Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

WIC 361.2(a)—NONCUSTODIAL PARENTS

In re A.C.—filed 8/7/20, Certified for Publication 8/28/20; Second Dist., Div. Eight
Docket No.: B302248; (2020) 54 Cal.App.5th 38
Link to Case: https://www.courts.ca.gov/opinions/documents/B302248.PDF

ALTHOUGH NOT DISPOSITIVE, A CHILD'S WISHES ARE A FACTOR TO BE CONSIDERED WHEN CONSIDERING PLACEMENT WITH A NONCUSTODIAL PARENT.

When the agency filed its petition alleging Mother's substance abuse endangered 12-year-old A.C. and her half sibling, A.C. did not know her father because she had not lived with him since she was a toddler and she had not heard from him in over five years. Father was living in Washington State with his wife and seven-year-old son and expressed wanting a relationship with his daughter. A.C. did not want to live with father; she only wanted visits during holidays or the summer. She was strongly attached to her half sibling, maternal grandparents, and mother. A.C. feared the prospect of going to live with father, and she could not sleep. A.C.'s therapist reported being concerned for A.C.'s mental health and concluded that removing A.C. from her grandparents' home would pose a considerable emotional

strain for A.C. and would affect her academic stability. Further, the therapist opined that without a proper reintegration process, placement with father would be detrimental to A.C.'s mental health and stability. The multidisciplinary assessment team agreed that placing A.C. with father would cause emotional detriment and would place A.C. at high risk of emotional deterioration. Shortly before the disposition hearing, during a phone call with the multidisciplinary team father acknowledged the need for A.C. to gradually bond with father and to feel safe and secure that she would be reunifying with mother. At the disposition hearing, father's counsel argued father was entitled to custody of A.C. pursuant to section 361.2 (a). The court sustained the petition and found it would be detrimental to place A.C. with father. Father appealed.

Affirmed. There was substantial evidence A.C. would suffer significant emotional harm if she were forced to live with father. Although the absence of a father-daughter relationship is a legally insufficient basis for rejecting placement with a noncustodial parent, it is a factor the court may consider because while the child's wishes are not dispositive, the child's wishes are relevant. The evidence showed A.C. was strongly attached to her mother, half-brother, and maternal family. Although father was a nonoffending parent who wanted custody of his daughter, the court's inquiry is more comprehensive than simply whether a child will be physically safe with a noncustodial parent or whether that parent has behaved badly. The basis for the court's finding was that A.C. would experience something akin to trauma should she be placed with father. (NS)

Removal – Substantial Evidence

In re V.L.—published 09/1/2020; Second Dist., Div. Two
Docket No. B304209
Link to case: https://www.courts.ca.gov/opinions/documents/B304209.PDF

SUBSTANTIAL EVIDENCE SUPPORTED REMOVAL OF THE MINORS FROM THEIR FATHER BY CLEAR AND CONVINCING EVIDENCE GIVEN THE ONGOING CYCLE OF DOMESTIC VIOLENCE AND THE RECENT VIOLENT MUTUAL COMBAT INCIDENT

The Agency received a child welfare referral after a violent incident occurred on the street between father and mother. A neighbor provided surveillance footage which showed mother as the primary aggressor, and father speeding past a stop sign near mother. During the incident mother opened the door to father's car and assaulted him. Mother and father engaged in a mutual physical altercation. Father drove

away, but then drove back at a high speed, and mother walked up to the car, possibly being hit. Father admitted to grabbing mother during her attack, and that mother bumped into his car when she got in the way of his trying to leave. Their son was present and consistently reported that father hit mother with his car and she went flying in the air. Their daughter was not present but later saw mother with marks and scratches on her body. Mother and both children reported prior domestic violence, which father denied. At the detention hearing, the minors were detained from father and released to mother. At the jurisdiction hearing, the court sustained two counts of the petition regarding the parents' history of domestic violence including the recent incident of mutual combat. Father completed a parenting and domestic violence class, and was having visits, which were going well. At the disposition hearing, the court removed the minors from father and ordered him to complete individual counseling to address case issues. Father appealed.

Affirmed. A removal finding must be made by clear and convincing evidence and the facts upon which the court relied must be stated on the record. The recent Supreme Court case of *Conservatorship of O.B.* (2020) 9 Cal.5th 989 is controlling in dependency cases, and held that when a statute requires a fact to found true by clear and convincing evidence, and that finding is challenged, an appellate court must determine whether the record contains substantial evidence that the trier of fact could have found it highly probable that the fact was true, viewed in the light most favorable to the prevailing party. Here, the evidence showed an ongoing cycle of domestic violence, including three violent altercations which the children witnessed. Further, father's poor judgment by speeding through a stop sign either very near mother or so close that his car bumped her body, recklessly endangered the mother in front of their son. Father denied the reported history of domestic violence, which makes it less likely that he will change his behavior in the future. Given all the evidence, a reasonable trier of fact could have found it highly probable that the children would be at substantial risk of being harmed by the exposure to future domestic violence if they were not removed from the father's custody, and there were no reasonable means to protect because the violence occurred in public and the father was a source of danger while denying any domestic violence history. The recent incident was evidence that there was ongoing violence between the parents, that the violence was not purely historical, and their relationship was unresolved. Finally, while the juvenile court failed to state the facts upon which it relied to make its removal findings, this was harmless error because the juvenile court would not have reached a different conclusion if it had stated the facts. (KH)

Notice—WIC 316.2 & WIC 366.26(l); Parentage

In re J.W.-P.—published 9/8/20; First Dist., Div. Five
Docket No. A156550;
Link to case: https://www.courts.ca.gov/opinions/documents/A156550.PDF

THE JUVENILE COURT ERRED BY FAILING TO SEND FATHER STATUTORILY REQUIRED NOTICE ADVISING HIM OF THE PROCESS FOR ELEVATING HIS PARENTAGE STATUS; SUCH ERROR WAS PREJUDICIAL

J.W.-P., then 10 years old, was detained from mother in October 2017. Mother stated at detention that she and father lived together and jointly raised the child until she was 2 years old, and there was a subsequent paternity action and father was ordered to pay child support. The juvenile court delayed making a parentage finding and detained the child from mother. A first amended petition was filed naming father as an alleged father. The court sustained the amended petition in November 2017 and granted mother reunification services. Father had repeatedly stated to the social worker that he was the father and wanted custody of his daughter and was advised to ask for an attorney in court. Father's request for an attorney was documented in court reports. Father mailed the birth certificate for J.W.-P. to the social worker with his name listed. Father then attended a meeting with the social worker and said he wanted his child placed with him. In March 2018, the court appointed father an attorney to address paternity. In spring 2018, J.W.-P. visited father for two days and by June 2018, father had visited minor in placement with maternal grandparents three times. Father is cited in the status review report as maintaining his request for custody of his daughter. At the August 2018 status review hearing, mother's reunification services were terminated, and a section 366.26 hearing was set for December 2018. The attorney for father had taken no action over the course of four hearings and was relieved at that status review hearing. A new attorney was appointed but was unable to represent father due to a conflict. The court learned of the conflict months later, such that father was unrepresented from August 2018 until January 31, 2019, during which time the court held the section 366.26 hearing, selected the plan of legal guardianship, and appointed maternal grandparents legal guardians of J.W.-P. On January 31, 2019, at a hearing to terminate jurisdiction, a new attorney was found for father and submitted to the termination without speaking to father or reviewing the record. Father appealed the orders from the status review hearing and from the section 366.26 hearing.

Reversed and remanded. Father is excused for failing to timely file a notice of intent to file a writ petition to contest the setting of the section 366.26 hearing, as the clerk of the court failed to give father proper notice regarding the writ requirement. On the merits, the trial court erred by failing to ensure father received statutory notice under section 316.2 of the dependency proceedings and his right to assert his parentage of J.W.-P. The notice requirement is designed to provide alleged father with information about the proceedings and steps to take to request elevation of

parentage status and preserve the limited due process right alleged fathers have. The error was not harmless because father would likely have been able to achieve presumed father status and request custody of J.W.-P. if had proper notice. Father was prejudiced by the lack of notice even though he had appointed counsel during portions of the case because that counsel failed to raise the parentage issue and father would have been able to raise it himself if the notice was sent to him directly. (SH)

WIC 388; WIC 390

In re Samuel A.—published 9/24/20; Second Dist., Div. Seven
Docket No.: B302700
Link to case: https://www.courts.ca.gov/opinions/documents/B302700.PDF

IN ORDER TO SUMMARILY DENY A WIC 388 PETITION, THE JUVENILE COURT MUST DECIDE WHETHER IT MAKES A PRIMA FACIE SHOWING OF NEW EVIDENCE OR A CHANGE OF CIRCUMSTANCES AND THAT THE REQUESTED RELIEF WOULD BE IN THE CHILD'S BEST INTEREST

The agency filed a section 300 petition alleging Mother had an unresolved history of alcohol abuse that made her unable to provide regular care of the child, Samuel. An amended petition was filed additionally alleging Mother suffered from severe and untreated anxiety and depression that also made her unable to provide regular care. The court sustained both allegations, declared Samuel a dependent, and ordered reunification services. Prior to the six-month review hearing, Mother filed a section 388 petition seeking, pursuant to section 390, to set aside the court's jurisdiction findings and to dismiss the amended section 300 petition in the interests of justice. In support of the petition, Mother relied on a recently completed Evidence Code 730 psychiatric evaluation by Dr. Dupée, which found that Mother did not suffer from any major mental illness that impaired her ability to parent, that mother's anxiety and anger were a direct result of the dependency proceeding and not any underlying mental illness, that there was no evidence of ongoing alcohol abuse since Samuel's detention, and that mother did not meet the diagnostic criteria for alcohol use disorder as defined in the DSM-5. Mother also provided several reports by monitors indicating a strong bond with Samuel and positive visits. Mother asserted Samuel's health had declined in the custody of the foster parent and it was in his best interest to be returned to her care. The agency's attorney asked the court to outright deny the petition, arguing it was a motion for reconsideration or for a new trial, and that either way it was untimely under the Code of Civil Procedure. The court appointed Mother new counsel and continued the

matter to address the petition. In the interim, the agency walked on a restraining order request to protect the social worker, foster parent, and child from Mother, reporting increasingly erratic and dangerous behavior by Mother toward the social worker and foster parent, and that a bailiff had noted Mother smelled of alcohol at a recent court hearing at which she was disruptive. The court promptly issued a temporary restraining order and set the permanent restraining order hearing on the date the 388 petition was to be addressed. On the date of the hearing, the court summarily denied the petition without deciding whether Mother had made a prima facie showing under section 388 sufficient to warrant a hearing on the merits. At the same hearing, the court also issued a permanent restraining order protecting the foster parent and social worker, and a temporary restraining order as to Samuel with carve-outs for virtual and telephonic visits. Mother appealed.
Reversed and remanded. WIC 388 allows for a change in court orders when the moving party presents new evidence or a change of circumstances and demonstrates the change of the order is in the child's best interest. The petition should be liberally construed in favor of granting a hearing but the "prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." WIC 390 allows the court to set aside findings and dismiss a dependency petition if it finds that the interests of justice and the child's welfare require dismissal and the parent is not in need of treatment or rehabilitation. Here, the 388 petition was based on new evidence, namely Dr. Dupée's evaluation of Mother and reports from visitation monitors that purportedly showed that termination of dependency jurisdiction was in Samuel's best interests. Instead of evaluating whether the petition made a prima facie showing to set the matter for a hearing on the merits, the court simply denied the petition outright, concluding it was simply "an untimely new trial motion" pursuant to Code of Civil Procedure 659. This was error. Filing a 388 petition to terminate dependency jurisdiction under WIC 390 is entirely proper. The fact that in the same hearing the court granted a temporary restraining order against Mother as to Samuel was a powerful indicator that the court believed the requested relief was not in his best interests – but instead the court had denied the petition on an incorrect procedural ground. (ML)

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Reconsidering Parentage—WIC 385

In re J.P.—published 10/1/20; Sixth Dist.
Docket No.: H047586
Link to Case: https://www.courts.ca.gov/opinions/documents/H047586.PDF

THE JUVENILE COURT MAY RECONSIDER PREVIOUS PATERNITY FINDINGS PURSUANT TO SECTION 385 AND FAMILY CODE SECTION 7642.

The children, J.P. and A.A., were detained from their parents due to unresolved substance abuse and domestic violence issues. The court later sustained the allegations and removed the children. Albert was the biological father of A.A., but not J.P. Albert was the ex-boyfriend of J.P.'s mother. Albert began dating J.P.'s mother when J.P. was two. Albert was initially deemed the presumed father of A.A only. Another individual, L.P., was found to be the presumed father of J.P. L.P. did not make his whereabouts known throughout the course of dependency proceedings and did not visit J.P. Both children were placed with Albert's parents. During interviews, Albert indicated that he wanted to be designated J.P.'s presumed parent. Albert stated J.P. called him "dad' and he referred to J.P. as his son even though he was not J.P.'s biological father. During the reunification period, Albert initially visited with J.P. regularly. Albert was hands-on with the children when they were with him and ensured that the children were fed, took them to local parks, and appeared to provide for their basic needs. A year into dependency proceedings, Albert sought presumed status of J.P. after mother impeded visitation. The court held a contested paternity hearing on September 24, 2018. Albert testified that he provided financial support for J.P. and developed a close relationship with him. He also testified that he lived with mother and J.P. for almost two years. Although the juvenile court stated the case was "a little bit of a close call", the court held Albert did not qualify as a presumed father under Family Code section 7611, subdivision (d). The juvenile court focused on Albert's failure to seek presumed status from the onset of the case. Although the court denied Albert presumed father status, the court did grant Albert regular visitation with J.P.[1]
On March 18, 2019, Albert petitioned the court again to recognize him as a presumed father of J.P. Albert testified the mother told J.P. that Albert was not his father and continued to disrupt J.P.'s visitations with him. The paternal grandmother testified she observed Albert caring for J.P. like a son, nurturing and guiding him. J.P. would refer to Albert as daddy during that period. Whenever J.P. was scheduled for a visit with Albert, he was always excited to do it. At the end of visits J.P. seemed reluctant to leave. Taking into consideration the most recent

[1] This decision was upheld on a separate appeal. (*In re J.P.* (2019) 37 Cal.App.5th 1111.)

evidence presented and reexamining the evidence presented at the previous paternity hearing, Albert was found to qualify as a presumed parent of J.P. The juvenile court found mother refused to allow Albert to visit J.P. for months prior to the initial paternity hearing and then continued to deny him visitation for months despite the court's visitation order. During the second paternity hearing, evidence was presented that explained Albert's reluctance to seek presumed status earlier. During the initial stages of the dependency case, mother allowed J.P. to visit Albert. However, after Albert was involved in an automobile accident, mother began to deny visitation. At that point, Albert sought presumed status. Consequently, the court found Albert's "failure to [seek a paternity ruling] was not based on any ambivalence towards his parental role, but on having a misplaced faith in the mother's ongoing recognition of his relationship with [J.P.]"

Affirmed. On appeal, mother argued the juvenile court erred by finding it was authorized to reconsider parentage under section 385. Family court and juvenile court serve different purposes. The overarching purpose of the dependency system is to maximize a child's opportunity to develop into a stable, well-adjusted adult. The best interest of the child is the fundamental goal of the juvenile dependency system. The juvenile court has the special responsibility to consider the totality of a child's circumstances, including the maintenance of relationships with other adults with whom the child has a strong bond. Under section 385, the court has broad authority to reconsider and change its prior orders. Section 385 authorizes the juvenile court to change, modify or set aside its prior orders sua sponte. However, the juvenile court most follow the Uniformed Parentage Act ("UPA") when addressing parentage. Family Code section 7642 provides, "[t]he court has continuing jurisdiction to modify or set aside a judgment or order made under this part." Such language was found to confer at least as broad an authority as that afforded to the juvenile court under section 385. As such, the juvenile court had the authority to reconsider its previous paternity order. (MO)

ICWA; WIC 366.26—Permanent Plan Selection

In re N.S.—filed 9/17/20, Certified for Publication 10/9/20; Fourth Dist., Div. One Docket No. D077177;
Link to case: https://www.courts.ca.gov/opinions/documents/D077177.PDF

THE JUVENILE COURT HAS THE AUTHORITY TO TERMINATE PARENT RIGHTS AND ORDER ADOPTION IN AN ICWA CASE EVEN WHEN THE TRIBE IS RECOMMENDING LEGAL GUARDIANSHIP; NO EXCEPTION TO ADOPTION, INCLUDING THE INDIAN CHILD EXCEPTIONS, APPLIED

N.S. was removed from mother due to her severe drug and alcohol abuse. N.S. was an Indian child within the meaning of the Indian Child Welfare Act (ICWA) based on father's membership in the San Pasqual Band of Mission Indians. He was placed with maternal grandparents shortly after detention at 16 months and had resided with maternal grandmother continuously since 2013. In 2014, the court appointed maternal grandmother legal guardian and closed the case. Mother filed a section 388 petition in 2018, stating maternal grandmother was denying her visitation with N.S.—maternal grandmother reported she obtained a restraining order due to mother's erratic behavior. Grandmother filed a 388 asking the court to reopen jurisdiction and set a section 366.26 hearing for adoption. Mother later withdrew her section 388 and the court granted maternal grandmother's request to set the 366.26 hearing. Between January 2019 and August 2019, mother had steady visits with N.S. and N.S., while initially anxious and stressed at visits, became more comfortable with her. N.S. consistently told social workers and his counsel that he wished to be adopted by maternal grandmother and did not want to live with mother. Mother filed a second 388 in August 2019 alleging prolonged sobriety, completion of inpatient and outpatient programs, and biweekly negative tests. The court granted a hearing on the section 388 petition set to precede the section 366.26 hearing. Following a Child and Family Team meeting with the agency, maternal grandmother, and the Tribe's ICWA representative, the agency recommended Tribal Customary Adoption for N.S. The Tribe had expressed concern that maternal grandmother had helped N.S. become connected to the Tribe or its traditions. Maternal grandmother expressed a desire and commitment toward connecting N.S. with his Tribe's heritage. The Tribe then changed its recommendation to legal guardianship, stating it was not sure maternal grandmother would follow through with the responsibilities of a Tribal Customary Adoption, but that it still wanted N.S. to have a relationship and visitation with his mother. The agency reported it felt Tribal Customary Adoption met the needs and recommendations of all parties, but because the Tribe was no longer in favor of it, the agency was recommending termination of parental rights and adoption. At the hearing on mother's 388, the court found changed circumstances but that it was not in N.S.'s best interest to grant additional reunification services. The court granted mother short unmonitored visitation. For the section 366.26 hearing, two ICWA experts wrote declarations supporting the legal guardianship recommendation of the Tribe because it preserved the mother's relationship and would preserve N.S.'s connection to his Tribe. The agency social worker, both ICWA experts, and the Tribe's ICWA representative testified at the hearing. The experts and ICWA representative testified that maternal grandmother had not made much effort to connect N.S. with the Tribe and that if parental rights were terminated N.S. would no longer be recognized as part of the Tribe. Mother argued that the beneficial parental

relationship exception to adoption applied, and that the Indian child exceptions to adoption applied: that termination of parental rights would substantially interfere with N.S.'s connection to his Tribe's community and that the Tribe had identified guardianship as the permanent plan. The court concluded there was not a compelling reason to avoid termination of parental rights on any grounds and found beyond a reasonable doubt that continued custody by mother would likely result in emotional or physical damage to N.S. Parental rights were terminated in January 2020. Mother appealed.

Affirmed. 1) The ICWA expressly grants selection of permanent plan to the states. California's preference is for Tribal Customary Adoption *if* that is what the Tribe recommends, but it is not obligated to select Tribal Customary Adoption. As the Court stated in *In re T.S.* (2009) 175 Cal.App.4th 1031, nothing in the statute prevents a court from selecting regular state adoption when the Tribe is recommending legal guardianship. The enumerated exceptions apply only if the circumstances described are present *and if* there is a compelling reason for finding that termination of parental rights would be detrimental to the child. 2) Mother's claim that N.S.'s counsel was ineffective for allegedly failing to investigate N.S.'s eligibility for Tribal benefits lacks merit. First, mother cannot show that counsel failed to investigate as the records are protected by work product privilege. Second, even if assuming, arguendo, counsel did fail to investigate, mother was not prejudiced because the record showed that N.S. was not eligible for membership and that the Tribe had expressed very little interest in N.S. throughout the course of the guardianship until the present litigation began. 3) The juvenile court properly concluded that terminating parental rights would not substantially interfere with N.S.'s connection to the Tribe because a) the Tribe had made little effort to connect with N.S. previously and b) the court believed maternal grandmother would follow through on her intent to provide N.S. with connection to his Tribe based on her statements in the reports, at the CFT meeting, her record of excellent care of N.S., and her request for additional assistance from the Tribe. The Indian child exception is similar to the sibling exception to adoption, and the court can rely on maternal grandmother's assurances in declining to apply the exception. Further, N.S. had spent nearly his entire life with grandmother and repeatedly stated he wanted her to adopt him, evidencing his need and desire for stability and permanency. The Tribe's recommendation for legal guardianship focused on mother's interest, not N.S.'s. 4) Ample evidence supported the finding of detriment beyond a reasonable doubt. Mother had a long history of drug and alcohol abuse, including repeated relapses and at least 15 different enrollments in recovery programs which she did not finish. The ICWA expert concluded that mother's history was likely to lead to serious emotional or physical damage if she were to regain custody. N.S.'s primary attachment was to his grandmother. 5) Mother's contention that the beneficial

parental relationship exception applied is also unsupported by the evidence. Mother did not have a parental relationship with N.S., but merely had friendly visits. N.S. had resided most of his life out of mother's home. N.S. was not distraught or upset when visits were over and did not express wanting to live with mother. N.S. was happy and thriving in maternal grandmother's care, and the stability and security she offered outweighed any possible detriment to N.S. from termination of parental rights. (SH)