IN ORDER TO MERIT A HEARING ON A PETITION FOR MODIFICATION (WELF. AND INST. CODE § 388) THE PARENT NEED NOT SHOW "CHANGED" AS OPPOSED TO "CHANGING" CIRCUMSTANCES.

The rather glib distinction between "changed" and "changing" circumstances appears to have originated in Division One of the Court of Appeal for the Fourth District. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) Indeed, it is most often found in opinions out of that district justifying the denial of a hearing on a section 388 petition. However, every district, except the Sixth Appellate District appear to have relied upon it at least once. Notably, our Supreme Court has not.

This distinction appears to be an example of what Justice Daniel Kolkey, formerly of the Third District Court of Appeal, has dubbed, "well-settled error." However difficult to overturn as a result of social and legislative reliance on the erroneous decision over the years, where a faultily reasoned decision becomes settled law through adoption and repetition, the reviewing court must go back to its origin and analyze it. (Kolkey, "Demonstrably Wrong Rulings Morph Into 'Well-Settled Error'," San Francisco Daily Journal, May 11, 2004, p.4.) Stare decisis does not demand adherence to a palpably erroneous ruling by a lateral court. The general rule is that a district court of appeal is free to follow the decisions from the other courts or to disagree with them if it finds they are poorly reasoned. (See, *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1405; *In re Matter of Hayden* (1981) 124 Cal.App.3d 72, 77 fn. 1; 9 Witkin, Cal. Procedure 3d ed. 1985, Appeal, sec. 772, p. 740.) "The rule of *stare decisis* is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each instance by the discretion of the court. Previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result." (*County of Los Angeles* v. *Faus* (1957) 48 Cal.2d 672, 679.) "Although the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction." (*People v. Latimer* (1995) 5 Cal. 4th 1203, 1212-1213.) A key consideration in determining the role of stare decisis is whether the decision being reconsidered has become a basic part of a complex and comprehensive statutory scheme, or is simply a specific, narrow ruling that may be overruled without affecting such a statutory scheme. (*Ibid*.)

In *Casey D.*, the court reasoned:

> A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's

> best interests. (*In re Edward H.*, *supra*, 43 Cal. App. 4th 584, 594.) " '[C]hildhood does not wait for the parent to become adequate.' " (*In re Baby Boy L.* (1994) 24 Cal. App. 4th 596, 610 [29 Cal. Rptr. 2d 654].)

(*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

In that case, the threshold showing necessary to merit a hearing on a section 388 petition was not at issue. The parents had been in dependency proceedings for 2 years for Casey's sister, had been party to a voluntary contract for 2 years prior to that and had received 10 months of services for Casey. (*Ibid.*) Thus, its decision to uphold the denial of a section 388 petition where the mother had only showed that she was drug free for six months, but had not completed other key portions of her case plan, was understandable. However, its coining of the distinction between "changed" and "changing" circumstances finds no support in *Edward H.*, the case it cited for that proposition.

In *Edward H.*, the Fifth District Court of Appeal reasoned:

> In addition, the court properly denied a hearing on the mother's petition. While her petition contained allegations of changed circumstances, it also included the statement that she was living with the father. This fatally undermined her petition because the father could not establish that he had met the requirements of the reunification plan with respect to the completion of sexual offender therapy. Although a juvenile court will order a hearing if a section 388 petition presents any evidence supportive of a conclusion that a hearing would promote the child's best interests (In re Jasmon O., supra, 8 Cal. 4th 398, 415), it need not ignore an allegation which shows a hearing will not promote such interests. [¶] Even assuming the petitions sufficiently pled changed circumstances, the order denying an evidentiary hearing did not prejudice the parents. As previously noted, nothing would have been gained had the cause gone to a full hearing because the father conceded he had not, and in all likelihood would not, participate in a sexual offender treatment program. . . .[¶] . . . Instead, the critical question was whether the best interests of the children might be promoted by the proposed change of order (§ 388), which in the mother's case was a return to reunification. At the point of these proceedings--on the eve of the section 366.26 permanency planning hearing--the children's interest in stability was the court's foremost concern and outweighed any interest in reunification. (In re Marilyn H., supra, 5 Cal. 4th at pp. 307-309.) Thus, the prospect of an additional six months of reunification to see if the mother would and could effectively separate from the father would not have promoted stability for the children and thus would not have promoted their

best interests.

(In re Edward H. (1996) 43 Cal. App. 4th 584, 593-594.)

In that case, the parents failed to reunify after 2 years of services. Though the issue before the court was the same as that here, the Court of Appeal did not rely on an invalid distinction between the terms “changed” and “changing.” Rather, the court simply held that the denial of the hearing, if error, was harmless, because the parents could not show it was in Edward’s best interest to live in the home with his father, a sex offender. Separation from Edward’s father was a key component of his mother’s case plan with which she had refused to comply.

A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Nickelsberg v. Workers’ Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294; *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) In construing a statute, the court first looks to the language of the statute itself. (*Ibid.*) The court is “required to give effect to statutes ‘according to the usual, ordinary import of the language employed in framing them.’” (*Moyer v. Workmen’s Comp. Appeals Bd., supra*, 10 Cal.3d at p. 230.) “‘If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.’ . . . ‘When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.’” (*Id.*, at pp. 230-231.) “[I]n general, a statute’s words are the most reliable indicator of legislative intent.” (*People v. Garcia* (1999) 21 Cal.4th 1, 14, fn.8.) When the language is clear and there is no uncertainty as to the legislative intent, the court will look no further and simply enforce the statute according to its terms. (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 464; *Atlantic Richfield Co. v. Workers’ Comp. Appeals Bd.* (1982) 31 Cal.3d 715, 726.)

Section 388 requires a parent to allege “a change of circumstance or new evidence” in order to merit a hearing on her petition for modification. First, it must be noted that the Legislature never used the past participle “changed,” but rather, chose to use the present “change.” Thus, the decisional transformation of the phrase by the Casey D. court is contrary to apparent legislative intent. As it is commonly understood “change,” as an intransitive verb, means “to become different in one or more respects, without becoming something else.” (Webster’s Third New International Dictionary (2002) Merriam-Webster, Inc., p. 374.) Webster’s entry continues: “a: to lose or acquire some characteristic . . . b: (1) to pass from one form . . . state, or stage to another.” (*Ibid.*) There is nothing about the term “change” as used in the phrase “change of circumstances” which implies a completed transformation or an elimination of all previous circumstantial characteristics.

In drafting the language of section 388, requiring that the parent allege "a change of circumstance or new evidence" in order to merit a hearing on her petition for modification, the Legislature did not intend to enact a ratification of Hegelian philosophy. Though the distinction between "being" and "becoming" have significance for follower of Hegel and historians of German Idealism, it cannot be the ground for such a visceral event as the permanent severing of a parent and child relationship. Thus, the distinction drawn in Casey D. is without support in the statute. Though a number of decisions (mostly unpublished) since Casey D. have made a similar distinction, sometimes, there are even more important policy questions at stake than the principle of stare decisis. (*County of Los Angeles v. Navarro* (2004 CA2/8) 120 Cal.App.4th 246, 249.) Despite the frequency with which this error has been repeated, this court should not follow suit. The juvenile court's denial of a hearing based simply on a finding that the circumstances were "changing" rather than "changed" should be reversed.