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"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

Disposition—WIC 361

In re M.V.—published 04/22/2022; Fourth Dist., Div. One
Docket No. D079473; 78 Cal.App.5th 944
Link to Case: https://www.courts.ca.gov/opinions/documents/D079473.PDF

REMOVAL IS NOT WARRANTED UNLESS THERE IS CLEAR AND CONVINCING EVIDENCE OF TWO CONDITIONS: (1) A SUBSTANTIAL DANGER TO THE PHYSICAL HEALTH, SAFETY, PROTECTION, OR PHYSICAL OR EMOTIONAL WELL-BEING OF THE CHILD IF RETURNED HOME AND (2) THERE ARE NO REASONABLE MEANS BY WHICH THE CHILD'S PHYSICAL HEALTH CAN BE PROTECTED WITHOUT REMOVAL FROM THE PARENT'S PHYSICAL CUSTODY.

M.V. and I.V., who were three and two years old, respectively, came to the attention of the agency in December 2020 after father called 911 and mother was arrested for domestic violence. Minors were present at home during the incident. Immediately thereafter, parents agreed to a safety plan where mother and minors would live with maternal grandmother. Weeks later, the agency approved parents and minors to reside together with maternal great

grandmother staying in the home until parents began services. By mid-January, the agency opened a voluntary services case for the family, and parents agreed to take domestic violence and parenting classes. In June 2021, the agency received a second report of domestic violence in the home with minors present. On the same day, father reported the incident to the social worker and showed her a video recording of it. For the June 2021 incident, mother agreed to leave the family home as part of a safety plan, and minors remained home with father. Father later recanted his statements regarding the June 2021 incident, claiming he called the agency because he was mad at mother and that the video was not new. The agency subsequently filed a petition for minors, who were detained. By adjudication, parents were compliant with the agency, engaged in services, and visiting the children twice a week consistently. Their visits were liberalized to unmonitored visits, and parents were allowed to visit together. After making jurisdictional findings, the juvenile court removed minors from parents, even though the social worker testified that she could not think of any safety risk to minors if they lived with father only. Removal was over the objection of father, mother, and minors, each of whom appealed the dispositional orders.

Reversed and remanded. Substantial evidence did not support the juvenile court's removal orders. Removal is a last resort; it is to be considered only when the child would be in danger if allowed to reside with the parent. As to father, the social worker testified that she could not think of any safety risk to releasing minors to father, and she agreed that father was doing extremely well in his programs. Father was not alleged to be the aggressor, and he called 911 and/or the agency after each incident. As to mother, she successfully parented the children on her own, without incident, while staying with maternal grandmother. After the June 2021 incident, she left the family home, appropriately prioritizing minors' need for safety and stability above her own. Mother was making progress in her case plan, such that the agency lifted the restriction of separate visits for parents. The agency's concern that parents failed to acknowledge the June 2021 incident, by itself, is not sufficient to justify removal from either parent. A social worker's "subjective belief" that parents lacked understanding of their responsibility or roles in the events leading to dependency and parents' lack of cooperation and hostility towards the agency is not clear and convincing evidence of substantial danger to minor under section 361, subdivision (c)(1). (*In re Jasmine G.* (2000) 82 Cal.App.4th 282.) Additionally, neither the agency nor the juvenile court considered the option of ordering mother to leave the home, as minors' counsel had requested and as the family had previously done. Accordingly, the removal orders were unsupported. (AMC)

ICWA—WIC 224.2; Mootness—CCP 909

In re Allison B.—published 5/27/22; Second Dist., Div. One
Docket No. B315698; 79 Cal.App.5th 214
Link to case: https://www.courts.ca.gov/opinions/documents/B315698.PDF

POSTJUDGMENT EVIDENCE IS ROUTINELY CONSIDERED IN SUPPORT OF DISMISSING A DEPENDENCY APPEAL, INCLUDING AN APPEAL FROM AN ICWA FINDING

The parents each filed a Parental Notification of Indian Status (ICWA-020 form) indicating the children had no Indian ancestry. The social workers filed declarations that they made inquiries regarding the children's Indian status and concluded there was no known Indian ancestry, but failed to identify to whom those inquiries were made. The juvenile court found ICWA did not apply. On September 10, 2021, the court ordered termination of parental rights (TPR). On appeal, mother argued the agency failed its duty of inquiry to question the extended family members with whom DCFS had contact or could have had contact, in particular pointing to the maternal grandparents (MGPs), paternal grandmother (PGM), and unnamed paternal cousins referenced by father. Prior to filing its respondent's brief, the agency filed a motion to dismiss the appeal based on mootness. A Last-Minute Information report (LMI) and March 1, 2022 minute orders filed subsequent to TPR were provided as support. The LMI stated that the agency's dependency investigator (DI) had spoken with MGPs about possible Indian ancestry and they reported having no knowledge that they or mother had any Indian ancestry or that mother was a member of an Indian tribe. The maternal grandmother also advised that her grandparents and great-grandparents never mentioned Indian heritage or being registered with a tribe. Likewise, PGM denied any Indian ancestry and had no knowledge that father (whose whereabouts were now unknown) had Indian ancestry or was a registered member of a tribe. The March 1, 2022 minute orders showed that, based on the LMI, the juvenile court found there was no reason to know or believe the children were Indian children as defined by ICWA and that ICWA did not apply. The minute orders also showed mother was neither present nor represented by counsel when the findings were made. Mother opposed the motion to dismiss her appeal. The Court of Appeal (Court) requested supplemental briefing on several questions including (1) whether mother contested the juvenile court's conclusions in the March 1, 2022 order, and, if so, why; and (2) whether, under Code of Civil Procedure (CCP) section 909, the factual statements in the LMI could be considered. Mother responded she had no information to contest or affirm the facts stated in the LMI, that she contested the juvenile court's findings in the March 1, 2022 order, and that the Court should not consider the additional evidence under CCP 909.

Dismissed. Under CCP 909, in all cases where trial by jury is not a matter of right, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court and may take additional evidence of facts occurring at any time prior to the decision of the appeal or may make any order as the case may require in the interests of justice. In dependency appeals, postjudgment evidence is routinely considered because it has the beneficial consequence of expediting proceedings and promoting finality of orders. Here, the LMI indicated the agency inquired of the relatives as to whether the children were Indian children, albeit after the TPR order. This postjudgment evidence rendered harmless its prior failure to comply with the duty to inquire within the meaning of ICWA. As to the great-grandparents, the agency did not have to attempt inquiry with them because they do not fall under ICWA's broad definition of "extended family member." As to the unnamed paternal cousins mentioned by the now-whereabouts unknown father, the cousins were not "readily available" for further inquiry and the agency was not required "to cast about" for leads. As to mother's argument that the March 1, 2022 orders should not be considered due to her lack of trial counsel at the hearing, those orders were not relied upon herein; rather, the Court relied upon the LMI and the record. Regardless, any due process concerns have been resolved by the consideration of mother's opposition to the noticed motion to dismiss, her supplemental brief, and the opportunity to provide oral argument. (ML)

Offer of Proof—WIC 366.3

In re A.B.—published 6/14/22; Second Dist., Div. Six
Docket No. H049676; 79 Cal.App.5th 906
Link to Case: https://www.courts.ca.gov/opinions/documents/H049676.PDF

THE JUVENILE COURT MAY REQUIRE AN OFFER OF PROOF IN ORDER TO SET A 366.3 HEARING FOR CONTEST IF THE PERMANENT PLAN IS NOT LONG-TERM FOSTER CARE.

The child was declared a dependent due to physical abuse by father. Reunification services were offered. At the 18-month review hearing, father's reunification services were terminated. Visitation was limited to once a month due to father's behavior. At the section 366.26 hearing, visitation with father was found to be detrimental to the child; father was ordered to stay 300 yards away from the home of the maternal grandparents and have no contact with the child. Legal guardianship was the selected permanent plan and letters of guardianship appointing the maternal grandparents as guardians of the child were issued. At a subsequent review hearing pursuant to section 366.3, father attempted to set the hearing for contest to liberalize

his visitation and argued an offer of proof was not required. The juvenile court declined to set a contested hearing on visitation. Father appealed and asserted he possessed an unfettered right to a contested permanency-review hearing and the juvenile court erred in requiring an offer of proof.

Affirmed. Section 366.3, subdivisions (e), (f) and (h), provides parents an unfettered right to set a contested hearing if the permanent plan is long-term foster care. The Legislature has long recognized that a placement in long-term foster care is not necessarily a stable placement and directs the juvenile court to consider all permanency plan options for the child, including returning the child to the parent's home—a parent may reinstate their reunification services if they show by preponderance of the evidence that reunification is the best alternative for the child. However, no such provision is contained within section 366.3 when the permanent plan is legal guardianship. Thus, when the permanent plan is legal guardianship, parents are not statutorily entitled to set a contested hearing. Further, requiring an offer of proof did not violate father's due process rights. Although parents in dependency proceedings have a right to due process, these rights do not include full-fledged cross-examination rights. Due process is a flexible concept that depends upon the circumstances and a balancing of various factors. Different levels of due process protection apply at different stages of dependency proceedings; once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability rather than reunification. (MO)

ICWA—Harmless Error Analysis

In re Dezi C.—published 6/28/22; Second Dist., Div. Two
Docket No. B317935; 79 Cal.App.5th 769
Link to Case: https://www.courts.ca.gov/opinions/documents/B317935M.PDF

ON APPEAL, IF THE DEPARTMENT FAILED TO CONDUCT AN INITIAL INQUIRY REGARDING A CHILD'S POSSIBLE INDIAN ANCESTRY, THE ERROR WILL BE HARMLESS IF THERE IS NOT A REASON TO BELIEVE THE CHILD MAY BE AN INDIAN CHILD UNDER ICWA.

Throughout the course of dependency proceedings, both parents denied having any Indian heritage. They also submitted ICWA-020 forms indicating no Indian heritage. While the case was ongoing, the social services agency spoke to several relatives, but never asked those relatives whether the children had any Indian heritage. After termination of her parental rights, Mother filed a timely appeal asserting the agency did not discharge its statutory duty to inquire of extended family members whether her children might be Indian children.

Affirmed. The agency failed to make the appropriate initial inquiry; the relatives should have been asked about the child's possible Indian heritage. However, the error was found to be harmless. Currently, there is a split in authority involving the harmless error analysis and ICWA violations. Division Two proposes a fourth rule—an agency's failure to discharge its statutory duty of initial inquiry is harmless unless the record contains information that suggests a reason to believe that the children at issue may be Indian children, in which case further inquiry may lead to a different ICWA finding by the juvenile court. For these purposes, the record means not only the record of proceedings before the juvenile court but also any further proffer the appealing parent makes on appeal. Because the record in this case contains the parents' repeated denials of Indian heritage, the parents were raised by their biological relatives, and because there is nothing else in the record to suggest any reason to believe the parents' knowledge of their heritage was incorrect or that the children at issue might have Indian heritage, the agency's error was harmless. (MO).

Disposition—WIC 360(d); Visitation/Exit Orders—WIC 362.4(a)

In re C.S.—published 6/13/22; Second Dist., Div. Seven
Docket No. B312003
Link to Case: https://www.courts.ca.gov/opinions/documents/B312003.PDF

[1] WHEN A CHILD IS PLACED WITH ONE OF TWO CUSTODIAL PARENTS, THE PARENT NOT RETAINING CUSTODY IS NOT ENTITLED TO REUNIFICATION SERVICES, AND AN ORDER FOR ENHANCEMENT SERVICES IS SUBJECT TO THE JUVENILE COURT'S DISCRETION. [2] A VISITATION ORDER THAT EXPRESSLY STATES THE FREQUENCY AND DURATION OF VISITS FOR A PARENT, WHILE REQUIRING MINOR'S THERAPIST TO APPROVE THE START OF THOSE VISITS, DOES NOT CONSTITUTE AN UNLAWFUL DELEGATION OF JUDICIAL AUTHORITY.

Mother entered a no contest plea to two counts: failure to protect pursuant to section 300(b)(1) and serious emotional damage pursuant to 300(c). The juvenile court accepted the plea on behalf of all three children. As to the first count, the juvenile court found that mother had a history of mental and emotional problems that, without treatment, placed minors at serious risk of physical harm. As to the second count, the juvenile court found that mother emotionally abused 12-year-old C.S. by using derogatory language toward the

child repeatedly and that, due to this conduct, minor suffered suicidal ideation and self-harming thoughts. Minors' fathers were nonoffending. At the disposition hearing, minors were declared dependents, removed from mother, and released to their respective fathers. For C.S., the juvenile court commented there was no hope of reunifying mother and C.S., terminated jurisdiction over C.S., and entered a juvenile custody order granting sole physical and legal custody of C.S. to father with mother to have monitored visitation in a therapeutic setting up to twice a week for two hours per visit when C.S.'s therapist determined that the visits could begin. Mother appealed.

Affirmed. Mother's arguments that (1) the juvenile court erred in terminating jurisdiction after it granted sole physical and legal custody to C.S.'s father without providing services to repair the relationship between mother and C.S. and (2) the juvenile court impermissibly delegated authority to C.S.'s therapist regarding visitation were rejected. As to the first issue, the juvenile court has broad authority to enter orders to protect a dependent child, reunite the family, and terminate jurisdiction as quickly as possible. This includes discretion at the close of the disposition hearing to terminate dependency jurisdiction when the child is in parental custody and no protective issue remains. (*In re Destiny D.* (2017) 15 Cal.App.5th 197.) When the juvenile court determined that mother's abusive parenting posed a risk to C.S., it resolved that issue by awarding father sole physical and legal custody and ordering monitored visits for mother; thus, there was no longer any reason for court supervision. Because C.S. remained with her father, a custodial parent, mother was not entitled to reunification services (WIC 16507(b)) or to enhancement services (WIC 362(a); *In re Destiny D.*, *supra*, 15 Cal.App.5th at pp. 212-213.) Additionally, mother's argument that the juvenile court impermissibly delegated visitation to the child's therapist is unavailing because this was one of two viable options available to the juvenile court, the other being to deny visitation altogether. Here, rather than prohibiting visitation, the juvenile court specified the frequency and length of visitation, thus giving no discretion to C.S.'s therapist regarding whether visits were allowed, and only reserved to C.S.'s therapist the determination when it would be safe to start visits. This is analogous to the visitation ordered in *In re Chantal S.* (1996) 13 Cal.4th 196. There, as here, the visitation order did not constitute an unlawful delegation of judicial authority. (AMC)

Juvenile Case File—WIC 827(a)(2)

***Therolf v. Superior* Court**—published 6/27/22; Fifth Dist.
Docket No. F083561
Link to Case: https://www.courts.ca.gov/opinions/documents/F083561.PDF

WHEN RULING ON WHETHER TO DISCLOSE A DECEASED CHILD'S RECORDS PURSUANT TO WIC 827(A)(2), THE COURT MUST DETERMINE WHETHER THE CHILD WOULD HAVE FALLEN UNDER SECTION 300 AT THE TIME OF THEIR DEATH, REVIEW THE JUVENILE CASE FILE IN CAMERA, HOLD A HEARING, AND ONLY PRECLUDE DISCLOSURE OF RECORDS THAT ARE DETRIMENTAL TO A LIVING CHILD.

In 2020, Amy C. was convicted of the torture and murder of her 12-year-old daughter, Mariah, whose foster care adoption was finalized just 8 months before her death, and the torture of her 14-year-old son, C.F. At the time of Mariah's death, the agency had not filed a 300 petition regarding Mariah, however they had received reports concerning Mariah's welfare. In 2021, journalist Garrett Therolf filed a petition requesting the disclosure of Mariah's juvenile case file. The agency filed an objection arguing that (1) no records existed because Mariah was not under the juvenile court's jurisdiction when she died, and (2) the release of the information would be detrimental to living children connected to the case. The juvenile court denied Therolf's petition finding that the release of information would harm a living child connected to the case. Prior to denying the petition the court did not review the juvenile case file, allow Therolf an opportunity to reply, or hold a hearing. Therolf filed a petition for writ of mandate challenging the court's denial of his petition for the disclosure of records of a deceased child pursuant to WIC 827(a)(2).

Reversed and remanded. The court erred by denying Therolf's WIC 827 petition based on the agency's objection without first reviewing the case file or holding a hearing. The agency's objection that Mariah was not under the court's jurisdiction was incorrect because records pertaining to a deceased child fall within WIC 827(a)(2) even when no dependency petition is filed if the child *would* have fallen under WIC 300. (*In re Elijah S.* (2005) 125 Cal.App.4th 1532.) Mariah would have fallen under WIC 300(a) and (b) due to severe physical abuse. Through its amendments to WIC 827, the legislature recognizes a strong public policy interest in investigating governmental errors leading to a child's death which would be thwarted by a rule that prohibited disclosures when no 300 petition exists. While records

can be withheld from disclosure when their release would harm a living child even with redaction, before making that determination the court must first review the records *in camera* and hold a hearing. (*Pack v. Kings County Human Services Agency* (2001) 89 Cal.App.4th 821.) The juvenile court is ordered to compel the agency to produce the file, review the juvenile court file in camera, preserve the record for appellate review, and only withhold records that, even after redaction, would be detrimental to an involved living child. (AE)