (4th Dist., Div. 3) [Orange]

Where the agency has proved that the conditions which justified the initial assumption of jurisdiction no longer existed, the trial court was required to terminate jurisdiction & had no discretion to do otherwise. At the § 364 hearing, the trial court continued jurisdiction because father objected to a restraining order. Mother appealed & the appellate court agreed & reversed & remanded. Mother was granted sole legal & physical custody of D.B. at 3 years old in 2008 as a result of a domestic violence restraining order against father. The restraining order expired in 2009 & after that father progressively received more frequent visitation & contact. A petition was filed in Dec 2012 because mother & D.B. were homeless & mother had health problems which required her to be hospitalized. The petition was sustained & D.B. was declared a dependent but he remained with mother. Two weeks later, mother was unconscious in their hotel room with a blood-alcohol level of 0.368. A supplemental petition was filed. By Apr 2014, mother had complied with her case plan & D.B. began a trial visit with mother &, in Jun 2014, D.B. was returned to mother. The § 364 hearing was held 6 months later in Jan 2015. Father had been visiting but he was verbally aggressive against mother & D.B. said she needed a "time out" from father because he did not engage with her during visits. The trial court found the conditions no longer existed which had caused the court to assume jurisdiction but without a restraining order it could not terminate jurisdiction. Father objected to a restraining order so the court continued jurisdiction. The appellate court held the trial court had no discretion to continue jurisdiction under these facts. Further, in order to protect the child, the trial court had the discretion to order a restraining order despite father's objection. [R. Keller - mother; L. Serobian - father]

DISPOSITION

Parent's Right To Be Present

In re M.M. (2015) 236 Cal. App. 4th 955 (2d Dist., Div. 7) [Los Angeles]

Mother contended, & the Court of Appeal agreed, the juvenile court erred in proceeding with the contested jurisdiction & disposition hearing in her absence & there was insufficient evidence the child was at substantial risk of serious physical harm. The petition was filed for M.M. (still in diapers) alleging mother took M.M. with her to solicit sex, mother was arrested, & then mother failed to make appropriate plans to care for M.M. Mother was arrested after M.M. was found in a car with an adult male who admitted mother was a prostitute & he was her "supervisor." Mother asserted she was applying to work at a strip club & her boyfriend, not her pimp, was watching M.M. while she sought employment nearby. By the time of the jurisdiction hearing, M.M. was placed

with the maternal grandmother. At the hearing, the trial court refused to continue the hearing to allow mother to be present per Pen. Code, § 2625, because mother was jailed in another county & they would not transport. Mother argued no evidence was presented of prostitution or that M.M. was in any danger since he was with her boyfriend. Further, mother had plans to place M.M. with her mother & that is exactly what the agency did prior to the jurisdiction hearing.

The appellate court found evidence of a strong legislative intent for a parent to be present & not just the parent's attorney. The court was troubled there was no need to hurry or hold the hearing immediately. After reviewing a few facts which might justify holding the hearing immediately, & finding they did not apply, the appellate court held the trial court erred in holding the hearing without mother's presence. The Court of Appeal disagreed with the agency's assertion that mother's absence was not prejudicial finding the evaluation of mother's testimony was important. For this reason, the opinion found the error cannot be found harmless. The court reversed the jurisdiction & disposition orders & remanded for a new hearing where mother must be given an opportunity to be present. [R. Keller]

Placement with Non-Custodial Parent

In re K.B. (Aug. 7, 2015, E061803) ___ Cal.App.4th ___ [2015 WL 5003665] (4th Dist., Div. 2) [Riverside]

Finding no reason that 6-year-old X.B. should not be placed with his previously non-custodial father, the appellate court affirmed the disposition order removing the child from his mother & placing the child with his father in another state. Mother argued on appeal that X.B.'s relationship with his older brother, K.B., & his grandmother was so strong that he would suffer "emotional harm" if separated from them. Finding no reason father could not care for X.B., & that X.B. would not be emotionally devastated by living with his father away from his brother & grandmother, the appellate court held the dispo order was correctly decided. The brothers were removed from mother & her boyfriend for physically abusing K.B., by using inappropriate discipline, beating him with belts, humiliating him in public & forcing him to complete strenuous exercise as punishment. K.B. has a different father than X.B.

At the start of the case, father was in the Air Force & stationed in Italy but he planned to retire in a few months, he paid mother monthly child support & he had phone calls & video teleconferencing with his son. He also expressed a desire to become a bigger part of his son's life & wanted shared custody. At the juris hearing, father requested custody. Father was married & raising 2 children with his current wife. Father was granted unsupervised visits but in an apparent mix up, the social worker believed father declined visitation. By the time of the dispo hearing, held 2 months later, father had retired from the Air Force, had separated from his wife but they were working on their marriage, & he was living with the paternal grandparents in North Carolina, visiting his wife & children in Springfield, Virginia, & searching for a job. He requested custody of X.B. & testified he had been consistent in wanting placement. At the dispo hearing, the trial court ordered an immediate extended visit with father. An agency investigator evaluated father's home at the paternal grandparents' home a few weeks later. The investigator found X.B. was

obviously bonded to his dad & paternal grandmother. At the continued dispo hearing, the trial court chastised the maternal grandmother for disobeying court orders & inappropriately attempting to influence X.B. re: placement & found, per § 361.2, subd. (a), that placement with father would not be detrimental to the safety or emotional well-being of the child & removed X.B. from mother & granted father sole physical & legal custody of X.B.

The juvenile court found that X.B.'s openness to living with father was evidence he would not be emotionally damaged by being placed with father away from his brother & maternal grandmother. Further, a child's preference is not a deciding factor. The appellate court also found that father's challenges being separated from his wife & searching for a job were not evidence father could not safely parent X.B. Father & his wife were working on their marriage & father had steady retirement income while he sought employment. Further, father's home was evaluated as safe & appropriate. The court also considered the lack of contact between X.B. & his father & held limited contact with a non-custodial, non-offending parent, alone, was not a basis for detriment. The appellate court found the court's decision to deny reunification service to mother & granting full custody to a non-offending parent was well within the trial court's discretion. [R. Keller]

Placement with Non-Related Extended Family Member (NREFM)

In re Joshua A. (2015) 239 Cal.App.4th 208 (4th Dist. Div. 1) [San Diego]

The trial court erred in finding mother's boyfriend was not a non-related extended family member (NREFM) but found the decision not to place Joshua with him was supported by sufficient evidence & was in his best interest. In Oct 2014, 13-year-old Joshua was removed from his mother because she became intoxicated & scratched & pinched him. The police found mother was "delirious" & "obviously intoxicated." In a prior dependency, Joshua said he was afraid to return home because mother could be physically abusive when intoxicated but he remained with his mother under a plan of family maintenance services. When this dependency was initiated, mother asked for Joshua to be placed with her boyfriend, Luis, as a NREFM. From the initial suggestion of placement with Luis, Joshua said he was uncomfortable with Luis& did not want to live with him. The juvenile court found under § 361.3, subd. (c)(2), did not meet the description of an NREFM because the term "parent" was not included in the definition of a relative. The appellate court held the juvenile court erred as a matter of law. The statutory scheme allows a person who has established a familial relationship with a parent of a dependent child to qualify as an NREFM. The opinion has extensive statutory interpretation for its findings.

Even with this error, however, the trial court did not abuse its discretion when it held placement with Luis was not in Joshua's best interest. In affirming the judgment, the appellate court found that placement under § 362.7 must be in the child's best interest. The social worker concluded placement with Luis was not in Joshua's best interest because Joshua's aversion would not offer the desired degree of stability, & Luis could not adequately supervise or protect Joshua from mother. Based on the evidence, the juvenile court did not abuse its discretion & was not required to order the agency to complete an evaluation of Luis' home. [C. Booth]

Restraining Order

In re N.L. (2015) 236 Cal.App.4th 1460 (2d Dist., Div. 5) [Los Angeles]

Reversing in part, the appellate court found insufficient support to include the child in the restraining order protecting father when mother had never been threatening to N.L. The agency filed a petition alleging N.L. was at risk due to mother's drug use & her repeated false allegations that father sexually abused N.L. under § 300, subd. (b). Mother abused marijuana, & in 2013, she possessed marijuana, smoked near the child & was under the influence of marijuana while caring for the child. Further, the petition alleged mother created a detrimental home for N.L. because mother repeatedly made false allegations to law enforcement & medical personnel that father sexually abused the child. In Jun 2014, the court declared N.L. a dependent, removed her from mother, placed her with father, & ordered monitored visits with mother. In Aug 2014, father requested a restraining order seeking protection from mother. Father declared under penalty of perjury that mother attempted to remove N.L. from school, she had threatened father, had made death threats, had struck him leaving scratches & pulled his hair. A temporary restraining order was granted. The agency reported mother had supervised visits & these visits were good & N.L. appeared to enjoy spending time with her mother. At the hearing for the permanent restraining order, N.L.'s attorney had no objection to having N.L. taken off the restraining order. The juvenile court issued a restraining order including N.L. as a protected person. Mother argued on appeal there was insufficient evidence to support the inclusion of N.L. as a protected person & the appellate court agreed.

The Court of Appeal held the issuance of the restraining order is not proper unless failure to issue the order might jeopardize the safety of the children. Relying on the fact that mother continued to hold education rights for N.L., the order preventing mother from communicating with the school was improper. As an educational rights holder, mother could contact N.L.'s school & seek removal of N.L. from school. Further, no evidence was presented that mother had engaged in any violent or dangerous conduct towards, or made any threats, to N.L. Finally, no evidence showed mother failed to obey the visit order or in any way abused her visitation rights. As a result, the juvenile court erred by including N.L. in the restraining order & the appellate court reversed that portion.

PRELIMINARY/CONTINUING CONSIDERATIONS

Indian Child Welfare Act (ICWA)

In re A.C. (Aug 17, 2015, D066943) ___ Cal.App.4th ___ [2015 WL 4882520] (4th Dist., Div. 1) [San Diego]

Court of Appeal held the trial court's request to father's trial counsel to notify father of his appellate rights from the 12-month review hearing did not prejudice father, & under the ICWA, the evidence was sufficient to support the implied finding of detriment to the child if returned to father's custody even without live expert testimony & evidence was sufficient to support the finding that active reunification services had been provided to father. Father challenges the termination of his parental rights & adoption as a permanent plan. In an effort to obtain review of certain of the juvenile court orders from the 12-month review hearing, father alleged ineffective assistance of counsel (IAC) for failure to personally advise father of his appeal & writ rights. The Court of Appeal held there was no adequate showing of IAC & father

forfeited the substantive arguments re: the 12-month review hearing &, even when the appellate court considered these issues on the merits, the court found them meritless.

The case began in 2012 based on the parents' mental illness, drug abuse, & inability to provide for A.C. The agency took action after learning A.C. was absent from school for 5 days, the parents were using drugs, had been investigated for domestic violence, father made suicide threats, & mother was hospitalized. The child was interviewed & acted inappropriately & gave alarming answers including demons made her watch pornographic images, a demon was going to kill her parents & herself, father hit her, & mother was planning to kill herself. The trial court found the ICWA applied & the Chickasaw Nation was permitted to intervene. A.C. was diagnosed with attention deficit hyperactivity disorder (ADHD), was prescribed medication, & more serious mental illness was a possibility. The trial court held the child was a dependent, removed her from father & found detriment to placing with mother. By the 6-month review hearing, A.C. had been placed with a NREFM who is a Native American & the tribe was satisfied the agency was fulfilling the ICWA requirements with this placement. The parents received 12 months of reunification services. At the 12-month review hearing, the court held the agency made active efforts to provide father with remedial services designed to prevent the breakup of the Indian family. At the close of the hearing, the trial court asked father's trial attorney to advise father of his writ rights. Father filed a notice of intent. Subsequently, a letter was filed & indicated no arguable issues had been found & no writ petition would be filed. Father's parental rights were subsequently terminated & father appealed.

On appeal, father challenged adoptability, failure to apply the c-1-B-i exception but also argued the ICWA detriment finding was not made with enough expert evidence support & the reunification efforts were insufficient. As to the violation of the notification requirements at the 12-month review hearing, the appellate court held there was substantial compliance in making the statutory advisement required by § 366.26, subd. (l)(3)(A), because not only did father's attorney file a notice of intent but his appointed appellate counsel timely responded & father was provided appropriate paperwork to proceed in pro per. To give due weight to father's contentions of IAC, the appellate court reviewed the merits of the claimed ICWA errors. As to the detriment finding, the appellate court found A.C. had been placed with an ICWA-approved home. The appellate court found even without expert witness testimony the record was adequate to support an implied finding of detriment to return to father under any standard. As to whether active efforts had been made, the appellate court found the trial court had an adequate basis to conclude active efforts, within the meaning of the ICWA, had been made to prevent the breakup of the Indian family & the tribe acknowledged active efforts were made but were not successful. Finally, father could not demonstrate material deficiencies in the reunification efforts directed towards him or to mother. [J. Willis Newton]

In re I.B. (Aug 11, 2015, B259021) ___ Cal.App.4th ___ [2015 WL 4736545] (2d Dist., Div. 4) [Los Angeles]

In reversing, the appellate court found the ICWA contains a continued duty to provide updated notices to relevant tribes when new information is disclosed. A petition was filed in Feb 2013 alleging mother had a history of mental & emotional

problems including schizophrenia, bipolar, & depression with recurrent severe psychotic features including auditory & visual hallucinations & delusions. Initially, mother denied Indian heritage but later claimed she might have heritage through the Blackfeet tribe. The petition was sustained & the agency sent notice to 3 Cherokee tribes, the Bureau of Indian Affairs (BIA), the Dept. of the Interior, & a Blackfeet tribe. The Cherokee Nation contacted the agency & requested further information about the maternal great-grandfather & great-grandmother. The agency provided additional info to this tribe but not to the other tribes. Although the agency sent a 2d set of notices, the 2d set contained the same information as the 1st set. On appeal, mother argued once the agency received additional info re: mother's relatives 4 months after the initial investigation it was required to send a new set of notices to all the tribes & the appellate court agreed. The Court of Appeal reversed the ICWA findings & remanded to the juvenile court for the limited purpose of providing proper notice. [M. Toole]

In re P.R. (2015) 236 Cal. App. 4th 936 (3d Dist.) [Shasta]
Mother's sole contention is that substantial evidence did not support the juvenile court's finding there was good cause to deviate from the adoption placement preferences of the Indian Child Welfare Act (ICWA) but the appellate court dismissed the appeal finding mother has no standing. (25 U.S.C. § 1901 et seq.) Finding mother did not challenge the termination of her parental rights, she had no standing to challenge a placement decision. Case began because of mother's serious drug abuse & father's absence. The parents are given 6 months of reunification & made little progress. During the case, the parents both claimed Indian heritage. Ultimately, P.R. was found to be eligible for enrollment in the Muscogee Creek Nation but the tribe did not intervene. Instead, the tribe requested an ICPC be completed before the adoption of P.R.

Following the California Supreme Court, the appellate court held a parent's appeal from a judgment terminating parental rights confers standing to appeal an order concerning the dependant child's placement only if the placement order's reversal advances the parent's argument against terminating parental rights. (*In re K.C.* (2011) 52 Cal.4th 231, 238.) Because mother made no claim on appeal that the termination of parental rights was in error, mother has no standing to challenge the deviation from the ICWA adoption placement preference. [M. Jarvis]

Paternity

Adoption of Emilio G. (2015) 235 Cal. App. 4th 1133 (1st Dist., Div. 4) [San Francisco]
Based on father's abusive conduct during the pregnancy & a lack of meaningful efforts to assert his parental interests, the trial court found father had failed to establish his commitment to fatherhood was sufficient to establish him as a *Kelsey S.* father. (*Adoption of Kelsey S*. (1992) 1 Cal.4th 816.) Specifically, the trial court found that before Emilio's birth, although Andrew (father) acknowledged the child was his, "he failed to promptly assume or attempt to assume his parental responsibilities as fully as the mother allowed and his circumstances permitted."

The parents dated for 8 months but broke up a few months before Emilio was born in July 2013. During the pregnancy, mother made plans to have Emilio adopted. By that time,

mother knew father could be violent & unpredictable. Once chosen, the adoptive parents filed a petition to end father's parental rights to make way for adoption. The trial court held father was a biological dad, but not a presumed father. The appellate court found substantial evidence supported the conclusion father was not a *Kelsey S*. father & that precluding adoption was not in the child's best interest.

During the pregnancy, father was emotionally & physically abusive to mother & mother successfully obtained a restraining order based on 4 different instances. Father had previously pled guilty to possessing metal knuckles & trespass & was on probation, he took mother's car without permission & used it exclusively even though mother was making car & insurance payments, he pushed mother against a wall & knocked her down, & he drove drunk, crashed & tried to force mother take responsibility for the accident so he could avoid violating his probation. Father argued on appeal he had made 2 payments of less than $50 to mother, had attended 1 visit to the doctor, had provided some supplies worth less than $100, filed a legal action for custody before Emilio was born, & visited his son twice in 5 months. Based on the facts, the trial court held father's action towards mother were harmful including emotional & domestic abuse & his efforts to seek custody were part of his efforts to harass mother. Finally, father efforts were not sufficient to find he had established a commitment to fatherhood.

Notice

See ***In re A.C.*** (Aug 17, 2015, D066943) ____ Cal.App.4th ____ [2015 WL 4882520] (4th Dist., Div. 1) [San Diego] under ICWA.

388 PETITION

In re A.R. (2015) 235 Cal. App. 4th 1102 (6th Dist.) [Santa Clara]
Reversing in part, the court affirmed the order to end reunification services but not removal from the father since the child was no longer in father's custody. The dependency case began over now 5-year old A.R., because of concerns re: father's alcohol abuse, domestic violence against mother, mental health issues of mother, & past use of inappropriate discipline. Despite these concerns, A.R. appeared well-cared for & he said he felt safe in the home. The parents acknowledged concerns & expressed a willingness to participate in services. At the original disposition hearing in Jan 2014, the trial court took jurisdiction, declared A.R. a dependent but left him with his parents under family maintenance. By Jun, father had moved out of the home, was testing positive for drug use, had told the social worker he intended to continue to use alcohol & marijuana, & was no longer in any services. The agency filed a 388 petition requesting the juvenile court end family maintenance to father, continue family maintenance for mother, & order supervised visits for father. The trial court granted the agency's 388 petition but also removed A.R. from father & father appealed. The appellate court affirmed the trial court's order granting the 388 petition finding evidence that father was no longer interested in participating in services. However, the Court of Appeal held the removal part of the order must be stricken since the petition did not specifically ask for this modification & A.R. was no longer in father's custody making the order in error. [L. Barry]

SECTION 366.26

In re Anthony B. (Jul 22, 2015, D067577) ___ Cal.App.4th ___ [2015 WL 4748222] (4th Dist., Div. 1) [San Diego]
After father is granted 18 months of reunification services, father's continued struggle with sobriety supports the trial court's finding that father's visits were not substantial, adoption outweighed any benefit from maintaining a relationship with father, & termination of parental rights was proper. Anthony was born premature & had an extensive stay at the neonatal intensive care unit. A petition was filed alleging the parents were unable to care for Anthony due to inadequate housing, mother's mental health condition including schizophrenia, bipolar & anxiety, & the parents failed to reunify with Anthony's siblings because of domestic violence, substance abuse, & homelessness. Father was granted reunification services but services were bypassed to mother. Father was involved in reunification services &, after almost 2 years, father had his 1st overnight visit. Less than a month after overnights started, father was found intoxicated during a visit. At the 18-month review hearing, after 22 months of reunification services, father continued to struggle with sobriety. Father's reunification services were terminated & a month later he was arrested for domestic violence, possess of drug paraphernalia, battery, & false imprisonment. Father was released a month later but failed to see Anthony during the 3 months before the § 366.26 hearing.

At the § 366.26 hearing, the trial court found that although father's visits were generally good, they were not substantial. The appellate court found that during the 5 months preceding the § 366.26 trial, father's visits were sporadic at best & this was evidence the visits did not amount to regular contact. As to the substantial benefit prong, the appellate court found this was not an extraordinary case appropriate for application of the beneficial-relationship exception. Although father visited regularly the 1st 18 months, the relationship between Anthony & his son diminished after nearly 5 months without visits or contact & affirmed the trial court's findings. [V. Lankford - father; E. Alexander - mother]

MISCELLANEOUS

Visitation When Legal Guardianship Ordered

In re A.J. (2015) 239 Cal.App.4th 154 (4th Dist., Div. 2) [San Bernardino]
When a child is placed in a legal guardianship, the mere biological father is not entitled to visits because he is not a parent under the governing statute. The Court of Appeal held that father, as a mere biological father is not considered a "parent" under § 366.26, subd. (c)(4)(C), & was not presumptively entitled to visits in a guardianship.

A petition was filed in 2012 after mother struck 4-year-old A.J. & left 2 black eyes & bruises on his face. The petition further alleged mother abused drugs & was incarcerated. As for father, he allowed the child to be at risk in mother's custody, had an unstable & unsafe lifestyle, & his whereabouts were unknown. A.J. was detained & was placed with the maternal grandparents. The only allegation sustained against father was his unstable & unsafe lifestyle. The father is a biological parent but not a presumed father. Because he

is a registered sex offender, the trial court denied father's request for supervised visits. Mother was granted reunification services. At the 18-month review hearing, the court ended mother's reunification but found it was not in the child's best interest to consider terminating parental rights. Shortly before the § 366.26 hearing, father filed a 388 petition to modify the order denying father reunification services. The court denied the petition without taking evidence. At the § 366.26 hearing when the guardianship was ordered, the trial court held it was necessary to make a detriment finding in order to deny visits to father. Father testified he was incarcerated & stated he could not "promise nothing" when asked if he would abide by juvenile court orders.

Father argued there was insufficient evidence that visitation would be detrimental. The appellate court found the detriment finding was supported by sufficient evidence but also found a detriment finding was not necessary because a mere biological father is not a parent entitled to visits. The evidence showed even supervised visits presented some danger because the child was young at 6 years old, had no bonding with father, had last seen his father at 18 months old, & frequently violated parole. In addition, father had a long record of serious criminal convictions including several for sex crimes against children. As to whether father was entitled to visits, the appellate court held a biological father, who is not also a presumed father, is not a parent according to the Uniform Parentage Act. As a result, father was not entitled to visits & a detriment finding was unnecessary. [D. Prince]

In re Ethan J. (2015) 236 Cal. App. 4th 654 (5th Dist.) [Fresno]
When the juvenile court orders a legal guardianship for a child with visitation for the mother, and the child refuses to participate in visitation, the trial court may not terminate dependency jurisdiction with knowledge that its visitation order will not be honored or enforced. The appellate court concluded the trial court may not end jurisdiction unless it held visitation is detrimental & reversed the trial court's order.

Ethan is now 9 years old & is in a legal guardianship with maternal grandmother that was granted in Jun 2012. Mother had visitation Ethan & his older siblings. The case began in Sept 2010 when maternal grandmother reported mother was attempting to take custody of Ethan & his 17- & 14-year-old siblings even though mother was homeless & abusing methamphetamine. An investigation had already began after allegations of sexual abuse by Ms. C, a friend of mother. Both the 17-year-old sib & Ethan confirmed the sex abuse. The trial court took jurisdiction & mother received reunification services for 12 months. Ethan was in therapy but his therapist recommended against return to mother. After a legal guardianship was ordered, mother filed a 388 petition& requested increased visits. This 388 petition was denied in part because Ethan did not want more visits. Mother filed another 388 petition 9 months later requesting overnight visits & the contested hearing was held in Jun 2014. The trial court ordered therapeutic visits between mother & Ethan but ordered an evaluation to determine if visits would be detrimental. Ethan refused to be evaluated & had refused visits for 6 months. At a subsequent hearing 2 months later, Ethan testified that he did not want to see mother, he was angry with her because she threatened his grandmother, he did not miss mother & he refused any therapy in order to

discuss his feelings about visits. In response, the juvenile court ended jurisdiction finding it could not resolve the situation.

Mother argued on appeal, & the Court of Appeal agreed, the trial court erred in ending jurisdiction knowing its visitation orders would not be followed. The appellate court held the trial court erred in terminating jurisdiction because it did not make a detriment finding for mother's visits & the court knew it's visitation order would be ignored. The appellate court acknowledged the difficulty & frustration but held the trial court impermissibly delegated authority over visits to Ethan. The Court of Appeal suggested some steps to resolve the situation including relying on the child's former therapist to perform an evaluation. The order ending jurisdiction was reversed & remanded for a new hearing. [E. Alexander]

Non-minor Dependent

In re Aaron S. (2015) 235 Cal.App.4th 507 (Sixth District) [Santa Clara]
Where 19-year-old dependent failed to enroll in college or to get a job even with some efforts to do so, the trial court correctly held he was not participating in an independent living program & terminated jurisdiction. Aaron S. was adjudged a dependent minor when he was 16 years old and became a non-minor dependent when he turned 18. Aaron was made a dependent because his mother abandoned him & his father was incarcerated & his parents were given 12 months of reunification services. When his parents' reunification services were terminated in May 2012, Aaron was living in a group home & enrolled in an independent living program through the agency. As part of that, Aaron completed a transitional independent living plan & agreement listing goals including graduating from high school, obtaining a driver's license, & getting a job. Aaron was diagnosed with attention deficit & hyperactivity disorder (ADHD) & anxiety & was prescribed medicine to help improve his impulse control. Aaron admitted using marijuana almost daily. Aaron struggled with abandonment issues but he graduated from high school on time.

Since January 2012, § 391 requires the juvenile court to continue dependency jurisdiction over non-minor dependents unless either (1) the non-minor does not wish to remain subject to dependency jurisdiction or (2) the non-minor is "not participating in a reasonable and appropriate transitional independent living case plan." Failing to meet at least one of the five eligibility conditions in § 11403, subd. (b), constitutes a failure to participate in a transitional independent living case plan. After graduating from high school, Aaron continued in the program for 6 months & made some attempts to comply but was unsuccessful at either enrolling in school or in obtaining a job. At the end of the 6 months, the juvenile court terminated jurisdiction finding Aaron failed to participate in his transitional independent living case plan because he had not enrolled in school or to get a job. On appeal, Aaron argued his attempts to enroll in school & get a job should be deemed sufficient. The appellate court held his efforts did not amount to compliance & affirmed the order. In addition, Aaron asserted the agency failed to provide a 90-day transition plan. The appellate court agreed the agency erred in not providing a plan but

found it was harmless error since all the information such a plan would contain was provided to Aaron.

Appealability of Section 366.28

A.M. V. Superior Court (2015) 237 Cal.App.4th 506 (4th Dist., Div. 2) [San Bernardino] **Placement with particular foster parent is within the agency's authority and the order from a section 366.28 hearing is not appealable**. In 2006, A.M. was the result of father impregnating his own 14-year-old daughter & she was adjudicated a dependent. A.M. suffered from softening of the brain, cerebral palsy, spastic quadriplegia, & seizures. His condition was likely due to a summation of several different genetic disorders. Mother was unable to care for A.M. & he was placed in an intermediate care facility for developmentally disabled children (Mountain Shadows). Mother received 6 months of reunification services but was unable to reunify. At the initial § 366.26 hearing held in Feb 2008, the court found A.M. had a probability of adoption but was difficult to place. Adoption was identified as the permanent plan but the hearing was continued. A planned permanent living arrangement (PPLA) was ordered in Aug 2008. Two years later, Ms. S. expressed an interest in adopting A.M. The agency filed a 388 petition to set a § 366.26 hearing & the 388 petition was granted. At the § 366.26 hearing held in Jun 2011, the court found A.M. adoptable & terminated parental rights. For reasons that are unclear, the adoption was not pursued. In Mar 2014, the S family was shocked to learn A.M. had not been adopted. At a new post-permanency hearing held Nov 2014, the court found the PPLA was no longer appropriate & changed the permanent plan to adoption. Two days later, minor filed a notice of appeal. In Feb 2015, acting on a supercede petition filed by minor's appellate counsel, the Court of Appeal stayed the order authorizing a change of placement.

The appellate court considered both the juvenile court's ruling giving the agency authority to place A.M. with Ms. S & the court's change to A.M.'s permanent plan from PPLA to adoption. The court reviewed the analogous scope of the § 366.26, subd. (l). Finding § 366.28 is closely modeled on subd. (l) & had the same rational – to prevent lengthy appeals from delaying a child's permanent placement. Consequently, the orders from a § 366.28 hearing are not appealable. The court addressed the lack of a writ advisement finding the missing advisement is good cause for a parent's failure to file a writ petition but it is not good cause for a child's failure. Consequently, the lack of a writ advisement did not make the orders appealable. [S.Rollo]