Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

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Written by: Stacie Hendrix (SH), Nancy Sariñana (NS), Margaret Lee (ML), Kristin Hallak (KH), Michael Ono (MO), Ann-Marissa Cook (AMC), and Stanley Wu (SW)

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NEW DEPENDENCY CASELAW

ICWA—WIC 242.2

In re Charles W.—filed 6/17/21; cert. for publ. 7/9/21; Fourth Dist., Div. One
Docket No.: D078574
Link to case: https://www.courts.ca.gov/opinions/documents/D078574.PDF

WHEN CONSIDERING WHETHER THERE IS A REASON TO BELIEVE A CHILD IS AN INDIAN CHILD, THE COURT MAY RELY ON PARENT COUNSEL'S REPRESENTATION OF THE PARENT'S ANCESTRY.

In previous court proceedings, the juvenile court found that ICWA did not apply regarding Jr. and S.W. Subsequently, a new petition was filed regarding Jr., S.W. and newly born R.W., a full sibling of the two older children. During the investigation of the new petition, mother told the assigned social worker she had Yaqui and Aztec heritage, but she had already gone through the court process, and the court had found ICWA did not apply. Father denied any Indian heritage. The court directed the agency to investigate and make further inquiry on the matter and ordered the parents to complete the Parental Notification of

Indian Status form (ICWA-020). At the arraignment hearing, Mother's counsel informed the court an ICWA-020 form was previously filed with the court and there were no changes on behalf of mother. Further, counsel stated he spoke to his client in the morning, and mother indicated she had no Native American ancestry. Mother participated in the remote hearing and did not contest her counsel's representation regarding her heritage. The court reconfirmed that ICWA did not apply. Father appealed.

Affirmed. Substantial evidence supports the finding that ICWA does not apply. The juvenile court and the Agency made an adequate inquiry into the children's possible Indian ancestry, relying on a prior court finding that ICWA did not apply and the parents' representation that they had no change in information. The inquiry did not yield a reason to believe the children were members of or eligible for membership in an Indian tribe. If ICWA did not apply to the two older children, then it would not apply to the baby because all three children shared the same ancestry. Furthermore, mother's counsel represented, twice, in mother's presence that mother had no changes and no Native American ancestry; therefore, the court was not required to disregard counsel's representations and conduct further inquiring, including directly questioning mother regarding possible Indian status of the child. (NS)

Beneficial Parental Relationship Exception—WIC 366.26

In re B.D.—published 7/27/21; Fourth Dist., Div. One
Docket No.: D078014
Link to case: https://www.courts.ca.gov/opinions/documents/D078014.PDF

FOR PURPOSES OF EVALUATING THE SECOND PRONG OF THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION FOR SECTION 366.26, IT IS REVERSIBLE ERROR FOR A COURT TO CONSIDER A PARENT'S LACK OF PROGRESS IN REDRESSING ISSUES THAT LED TO DEPENDENCY IN ISOLATION WITHOUT EVALUATING WHETHER IT HAS ANY AFFECT ON THE CHILDREN'S EMOTIONAL ATTACHMENT TO THE PARENTS.

The agency filed a petition in 2018 for 6-year-old B.D. and 3-year-old L.D. due to domestic violence and substance abuse issues by the parents. The court sustained the petition, ordered reunification services for mother and father, and placed the children with their paternal grandmother. During the reunification

period, both parents failed to comply with their drug testing or substance abuse program requirements, although they did complete domestic violence programs and continued to regularly visit with B.D. and L.D. The court terminated their family reunification services in 2019 and set a section 366.26 hearing. A contested .26 hearing was held in September 2020, in which the parents asserted the beneficial parental relationship exception. The court found that although the parents "easily met" their burden of demonstrating consistent visitation with their children, both parents failed to show they had a significant parental role in the children's lives such that there was a positive emotional attachment between them and the children. The court stated two reasons for this: because the paternal grandmother fulfilled that role for the children, and the parents' substance abuse was their "core issue" which had not been resolved over the past two years. The court also found that even if that kind of parental relationship was demonstrated, the detriment resulting from a termination of parental rights was not outweighed by the benefits of adoption. The court found the beneficial parent relationship exception did not apply and terminated both mother's and father's parental rights. Both parents appealed.

Reversed. The juvenile court erred in its analysis of the beneficial parental relationship exception in light of the new California Supreme Court decision, *In re Caden C.* (2021) 11 Cal.5th 614, specifically regarding the second prong of the test, whether "the child has a substantial, positive, emotional attachment to the parent—the kind of attachment implying that the child would benefit from continuing the relationship." While a review of the record indicates the parents resolved their domestic violence issues but did not address their ongoing substance abuse, the trial court did not examine whether those issues impacted the parents' visitation and relationship between the parents and the children. The evidence indicates the parents had a beneficial relationship with their children, specifically that the children exhibited a strong, happy bond with the parents during visits and mother and father properly parented the children "on the spot" by directing, praising, and engaging with the children. Although the CSW testified that mother and father did not engage in a day-to-day parenting role with the children, these statements seemed directed at parents' inability to parent their children full time, not whether they serve in a parental role during their allotted visitation time. This is concerning because it is unclear to what extent the trial court relied on the parents' continued substance abuse issues in making its findings regarding the harm of severing the parent-child relationship. Accordingly, the order terminating parental rights is reversed and the case is remanded to hold a new .26 hearing in accordance with the principles articulated in *In re Caden C.* (SW)

Jurisdiction—WIC 300(b), (d); Removal—WIC 361(c)

In re L.O.—published 07/29/2021; Fourth Dist., Div. Two
Docket No. E075921
Link to Case: https://www.courts.ca.gov/opinions/documents/E075921.PDF

EVEN WHERE PARENTS' RELATIONSHIP HAS ENDED, CURRENT RISK OF DOMESTIC VIOLENCE MAY BE SHOWN THROUGH RECENT ACTS OF VIOLENCE THAT ARE REASONABLY LIKELY TO CONTINUE; A PARENT'S INADVERTENT EXPOSURE OF A CHILD TO SEXUAL CONDUCT IS NOT JURISDICTIONAL UNDER 300(d) WHERE THERE IS NO EVIDENCE THAT THE PARENT ACTED INTENTIONALLY.

In June 2020, 6-year-old L. was detained from his parents pursuant to a petition alleging, *inter alia*, that father engaged in domestic violence with partners, which was ongoing, and that he exposed L. to inappropriate sexualized behaviors, resulting in L. acting out in a sexualized manner. L.'s parents shared joint custody, although their ongoing family law matter was contentious. In father's interviews, father denied a history of domestic violence but noted that mother had socked and scratched him three to four years prior; admitted that L. had witnessed a lot of arguing, including three times when it got physical; and shared that he, mother, and her boyfriend had been in a physical altercation where restraining orders were sought. Father admitted that he and his girlfriend shared a room with L. but denied having sexual relations in front of L. In mother's interviews, she described a physical altercation in December 2019 involving father and mother's boyfriend where mother tried to stop the altercation between the men while she held L. in her arms. Mother confirmed that she and father had engaged in verbal fights, slapping matches, and bouts of pushing one another when they were together. Mother, father, and L.'s caregiver (paternal grandmother) all reported that L. displayed sexualized behavior, and paternal grandmother reported that L. had tried to choke his cousin. Parents each blamed the other as the cause of L's behavior. Based on the reports and arguments, the juvenile court found allegations under subdivisions (b) and (d) true as to father and removed L. from his parents. Father appealed.

Affirmed as modified. Substantial evidence supported the juvenile court's finding under 300(b) and its order removing L. from father's custody. However, insufficient evidence supported the court's finding under 300(d); accordingly, that allegation is stricken. With regard to the 300(b) finding, even though parents' relationship had ended, and the agency alleged "partners," rather than

mother in the petition, the requisite current risk was shown. Mother and father both admitted to multiple prior incidents of domestic violence in the home. Father noted that mother had socked and scratched him and admitted that L. had witnessed a lot of arguing, including three times when it got physical. Even after parents' separation, mother described a physical altercation in December 2019 involving father and mother's boyfriend where mother tried to intervene while she held L. in her arms. Parents remain involved in an acrimonious family law matter, have engaged in domestic violence during custody exchanges, and will likely continue to encounter one another in L.'s presence for the foreseeable future. Father's efforts to align his case with *In re Daisy H.* (2011) 192 Cal.App.4th 713, *In re Jonathan B.* (2015) 235 Cal.App.4th 115, and *In re M.W.* (2015) 238 Cal.App.4th 1444 are unavailing as father's case involved more recent acts of violence which the court could reasonably find were likely to continue. With regard to the unsupported 300(d) finding, the only enumerated offense under Penal Code 11165.1 applicable to father here is child molestation, as described in Penal Code 647.6(a)(1). That provision makes it a crime to "annoy[]" or "molest[]" any child under the age of 18. The offensive or annoying conduct becomes criminal when it is sexually motivated. Although L. acted out sexually and may have witnessed father engage in sexual conduct with his girlfriend, there is no evidence that such an error or lapse on father's part was sexually motivated by father, rather than simply an accident. In other words, although father may have inadvertently exposed L. to sexual conduct with his girlfriend, there is no evidence that he intentionally exposed L. to the behavior. While jurisdiction based on these facts could have been established under 300(b), they do not support a jurisdictional finding under 300(d). Finally, removal was proper because, until it was determined how or where L. learned his sexualized behaviors, which had been decreasing since placed with paternal grandmother, he remained at substantial risk of serious physical harm if returned to father's care. (AMC)

Due Process; Conforming to Proof

In re I.S.—published 8/16/2021; First Dist., Div. Two
Docket No.: A161417; 67 Cal.App.5th 918
Link to case: https://www.courts.ca.gov/opinions/documents/A161417.PDF

IT WAS AN ABUSE OF DISCRETION AND VIOLATION OF A PARENT'S DUE PROCESS RIGHTS FOR THE JUVENILE COURT TO AMEND THE ALLEGATIONS TO CONFORM TO PROOF IN SUCH A WAY THAT IT

MATERIALLY ALTERED THE ALLEGATIONS BY INCLUDING FACTS AND LEGAL THEORIES NOT INCLUDED IN THE ORIGINAL PETITION.

On October 29, 2019, the agency filed a petition under section 300 subdivisions (b) and (d), alleging that I.S. was sexually abused by D.B., a member of the household and maternal aunt's boyfriend, and that mother knew of the abuse. I.S. reported that D.B. sexually abused her the year prior, texted her not to tell anyone, and then she told her mother two days later. I.S. showed mother the text messages, and mother eventually held a meeting with the other adult family members who lived in the home, including D.B. and I.S., to discuss what occurred. At the meeting mother decided to have D.B. move out of the home. The other family members stopped speaking to I.S. Mother later let D.B. move back in. I.S. felt anxious and scared with D.B. living in the home again. Mother reported that I.S. was a liar and confirmed D.B. lived in the family home. At the detention hearing, I.S. was detained. The agency filed a report for the adjudication in which I.S. was consistent in her statements of the sexual abuse, and mother was consistent in her denial that anything happened to I.S. At the adjudication, the parties informed the juvenile court that they reached a negotiated agreement, but the court rejected the settlement because it took the responsibility for what happened away from the mother. After hearing testimony, the juvenile court sustained the b-1 allegation, but amended it to conform to proof. In conforming to proof, the juvenile court added six paragraphs including factual and legal theories not in the original petition, including emotional abuse by the mother. The court's written order dismissed the d-1 count. At the dispositional hearing almost two months later, the court was asked to clarify its ruling on the d-1 allegation, and the court agreed it was not clear and was going to issue a clarifying order. At the disposition hearing two weeks later the juvenile court ordered the d-1 allegation sustained but amended it to conform to proof, adding five paragraphs adding factual and legal theories that were not in the original petition. The juvenile court removed I.S. from her mother's care. Mother appealed.

Reversed. Mother's due process was violated when the juvenile court amended the petitions to conform to proof by including facts and legal theories that were not in the original petition. A juvenile court may amend a petition to conform to the proof presented at a jurisdictional hearing if the amendment is immaterial, but amendments that are material or prejudicial are not allowed. An example of an allowable amendment is the substituting of one word for another where the variance between the words was minimal. (See *In re Jessica C. (2001) 93 Cal.App.4th 1027* [holding the word "touching" could be substituted for

"penetrating" in a sexual abuse case because the basic allegation remained the same].) However, if the amendments to conform to proof change the grounds for establishing jurisdiction, they are not allowable. (See *In re G.B.* (2018) 28 Cal.App.5th 475 (G.B.) [holding that it was error to amend the petition to establish jurisdiction under a different legal theory than the original allegations, make a non-offending parent offending in the amended petition, and to base it all on facts not at issue in the original petition].) This case is more akin to *G.B.* in that the amended allegations asserted a new legal theory, namely that of emotional abuse, and was therefore not an allowable amendment resulting in the same basic allegations. Further, one of the amendments asserted the legal theory that mother *might* have known of the abuse if she conducted a reasonable investigation of the text messages, whereas the original petition alleged mother knew of the abuse. With this different legal theory at play, mother possibly would have altered her defense at trial. Thus, the amendments materially varied from the original petition. The principle that a juvenile court's order asserting jurisdiction can be affirmed if there are multiple grounds for jurisdiction and any one of the statutory bases is supported by substantial evidence is not appropriate in this case because of the irregular way in which the juvenile court sustained the d-1 allegation, even though mother did not challenge that I.S. was sexually abused by a member of the household. First, the juvenile court dismissed the d-1 allegation, then two months later indicated that it was going to sustain it, and then materially amended it. While a juvenile court may sua sponte change any court order under section 385, the procedural requirement to do so is to provide notice and an opportunity to be heard to the parties. Mother had no notice of the amendments and was not able to properly present a defense. Mother's fundamental due process rights were violated when she did not receive notice or a fair opportunity to be heard. (KH)

Terminating Legal Guardianship—WIC 388

In re N.B.—filed 7/27/21, cert. for publ. 8/18/21; First Dist., Div. One
Docket No.: A161425
Link to case: https://www.courts.ca.gov/opinions/documents/A161425.PDF

SECTION 388 IS THE PROPER VEHICLE FOR TERMINATING A DEPENDENCY LEGAL GUARDIANSHIP

N.B. was removed from her parent's care in 2008 and parents failed to reunify. N.B.'s grandmother, Catherine, along with their maternal aunt, became her

legal guardian in 2012, when N.B. was 5 years old. In 2019, N.B. came to the attention of the child welfare agency when she threatened Catherine with a knife. The agency filed a section 300 petition alleging N.B. was suffering severe emotional damage and that her parents left her without provision for support. The petition was sustained, and Catherine and aunt received family maintenance services. N.B. stabilized for a while, but then N.B. was hospitalized due to an overdose and placed in maternal aunt's care upon release from the hospital. Maternal aunt continued to receive family maintenance services but became overwhelmed with caring for N.B. and returned her to Catherine without the agency's knowledge. N.B. once again attempted to self-harm and was then removed from both Catherine and maternal aunt. The agency then filed a petition under section 388 to terminate the maternal aunt's legal guardianship, as well as a supplemental petition under section 387 alleging that Catherine and maternal aunt lied about N.B. living with maternal aunt, lied to the agency about N.B.'s well-being and whereabouts, and had asked N.B. to lie for them. The agency then filed a second 388 petition seeking to terminate Catherine's legal guardianship. The report described Catherine as combative with service providers and unable to meet N.B.'s needs because she continually pathologized the child, focused on the child's faults, insisted on increasing the child's medication, and refused to work with service providers who disagreed with her. At trial, Catherine testified she wanted additional services that were not previously provided. N.B.'s counsel and maternal aunt's counsel requested termination of legal guardianship. The trial court found that Catherine's behavior contributed to N.B.'s problems and that she lacked insight into how to help N.B. The guardianship was terminated; Catherine appealed.

Affirmed. The juvenile court properly used section 388 as the vehicle to terminate a legal guardianship established through the dependency court. Cal. Rules of Court, rule 5.740 provides that a section 388 petition should be filed to terminate a dependency guardianship. Catherine's argument that the juvenile court should have proceeded under section 387 with a dispositional hearing before proceeding to a section 388 hearing is unsupported by statute and her reliance on *In re Jessica C.* (2007) 151 Cal.App.4th 474, was misplaced. There is no statutory support for the conclusion in *In re Jessica C.* that a section 387 disposition hearing must be held prior to consideration of termination of legal guardianship under section 388. Since the statute governing terminating guardianships does not refer to section 387, see WIC 366.3, subd. (b)(2), and the rule of court governing termination of legal guardianships identifies section 388 as the proper vehicle, it is clear that the failure to conduct a section 387 hearing was not reversible error. (SH)

Material Change in Circumstances; Best Interest—WIC 388

In re N.F.—published 8/20/21; Fourth Dist., Div. Two
Docket No.: E076330
Link to Case: https://www.courts.ca.gov/opinions/documents/E076330.PDF

A BRIEF PERIOD OF SOBRIETY IS INSUFFICIENT TO SHOW A MATERIAL CHANGE IN CIRCUMSTANCES UNDER WELFARE AND INSTITUTIONS CODE SECTION 388.

At the jurisdiction hearing, the juvenile court found the substance abuse allegations against the parents to be true. At the disposition hearing, the juvenile court denied reunification services due to the parents' historic and untreated substance abuse issues pursuant to Welfare and Institutions Code section 361.5(b)(13). The previous dependency case involving the family closed five months prior and also involved substance abuse issues. The present case was initiated after mother relapsed and crashed her car several times while driving with the child. Months after the juvenile court denied the mother's reunification services, she filed a petition under Welfare and Institutions Code section 388 asking for the reinstatement of reunification services. Mother's 388 petition argued she had a significant bond with the child, and she had completed a 90-day residential treatment program. The juvenile court denied mother's 388 petition and found circumstances to be "changing" but "not changed." Further, the juvenile court found providing mother reunification services was not in the child's best interest. Mother appealed.

Affirmed. In determining whether the petitioning party has carried his or her burden, the court may consider the entire factual and procedural history of the case. The change in circumstances supporting a section 388 petition must be material. In the context of a substance abuse problem that has repeatedly resisted treatment in the past, a showing of materially changed circumstances requires more than a relatively brief period of sobriety or participation in yet another program. The juvenile court properly concluded that the mother completing a 90-day residential program was not a material change due to her history of completing programs and then relapsing. Granting mother further reunification services was also found not to be in the child's best interest; mother's circumstances were "unstable" and there was no telling whether her latest efforts at sobriety would last. After a parent's reunification services are

terminated or denied, the focus of the case shifts from the parent's interest in the care and custody of the child to the needs of the child for permanency and stability. The child was thriving with her relative caregivers, and they were committed to providing her permanency through adoption. (MO)

NEW NON-DEPENDENCY CASELAW

Family Code 7612(c)

M.M. v. D.V.—published 7/19/21; Fourth Dist., Div. One.
Docket No. D077468
Link to case: https://www.courts.ca.gov/opinions/documents/D077468.PDF

THE EXISTENCE OF AN ESTABLISHED PARENT-CHILD RELATIONSHIP IS REQUIRED TO QUALIFY AS A THIRD "PRESUMED PARENT" UNDER FAMILY CODE 7612(C).

Mother was in a relationship with two men, M.M. and T.M., at the same time. When she discovered she was pregnant, mother told M.M. that he could not be the father based on the timing of conception. When the child was born, T.M. signed a voluntary declaration of parentage and was listed as the father on the birth certificate. T.M. and mother then married. When the child was 2½ years old, DNA testing determined M.M. to be the biological father. Mother allowed M.M. to meet with the child for a brief time but then cut off contact because she thought it would be "confusing and traumatizing" to introduce a stranger into the child's life. M.M. filed a petition to be declared a third presumed parent within the meaning of Family Code 7612(c). However, M.M. also argued that he should be accorded "presumed father" status as a *Kelsey S*.-father because mother, by denying him access to the child, had prevented him from establishing himself as presumed father. M.M. testified he would have assumed his obligations had he known the child was his, but acknowledged he never paid nor offered to pay child support.

Affirmed. Family Code 7612(c) allows a third presumed parent-finding "if the court finds that recognizing only two parents would be detrimental to the child." Because only a person "with a claim to parentage" is eligible to be a third parent, the person must first show that he or she qualifies to be a presumed parent – a status which is based on familial relationship rather than any biological connection. Moreover, this parent-child relationship must be shown *before*

determining whether recognition of only two parents would be detrimental to the child. Here, M.M. neither qualified as a *Kelsey S.*-presumed father (having failed to show a full commitment to his parental responsibilities) nor a presumed parent under the definitions listed in 7611. Lastly, even if M.M. had qualified as a presumed parent, this was not an "appropriate action" in which to find a child has more than two parents. Legislative history shows this provision was intended to be narrow in scope and apply only in "rare cases" in which a child "truly has more than two parents" who are parents "in every way." Accordingly, an "appropriate action" for application of 7612(c) is one in which there is an *existing* parent-child relationship between the child and the putative third parent such that recognizing only two parents would be detrimental to the child. Here, M.M. had the burden to show an *existing* meaningful relationship between the parent and the child, but none existed between him and the child. (ML)