Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

Jurisdiction—WIC 300(a); Disposition—WIC 361(c)

In re Nathan E.—published 2/22/21; Second Dist., Div. One
Docket No. B306909
Link to case: https://www.courts.ca.gov/opinions/documents/B306909.PDF

SECTION 300, SUBDIVISION (A) CAN BE SUSTAINED BASED ON DOMESTIC VIOLENCE BETWEEN THE PARENTS; MOTHER'S FAILURE TO BENEFIT FROM PAST SERVICES AND MINIMIZATION OF DOMESTIC VIOLENCE SUPPORTED JURISDICTIONAL AND DISPOSITIONAL ORDERS

Nathan E. (age 4) and his younger siblings were the subjects of a referral regarding a domestic violence incident in February 2020. Mother initially refused to meet with investigating social workers and claimed that the children were not present during the domestic violence incident. Police reports showed that mother disclosed she and father argued, that father yelled, pulled at mother's necklace, and clawed and scratched her neck. Police uncovered three previous domestic violence incidents between the parents and a criminal protective order in place through 2025. Throughout the agency's investigation, mother at times declined to answer questions about the allegations and minimized the domestic violence. In a prior domestic violence case, mother had been the aggressor and stabbed father. She had

been ordered to complete a 52-week domestic violence course. In the agency's interviews, Nathan divulged that mother and father fought, that he had been in the room during the February 2020 incident, and that mother hit him with a wooden spoon for discipline. The agency filed a section 300 petition under subdivisions (a), (b), and (j), alleging both domestic violence and physical abuse. The juvenile court sustained the domestic violence counts under subdivisions (a) and (b) and dismissed the physical abuse counts. The court then removed the children from both parents and ordered reunification services. Mother timely appealed both the jurisdiction and disposition orders and argued that subdivision (a) cannot apply to domestic violence between parents.

Affirmed. Domestic violence can be the basis for jurisdiction under section 300, subdivision (a) where, as stated in *In re Giovanni F.* (2010) 184 Cal.App.4th 594, exposure to domestic violence placed a child at substantial risk of suffering serious physical harm inflicted non-accidentally by the parent. Perpetrating or engaging in domestic violence is itself non-accidental. Here, parents engaged in domestic violence for many years and the violence persisted even after mother engaged in services. Police records demonstrated numerous calls regarding domestic violence in the household. Mother cannot rely on her enrollment in services to counter the jurisdiction and disposition findings, as those services had proven ineffective, and mother refused to cooperate with the agency. The agency did not have to prove how the children could have been injured during the domestic violence incident in order to prove the allegations—it was enough to show the history and seriousness of the violent incidents in the past. Clear and convincing evidence supported the removal orders. (SH)

Disposition—WIC 361(c)(1)

In re I.R.—filed 2/24/21; cert. for publ. 3/2/21; Second Dist., Div. One
Docket No. B307093
Link to Case: https://www.courts.ca.gov/opinions/documents/B307093.PDF

A FINDING OF CLEAR AND CONVINCING EVIDENCE IS NOT SUPPORTED IN A DOMESTIC VIOLENCE CASE WHERE A REASONABLE INFERENCE CANNOT BE MADE THAT THE PARENT IS VIOLENT AND AGGRESSIVE OUTSIDE THE CONTEXT OF THE RELATIONSHIP, NOR IS A GENERALLY VIOLENT, AGGRESSIVE, OR ABUSIVE PERSON.

I.R. was detained from father, with monitored visits, and remained released to mother due to allegations of domestic violence between parents. At the jurisdictional hearing, the court sustained a domestic violence allegation, which was supported by evidence of two instances in which father slapped mother, the second of which also involved him throwing a baby shoe at her. Father had no DCFS

history, no prior referrals, and no criminal record. Father remained out of the family home since the detention hearing and there was no evidence of any contact between father and mother or that the parents had any intent to reconcile. Father visited I.R. five days a week, for two and one-half hours per visit, without incident. At the dispositional hearing, both I.R.'s and father's counsel argued that clear and convincing evidence did not support removal from father and that there was a safety plan to allow I.R. to remain with father, namely that father and mother were not together, two paternal relatives had been approved as monitors and they could help in the exchange of the child. Based on mother's drug history and I.R.'s young age, I.R.'s counsel also requested that mother present three consecutive clean drug tests. The court found clear and convincing evidence and removed I.R. from father, with unmonitored visits, and placed I.R. home-of-parent-mother. The court denied I.R.'s request that mother drug test. I.R and father appealed.

Reversed in part, affirmed in part. The evidence did not support that I.R. would be in substantial danger in father's custody or that removing I.R was the only means to protect her. The sole source of potential danger to I.R. while in father's care derived from the history of domestic violence with mother, not danger resulting from I.R. being in father's care. Nothing in the record suggested that father had ever been violent or aggressive outside of the context of his relationship with the mother, nor that he is a generally violent, aggressive, or abusive person. There was not substantial evidence to support that the domestic violence will continue if I.R. is placed in father's care. Further, the court did not abuse its discretion by declining to impose drug testing requirements because there was no evidence supporting any link between any current drug use by mother and the incidents of domestic violence with father. (LV)

WIC 388—ANSLEY MOTION

In re R.A.—published 3/11/21; First Dist., Div. Two
Docket No. A161510
Link to case: https://www.courts.ca.gov/opinions/documents/A161510.PDF

WHERE THE AGENCY FAILED TO GIVE ANY NOTICE OR USE REASONABLE DILIGENCE TO LOCATE A PARENT, A SEPARATE SHOWING OF BEST INTEREST IS NOT REQUIRED IN THE PARENT'S WIC 388 ANSLEY MOTION.

A WIC 300 petition was filed on R.A. that identified father as his alleged father, stated his whereabouts were unknown, and included a WIC 300(g) allegation against him. Mother provided the agency with father's name and date of birth. All reports filed for jurisdiction/disposition indicated father's whereabouts were unknown and that mother had no contact with him but made no mention of the efforts made to locate father. The juvenile court found notice proper and sustained

the allegations against mother and father. A supplemental petition was filed. Reports again stated father's address was unknown, mother had no contact with father, and made no mention of the efforts to locate father. The court found notice proper and that the agency had exercised "due diligence to locate the child's relatives," and ordered reunification services for mother. At the six-month hearing, the agency listed a state prison address for father for the first time. The court appointed an attorney for father. At the twelve-month hearing, a new attorney substituted in for father who filed a WIC 388 motion to set aside all prior findings and orders based on lack of notice to father in those proceedings. After finding father presumed, the court heard argument as to whether his section 388 petition should be set for hearing. By this time, father had been released from incarceration. The court summarily denied his petition, finding there were changed circumstances but a failure to meet the best-interest prong given that the minor was moving towards permanency. Father filed a writ petition.

Writ granted. Because father sufficiently stated a notice violation, he was entitled to an evidentiary hearing on his WIC 388 motion. A parent may raise the agency's failure to provide adequate notice through a WIC 388 petition, but the analysis is different when a parent shows no notice of the dependency petition given. In that scenario, a separate showing of best interest is *not* required because a lack of due process means there is a fatal jurisdictional defect. If a parent is transient and his whereabouts are unknown, due process may be afforded by reasonable diligence to locate the parent, or, in other words, through a thorough, systematic investigation and an inquiry conducted in good faith. This case is different from *In re Justice P.* because, there, the agency initially made reasonable search efforts. Here, father claimed the agency failed to make any reasonable search effort from the start of the case. "We cannot accept the idea that an agency may completely ignore its duty to search for a missing parent and then, should the missing parent show up, rely on the best interest of the child to preclude that parent from participating in the dependency case." The juvenile court was directed to conduct an evidentiary hearing on the 388 petition where father and the agency should be able to present evidence and argument as to whether the agency exercised due diligence to locate father and provide notice of the proceedings. (ML)

DETRIMENT—WIC 362(a)

In re F.P. – filed 2/24/21; cert. for publ. 3/16/21; Second Dist., Div. Two
Docket No.: B37313
Link to Case: https://www.courts.ca.gov/opinions/documents/B307313.PDF

A FINDING OF PHYSICAL AND EMOTIONAL ABUSE IS SUFFICIENT TO MAKE A DETRIMENT FINDING AND DENY VISITATION TO A PARENT. CONDITIONING CONJOINT THERAPY ON THE RECOMMENDATION OF A

CHILD'S THERAPIST IS APPROPRIATE AND FALLS WITHIN THE JUVENILE COURT'S AUTHORITY UNDER WIC 362(a).

F.P. came to the attention of the agency after mother contacted law enforcement and alleged her adult son had kidnapped the child. Upon contact, the child disclosed that he was fearful of his mother and wished to stay with his adult sibling. The child alleged his mother, "physically abus[ed] him on a regular basis by throwing things at him, punching him, and pinching him, [which] sometimes [left] bruises." The child also voiced a fear of his mother due to her mental state, "[mother] often talk[ed] about killing herself … [and] thinks she is being followed or believes she sees extraterrestrials." While caring for F.P., mother often threatened to kill herself and while traveling from Utah to California threatened to drive their car over a cliff. Mother often screamed and cursed at the child and told him he was stupid; she would also regularly pretend she was going to hit him and then laugh at him when he flinched. The child was detained from mother and monitored visits were ordered. During the period between the detention and adjudication, the child was hospitalized due to suicidal ideation. The social worker at the hospital described F.P. as "depressed and fearful." The child was hospitalized after cutting himself and telling another child in the foster home he did not want to wake up after he fell asleep. He suffered from frequent nightmares, called himself "idiot," "stupid," and "good for nothing," and would bang his head against the wall. F.P. refused all contact with his Mother. When Mother attempted to call the child at his placement, he would become anxious and stressed. The juvenile court sustained physical and emotional abuse allegations against the mother, made a detriment finding and ordered no visitation. Conjoint counseling was ordered if the child's therapist recommended it. Mother appealed and contended there was insufficient evidence to support a no visitation order and the juvenile court improperly delegated to the child's therapist the decision whether to allow conjoint therapy.

Affirmed. Substantial evidence supported the juvenile court's finding that visitation between mother and child would be detrimental. The record showed mother was physically and emotionally abusive. This abuse resulted in the child suffering from suicidal ideation and depression, which required multiple hospitalizations. Although mother forfeited her challenge to the order for conjoint counseling by failing to raise any objection at the dispositional hearing, even absent such forfeiture, there was no error. Pursuant to section 362(a), a juvenile dependency court has the authority to issue "all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of a [dependent] child." Due to mother acting as a trigger and causing the child significant stress and anxiety, the juvenile court's decision to commence conjoint counseling once the child's therapist authorized such contact was appropriate. Unlike visitation, there is no statutory right to counseling. Counseling is merely a service the juvenile court may order if the juvenile court thinks it would benefit the parent and the child. As such, the

juvenile court's decision to order conjoint counseling when deemed appropriate by the child's therapist was not an improper delegation of power. (MO)

ICWA—Notice

In re J.S.—filed 3/2/2021; cert. for partial publ. 4/1/2021; Second Dist., Div. Seven Docket No. B301715
Link to case: https://www.courts.ca.gov/opinions/documents/B301715.PDF

SUBSTANTIAL EVIDENCE SUPPORTED THE FINDING THAT THE ICWA DID NOT APPLY WHEN THE ONLY SOURCE OF INFORMATION ABOUT POTENTIAL NATIVE AMERICAN ANCESTRY CAME FROM A DNA TEST WHICH REVEALED NO SPECIFIC TRIBE OR REGION AND THE AGENCY CONDUCTED A FURTHER INQUIRY SURROUNDING THE CLAIMS TO NO AVAIL.

At the detention hearing, the juvenile court found that it had no reason to know that the ICWA applied after mother indicated that she had no Indian ancestry on her ICWA-020 and informed the court that father did not either. Father first appeared at the jurisdiction hearing and submitted an ICWA-020 indicating he may have Indian ancestry and that paternal grandmother has 58% Indian ancestry. The paternal grandmother provided her contact information, and later told the agency that she submitted her DNA to ancestry.com and was shocked that the results indicated she had 54% Native American heritage. No tribe was specified. She indicated that she was almost 100% positive that no one in her family was eligible for tribal membership, that her family is of Mexican descent, and came to the United States in 1917. Paternal grandmother said her aunt also took the DNA test which indicated she had 68% Native American ancestry, but that she was elderly, does not know what tribe, and would have no further information. She did not have contact information for her aunt to provide to the agency. The agency informed the juvenile court that it could not notice any tribes since no tribes were known. The juvenile court found that it had no reason to know that the ICWA applied. Mother appealed.

Affirmed. Under ICWA and the WIC, an "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); § 224.1, subds. (a) and (b).) The juvenile court and the agency have an ongoing duty to inquire if a child is or may be an Indian child. There is the initial duty of inquiry to determine if a child may be an Indian child, the duty of further inquiry which is triggered if there is reason to believe a child may be an Indian child, and the duty to notice when the juvenile court knows or has reason to know a child is an Indian child. Here, the father indicated he may

have Native American ancestry solely because his aunt's ancestry.com DNA results said she was 54% Native American. When contacted, paternal aunt indicated she had no further information on the subject, that no one in the family would, and that she was almost 100% certain no one in her family was ever enrolled or eligible to be enrolled with a tribe. Further, when used in the context of ancestry.com, the term "Native American" includes ethnic origins stretching from North to South America. Since the ancestry.com results in question did not specify a tribe or region, the results are not useful in determining if the children were Indian children as defined by the ICWA, which covers only certain federally recognized tribes. Since no tribe or region was provided, the BIA could not have assisted the agency. The agency conducted an adequate further inquiry to the extent that the information provided required it. Substantial evidence supported the juvenile court's finding that the ICWA did not apply. (KH)

Jurisdiction—WIC 300(b); Disposition—WIC 361(d), 361.5(e)(1)

In re J.N. —published 04/02/2021; Second Dist., Div. One
Docket No. B308779
Link to Case: https://www.courts.ca.gov/opinions/documents/B308879.PDF

ABSENT A SHOWING OF NEXUS, NEITHER A JURISDICTIONAL FINDING NOR A REMOVAL ORDER CAN BE BASED SOLELY ON A PARENT'S INCARCERATION AND CRIMINAL RECORD.

In an amended petition, the agency alleged that minor was at risk of serious physical harm due to father's violent criminal history and his associated incarceration. To support these allegations, the jurisdiction/ disposition report attached dockets from father's criminal court cases and detailed results from his California Law Enforcement Telecommunications System (CLETS) report. At the jurisdiction and disposition, the juvenile court sustained the jurisdictional allegations against father, noting father's "very serious convictions of crimes that impact child safety and a parent's safety while caring for their child." The juvenile court removed minor from father, released minor to mother, and bypassed reunifications services for father pursuant to section 361.5(e)(1). The court found that offering reunification services to father, who was incarcerated, would be detrimental to minor. Father appealed.

Reversed in part, vacated in part. The juvenile court's jurisdictional finding, removal order, and detriment finding as to father under section 361.5 were erroneous. First, as to the jurisdictional finding, nexus was not shown. Father's criminal record, which included convictions for violent crimes, and his incarceration did not establish a substantial risk of harm to minor. Nothing in the record suggested that any of father's crimes were against children, involved children, or

placed minor in danger during the time that father was engaged in minor's life. The record did not suggest that father exposed minor to his criminal activities, that father provided minor access to weapons or dangerous instruments of crimes, or that minor was in father's care at the time of the underlying crimes. Second, the removal order was unsupported. Because father was a non-custodial, incarcerated parent, the applicable statute - section 361(d) - required an assessment as to whether father's arrangements for minor's living situation would create the requisite substantial risk. Here, the record did not establish how such an arrangement would put minor in physical danger nor did it show the requisite danger to minor if he lived with father after father's release from prison. Finally, because minor was released to mother at disposition, the court was not authorized to grant or deny reunification services to father. Accordingly, the bypass provisions of section 361.5 did not apply, and the detriment finding was erroneous. (AMC)

Ineffective Assistance of Counsel; Right to Appeal

In re A.R.—published 4/05/2021; Supreme Court of California
Docket No. S260928
Link to Case: https://www.courts.ca.gov/opinions/documents/S260928.PDF

IF AN ATTORNEY FAILS TO TIMELY FILE AN APPEAL AFTER TERMINATION OF PARENTAL RIGHTS, PARENTS MAY SEEK RELIEF BASED ON DENIAL OF COMPETENT COUNSEL PER WIC 317, 317.5

The juvenile court terminated reunification services of a minor mother and set the WIC 366.26 hearing. Mother was not present at the hearing. Additionally, her original court appointed attorney was in the process of quitting her job at the time, and a new attorney appeared on mother's behalf. The juvenile court terminated mother's parental rights, and mother directed her newly court-appointed attorney to appeal five days later. The attorney mistakenly filed the notice of appeal four days after the 60-day filing deadline passed. The Court of Appeal dismissed mother's appeal as untimely. Mother filed a habeas petition challenging the dismissal of her appeal based on ineffective assistance of counsel.

Reversed. When a court-appointed attorney fails to timely file a notice of appeal of an order terminating parental rights, parents whose rights have been terminated may seek relief based on the denial of the statutory right to the assistance of competent counsel (WIC 317, 317.5.) The Legislature enacted procedural protections to ensure parental rights will not be terminated in error - specifically (1) the right competent counsel and (2) the right to appeal. If the right to appeal is denied because of the attorney's failure to timely file the appeal, then the parent's relief is to appeal based on competent counsel. Ineffective assistance of counsel claims are normally made through habeas petitions; however, the Supreme Court expressly

stated that in the context of late filed appeals, habeas is not required and courts may fashion their own procedures for raising this issue on appeal. Additionally, the court weighs the interest of the parental rights against the child's interest in avoiding unnecessary delay of permanency. Therefore, to succeed in a claim of competent counsel in this situation, parents must show that they would have filed a timely appeal absent attorney error, and that the parent diligently sought relief from default within a reasonable time. (ME)

ICWA

Brackeen v. Haaland, (5th Cir. Apr. 6, 2021) (en banc)
No. 18-11479
Link to case: https://www.ca5.uscourts.gov/opinions/pub/18/18-11479-CV2.pdf

The en banc U.S. Fifth Circuit Court of Appeals considered the constitutionality challenges to the Indian Child Welfare Act (ICWA) and the validity of implementing regulations promulgated by the Bureau of Indian Affairs (BIA) in its 2016 Final Rule (Final Rule). The Plaintiffs were the Brackeens and two other non-Indian families who sought to adopt children of Native American ancestry, and the States of Texas, Louisiana, and Indiana. Defendants were the United States, federal agencies and officials charged with administering ICWA and the Final Rule, as well as several Indian tribes that intervened in support of ICWA. The first decision in the case, issued in October 2018, struck down ICWA as unconstitutional because its provisions treat Indian children differently based on race. The district court granted Plaintiff's motion for summary judgment in part, declaring that ICWA and the Final Rule violated equal protection, the Tenth Amendment, and the nondelegation doctrine, and that portions of the Final Rule were invalid under the Administrative Procedure Act (APA). Defendants appealed. One panel of the 5th Circuit reversed and rendered judgment for the Defendants. The case was then reconsidered en banc.

Affirmed in part, reversed in part. Twenty-six states, including California, filed amicus briefs in the case asking the Fifth Circuit to uphold ICWA. Collectively, these states make up 94% of federally recognized tribes and 69% of the national American Indian and Alaska Native population. A majority of the en banc Court agreed that Congress was authorized to enact ICWA, and a majority of ICWA is constitutional. An en banc majority held: 1) the "Indian Child" designation does not offend equal protection principles; and 2) the BIA acted within its statutory authority in issuing binding regulations. The provisions of ICWA deemed unconstitutional did so under the anti-commandeering doctrine which says that the federal government cannot require states or state officials to adopt or enforce federal law. The provisions deemed to unconstitutionally commandeer state courts include: 1) ICWA's "active efforts" clause which requires prospective adoptive foster

parents of a Native child to prove that active efforts were made to remediate or rehabilitate the biological parent and prevent the breakup of the Indian family; 2) testimony of a qualified expert witness; and 3) placement record-keeping requirements.

The provisions from the decision go into effect June 1, 2021, but only affects court proceedings in Louisiana, Mississippi, and Texas. The decision has no effect on California because the constitutionality was upheld and because in 2006 and 2018 California expanded state ICWA protections by incorporating both ICWA and the federal rules regarding ICWA into California law. The next step in the case could be an appeal to the U.S. Supreme Court. (NS)