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"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

UCCJEA; ICWA—Inquiry and Notice

In re Austin J.—published 4/15/20; Second Dist., Div. One
Docket No. B299564;
Link to case: https://www.courts.ca.gov/opinions/documents/B299564.PDF

(I) THE UCCJEA DOES NOT PRECLUDE A HOME STATE FROM EXERCISING JURISDICTION OVER A CHILD MERELY BECAUSE A DIFFERENT STATE COURT HAD PREVIOUSLY MADE A CUSTODY ORDER OR INVESTIGATED THE FAMILY. (II) ICWA NOTICE IS TRIGGERED WHEN THERE IS REASON TO KNOW OR BELIEVE A CHILD IS AN INDIAN CHILD BASED ON TRIBAL MEMBERSHIP, NOT ANCESTRY.

Mother had seven children. Leslie J. was the father of the four older children. Edward G. was the father of the younger three. For clarity, the Court of Appeal referenced the four older ones as Leslie's children and the three younger as Edward's children. In May 2017, the North Carolina juvenile court declared Leslie's children dependents and ordered reunification services. Mother eventually obtained return of the children. In May 2018, North Carolina's child welfare agency opened a new investigation on the family but lost contact as they had moved to California (CA). In October 2018, Mother moved to Palmdale, CA. In May 2019, the agency filed a WIC 300 petition. At detention, Mother reported she had heard her mother had Cherokee heritage and her family would know

more. She filed a parental notification of Indian status ("ICWA-020 form") stating the children may have Cherokee ancestry through her deceased grandmother, but left unchecked the boxes regarding tribal membership or eligibility for membership. Mother later told the agency that she had heard her mother had Cherokee ancestry, and Mother's aunt similarly stated she may have Cherokee heritage. Leslie told the court he had no Indian ancestry and left unmarked the checkboxes on the ICWA-020 form. The court found there was no reason to know Leslie's children were Indian children. As to Edward's children, Edward never filed an ICWA-020 form and the court failed to inquire with Edward about his tribal membership or eligibility. The court took jurisdiction over the children and placed them in foster care. Mother appealed the jurisdiction and dispositional findings based on lack of subject matter jurisdiction under the UCCJEA and defective ICWA notice. As part of its decision, the Court of Appeal took judicial notice of subsequent minute orders that showed the children were returned to Mother and Edward.

Affirmed. (I) Under the UCCJEA, a court of this state has jurisdiction to make an initial child custody determination if this state is the child's home state on the date the proceeding was commenced or was the home state within six months before commencement of the proceeding. (Fam. Code 3421(a)(1).) A child's "home state" is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." (Fam. Code 3402(g).) Here, CA is the home state because Mother lived in CA at least since October 2018 and does not dispute that her children lived with her in CA for at least six consecutive months prior to the filing of the WIC 300 petition in May 2019. North Carolina did not have exclusive continuing jurisdiction under the UCCJEA because the children were returned to Mother with an exit order in North Carolina and then the family moved to CA during an investigation. Mother also tried to invoke Fam. Code 3423, which generally prohibits a CA court from modifying child custody orders made by another state's court, but this section does not preclude a CA court from exercising jurisdiction over a child merely because a different state court had previously made orders regarding the child. (II) ICWA Background: In 2018, the Legislature changed the state's ICWA-related statutes to conform them to recent changes in federal ICWA regulations. The changes included repealing the definition under which the court would have a "reason to know" that a child is an Indian child based merely upon "information *suggesting* the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (Former WIC 224.3(b)(1).) Here, as to Edward's children, the issue is moot because the relief that ICWA could provide–the invalidation of the foster care placement order—became unavailable once the court returned them to their parents. As to Leslie, based on his representation of having no known Indian ancestry, there was no "reason to believe" his children were Indian children through his parentage and therefore no duty to make "further inquiry." As to Mother, her claim that the agency was required to notice the Cherokee tribes because there was "reason to *know* an Indian child was involved" fails

based on the revised criteria of whether there is a "reason to know" as described in WIC 224.2(d). Mother's and her relative's statements at most suggested the possibility that the children may have Indian ancestry, but ancestry is no longer a statutory criterion of a "reason to know." Whether there was "reason to *believe*" that Mother's children were Indian children (WIC 224.2(e)), is a closer question, but again the information regarding ancestry was "'too vague, attenuated and speculative'" to support a reason to believe they might be Indian children based on eligibility for tribal membership. Therefore, the duties under ICWA were met as to all the children. (ML)

Jurisdiction—WIC 300(b)

In re J.A.—filed 4/1/20; Certified for publication 4/20/20; Second Dist., Div. Five
Docket No. B297416;
Link to case: https://www.courts.ca.gov/opinions/documents/B297416.PDF

MERE USE OF MARIJUANA, EVEN WHILE PREGNANT, WITHOUT MORE, IS NOT ENOUGH TO DESCRIBE A CHILD UNDER WELFARE AN INSTITUTIONS CODE SECTION 300(b)

J.A.'s baby brother, D.Y. was born in December 2018 and tested positive for marijuana. Mother admitted to consuming edible marijuana but denied smoking it. Mother stated she used the marijuana to treat her pregnancy symptoms after doing research online about natural remedies. She did not tell her doctor she was using edibles. Mother stopped taking marijuana after she was told she could not breastfeed her baby if she was testing positive. On December 28, 2018 mother started testing negative for marijuana and tested negative for all remaining tests. Mother stayed with various relatives for the two months following D.Y.'s birth, but her family members were about to lose their housing. Mother decided to remain with maternal grandmother (MGM) until MGM was evicted around February 1, 2019. The agency raised concern with mother's housing, as well as concern regarding lack of a speech evaluation for J.A. and an old, inconclusive referral. The agency filed a non-detain petition on February 5, 2019, approximately two months after D.Y. was born, alleging D.Y. tested positive for marijuana and that mother abused marijuana, putting J.A. and D.Y. at risk of serious physical harm. At the jurisdictional hearing, the agency argued to sustain the petition, citing mother's admission of use during pregnancy as well as evidence showing mother had been, years before, admitted to a hospital for self-harm. The court sustained the petition, finding both drug counts true, but did not remove the children from mother. Mother timely appealed.

Reversed. There was insufficient evidence of either substance abuse or substantial risk to the children arising from substance abuse. The agency provided no evidence that mother's use of edibles to help with pain during her pregnancy was substance abuse or that it rendered incapacitated or otherwise incapable of parenting J.A., a toddler at the time of

mother's pregnancy with D.Y. The agency's claim that mother was under the influence or "high" while parenting was mere speculation. There was also no evidence that mother's use of marijuana placed the children at risk, as all evidence showed she took great care of her children, had a substantial family support system, and that the children were in good health. There was no evidence that mother's use interfered with her ability to parent a toddler, as the evidence showed she was able to request an IEP and arrange a speech evaluation for J.A. prior to the detention hearing. The agency's reliance on caselaw and WIC 355.1 presumption of dependency is inappropriate in this case. WIC 355.1 creates a presumption of jurisdiction if the court finds, "based on competent professional evidence, that an injury, injuries or detrimental condition" is of such a nature as would not ordinarily occur without the unreasonable or neglectful acts of either parent. Cases which have found this presumption to apply in drug abuse cases where the infant tests positive for illicit drugs involve highly dangerous drugs such as cocaine and methamphetamine. (See, e.g., *In re Monique T.* (1992) 2 Cal.App.4th 1372.) Here, the agency acknowledged there was no injury to D.Y, and there was no competent professional evidence of an injury or any detrimental medical condition. The speculative statement by the public health nurse to mother during an in-person visit that D.Y. may exhibit delays at a later date is not enough to establish injury. (SH)

Removal of Custody – WIC 361(c); Sexual Abuse – WIC 300(d)

In re S.R.—published 4/23/20; Second Dist., Div. One
Docket No. B300214;
Link to case: https://www.courts.ca.gov/opinions/documents/B300214.PDF

EVEN WHEN THE WIC 355.1(d) PRESUMPTION IS REBUTTED, THE COURT MAY STILL CONSIDER THE CONVICTION/PRIOR FINDING AND ANY REASONABLE INFERENCES TO BE DERIVED FROM IT. THE PRINCIPLES OF *IN RE I.J.* APPLY TO THE CIRCUMSTANCES OF A PARENT WHO POSSESSES CHILD PORNOGRAPHY.

The agency filed a dependency petition concerning ten-year-old S.R. based on Father's possession of child pornography in the child's home. Prior to adjudication, Father was convicted of possession of child pornography and placed on felony probation. During adjudication, the court received letters and testimony from Drs. Crespo and Malinek. Dr. Crespo opined that Father likely posed a risk of substantial harm to his own daughter, but he had only reviewed the agency's reports and a non-peer reviewed study. Dr. Malinek did a comprehensive psychological evaluation of the Father and used the Child Pornography Offender Risk Tool (CPORT), a relatively new actuarial tool to assess recidivism among child pornography offenders, and found that Father was a "fantasy driven" and not "contact driven" offender who posed a low risk of harm to his child. However, Dr. Malinek acknowledged that Father had not yet developed insight as to what led him to possess child pornography. In testimony, Dr Malinek conceded the CPORT may not be reliable due to the control group being too small. The juvenile court sustained the petition and

removed S.R. from Father's custody. The court based its removal on Father's conviction and probation terms that included a sex abuse program and restriction from children except his own, as well as the great harm that S.R. could suffer even though the likelihood of harm was low. The court indicated he was not sure which expert's statistical analysis was sound but gave Dr. Malinek's CPORT score little weight and discounted much of his other assertions about Father. On appeal, Father challenged only the dispositional ruling removing S.R. from his custody.

Affirmed. The juvenile court is entitled to rely on some aspects of an expert's opinion while disregarding other aspects. Here, substantial evidence showed Father lacked the insight required to avoid engaging in behavior that would put S.R. at risk of sexual abuse. Moreover, although Father had rebutted the WIC 355.1(d) presumption (that, *inter alia*, a parent's conviction for sexual abuse shall be prima facie evidence that the subject minor is at substantial risk of abuse or neglect), the benefit of the presumption, rebutted here by Father's own expert, affects only the burden of producing evidence. The juvenile court was nevertheless entitled to consider the conviction and any reasonable inferences to be derived from it. Finally, "[s]ome risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great…[I]n order to determine whether a risk is substantial, the court must consider both the likelihood that harm will occur and the magnitude of the potential harm…" (*In re I.J.* (2013) 56 Cal.4th 766, 778.) Here, although there was an arguably low probability that Father would perpetrate a hands-on offense against S.R. if he had unmonitored contact with her, the harm of being involved in child pornography or some other sexual abuse is of great magnitude to the child that justified removal from Father's custody. As the *I.J.* Court held, "[S]exual or other physical abuse of a child by an adult constitutes a fundamental betrayal of the appropriate relationship between the generations….Such misparenting is among the specific compelling circumstances which may justify state intervention, *including an interruption of parental custody*." (*In re I.J.* (*supra*) 56 Cal.4th at p. 778 (emphasis added).) (ML)

Disposition; Removal—WIC 361(c)-(d)

In re G.C.—published 4/24/20; Fourth Dist., Div. Two
Docket No.: E072514
Link to case: https://www.courts.ca.gov/opinions/documents/E072514.PDF

WHERE A DIRTY HOME IS A RECCURING ISSUE, THERE MAY BE SUBSTANTIAL EVIDENCE SUPPORTING REMOVAL EVEN IF THE HOME IS CLEAN BY THE TIME OF THE DISPOSITION.

The children were detained from parents because the home was filthy, the floors were covered in animal feces and urine, the food in the home was expired or had mold, the home smelled of marijuana, and mother did not have formula for G.A. Mother also made suicidal disclosures. Father, who was deployed in Syria and trying to return home,

disclosed mother had a history of mental illness and he believed mother had failed to take her medication. Mother admitted using marijuana just days before the children were detained and had a difficult time acknowledging the severity of the living conditions at the home. By the jurisdiction/disposition hearing the condition of the home was acceptable, mother was back on her medication, and father was back in the home. However, the agency reported the parents had a voluntary maintenance case in North Carolina in 2013 due to a filthy home (trash, clothes, old food, dog urine and feces, and vomit), the home smelling of marijuana, and mother's mental health, but mother had failed to complete the services. In 2015 mother was charged with assaulting a police officer. In 2016 a case was open because mom left G.I. and J.C. alone for two to three hours. Further, in 2015-2016 social workers attempted to contact mother numerous times and to make unannounced home visits that were unsuccessful. The agency held a child and family team meeting and proposed allowing the children to stay with father so long as mother moved out of the home, but the parents said it would be a financial burden for mother to move out of the home. The court sustained the petition regarding the conditions of the home, mother's substance abuse, mother's mental health, and father's failure to protect. With regard to disposition the juvenile court stated that there are issues that keep reoccurring—simply cleaning up the home does not alleviate the fact that this is the third time a social services agency has been involved with the family and the issues are still unresolved. The court removed the children from the parents, ordered family reunification, and gave discretion for unsupervised, overnight and weekend visits for both parents and return to father if mother was not in the home. Parents appealed.

Affirmed. On appeal parents raised three arguments: 1) at the time of the disposition there was no evidence to demonstrate the children were at substantial risk of serious physical harm if they remained in their parents' custody; 2) a messy home is insufficient in itself to show danger to a child; and 3) the juvenile court's findings were not supported because the court failed to make findings regarding the reasonable efforts to prevent or eliminate removal as required under section 361, subdivision (d). The Court held there was substantial evidence to support removal because although in isolation this case looks a lot different, there are issues that keep reoccurring, and they have not been resolved. Further, the social worker presented the parents with a viable option to prevent removal of the children from the home, but the parents decided mother could not move out. Although the court could have ordered numerous reasonable means to prevent the removal of the children, the facts of the case—including the parents' involvement with child protective services in North Carolina—show there was substantial evidence supporting the court's order removing the children from parental custody. (NS)

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Caseplans—WIC 16501.1

***In re M.R.*.** —Cert. for Partial Publ. 4/29/2020; Fifth Dist.
Docket No. F079971
Link to case: https://www.courts.ca.gov/opinions/documents/F079971.PDF

IN ORDER TO SATISFY WIC 16501.1(g)(2), A CASE PLAN MUST IDENTIFY SPECIFIC GOALS AND HOW EACH PLANNED PROGRAM IS APPRORIATE TO MEET THOSE GOALS.

A petition was filed after the agency investigated two referrals for domestic violence between the parents and a domestic violence dispute between mother and paternal uncle, who was trying to take the children from the mother, alleging she was a methamphetamine user. A case plan was created for mother and signed by the social worker. The case plan listed objectives for mother's services, and client responsibilities, including attending individual counseling, a parenting program, and a SUD assessment. Listed after each of these objectives was the requirement that mother participate in the program as well as follow all recommendations of the program. At the jurisdiction/disposition hearing, father's counsel requested the court strike the phrase "to follow all recommendations" from the case plan. The matter was set for a contested hearing on the issue of the case plans. At the hearing the court heard testimony from a supervisor at mother's service provider, who testified that if case plans do not include the language "follow all recommendations" a parent cannot immediately begin additional programs offered at the agency that have been identified as beneficial to the parent. The court also heard testimony from a social worker who prepares case plans for the agency who indicated the "follow all recommendations" language is beneficial because it avoids delays in services. After hearing argument, the juvenile court ruled that the phrase "except a psychological evaluation" would be added to the case plans after the phrase "follow all recommendations." The court sustained the petition and removed the children from both parents. Mother appealed.

Affirmed. Although the language of the case plans ordered by the juvenile court did not meet the requirements of WIC 16501.1, subdivision (g)(2), the decision was affirmed based on the harmless error standard. There are several components to a case plan, including identifying the reasons for dependency and setting forth the specific goals and how each planned service is appropriate to meet those goals. (WIC 16501.1, subds. (g)(2), (g)(10).) Case plans are to be updated with the needs of the family and for each review hearing. (WIC 16501.1, subd. (e).) The agency has the authority to modify the case plan without court approval between review hearings. (WIC 16501.1, subd. (g)(14).) The court reviews the case plans to determine if they meet the requirements of section 16501.1 and to ensure that appropriate parties were consulted in its preparation. When a parents is court ordered to participate in a program it must be reasonably designed to "eliminate those

conditions that led to the court's finding that the child is a person described by Section 300." (WIC 362, subd. (d).) Case plans first state specific goals for the parent, and then explain how the planned services relate to the goals. Here, the case plans had no restrictions on the types of services that could be recommended by the clinicians. The phrase "follow all recommendations" is not specific as to a particularized program, and therefore it cannot be shown to be appropriate to meet the goals of the case plan. The statute contemplates the needs of the parent being identified first, followed then by identifying the appropriate service to accomplish the goals. Case plans must avoid identifying a category of services so broad that it is not possible to explain how they are appropriate under WIC section 16501.1(g)(2). Even though the juvenile court erred in the language of the case plans, the error was harmless given the testimony at the contested hearing which indicated there would be little likelihood of the language being invoked in a prejudicial manner. (KH)

Adoptability—WIC 366.26

In re Mary C.—published 5/4/20; Fourth Dist., Div. Four
Docket No. A157256;
Link to case: https://www.courts.ca.gov/opinions/documents/A157256.PDF

DEFICIENCIES IN THE WIC 366.26 REPORT ARE NOT ROUTINELY GROUNDS FOR REVERSING A FINDING OF ADOPTABILITY

Mary and Aurora were detained from their parents at the ages of 18- and 8-months due to their parents' drug abuse problems. The girls were released to their parents and their case was dismissed. A month later, the parents were found in a car passed out from drug use with Mary in the back seat. The girls were detained again and placed in a fost-adopt home with Shawn. At the 366.26 hearing, the agency filed a report recommending termination of parental rights (TPR) and a permanent plan of adoption. The record showed that both girls had a variety of issues including global developmental delays, walking and vision problems, and aggressive, obsessive, and self-harming behaviors, all of which required therapeutic services. The report said the girls had been with Shawn for 16 months, assured that Shawn was committed to providing a permanent home, and that the girls were strongly bonded to Shawn. The social worker opined the children were generally adoptable despite their special needs. The court found the girls would be adopted, selected adoption as their permanent plan, and terminated parental rights. The parents appealed, claiming the court's findings of the girls' adoptability were unsupported due to their significant medical and behavioral issues. They also claimed the girls were not specifically adoptable because Shawn and her partner were not sufficiently vetted by the agency.

Affirmed. The agency is required to provide a 366.26 report to address, among other things, (1) an evaluation of each child's "medical, developmental, scholastic, mental, and

emotional status," (2) a "preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent" that includes her "understanding of the legal and financial rights and responsibility of adoption and guardianship." (WIC 366.21(i)(1)(C)(i),(D); 366.22(c)(1)(C)(i), (D).) In order to terminate parental rights, the court must find only that the child is "likely" to be adopted within a reasonable time, by clear and convincing evidence, which the court did here. A prospective adoptive parent (PAP)'s willingness to adopt generally indicates that the minor is likely to be adopted within a reasonable time either by the PAP or another family. It is common sense that adoptability is established where the child is already living in a prospective adoptive home and where all the evidence points to the child being adopted into the home should matters continue. In such a case, the language of the statute is satisfied because "it is likely" that the child will be adopted. The parents' argument that the social worker's opinion alone is insufficient to prove adoptability likewise fails as there were additional facts proving adoptability, such as the presence of a fost-adopt home, a brother with more severe health problems who had been adopted, and the girls' loving, trusting relationship with Shawn. Regarding the agency's duty to provide a "preliminary assessment" of the identified PAP, the report failed to expressly address Shawn's understanding of her responsibilities of adoption, but the good parenting that met all the girls' needs and length of placement in the home showed that Shawn knew exactly what was needed for their care and was up to the task. This Court emphasizes that the statutory scheme requires only a "preliminary assessment" of any PAP's eligibility and commitment; the ultimate issue of the PAP's suitability to adopt is for the subsequent adoption proceeding. Finally, this case is distinguishable from *In re B.D.* (2019) 35 Cal.App.5th 803, which involved an incomplete 366.26 report that thoroughly undermined the basis for TPR. In *B.D.*, uniquely egregious, unreported facts came to light after TPR– a PAP with a serious criminal record whose parental rights were previously terminated over his own children, physical abuse of B.D., and sex-offenders who were allowed to reside in the home. Here, there is no showing of any egregious fact omitted from the 366.26 report that would similarly compel reversal. (ML)