Children's Law Center of Los Angeles

"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASE LAW

APPEALABILITY

In re S.B. – filed May 28, 2009, Supreme Court of California
Docket No. S162156
Link to case: http://www.courtinfo.ca.gov/opinions/documents/S162156.DOC

The Court of Appeal dismissed as premature mother's appeal from orders entered under WIC section 366.26(c)(3). WIC 366.26(b)(3) and (c)(3) authorizes the juvenile court to find that adoption of a dependent child is probable but difficult, and to order a search for an appropriate adoptive family within 180 days. While the Courts of Appeal have divided over whether such orders are appealable, the California Supreme Court holds that they are.

Reversed. The Supreme Court found that mother was not appealing only the *finding* that her children were probably adoptable, but also the *order* that efforts be made to locate an appropriate adoptive family, so any reasoning that she is challenging only the trial court's finding is error. In addition, section 366.26(c)(3) orders are not mere continuances of section 366.26 hearings (*In re Jacob S.* (2002) 104 Cal.App.4th 1011 and *In re Cody C.* (2004) 121 Cal.App.4th 1297) where parents are not aggrieved in any way, but are orders which eliminate the option of long-term foster care when no adoptive placement is found. Because the court must hold another hearing after the expiration of the 180 days and choose between adoption and legal guardianship by a non-relative, the interest of the parents are substantially affected by the section 366.26(b)(3) order (*In re Ramone R.* (2005) 132 Cal.App.4th 1339 and *In re Gabriel G.* (2005) 134 Cal.App.4th 1428). Lastly, the Supreme Court found no persuasive reason for excepting section 366.26(c)(3) orders from the usual rule of appealability in dependency proceedings. (JC)

EDUCATION RIGHTS; COURT'S AUTHORITY TO ORDER COUNTY AGENCY TO PAY EXPENSES OF EDUCATIONAL REPRESENTATIVE

In re Samuel G. – filed May 28, 2009, Fourth Dist., Div. One
Docket No. D054066
Link to case: http://www.courtinfo.ca.gov/opinions/documents/D054066.DOC

Samuel was detained at age nine due to abandonment. He had serious mental health and learning disabilities. Juvenile court appointed a CASA, who eventually was also appointed as his educational representative. She visited Samuel frequently and attended all his IEP meetings. At age 13, Samuel was moved to an out-of-county placement. At the request of Samuel's attorney, juvenile court ordered agency to pay for the CASA/educational representative to visit Samuel on a quarterly basis (because the CASA program did not have sufficient funding to do this). Agency appealed. Affirmed. Juvenile court order did not violate separation of powers doctrine because court has responsibility to ensure adequate educational services for children in long-term care. Ensuring that Samuel received the services of his educational representative was a legitimate judicial function. The order was not an improper gift of public funds because it was for a public purpose – meeting the educational needs of a dependent child. (MM).

ICWA

In re S.B.- filed June 3, 2009, Second Dist., Div. Four
Docket No. B210101
Link to case: http://www.courtinfo.ca.gov/opinions/documents/B210101.DOC

Parents twice appealed the juvenile court's failure to comply with the ICWA notice requirements. After the case was remanded the second time, the juvenile court asked parents' counsel whether they had any objections regarding the latest ICWA compliance then continued the matter for two months to give them an opportunity to look through the notices, compare them to other notices, and specify any objections. At the continued hearing, neither counsel had any legal objections and the court found that ICWA did not apply and reinstated the order terminating parental rights. Both parents appealed.

While the parents did not claim that the contents of the notices were inadequate or that the a tribe entitled to notice was not given notice, they argue that DCFS failed to comply with WIC 224.2(c) which requires proof of the notice (including copies of notices sent and all return receipts and responses received) be filed with the court in advance of the hearing. Although DCFS failed to include return receipts for any of the notices and only filed responses from nine of the fourteen tribes, the filing of return receipts of responses is not required under ICWA and any failure to comply with WIC 224.2(c) is harmless here. Further, there is a presumption that the social worker performed its duty to send notices, and in the absence of any contradictory evidence, the court can conclude that ICWA notice was given to all appropriate tribes. Finally, parents' counsel have a responsibility to raise prompt objections in the juvenile court to any deficiency in notice so that it can be corrected in a timely fashion. (SA)

JURISDICTION UNDER WIC 300(d); WIC 342 SUBSEQUENT PETITION

In re Carlos T.- filed June 3, 2009, Second Dist., Div. Four
Docket No. B207604
Link to case: http://www.courtinfo.ca.gov/opinions/documents/B207604.DOC

After father raped Linsey and she became pregnant, agency filed dependency petition as to Linsey and her brother Carlos, alleging sexual abuse of Linsey by father and failure of mother to protect. The juvenile court sustained the petition and denied reunification services to both parents. While in foster care, Carlos began exhibiting sexualized behavior and disclosed that father had also sexually abused him. DCFS filed a WIC 342 petition alleging that father sexually abused Carlos and that mother should have reasonably known but failed to protect. Father moved to dismiss the petition on grounds that there was no current risk as he had not had any contact with the children for the previous two years. Mother argued that the children were not currently at risk because the father was incarcerated. The court denied the motion to dismiss and sustained the petition. The parents appealed.

Affirmed. While a finding of current risk is required for jurisdiction under subdivision (b) and (j), nothing in subdivision (d) limits the duration of dependency. Subdivision (d) states, "the child has been sexually abused, *or* there is a substantial risk that the child will be sexually abused…" Thus, the parents' reliance on *In re Karen R.* (2002) 95 Cal.App.4th 84 and *In re P.A.* (2006) 144 Cal.App.4th 1339 to argue that jurisdiction under subdivision (d) is improper because father was incarcerated at the time of the jurisdiction hearing and therefore there was no risk that he would sexually abuse the children is misplaced. In those cases, the issue was whether the court could exercise jurisdiction over the male sibling based on the father's sexual abuse of the daughter. Here, the juvenile court found that Carlos was a dependent under the first prong of subdivision (d) based on substantial evidence that the father sexually abused Carlos. It was also reasonable for the court to infer that the mother should have suspected father was sexually abusing Carlos as she knew father was sexually abusing and had raped Linsey. Finally, the parents' claim that the children were not at risk because they were already dependents and the father was incarcerated at the time of the jurisdiction hearing is misplaced. Even if a child is already a dependent, the court can still find, based on new evidence of past abuse, that the child would remain at risk of further abuse without state intervention. And although father was incarcerated on sexual molestation convictions at the time of jurisdiction, he had not yet been sentenced, he still had the right to appeal the convictions, and he could still be released from custody and resume his abuse without the state preventing him from accessing the children. (SA)

JURISDICTION; WIC 300(b), (j); THERAPIST-PATIENT PRIVILEGE; DUE PROCESS

In re Cole C. – filed June 4, 2009, Fourth Dist., Div. One
Docket No. D053845
Link to case: http://www.courtinfo.ca.gov/opinions/documents/D053845.DOC

Six- and four-year old girls disclosed physical and sexual abuse by stepfather Mark C.. County agency filed petition as to the girls, and petition alleging that Mark C.'s seven-month-old baby, Cole, was also at risk of physical and sexual abuse. After trial, juvenile court declared Cole a dependent and removed him from Mark. Mark appealed. Affirmed. (1) Juvenile court did not err in allowing the girls' attorney to assert psychotherapist-patient privilege as to statements made by the girls during conjoint therapy with their mother before the dependency petition was filed. Even though the statements were made in the past, the holder of the privilege at the time of trial was the girls' attorney, not their mother. Even though the privilege is not absolute, the court did not abuse its discretion by preserving the privilege. Mark's claim that the girls did not disclose abuse during therapy, even if true, would not have changed the outcome of the trial; (2) Juvenile court did not deny Mark due process by adjudicating the dependency petition as to his stepdaughters (to which the parents submitted) before adjudicating the petition as to Cole. Mark had a full opportunity to present evidence that Cole was not at risk of abuse. The trial on Cole's petition lasted 14 days, and Mark called 16 witnesses and introduced numerous documents into evidence; (3) The evidence was sufficient to support the juvenile court's finding that Cole was at risk of physical abuse because Mark had used excessive and inappropriate physical discipline on the girls, and to support the juvenile court's dispositional finding that removal from Mark was necessary to protect Cole's safety. (MM)

WIC 366.21(e); TERMINATION OF REUNIFICATION SERVICES BASED ON PARENT'S FAILURE TO CONTACT AND VISIT CHILD

S.W. v. Superior Court of Orange County.- filed May 15, 2009, Fourth Dist., Div. Three
Docket No. G041674
Link to case: http://www.courtinfo.ca.gov/opinions/documents/G041674.DOC

Agency filed dependency petition alleging that father had left 10 year old S.W. in the care of relatives and caregivers for more than two months without providing support. The court sustained an amended petition, declared S.W. a dependent, and ordered reunification services for the father. At the six month review, the court terminated services and set a WIC 366.26 hearing, noting that the father had not visited S.W. in the preceding six months and only spoke to her once on the phone despite her numerous attempts to contact him. Father filed a writ petition.

Petition denied. According to WIC 366.21(e), a parent's failure to contact *and* visit the child is a basis for terminating reunification services and setting a WIC 366.26 hearing, regardless of why the child was initially removed or whether the parent's whereabouts are known. Here, the father did not contact *and* visit S.W. during the six month period. Father mistakenly relies on California Rules of Court ("CRC"), rule 5.710 which states that a court may set a WIC 366.26 hearing at the six month review if it finds by clear and convincing evidence that the parent has not had *contact* with the child for six months. However, when a rule is inconsistent with a statute, the rule is invalid and not binding on the courts. Also, to maintain consistency with section 366.21(e), the term "contact" in CRC 5.710(f)(1)(B) should be construed as a shorthand reference to the statute's dual "contact *and* visit" requirement. Further, even if "contact" alone warranted additional services, one telephone conversation in six months is not

substantial contact and does not preclude application of WIC 366.21(e). Finally, although reunification services may be continued when "extenuating circumstances" result in a parent's failure to contact and visit the child, father's decision to go to New York without a means of returning to California is not an extenuating circumstance. (SA)

UNPUBLISHED CASES OF INTEREST

JURISDICTION UNDER WIC 300 (b) and (g);

In re J.O. et al- filed May 21, 2009, Second Dist., Div. Seven
Docket No. B210785
Link to case: http://www.courtinfo.ca.gov/opinions/nonpub/B210785.DOC

Agency filed dependency petition under subdivisions (b) and (g) alleging substance abuse by both parents, history of domestic violence, failure by father to provide the children necessities of life, and inability by father to arrange for his children's care due to his incarceration. Mother's drug allegation was based on two missed drug tests and a positive test for methamphetmine, father's drug allegation was based on mother's statements that father used drugs, and the domestic violence allegation was based on mother's statements that father had been physically and verbally abusive toward mother. The juvenile court found father was an alleged father, sustained the petition, and ordered reunification services for the mother but not the father. Father appealed.

Reversed. A jurisdictional finding under WIC 300, subdivision (b) requires either neglectful conduct by the parent which causes serious physical harm or illness, *or* a substantial risk of such harm or illness. Here, although there was evidence of mother's drug history and continuing drug problem, there was no evidence tying her drug abuse to past physical harm to the children or any evidence of a specific, defined risk of harm resulting from her drug abuse. During the initial investigation, the CSW observed that the children had not been physically abused, the home was clean and there were no safety concerns, and mother had the support of her extended family in caring for the children. The above analysis also applies to the drug allegation regarding father. Regarding the domestic violence allegation, in light of father's incarceration and his stated intention not to reunite with mother, there is no evidence that the domestic violence would reoccur, or that the children were at substantial risk of serious physical harm or illness from domestic violence at the time of the jurisdiction hearing. Further, a finding under subdivision (g), is not supported by substantial evidence. That the children were placed with their paternal grandmother who was able to care for them without financial assistance from DCFS indicates that the father would have been able to arrange for the children's care during his incarceration. Finally, the father's failure to provide the children with the necessities of life was not a basis to assert jurisdiction because the mother supported them and there was no evidence that they had been deprived of food, clothing, or shelter. However, the juvenile court did not err in finding the father was an alleged father and denying him reunification services. (SA)

NONCUSTODIAL PARENTS

In re M.P. – filed June 1, 2009, Second Dist., Div. Seven
Docket No. B207299
Link to case: http://www.courtinfo.ca.gov/opinions/nonpub/B207299.DOC

Child M.P. was removed from father due to medical neglect and father's mental health problems. Mother, who lived in San Bernardino county, requested custody of M.. (A prior family-law order had granted custody of M.P. to father, mainly because mother was caring for M.P.'s half-sister B., who had mental health and developmental issues and had been violent with M.P.) M.P. was placed in foster care and both parents received services. At disposition, the court did not place M.P. with mother due to concerns about B. and about mother's boyfriend. Three months later, M.P.'s counsel filed a WIC 388 petition asking for placement with mother. At the hearing date on this petition, the agency and the child's therapist favored placement with father. The court continued the hearing until shortly before the 6-month review date, and released M.P. to mother on an extended visit pending the 388 hearing date. On that date, the county agency changed its recommendation, stating that M.P. should remain with mother and the case should be transferred to San Bernardino County so that M.P. could obtain services there. The court granted M.P.'s WIC 388 petition, finding that the safety issues concerning mother's home had been resolved, and transferred the case to San Bernardino. Father appealed.

Reversed and remanded. When a child is removed from one parent and placed with a non-custodial parent, the parent from whom the child has been removed is still entitled to a contested hearing on the issue of placement. The court erred in applying the WIC 364 standard – and thus considering only whether M.P. should be released to mother or remain in foster care -- rather than applying the WIC 366.21(e) standard and also considering whether the child should be returned to father. The error was not harmless because, by the time of the hearing, father was in compliance with the case plan, there was a close bond between M.P. and a half-brother who lived with father, and M.P.'s therapist continued to recommend that M.P. be returned to father. Remanded for contested hearing on issue of placement. If juvenile court finds on remand that M.P. should be placed with father, then the transfer order should be vacated. (MM).

REASONABLE EFFORTS; MOOTNESS

In re W.E. - filed May 27, 2009, Second Dist., Div. Seven
Docket No.: B210988
Link to case: http://www.courtinfo.ca.gov/opinions/nonpub/B210988.DOC

Agency filed dependency petition on basis of physical abuse by mother and domestic violence between mother and father. Father was in prison at time of detention hearing and adjudication. Juvenile court sustained petition, placed children in foster care, and ordered county agency to provide father with phone visits, parenting, anger management, and domestic violence counseling. Four months later, father was deported. At the 12-month hearing, the court terminated reunification services for father. Father appealed. Reversed.

Agency concedes that termination of reunification services was erroneous, since the agency never provided father with any services and the court could not properly have made a reasonable efforts finding -- but argues that the error was harmless and father's appeal is moot. Father's appeal is not moot, and the error was not harmless, because father might return to the United States in the future and seek to reunify with his children, and the adverse ruling could hurt his chances of doing so. (MM).

OTHER LEGAL DEVELOPMENTS

New or Revised Los Angeles County Department of Children and Family Services Policies of Significance –

For Your Information (FYIs):

09-24 Dependency Court Closure Plan

Link to FYI: http://dcfs.co.la.ca.us/Policy/FYI/2009/FYI0924CourtClosing.doc
This FYI is to advise staff the the Superior Court's plan to close all courthouses on the third Wednesday of each month, effective Wednesday, July 15 and continuing through the end of the fiscal year, June 2010. The plan is one part of the court's budget-cutting measures to address a $90 million dollar shortfall in FY 2009-2010. The only exception to the Wednesday closures will be for detention hearings, which will continue to be heard on those Wednesdays. The Clerk's Office will be clearing calendars for July 15 and all 3rd Wednesdays of the month thereafter and will be providing DCFS Juvenile Court Services staff with copies of minute orders with the new hearing dates, which will be sent to the assigned CSW so that they can provide proper notice to clients. Further, the DCFS-Juvenile Court Services section will remain open and staff will be available in the Liaison Unit, 241.1 Unit, Intake and Detention Control and Shelter Care. Children will be transported to court for the Detention hearings. Finally, the Antelope Valley Court will be closed. All Detention matters will be heard at the Monterey Park court and transferred back to AVC for subsequent hearing dates. (SA)

09-25 Forms Posting Update

Link to FYI: http://dcfs.co.la.ca.us/Policy/FYI/2009/FYI0925FormsUpdate.doc
This FYI is to provide staff with an update to the posting of new/revised forms to LA Kids and to the CWS/CMS (LA County specific templates) since the release of FYI 09-19, issued 04/22/09. (SA)

09-28 Mentoring Opportunities For Youth

Link to FYI: http://dcfs.co.la.ca.us/Policy/FYI/2009/FYI0928MentoringProgram.doc
This FYI cancels FYI 07-41 "Mentoring Opportunies For Youth" issued 1/4/08. According to this FYI, DCFS has contracted with community agencies to recruit, train, match, and supervise 400 mentors for youth in out-of-home care. For the youth to be eligible, they must be 10-17 years old; must be residing in a group home, FFA, FFH, or with a relative; must have no immediate plan for reunification and/or no premanent connections; must have been in

out-of-home care for at least 2 years; must be motiviated to participate in the program for a minimum of 12 months; and must have no significant emotional or behavioral problems that would prevent them from successfully participating in the program for 12 months. (SA)