Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

ICWA; UCCJEA

In re A.T.—published 4/2/21; First Dist., Div. Three
63 Cal.App.5th 267
Link to Case: https://www.courts.ca.gov/opinions/documents/A160454.PDF

ICWA IS INAPPLICABLE WHEN A CHILD IS PLACED WITH A PARENT AND THE LIKELIHOOD OF FUTURE REMOVAL AND FOSTER CARE PLACEMENT IS MINIMAL.

The child, A.T., resided primarily in Washington with both parents. Mother was an enrolled member of the Yurok Tribe and claimed Wiyot Tribe ancestry. In 2019, the parents divorced and the Washington family court awarded mother custody with visitation for father. Mother then took A.T. to California in violation of the family court's orders. The two spent four months in California. Mother and the child came to the attention of the county agency due to mother's significant mental health issues. At the detention hearing, A.T. was detained and temporarily placed with a maternal aunt. After the detention hearing, the Washington family court issued a restraining order against mother and ordered A.T. returned to his father. The Wiyot Tribe subsequently intervened in the dependency proceedings. After contacting and conferring with the Washington family court, the juvenile court determined Washington had exclusive jurisdiction over the case. The juvenile court dismissed

the dependency case in California in favor of jurisdiction in Washington. Mother timely appealed. Mother contended the juvenile court should have found that ICWA applied and precluded it from dismissing the dependency case pursuant to the UCCJEA.

Affirmed. Although ICWA empowers an Indian child's tribe to intervene in any Indian child custody proceeding, it is not implicated in every dependency case in which the child may have some degree of Native American heritage. ICWA is inapplicable in cases where a child is placed with a parent and there is little risk of future removal. The present case is distinguishable from *In re Jennifer A.*, (2002) 103 Cal.App.4th 692, in which the child was initially placed in temporary foster care and the social welfare agency continued to recommend foster care placement at disposition. Under those circumstances the possibility of a foster care placement was "squarely before the juvenile court," and, accordingly, ICWA applied even though the court ultimately placed the child with her nonoffending parent. In contrast, neither the court, the agency, nor any other party sought to have A.T. placed in foster care or pursued any placement other than with father. Although ICWA requirements apply to any action that "may" result or "may" culminate in a foster or adoptive placement, the mere theoretical possibility that a parental placement pursued by agency could fall through is insufficient. (MO)

Domestic Violence: WIC 300(b)

In re Ma.V.—filed 5/6/21; Fourth Dist., Div. Three
64 Cal.App.5th 11
Link to case: https://www.courts.ca.gov/opinions/documents/G059433.PDF

WHERE DESPITE THE LACK OF COMPLETION OF PROGRAMS, THE ISSUES WARRANTING JURISDICTION PURSUANT TO WIC 300(b) ARE RESOLVED BY THE JURISDICTION/DISPOSITION HEARING, THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURISDICTIONAL FINDINGS AND REMOVAL.

In October 2019, 16-year-old Ma., 11-year-old Mi., and 10-year-old P. were detained from parents pursuant to a petition alleging, among other issues, that mother and B.L., her then-boyfriend, engaged in ongoing domestic violence. At the February 2020 jurisdiction/disposition hearing the social worker testified that mother had not had any contact with B.L. since the September 2019 domestic violence incident, and that mother had attended a domestic violence program. Mother testified that she had been victimized by B.L., had terminated her relationship with B.L., and had been attending a domestic violence program since November 2019. Mother seemed to not get along with the social worker, and it was questionable whether mother had signed a consent for release of information. The juvenile court continued the hearing to allow the social worker to speak to mother's service providers. Due to

the pandemic, testimony resumed in July 2020. The social worker testified that the agency had been unable to get any detailed information from mother's therapist but planned to conditionally return the children to mother after mother's two-week trip to Mexico. The juvenile court sustained the allegation regarding domestic violence, because prior to the September 2019 incident B.L. had assaulted mother twice and she thereafter let B.L. back into her family home. The juvenile court conceded the allegation had aged out but there was no verification that mother was actually involved in services to get her to a place where she not only recognizes she is a victim of domestic violence, but that she will also see the red flags to avoid having that kind of relationship in the future. The court held by clear and convincing evidence there was a substantial risk of harm based on the historical issue of domestic violence, the lack of evidence mother had dealt with the issues and mother's attempts to thwart the agencies efforts to confirm mother was participating in services.

Reversed and remanded. The juvenile court lacked substantial evidence to support its jurisdictional findings and there was insufficient evidence for the court to remove the children at the dispositional hearing. The juvenile court's jurisdictional rulings focused on old issues that were resolved by the time of the jurisdictional hearing—10 full months after the children were detained from mother. It was undisputed that the perpetrator of the domestic violence had left the home and mother had ended her relationship with him. While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm. Therefore, the juvenile court's focus on mother's past as a victim of domestic violence, which had not occurred again during the 10 months the case was pending, and not a current risk, was error; the key concerns warranting jurisdiction had been resolved. The evidence was also not sufficient to meet the clear and convincing standard of proof at disposition. Although it was difficult to discern whether mother had completed a case plan, the services prior to disposition were only voluntary; such a reliance on completion of the case plan is more appropriate when the services have been court ordered. Furthermore, the ability of a parent to get along with a social worker is not evidence from which a removal order can be supported. The Court cautioned against preconceptions that damage the credibility of victim-witnesses and against a troubling trend of mothers being punished as victims of domestic violence. It seems as if once a woman is battered, she will forever be faced with losing her children. This is not the legal test. (NS)

Notice; WIC 388

In re Daniel F.—cert. for partial publ. 5/24/2021; First Dist., Div. Three
64 Cal.App.5th 701
Link to case: https://www.courts.ca.gov/opinions/documents/A160929.PDF

FATHER WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS SECTION 388 PETITION ALLEGING THE AGENCY'S LACK OF DUE DILIGENCE IN ATTEMPTING TO LOCATE AND NOTICE HIM, THUS DENYING HIM DUE PROCESS BY FAILING TO NOTICE HIM OF THE PROCEEDINGS AND PROVIDE STATUTORILY REQUIRED FORMS TO ASSERT PATERNITY.

A petition was filed in January 2019 for three-year-old Daniel due to mother's substance abuse and father's whereabouts and ability to care for the minor being unknown. The agency was told that father resided somewhere in Mexico. Daniel was declared a dependent and reunification services were ordered for mother. In May 2019, the agency social worker spoke with paternal aunt about being a possible placement for Daniel, but they did not discuss the father or his whereabouts. In February 2019 the agency submitted an "Absent Parent search request" which was not processed, so they submitted another in August 2019. The agency filed a 388 petition asking to terminate mother's reunification services and set a section 26 hearing, but father was not listed in that petition or noticed. In September 2019, the agency reported that father was still whereabouts unknown despite reasonable efforts to locate him. Father's last known address was in Mexico, and the databases of records searched in California and Alameda County yielded no information to locate father. In November 2019, the paternal aunt provided the agency with father's phone number, date of birth, and indicated he lived somewhere in Mexico City. The social worker left two messages for father, and a second declaration of search efforts was filed in December 2019, indicating the same databases were searched. The juvenile court terminated mother's reunification services, set a section 26 hearing, found the agency's search efforts sufficient, and ordered father to be noticed for the section 26 hearing by publication in the California Bay Area and Mexico City. In May 2020, paternal aunt "had the father call" the agency, and he finally spoke with a social worker. Father provided contact information, opposed the adoption, wanted custody of his son, and wanted an attorney. Father's attorney filed a section 388 petition alleging he was not provided proper notice of the initial petition or the setting of the section 26 hearing, and that he wanted custody of his son. The juvenile court denied father's 388 without a hearing, stating that he failed to state prima facie evidence that there was a change in circumstances, new evidence, or that it was in the minor's best interest. Parental rights were terminated. Mother and father appealed.

Affirmed in part (unpublished) and reversed in part. In the published portion of the opinion, the court remanded for an evidentiary hearing on father's 388 petition. To grant a section 388 petition alleging a due process violation for lack of notice for an evidentiary hearing, a parent need not make a separate showing of best interest to the child if they can demonstrate that the agency made little to no effort to determine the whereabouts of the parent. In reviewing a 388 petition, the juvenile court can deny it without a hearing, but a 388 petition must be liberally construed

in favor of its sufficiency. A hearing should only be denied if the petition fails to state any changed circumstances or new evidence. When raising a due process challenge for lack of notice, the proper vehicle is to file a 388 petition. An alleged father is entitled to notice and an opportunity to be present, assert a position, and elevate paternity status. As long as the agency has exercised reasonable diligence in attempting to locate a parent, there is no due process violation. Reasonable diligence means a thorough and systematic investigation made in good faith, including standard avenues for locating a missing parent, as well as specific avenues most likely to yield results given the unique facts of the case. Here, instead of utilizing a cooperative family member, the agency only utilized standard avenues to attempt to find father. Although the agency first spoke with paternal aunt weeks after the jurisdiction/disposition hearing, they asked nothing about father's whereabouts. It was not until six months later that they asked her about father, at which time she provided a phone number, and eventually contact was made with father after she had father call the agency. Further, the databases the agency used were all California databases even though mother and other family members indicated father lived in Mexico. The effort to locate, notice, and provide required forms such as the JV-505 to alleged parents should occur in the beginning stages of the case. By failing to locate and notice father he was denied notice of his rights and could not utilize procedures to elevate his paternity status or obtain reunification services. The error was not harmless as father was deprived of his due process right to notice of the critical dependency proceedings and his rights as an alleged father. (KH)

Beneficial Parental Relationship Exception—WIC 366.26

In re Caden C.—published 5/2721; Supreme Court of California
11 Cal.5th 614
Link to case: https://www.courts.ca.gov/opinions/documents/S255839.PDF

COURTS MAY CONSIDER A PARENT'S PROGRESS IN REDRESSING ISSUES THAT LED TO DEPENDENCY IN A BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION ANALYSIS ONLY TO THE EXTENT IT AFFECTS WHETHER THE RELATIONSHIP IS BENEFICIAL OR WHETHER IT WOULD BE DETRIMENTAL TO THE CHILD TO SEVER IT.

Caden lived with his mother until age 4. He was detained from mother in 2013 due to mother's drug use and recent suicidal ideation. Prior to detention, Caden and mother lived in mother's car. Caden was returned to mother almost a year later, the case remained open, and the family moved to San Francisco in 2014. Mother relapsed two years later, and Caden was detained on a supplemental petition in 2016. Caden was placed back in his original foster home, was replaced three times, and again placed back in the first foster home. Evidence showed that mother's visits

and communications with Caleb destabilized his placements and were emotionally taxing on Caden. Caden was very bonded to mother and at the same time preoccupied with her in a potentially damaging way. Mother entered rehabilitation but left after her first section 388 petition was denied. In May 2017, mother's visits were reduced to one time per month and a section 366.26 hearing was set. At the .26 hearing, the court considered agency reports, two expert reports, a letter from Caden, and testimony from both the agency expert and mother's expert. Mother's expert testified as to visits he observed and stated Caden had an intense bond that might impede Caden in forming relationships with others but had not yet done so. The agency's expert did not observe Caden and mother but testified that while Caden had a strong emotional bond with mother, the impact of that bond posed a risk to Caden's ability to develop socially and emotionally. The trial court ruled that the parental-benefit exception applied, finding that Caden had a strong bond with his mother, that mother served in a parental role and had substantially complied with her case plan, and that Caden would be greatly harmed by severing that relationship. The agency and minor appealed. The Court of Appeal for the First District reversed, finding that the trial court erred in finding that mother substantially complied with her case plan and erred in finding that the relationship benefitted Caden to such a degree as to warrant long term foster care as the permanent plan. Mother filed a petition for review, which was granted with the following questions presented: 1) what is the proper standard of review for the beneficial parental relationship exception, and 2) does a parent have to show progress in addressing issues leading to dependency in order to meet the exception?

Reversed. *First*, the test for evaluating the beneficial parental relationship exception is clarified to require a parent to show: 1) regular visitation and contact with the child, 2) the child has a "substantial, positive, emotional attachment to the parent – the kind of attachment implying the child would benefit from continuing the relationship, and 3) terminating that attachment would be detrimental to the child even when balanced against the countervailing benefit of a new, adoptive home." The test and reasoning in *In re Autumn H.*, (1994) 27 Cal.App.4th 567, remains as a guide to interpreting the exception. Some Courts of Appeal have added or implied a fourth step, that the court find that these three prongs are met *and then* that there exists a compelling reason to forego adoption, are now disapproved – once a court determines that the visitation has been regular, a beneficial relationship exists, and that terminating the relationship would be detrimental, that *is* a compelling reason not to terminate parental rights under the statute. *Second*, parents do not have to show they are "complying substantially with their case plan" or maintaining their sobriety to establish the beneficial parental relationship exception and cases which appear to hold otherwise are now disapproved. A parent's progress, or lack thereof, however, is relevant to whether

the child would benefit from continuing the relationship or be harmed by losing it. While a parent's progress may be more directly relevant to the second prong of the test, in essence the positive or negative effect of the relationship, it may also be relevant to whether severing the relationship would be detrimental. A court may consider a parent's progress when evaluating whether a beneficial relationship exists, and may also consider a parent's progress, albeit in a different way, when considering whether severing that relationship would cause more harm than would being in a placement less permanent than adoption. *Third*, the Court adopted the hybrid standard of review, where the first two prongs of the test, involving primarily factual determinations, are reviewed for substantial evidence and the third prong, involving balancing different factual findings and making a determination regarding detriment, is reviewed for abuse of discretion. In the instant case, the Court of Appeal for the First District improperly based its decision to reverse the trial court in part on the fact that mother had not maintained her sobriety or addressed her mental health issues. The Court of Appeal failed to connect mother's ongoing substance abuse and mental health issues with what benefit Caden derived from the relationship or whether severing it would be detrimental to him. Because the Supreme Court reversed on that basis, it did not address the Court of Appeal's reasoning regarding whether mother's visits and relationship were detrimental to Caden's well-being or whether the Court of Appeal improperly substituted its judgment for that of the trial court. (SH)

De Facto Parents—Cal. Rules of Court, rules 5.502(10) and 5.534(a)

In re B.S. —published 6/18/21; Third Dist.
Docket No. C091678
Link to case: https://www.courts.ca.gov/opinions/documents/C091678.PDF

DE FACTO PARENTS HAVE NO STANDING TO APPEAL A PLACEMENT OR CUSTODY ORDER.

The agency filed a WIC 300 petition on behalf of B.S. who was born with a positive toxicology. There were several placement possibilities with relatives, including the maternal great aunt and uncle (hereinafter "relatives") who appeared at detention and had guardianship of siblings. After bypassing the whereabouts-unknown mother for reunification services, the court set the matter for a WIC 366.26 hearing and advised the parties it wished to explore relative placement, conduct a full hearing on the issue, and opined it would be in the minor's best interest if she were placed with relatives who also cared for her sibling. The agency later reported an individual in the relatives' home had a nonwaivable conviction and was against placement. At the continued hearing, the agency reported that RFA was still

pending – approval had been denied because of the individual with criminal history, but the individual had moved out a few days after the denial and the relatives were pursuing a grievance hearing. The court continued the hearing seven times, eventually liberalizing the relatives' visits to unmonitored, once a week. Meanwhile, the foster parents became de facto parents. Finally, upon approval of the relatives' RFA, the court proceeded with the combined relative placement/366.26 hearing. The agency opposed relative placement and wanted the minor to remain with the de facto parents who intended to adopt. Minor's counsel argued in favor of relative placement. The court found placement with the relatives and her sibling was in the minor's best interest and ordered her placed with them. The court then terminated parental rights. The de facto parent appealed the order removing the minor from his and his wife's care and placing her with relatives.

Appeal dismissed. De facto parents do not have standing to appeal a placement order. De facto parents only have the right to appear as parties in juvenile court proceedings to assert and protect their own interests in the companionship, care, custody, and management of the child. The court receives the de facto parents' information in consideration of all the evidence that bears on the child's best interests. The de facto parent's limited standing does not give them all the rights and preferences given to parents or guardians. For instance, de facto parents do not have a right to reunification services, visitation, custody, or placement of the minor, "or to any degree of independent control over the child's destiny whatsoever." Despite their *feelings* of being aggrieved, de facto parents, who do not even have the legal right to adopt, cannot show how their *legal* rights are injuriously affected by orders that affect the minor's custody or placement. (ML)

NEW NON-DEPENDENCY CASELAW

WIC 213.5 – Temporary Restraining Order (TRO)

In re E.F. —published 4/19/21; Supreme Court of California
Docket No. S260839
Link to case: https://www.courts.ca.gov/opinions/documents/S260839.PDF

A TEMPORARY RESTRAINING ORDER APPLICATION UNDER WIC 213.5 MUST SATISFY THE PROCEDURAL NOTICE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTION 527.

E.F., a minor, was charged with poisoning her classmate. The juvenile delinquency court entered a temporary restraining order (TRO) pursuant to section 213.5(b) against E.F. without advance notice. E.F. appealed and the Court of Appeal affirmed. Because the Courts of Appeal were divided on whether the juvenile court

may issue a temporary restraining order pursuant to WIC 213.5(b) without advance notice to the minor, the California Supreme Court granted review.

Reversed. WIC 213.5(b) incorporates the notice requirements set forth in Code of Civil Procedure section 527, subdivision (c). By the terms of that provision, "[n]o temporary restraining order shall be granted without notice" to the minor unless the prosecutor (1) shows that "great or irreparable injury will result" before the matter can be heard with proper notice and (2) previously informed the minor of the time and place that the application will be made, made a good faith attempt but was unable to so inform the minor, or provides specific reasons why the prosecutor should not be required to so inform the minor. Where the prosecutor neither provides notice nor shows justification for lack of notice, the juvenile court must provide counsel and the minor with sufficient time to prepare and respond before any TRO may issue. In sum, Code of Civil Procedure section 527, subdivision (c) makes clear that either advance notice or a justification for lack of notice is required for a TRO issued under WIC 213.5. (ML)