Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

Vol. 19, No. 2: March 16, 2023
Issued by the Children's Law Center of California on the second Tuesday of each month.
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NEW DEPENDENCY CASELAW

WIC 366.26; Parental Fitness

In re N.R. – filed 1/27/2023; Second Dist., Div. Eight
Docket No. B322164; 87 Cal.App.5th 1187
Link to case: https://www.courts.ca.gov/opinions/documents/B322164.PDF

THE JUVENILE COURT COULD PROPERLY RELY ON A PRIOR FINDING OF PARENTAL UNFITNESS OR CHILD DETRIMENT IN TERMINATING PARENTAL RIGHTS REGLARDLESS OF WHETHER A DIFFERENT CHILD WITH DIFFERENT NEEDS WAS RETURNED TO MOTHER'S CUSTODY SINCE ASCERTAINMENT OF PARENTAL FITNESS OR CHILD DETRIMENT IS A CHILD SPECIFIC INQUIRY

Mother has two children, N.R. and R.L., who were six and 10 months old, respectively, when the dependency case began as a result of, among other things, mother's physical abuse of N.R. The juvenile court initially released the children to mother's home, but they were detained 3 months later when section 387 and 342 petitions were filed. The new allegations were sustained, and the children were placed in foster care after the court found there would

be detriment if they were released to mother. Throughout much of the reunification period, N.R. was extremely unstable. As a result of her behaviors, she was placed in 13 different foster homes. She was hospitalized many times for suicidal ideation, auditory hallucinations with homicidal ideation, and physical aggression, and was eventually diagnosed with "severe bipolar disorder." Her behaviors made it difficult for her to be brought into the community. N.R.'s therapist indicated that mother was a trigger for N.R., she had daily outburst and physical aggression, and she was not responding well to therapy. It was reported that her behaviors escalated after visits with her mother. Eventually, N.R. was placed with a relative and began to stabilize. She reported that she did not want to live with mother, wanted to be adopted by her relative, and continued to be triggered by mother. By contrast, R.L. was continually reported to do well in placement and during visits with mother, and exhibited none of the same behaviors. Throughout reunification, mother made a lot of progress on her case plan. Her visits were consistent, but she struggled to control N.R.'s severe behaviors on the visits and needed assistance from the monitor. Mother was reported to lack insight as to N.R.'s needs, and believed her problems were due to the guilt over being removed from mother. Two conjoint visits took place and mother was irritable and did not respect N.R.'s boundaries. At the section 366.25 hearing, the juvenile court found there would be a substantial risk of detriment to N.R. if returned to mother, terminated reunification services, and set a section 366.26 hearing. R.L. was returned to mother, and ultimately jurisdiction was terminated as to R.L. A bonding study was conducted, and the evaluator indicated they did not believe there would be a detriment to N.R. if parental rights were terminated, as there was no connection or affection between them. N.R. continued to say she wanted to be adopted by her relative and felt unsafe with mother. The juvenile court terminated parental rights. Mother appealed.

Affirmed. The determination of parental unfitness or child detriment is a child-specific inquiry, and a juvenile court can properly rely on prior findings of parental unfitness in terminating parental rights even if a different child was returned to the care of a parent. Parental unfitness is expressed in terms of detriment to the child. At the stage of removal, there must be clear and convincing evidence of such detriment, and the finding is revisited throughout the subsequent hearings. The determination of detriment takes into consideration the family circumstances, including the parental capacity and the specific needs of a child. As such, the detriment, or parental unfitness, determination is made on a child-by-child basis. Just because a parent is found fit to have one child in their care, that does not mean the parent is fit to have a different child with different needs in their care. There

is no "general" parental fitness, but rather an assessment of a parent's capacity to care for a specific child with their individualized needs. Here, the fact that R.L. was returned to mother's care does not mean that the prior findings of detriment to N.R. are rebutted, as the needs of the children were different. The evidence demonstrates that N.R. had mental health and behavioral issues, mother was a trigger for N.R., making her behavioral issues worse, and mother struggled to handle N.R.'s behaviors. R.L. had none of the same issues. The juvenile court's order terminating mother's parental rights over N.R., based on prior detriment findings, was permitted by due process. (KH)

Notice – Due Diligence; ICWA—WIC 224.2

In re Jayden G.—published 2/14/23; Second Dist., Div. Eight
Docket No. B321426
Link to case: https://www.courts.ca.gov/opinions/documents/B321426.PDF

[1] THE AGENCY'S FAILURE TO CONDUCT A PROPER DUE DILIGENCE SEARCH FOR FATHER DESPITE HAVING KNOWLEDGE TO LOCATE HIS WHEREABOUTS CONSTITUES REVERSIBLE ERROR; [2] THE AGENCY HAS A CONTINUING DUTY TO INQUIRE WITH ALL AVAILABLE RELATIVES CONCERNING INDIAN ANCESTRY.

The agency filed a petition concerning Jayden and his two younger siblings. At the detention hearing, mother stated Jayden's father was Cesar T. and she believed he was currently incarcerated. Mother also provided father's middle name as well as his year of birth. Regarding ICWA, mother indicated she had no Indian ancestry. Jayden, the subject of this appeal, was detained from mother and placed with a foster caregiver. The juvenile court found Cesar T. to be an alleged father. The agency later filed a declaration of due diligence indicating they had completed a database search and could not locate father because they did not have a complete date of birth. The declaration indicated the agency did not search the databases using father's middle name or year of birth. The agency also filed an LMI prior to the adjudication hearing indicating father was now possibly released from custody as mother had seen father on the day he was released. Mother indicated she observed father because he also resided on the same street as her, in a house with paternal grandfather down the road from her. However, mother indicated she had no contact information for father. The juvenile court found notice proper, removed Jayden from mother and later terminated mother's reunification services. During permanency planning, the agency

submitted an updated declaration of due diligence indicating they had searched all relevant databases for father but could not locate him. The juvenile court found the due diligence search proper and ordered publication as well as first-class mail notice sent to the parties and the grandparents of the child. The agency did not mail notice to either maternal or paternal grandparents, but noticed mother, Jayden, and Jayden's caregiver. Regarding ICWA, during the pendency of the case, the agency did not interview any known relatives as to potential Indian ancestry. Subsequently, the juvenile court found notice proper as to both parents and terminated their parental rights. Mother appealed.

Reversed and remanded. [1] Father's status as an alleged parent requires that he be given notice, an opportunity to appear and participate in dependency proceedings, and an opportunity to change his paternity status. Reasonable diligence in giving notice includes not only standard avenues to locate a parent, but also specific methods available and known by the agency in that specific case which may assist them in locating a parent. In this case, the agency did not exercise reasonable due diligence in its attempted search for Jayden's father. The agency had a middle name and a year of birth for father, and also knew he was incarcerated. Moreover, mother informed the agency that father was residing with paternal grandfather, who resided just down the street from her. Despite obtaining this information, the agency only searched generalized databases for father without using this specific information to possibly locate father. Additionally, published notice did not remedy this error because due process requires the agency employ the most likely means necessary to notify a parent, which the agency did not do in this case. This error was not harmless as there is no evidence to suggest that father would not have failed to assert his rights had he received proper notice of the case. [2] In California, the agency is required to ask all parties as well as extended family members and others who have interest in the child about potential Indian ancestry in order to comply with ICWA. The agency did not comply with those requirements in this case as the agency did not ask any known maternal or paternal relatives about Indian ancestry. Accordingly, as this case is already remanded to effectuate proper notice, the agency is also directed to complete its duty of initial inquiry under ICWA by asking available relatives about Indian ancestry. (SW)

ICWA - WIC 224.2

D.S. v. Superior Court – filed 2/15/2023; Fourth Dist., Div. Two
Docket: E079017
Link to Case: https://www.courts.ca.gov/opinions/documents/E079017.PDF

THE DUTY OF INQUIRY UNDER SECTION 224.2 APPLIES EQUALLY TO ADOPTIVE RELATIVES AS IT DOES TO BIOLOGICAL RELATIVES.

The agency filed a petition in response to allegations that mother, the only adoptive parent, physically abused A.S. At the initial hearing, mother denied Indian ancestry and provided contact information for several maternal relatives. No subsequent reports from the agency indicated that its workers contacted any of these relatives to inquire whether A.S. is or may be an Indian child. At the combined jurisdiction/ disposition hearing, the juvenile court found ICWA did not apply, denied reunification services to mother, and set a 366.26 hearing. Mother later filed a 388 petition, requesting only that A.S. be returned to mother's home. The juvenile court summarily denied the 388 petition. Mother appealed.

Relief granted. The Court construes mother's appeal as a petition for writ of mandate, given that mother seeks only an order directing ICWA compliance by the juvenile court and agency while the dependency case remains pending. Section 224.2 creates three distinct duties regarding ICWA in dependency proceedings. The first-step inquiry duty imposes an affirmative and continuing duty of inquiry on the agency to ask all involved persons whether the child may be an Indian child. (WIC 224.2, subds. (a), (b).) If that initial inquiry creates a "reason to believe" the child is an Indian child, then the second-step inquiry duty requires the agency to "make further inquiry regarding the possible Indian status of the child." (WIC 224, subd. (e).) Following the inquiry stages, the juvenile court may make a finding that ICWA does not apply, which includes an implicit finding that the social workers fulfilled their duty of inquiry. Here, the record does not support that implicit finding for the initial inquiry. Mother provided contact information for several maternal relatives, yet the agency's reports do not document any efforts to contact those individuals regarding an ICWA inquiry. While the agency asserts that it had no duty to conduct an inquiry because the identified relatives were adoptive relatives, this argument is rejected. In this regard, the agency's reliance on *In re Francisco D.* (2014) 230 Cal.App.4th 73 is misplaced as it was decided before section 224.2 was added to the WIC and, thus, is of little value in interpreting section 224.2. Section 224.2, subd. (b), makes no distinction between a natural parent and an adoptive parent when using the term "parent." The inclusion of legal guardians, Indian custodians, others who have an interest in the child, and the reporting party in the list of

persons who must be interviewed does not suggest any limitation on the duty of inquiry based on a biological connection to the child. Thus, there is no basis to conclude that the duty of inquiry imposed under section 224.2 is limited only to biological relatives. (AMC)

ICWA - WIC 224.2

In re A.A. – filed 2/16/2023; Fourth Dist., Div. Two
Docket No. E079176
Link to case: https://www.courts.ca.gov/opinions/documents/E079176.PDF

[1] SUBSTANTIAL EVIDENCE SUPPORTED A FINDING THAT THE ICWA DID NOT APPLY BECAUSE THE CHILDREN WERE NOT "INDIAN CHILDREN" UNDER THE ICWA SINCE THEIR WAS NO EVIDENCE OF ANY INDIAN ANCESTRY FOR FATHER AND ALTHOUGH MOTHER WAS A MEMBER OF THE JEMEZ PUEBLO TRIBE THE CHILDREN'S BLOOD QUANTUM WAS TOO LOW TO BE ELIGIBLE FOR MEMBERSHIP THEMSELVES; [2] THE DETERMINATION BY THE JEMEZ PUEBLO TRIBE THAT THE CHILDREN WERE NOT ELIGIBLE FOR TRIBAL MEMBERSHIP WAS CONCLUSIVE AND BINDING ON THE TRIAL AND APPELLATE COURT.

Five children were removed from mother's care and placed in foster care. Father's whereabouts were initially unknown, but his parents denied any Indian ancestry. Eventually father himself denied ancestry, too. Mother reported she was a member of the Jemez Pueblo tribe. The juvenile court ordered notice to the tribe and BIA and found that the children may be Indian children. Per the Jemez Pueblo, tribal membership is based on blood quantum, requiring members to have 1/4 Jemez Pueblo blood quantum. When the agency spoke with the tribal representative, they reported the children were not registered members of the tribe but would be eligible to be "naturalized" members. Mother had another child who was later removed from her care. The social worker spoke with a Child Advocate for the Jemez Pueblo and their ICWA representative, who reported the children were not eligible for tribal membership based on their blood quantum, that they were eligible for "naturalization" that would qualify them only for health services but exclude them from any federal funding, and that the tribe would not be intervening on behalf of the children in the case because they were not enrolled members. The children were eventually returned to mother's care, but then ultimately removed again. The agency spoke with the tribal ICWA representative again to clarify the children's status, and was again told that the tribe would not intervene because the children could only ever be

naturalized members. The agency asked the court to find that ICWA did not apply since the children were not Indian children. The juvenile court found ICWA did not apply. Parental rights to three of the children were ultimately terminated. Mother and father appealed.

Affirmed. There was substantial evidence for the juvenile court's order that ICWA did not apply. ICWA applies when an "Indian child," as defined by ICWA as a child who is a member of an Indian tribe or eligible for membership, is involved. Each tribe has the exclusive authority to determine whether a child is a member or eligible for membership, and that determination is conclusive and binding on both the juvenile court and appellate court. The tribal representative of the Jemez Pueblo tribe was clear that while the children could become naturalized members of the tribe, they were not eligible to be enrolled as members of the tribe. As such, substantial evidence supported the finding that the children were not Indian children and ICWA did not apply. (KH)

Jurisdiction—WIC 300

In re L.B.—published 2/16/23; First Dist., Div. One
Docket No. A165001
Link to case: https://www.courts.ca.gov/opinions/documents/A165001.PDF

A LACK OF CUSTODY ORDER DOES NOT FORECLOSE THE JUVENILE COURT FROM TAKING JURISDICTION OVER THE CHILD SO LONG AS THERE IS AT LEAST ANOTHER FACTOR THAT ESTABLISHES SUBSTANTIAL RISK OF HARM UNDER WIC 300(B)

The agency filed a WIC 300(b) petition over L.B. due to mother's failure to protect then 12-year-old L.B. from ongoing domestic violence between mother and her partner, T.Y. The evidence showed a history of domestic violence between mother and her partner in the presence of L.B. and his half-siblings, significant injuries suffered by mother at the hands of T.Y., a detrimental home environment, mother's suicide attempts, and her failure to properly manage the treatment of her own serious health condition. During the investigation of the case, it was discovered that L.B. was living with his father. A family court order allowed father to have L.B. for summers, but father ended up keeping L.B. due to mother's "unmanageable" household. This was not the first time father had taken L.B. from mother — he had done so a few years prior when mother was living in a "trap house," had attempted suicide, and L.B. was found to be dirty, hungry, and without sufficient clothing. Father now wanted to keep L.B. in his custody. By the time of the jurisdiction hearing, mother continued to deny the case issues, refused to interview for the social study, and had failed to contact L.B. The juvenile

court sustained the 300(b) count, finding mother unable to protect her children from ongoing domestic violence and that she could otherwise take L.B. back into her custody at any time. The court removed L.B. from mother, granted sole physical custody to father, and dismissed the petition with a custody order to be filed in family court. Mother appealed.

Affirmed. Effective January 1, 2022, WIC 300(b)(1) was amended to include the following language: "A child shall not be found to be a person described by this subdivision solely due to the failure of the child's parent or alleged parent to seek court orders for custody of the child." (WIC 300(b)(2)(B).) On appeal, mother cites to this new provision in arguing that jurisdiction here was ultimately based on the failure to seek formal custody orders over L.B. in family court. This argument however disregards a plain reading of the amended statute which proscribes jurisdiction based *solely* on the failure of a parent to seek custody orders. Further, after the Legislature added this custody-order provision, it amended subdivision (b) again, effective January 1, 2023, with a provision related to indigency and grouped these two provisions together with an existing third provision involving homelessness. Thus, in its current form, subdivision (b)(2) provides that a child shall not be described by this subdivision solely due to (A) homelessness, (B) the failure of the parent to seek a child custody order, or (C) indigence or financial difficulty, including poverty or the inability to provide clothing, childcare, or home or property repair. By grouping these three exclusions together, the Legislature's intent was made even clearer that they are each to operate in similar fashion. Homelessness and indigence may be a factor considered under 300(b), so long as neither is the only factor to support jurisdiction. Similarly, a failure to obtain a child custody order is a factor to consider but may not be the only jurisdictional basis. Here, the subdivision (b)(2)(B) exclusion to jurisdiction was not relevant as there were other factors, such as domestic violence and assaultive behavior by mother, that placed L.B. at ongoing substantial risk of harm. (ML)

Custody Orders – WIC 362.4

In re N.M. – published 3/2/2023; Second Dist., Div. One
Docket No.: B315559
Link to Case: https://www.courts.ca.gov/opinions/documents/B315559.PDF

EXIT ORDERS MUST SERVE THE CHILD'S BEST INTERESTS AND MAY NOT REWARD OR PUNISH ONE PARENT OR ANOTHER FOR FAILING TO COMPLY WITH A CASE PLAN.

The family came to the agency's attention after mother was arrested for driving under the influence of alcohol with her youngest child in the car. At the jurisdiction and disposition hearing, the juvenile court removed the children from mother and released them to father, with a plan that the children would continue to reside with maternal grandmother. Father was non-offending in the petition. He had a prior arrest for possession and used marijuana. The juvenile court ordered him to complete a parenting program, submit to five drug tests, and to complete a drug program if he had any missed or dirty tests. Mother completed her case plan. Father missed 22 drug tests and refused to enroll in any drug rehabilitation program. His visits became inconsistent due to work. At the final review hearing, father requested an exit order granting him joint physical custody. Due to father's lack of case plan compliance, the juvenile court stated, "[i]t's not appropriate to reward a parent who does nothing in this court…" The juvenile court ordered sole legal and physical custody to mother and unmonitored visits for father. Father timely appealed.

Reversed. Custody orders must serve the child's best interests. Granting the mother sole custody due to father's non-compliance was an abuse of discretion. Exit orders must not reward or punish one parent or another for failing to comply with a case plan. Although father was not in compliance with his case plan, he was a non-offending parent, and no evidence suggested that his drug use, lack of a parenting class, or visitation practices impacted the children in any way. (SL)

WIC 388 – Vaccinations

In re Matthew M. – published March 6, 2023; Second Dist., Div. Seven
Docket: B319258
Link to Case: https://www.courts.ca.gov/opinions/documents/B319258.PDF

IT IS IN A CHILD'S BEST INTEREST TO BE VACCINATED AGAINST A COMMUNICABLE DISEASE; A PARENT CANNOT CLAIM FREEDOM FROM VACCINATION ON RELIGIOUS GROUNDS.

The child was declared a dependent and removed from his parents. Both were offered reunification services. At the six-month review hearing, mother objected to the COVID-19 vaccine being administered to the child due to possible medical side effects and religious grounds. After considering mother's objection, the juvenile court permitted vaccination in accordance with CDC guidelines. At a later time, mother filed a section 388 petition seeking to revoke the juvenile court's prior order allowing vaccination. In her

section 388 petition, mother asserted the vaccine went against her and the child's religious beliefs because the vaccine used fetal cells. The agency recommended vaccination. At a section 388 evidentiary hearing, mother testified the child already had COVID and was fine. She did not address her religious objections. The juvenile court denied mother's petition. Mother timely appealed.

Affirmed. Pursuant to section 388, a parent must show: 1) new evidence or a change in circumstances and 2) the requested modification is in the child's best interest. Mother did not present new evidence at the section 388 evidentiary hearing. Her objections, concerns regarding possible side effects and religious beliefs, were previously raised at the six-month review hearing. Further, mother's proposed modification was not in the child's best interest. When a child is declared a dependent, the juvenile court is expressly authorized to make any and all reasonable orders for the care, supervision and support of the child. This authority includes the ability to order vaccinations over a parent's objection. Although mother's religious objections warranted consideration, such beliefs are not outcome determinative. A parent cannot claim freedom from compulsory vaccination on religious grounds, the right to practice religion freely does not include the right to expose the community or child to communicable disease. COVID-19 was one of the 10 leading causes of death at the time and the child was in contact with multiple individuals because of school. Thus, it was not averse for the child to receive the vaccination. (MO).