

**FIRST DISTRICT APPELLATE PROJECT/
CALIFORNIA APPELLATE DEFENSE COUNSEL
TRAINING SEMINAR**

DECEMBER 8, 2020

ISSUE SPOTTING DURING A PANDEMIC

**LOUISE E. COLLARI
Staff Attorney
First District Appellate Project**

Copyright © 2020 First District Appellate Project.

All rights reserved.



ISSUE SPOTTING DURING A PANDEMIC

**FDAP/CADC Co-Sponsored Webinar
Louise Collari, FDAP Staff Attorney**

December 8, 2020

Key Dates During the Pandemic

January 13, 2020: Secretary of Health and Human Services declares a public health emergency pursuant to section 319 of the Public Health Service Act (42 U.S.C. 247d). The public health emergency extends through January 21, 2021.

March 4, 2020: Governor Newsom proclaims a state of emergency as a result of Covid-19.

March 11, 2020: WHO announces Covid-19 outbreak could be characterized as a pandemic.

March 13, 2020: President Trump declares Covid-19 constitutes a national emergency as of March 1, 2020.

March 16, 2020: Shelter-in-place order goes into effect for Bay Area counties (San Francisco, Marin, Santa Clara, Santa Cruz, San Mateo, Contra Costa, and Alameda).

Around the same time, other counties throughout the state make recommendations that residents stay at home as much as possible or impose sweeping restrictions that stop short of a shelter-in-place order.

The California Supreme Court amends oral argument procedures in response to Covid-19 which was quickly followed by an expansion of electronic filing.

In addition, the Courts of Appeal throughout the state begin issuing orders either extending deadlines and/or suspending all in-person oral argument “in light of the current public health emergency caused by the Covid-19 pandemic, to protect the health and

safety of the public.” (i.e., March 16 for 2nd District, March 17th for 5th District, March 18 for 1st District.)

March 19, 2020: Governor Newsom issues statewide shelter-in-place order (Executive Order N-33-20).

March 27, 2020: Governor issues an order (Executive Order N-38-20) giving the Judicial Council authority to take necessary action to respond to the pandemic, including by adopting emergency rules that otherwise would be inconsistent with statutes concerning civil or criminal practice or procedure. The Governor’s order also suspended statutes to the extent they would be inconsistent with such emergency rules.

April 6, 2020: Judicial Council adopts emergency rules to address court operations.

| |
|---|
| California Rules of Court, rule 8.66 |
|---|

Rule 8.66. Tolling or Extending Time Because of Public Emergency

(a) Emergency tolling or extensions of time

If made necessary by the occurrence or danger of an earthquake, fire, public health crisis, or other public emergency, or by the destruction of or danger to a building housing a reviewing court, the Chair of the Judicial Council, notwithstanding any other rule in this title, may:

- (1) Toll for up to 30 days or extend by no more than 30 days any time periods specified by these rules; or
- (2) Authorize specified courts to toll for up to 30 days or extend by no more than 30 days any time periods specified by these rules.

(b) Applicability of order

- (1) An order under (a)(1) must specify the length of the tolling or extension and whether the order applies throughout the state, only to specified courts, or only to courts or attorneys in specified geographic areas, or applies in some other manner.

(2) An order under (a)(2) must specify the length of the authorized tolling or extension.

(c) Renewed orders

If made necessary by the nature or extent of the public emergency, with or without a request, the Chair of the Judicial Council may renew an order issued under this rule prior to its expiration. An order may be renewed for additional periods not to exceed 30 days per renewal.

Rule 8.66 amended effective April 4, 2020.

Advisory Committee Comment:

Any tolling ordered under this rule is excluded from the time period specified by the rules. (See *Woods v. Young* (1991) 53 Cal.3d 315, 326, fn. 3 [“Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.”].)

The tolling and extension of time authorized under this rule include and apply to all rules of court that govern finality in both the Supreme Court and the Courts of Appeal.

Judicial Council Emergency Rules Issued in Response to the Pandemic

At the beginning of the pandemic, thirteen emergency rules related to Covid-19 were approved by the Chief Justice and the Judicial Council. They can be found at www.courts.ca.gov/43820.htm (Under Forms and Rules > Rules of Court)

Rules most relevant for juvenile dependency proceedings:
<https://www.courts.ca.gov/documents/appendix-i.pdf>

Rule 3: Use of technology for remote appearances

Courts may now require judicial proceedings and court operations be conducted remotely, such as through video, the electronic authentication of documentary evidence, eFiling, and eService.

Rule 6: Emergency Orders: juvenile dependency proceedings

This rule applies to all juvenile dependency proceedings filed or pending until the state of emergency related to the Covid-19 pandemic is lifted. The orders relate to hearings, reports, notice, continuances, and visitation.

See Advisory Committee Comment to rule 6:

Federal requirements/guidelines do not stop even during an emergency. Circumstances may arise where reunification services to the parent, including visitation, may not occur or be provided. The court must consider the circumstances of the emergency when deciding whether to extend or terminate reunification services and whether services were reasonable given the state of the emergency.

Federal Government Guidance Relating to the Pandemic

Coronavirus Aid, Relief, and Economic Security (CARES) Act

Bill signed March 27, 2020 provided the Administration for Children and Families with \$6.3 billion in additional funding to aid in the continuation of work “protecting, supporting, and uplifting our vulnerable communities during this public health crisis.” The bill provided \$45 million to support the child welfare needs of families during this crisis and to help keep families together. The funds were to be dispersed to states, territories, and tribes in an effort to provide financial and administrative support to their child welfare system.

(<https://www.hhs.gov/about/news/2020/04/24/administration-children-and-families-release-funding-support-child-welfare-services.html>)

U.S. Department of Health & Human Services – Administration for Children and Families - Children’s Bureau

<https://www.acf.hhs.gov/cb/resource/covid-19-resources>

The HHS website includes guidance from the federal government to the states on managing dependency proceedings during the pandemic.

Sampling of available information from DHHS

1. Letter dated March 27, 2020

https://www.acf.hhs.gov/sites/default/files/cb/covid_19_childlegalandjudicial.pdf

Excerpt:

Findings that still must be made at court hearings: In all cases, title IV-E of the Social Security Act (the Act) requires that the following hearings be held and determinations made:

1. *Contrary to the welfare (judicial determination):* This critical judicial determination must be made in the first court proceeding that sanctions the child's removal. If that does not occur, the child is ineligible for title IV-E foster care maintenance payments for the duration of the child's time in foster care.
2. *Reasonable efforts to prevent removal (judicial determination):* This determination—an important statutory protection—must be made within 60 days of the child's removal; if not conducted timely, the child will not be eligible for title IV-E for the duration of the foster care episode.
3. *Reasonable efforts to finalize the permanency plan (judicial determination):* This judicial determination must be made within 12 months of the child entering foster care (as defined at §475(5)(F) of the Act and 45 CFR 1355.20(a)). If not conducted in a timely manner, the agency may not claim title IV-E until it has secured the determination. Once made, the agency may again begin claiming title IV-E on behalf of the otherwise eligible child. Note that this determination may be made in any type of judicial proceeding, including a permanency hearing.
4. *Six-month review and 12-month permanency hearings:* These hearings ensure that the court is aware of what is happening with the child on a routine basis and that the child's case continues to progress. They can be held in any type of proceeding; neither impacts a child's title IV-E eligibility or the agency's ability to claim title IV-E on behalf of an otherwise eligible child, as long as the

requisite judicial determinations are made. Nonetheless, these hearings are to be conducted in a timely manner.

Despite the public health crisis that exists, it is critical that child welfare agencies and courts work together to ensure that the requisite judicial proceedings continue during this time of uncertainty; each is critical to ensuring the safety, permanency and well-being of children and youth who have been removed from their homes and placed into foster care or who may need to be removed from their homes.

Prolonged or indefinite delays in delivering services and postponements of judicial oversight place children's safety and well-being in jeopardy; may lead to unnecessarily long stays in foster care; and are inconsistent with statutory and regulatory requirements. States and courts should adhere to their own statutory and regulatory requirements about conducting such hearings in person or through other means, including holding such proceedings via videoconference and/or telephonically.

Excerpt:

Legal representation/participation in court hearings during the pandemic.

CB (Children's Bureau) believes that justice requires that parents and children continue to be able to meet, speak, and stay in frequent communication with their attorneys. Therefore, we urge all attorneys, courts, Court Improvement Programs (CIPs) and administrative offices of the courts to work together to ensure that parents, children, and youth are well represented and able to participate in all proceedings in which judicial determinations are made, whether they are conducted in-person or virtually. Similarly, we expect that all parties will continue to receive timely notice of all proceedings, as required by the Act. States and courts are reminded that hearings and notices must be accessible to limited English proficient individuals and individuals with disabilities, in accordance with Federal civil rights laws. CB urges all attorneys to keep in close contact with their clients, in any way they can, and to bring urgent issues to the attention of the courts and all parties.

Additionally, in order to practice in a manner consistent with constitutional principles and to serve the best interests of children, CB urges all attorneys, courts, CIPs and administrative offices of the court to:

1. Refrain from making sweeping, blanket orders ceasing, suspending, or postponing court hearings;
 2. Ensure that important decisions about when and how hearings are conducted are made on a case-by-case basis in accordance with the facts of each individual matter;
 3. Encourage attorneys to file written motions raising issues of immediate concern;
 4. Make maximum use of technology to ensure due process where in-person hearings are not possible or appropriate;
 5. Ensure parents and youth have access to technology such as cell phones, tablets, or computers with internet access to participate in hearings or reviews and maintain important familial connections;
 6. Consider utilizing CIP funds to support and enhance virtual participation for parents, children, youth, and their attorneys in hearings and reviews; and
 7. Encourage attorneys to resolve agreed-upon issues via stipulated orders. For example, if all parties agreed that a child in foster care can be reunified with his/her family immediately, that issue should be resolved via a stipulated order, rather than waiting weeks or months for an in-person court hearing.
2. **Letter dated March 31, 2020: Joint Statement on Child Welfare During a Public Health Crisis: Access to Justice and Advocacy**
https://www.acf.hhs.gov/sites/default/files/cb/statement_child_welfare_crisis.pdf
 3. **Letter dated April 16, 2020: Conducting Effective Remote Hearings**
https://www.acf.hhs.gov/sites/default/files/cb/covid19_conducting_effective_hearings.pdf
 4. **Letter dated April 17, 2020: Use of Federal Funds for Cell Phones and PPE**
https://www.acf.hhs.gov/sites/default/files/cb/letter_on_federal_funds.pdf

5. **Letter dated April 27, 2020:** Flexibility on Title IV-E findings
https://www.acf.hhs.gov/sites/default/files/cb/flexibility_letter.pdf
6. **Letter dated June 23, 2020:** Terminating Parental Rights During the Pandemic.
https://www.acf.hhs.gov/sites/default/files/cb/parental_rights_adopti_on_assistance.pdf attached

Excerpt:

The Social Security Act requires title IV-E agencies to initiate a petition to terminate a parent’s rights if the child has been in foster care for 15 out of the most recent 22 months (the 15/22 requirement). See the Social Security Act at §475(5)(E). The Social Security Act provides statutory exceptions to the 15/22 requirement, of which two are particularly relevant to circumstances when service delivery has been impeded as a result of the Covid-19 pandemic. *These statutory exceptions exist to ensure that an agency only files a petition to terminate parental rights when a parent has had access to the necessary services that can lead to a meaningful opportunity to reunify with his or her children.* The exceptions also allow the agency the flexibility to make life-changing TPR decisions on a case by case basis that consider the totality of circumstances for each family, including whether the parent has not been able to access services as a result of the pandemic.

An agency is not required to file a 15/22 petition if: 1) the agency is required to make reasonable efforts to reunify the family, but has not provided the family the services necessary for the safe return of the child; or 2) the agency has documented a compelling reason that filing a TPR petition is not in the child’s best interests.

A decision to file a TPR petition should be made in light of the impediments that a parent might face as a result of the pandemic. An agency should evaluate carefully whether parents have had a meaningful opportunity to demonstrate that they have made the necessary efforts to reunify with their children before taking that step.

7. **Letter dated November 20, 2020**
https://www.acf.hhs.gov/sites/default/files/cb/letter_to_child_welfare_leaders.pdf

Excerpt:

During the major disaster period, Children’s Bureau will allow title IV-E agencies to adapt programs and services that have been approved as part of the title IV-E agency’s Title IV-E Prevention Services Program Plan to a virtual environment to allow for children and families to receive necessary services without interruption and within public health guidelines. CB will only allow title IV-E agencies to adapt such programs and services to a virtual environment in situations where, absent the modification, such programs and services would not be available to families. In these cases, a virtual adaptation must be implemented in accordance with the version of program’ or service’s book, manual, or other available documentation that has been approved as part of the title IV-E agency’s Title IV-E Prevention Services Program Plan. CB strongly urges states to administer programs as designed, without adaptation, whenever possible.

State Resources Relating to the Pandemic

1. Impact of Covid-19 on California courts

<https://www.law.com/therecorder/2020/07/13/how-covid-19-is-impacting-california-courts-roundup-of-services/>

2. California Court Services Status Due to Covid-19

<https://www.courts.ca.gov/court-status.htm>

The court website lists the status of court services at the Supreme Court, Courts of Appeal, and superior courts. It is updated every two weeks.

3. Coronavirus: What Child Welfare Systems Need to Think About (article filed March 11, 2020)

<https://imprintnews.org/child-welfare-2/coronavirus-what-child-welfare-systems-need-to-think-about/41220>

4. Pandemic Continuity of Operations Resource Guide

Issued by Judicial Council of California in June 2020

[https://live-jcc-newsroom.pantheonsite.io/sites/default/files/newsroom/2020-09/Pandemic%20Working%20Group%20Resource%](https://live-jcc-newsroom.pantheonsite.io/sites/default/files/newsroom/2020-09/Pandemic%20Working%20Group%20Resource%20Guide.pdf)

20Guide.pdf or <https://www.courthousenews.com/wp-content/uploads/2020/06/CalifJudicialCouncil-CovidGuide.pdf>

Excerpt:

This resource guide is not a standard or regulation, and it creates no new legal obligations. It contains recommendations that are advisory in nature, informational in content, and are intended to assist courts in providing a safe environment for the public, litigants, lawyers, and judicial and administrative staff.

Principle 1 | Uphold Access to Justice, Liberty, and Due Process while Balancing Safety and Health Inherent in all plans responsive to a crisis is the obligation to maintain continued, fair, and equal access to the courts, including the protection of constitutional and civil rights. While continuity of court operations might require a more modern method, the method must incorporate individual and procedural constitutional and civil rights protections. A continuity of operations plan should look toward protection of those rights through avenues that afford the most access to the courts but in a manner that balances the need to maintain the health and safety of all court users, court staff, and the public.

5. State Efforts to Address Issues Raised by Pandemic

Money allocated to foster youth and families

On April 13, 2020, Governor Newsom announced \$42 million new investments to protect foster youth and family impacted by Covid-19, which included \$27 million to help families stay together, nearly \$7 million to support social workers, and \$3 million to support Family Resource Centers. (<https://www.gov.ca.gov/2020/04/13/governor-newsom-announces-42-million-to-protect-foster-youth-and-families-impacted-by-covid-19/>)

SB 115/AB 89

Due to the impacts of Covid-19, SB 155 extended assistance payments and case management support for all young adults in extended foster care turning 21 from April 17, 2020 through June 30, 2021.

SB 912 Pandemic Protections for Foster Youth – vetoed by governor

Senate Bill 912 would have extended foster care protections passed in the state’s annual Budget Act to 21 year olds in the child welfare system from losing their housing help and financial benefits during a

state or countrywide emergency. The goal of the bill was to fold in young adults left out of the budget and codify such protection to be triggered anytime there is a state or countywide emergency declared. The budget allocation only applied to young adult who turned 21 on or after April 17. Twenty-one year old whose birthdays fell between March 4, when the emergency order was declared, and the April 17 executive order would not receive any extra help. (Source: From the Imprint Youth & Family News: “California Lawmakers Pass Pandemic Protections for Foster Youth” by Sara Tiano <https://imprintnews.org/foster-care/california-lawmakers-pass-pandemic-protections-for-foster-youth-sb/47045>.)

On Monday, October 5, 2020, the governor vetoed the bill saying “[b]ecause disasters and pandemics vary and are difficult to predict, this bill would obligate the State to a specific approach that may not always be the most prudent or effective.” (Source: “Gov. Newsom Rejects Bill to Protect Young Adults in Foster Care During Future Crises” by Sara Tiano Filed 9/28/2020 <https://imprintnews.org/foster-care/gov-newsom-rejects-sb-912-bill-to-protect-young-adults-in-foster-care-during-future-crises/47795>)

| |
|---|
| <p>California Department of Social Services Resources Relating to the Pandemic</p> |
|---|

All-County Letters

<https://www.cdss.ca.gov/inforesources/2020-all-county-letters>

1. **ACL 20-25: Providing Optimal Child Welfare And Probation Services To Children And Families During Coronavirus (Covid-19) California State Of Emergency**
<https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/ACL20-25.pdf>
 - a. ACL 20-25: Waivers of in-person monthly caseworker visits (March 2020)
 - b. ACL 20-70: Requirements for monthly caseworker visits were reinstated with specific exceptions (July 2020)
 - c. ACL 20-130: Extension of exceptions to in-person caseworker requirements (November 2020)

2. **ACL 20-43:** Guidance For the RFA Program Due to Covid-19 Impacts
<https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/20-43.pdf>
ACL 20-71: Resumption of pre-Covid-19 in-person requirements for RFA program complaint investigations
ACL 20-86: Extended and revised guidance on RFA program and emergency placement requirements
3. **ACL 20-58:** Child Welfare Reunification Assessments During the Covid-19 Related California State of Emergency
<https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/20-58.pdf?ver=2020-06-25-142709-830>

Excerpt:

The purpose of this letter is to provide county child welfare agencies, Title IV-E agreement tribes, and juvenile probation departments with guidance on family support and reunification for children and families during the current state of emergency related to Covid-19. As the Department continues to address Covid-19 impacts for children, families, and caregivers, it is important for agencies to reassess casework practices and placement needs to determine the best interest of children in care under these emergency circumstances.

Consider possibility of safely reunifying children where appropriate using increased oversight and extra support and services.

4. **ACL 20-74:** Prior Guidance Extended Through Duration of Covid-19 State of Emergency Declared by Newson
<https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/20-74.pdf>
5. **ACL 20-112:** Guidance for Nonminor Dependents
<https://cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/20-112.pdf>

ACL 20-117E: <https://cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/20-117E.pdf?ver=2020-11-03-072210-313>

The Pandemic and dependency, Generally

1. Effect of pandemic on all families

For all families, not just those currently in the system, the pandemic can jeopardize a family's well-being by threatening their health, employment, housing, wealth, and food security.

2. Effect of pandemic on foster youth

Difficulties accessing technology, courts, social workers. (<https://edsources.org/2020/california-foster-youth-face-even-more-challenges-amid-pandemic/633904>.)

The need for extra support is clear, as research shows foster youth have been especially hard hit by the pandemic-fueled economic recession. A recent survey from the national nonprofit Foster Club revealed that two-thirds of 18- to 24-year-old foster youth have lost jobs or hours due to Covid-19. More than half reported they had struggled to find enough food during the crisis.

3. Racial bias in the system, generally

Addressing Systemic Racism In Our Child Welfare System, by Bryan Samuels. <https://imprintnews.org/opinion/addressing-systemic-racism-in-our-child-welfare-system/47430>. Filed [9/15/2020](#)

Excerpt:

Systemic racism/bias in the child welfare system - More than half – 53% – of all Black children and their parents will experience a child abuse or neglect investigation before their 18th birthday, according to research published in the American Journal of Public Health. Black and American Indian/Alaskan Native children are disproportionately represented at all stages of the child welfare system. Once in foster care, children of color experience higher rates of placement disruptions, longer times to

permanency, and more frequent re-entry than their white counterparts.

The most common allegation among their cases is neglect, which is inextricably linked to poverty. *While poverty does not cause neglect, it restricts access to housing, health care, food and child care, which challenges a family’s ability to care for children. And families of color are overrepresented among poor families due to systemic conditions that have persisted for generations.*

4. Covid-19 cases and deaths by race

California Department of Public Health statistics

*All Cases and Deaths associated with Covid-19 by Race and Ethnicity
(as of December 2, 2020)*

| Race/Ethnicity | No. Cases | Percent Cases | No. Deaths | Percent Deaths | Percent CA population |
|--|------------------|----------------------|-------------------|-----------------------|------------------------------|
| Latino | 533,533 | 58.5 | 9,342 | 48.4 | 38.9 |
| White | 176,596 | 19.4 | 5,875 | 30.4 | 36.6 |
| Asian | 53,015 | 5.8 | 2,256 | 11.7 | 15.4 |
| African American | 37,497 | 4.1 | 1,406 | 7.3 | 6.0 |
| Multi-Race | 11,908 | 1.3 | 164 | 0.8 | 2.2 |
| American Indian or Alaska Native | 2,767 | 0.3 | 64 | 0.3 | 0.5 |
| Native Hawaiian and other Pacific Islander | 4,915 | 0.5 | 94 | 0.5 | 0.3 |
| Other | 92,346 | 10.1 | 99 | 0.5 | 0.0 |
| Total with data | 912,577 | 100.0 | 19,300 | 100.0 | 100.0 |

Cases: 1,264,539 total; 351,962 (28%) missing race/ethnicity

Deaths: 19,481 total; 181 (1%) missing race/ethnicity

***1,047 cases with missing age**

****Census data does not include 'other race' category**

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Race-Ethnicity.aspx>.)

General Reminders

1. Work with trial counsel

Establish relationship early on

Get their insight

What is going on in their county, issues they have seen with service, notice, handling of remote hearings, access to services, or visitation, etc.

2. Record review

Look at DSL's – what is social worker doing; contacts made; services offered; visitation efforts

What was different about the proceedings?

3. Remember the fundamentals of dependency practice

Fundamental rights at stake: Parents have a fundamental liberty interest in the care, custody, and management of their child. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753.)

Parents already at a disadvantage pre-Covid: The “state’s ability to assemble its case almost inevitably dwarfs the parents’ ability to mount a defense.” (*Santosky v. Kramer* (1982) 455 U.S. 745, 763.)

Parents are entitled to due process: The “essence of due process is fairness in the procedure employed.” (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 757.)

Even though there is not a lot of case law relating to the pandemic, the rules already exist as to what is required and what process is due to the parents.

Timely Filing of Notice of Appeal

When the shelter-in-place order first went into effect, courts were completely closed down. In some instances, counsel and/or parents were unable to file a notice of appeal.

In an unpublished case, the Fifth District Court of Appeal found that notice of appeal was timely even if filed past jurisdictional deadline:

S.Q. v. Superior Court of Stanislaus County (July 16, 2020, F081348) 2020WL 4103248 (unpublished case out of Fifth District)

The superior court issued a disposition in a dependency action on February 7, 2020. Petitioner’s counsel subsequently submitted a notice of appeal on petitioner’s behalf from the same disposition on April 28, 2020, but the superior court rejected the filing as untimely.

Rule 8.406(a)(1), provides that “a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.” Without the recent emergency orders, petitioner's notice of appeal from a February 7, 2020, disposition therefore would have been due April 7, 2020.

However, because that date fell within the recent emergency extension period, petitioner was entitled to an additional 30 days to file a notice of appeal through May 7, 2020. Petitioner's attempt to file a notice of appeal on April 28, 2020, was therefore timely.

Dependency Hearings, Generally

1. Due process considerations

Due process right to notice, hearing, cross-examine, present objections, present evidence. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 412-413; *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418; *In re Armando L.* (2016) 1 Cal.App.5th 606, 617-620.)

2. General Covid-19 considerations

Access to justice

Courts must ensure access to justice and due process during this period. Proper notice requirements must be upheld. Hearings of any type should not be indefinitely postponed, particularly those involving executed or pending emergency removals. Even status hearings can be crucial opportunities to address imminent needs. Virtual and telephonic participation should be permitted, without cost to parties, in every non-evidentiary hearing until public health restrictions are lifted.

Access to court, whether in person or virtually, must include actual opportunity for all parties to fully participate. Staggered hearing schedules should be used to support social distancing for in-person hearings.

(Source: March 31, 2020 –Joint statement on Child Welfare During a Public Health Crisis: Access to Justice and Advocacy
https://www.acf.hhs.gov/sites/default/files/cb/statement_child_welfare_crisis.pdf.)

Technology costs

With respect to mandated costs or fees that litigants must pay in order to participate in dependency hearings via certain technology platforms in some jurisdictions, the Children’s Bureau urges any jurisdiction that requires payment from litigants to suspend such charges in light of the present circumstances. A comprehensive list of low or no cost communication platforms and applications used currently around the country for participation in hearings and reviews or attorney communication with children and parents is included as an attachment to this letter.

(Source: March 27, 2020 Letter from DHHS
https://www.acf.hhs.gov/sites/default/files/cb/covid_19_childlegalandjudicial.pdf.)

Remote Hearings

Emergency Rule 3 allows for remote hearings

Conducting Effective Remote Hearings in Child Welfare Cases
https://www.acf.hhs.gov/sites/default/files/cb/covid19_conducting_effective_hearings.pdf

Possible areas of concern

Does client have access to technology? Limits of cell phone

Can client speak privately to attorney

But, some benefits of remote hearings:

Parents may be more willing to participate or able to participate;

Parents don’t have to take time off work, worry about transportation, worry about outstanding warrants, etc.

Notice

1. Notice requirements, generally

WIC §§ 290.1, 290.2 – detention hearing

WIC § 291 – jurisdiction/disposition hearing

WIC §§ 224.2, 291 – for Indian children

WIC §§ 292, 293 – review hearings

WIC § 294, rule 5.725 – 366.26

Proper notice is critical at this stage of the proceedings. The parent has both a constitutional and a statutory right to notice, and failure to attempt to give notice as required is a structural defect requiring automatic reversal. (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114–1116.)

WIC § 295 – 366.3 hearings

2. Notice requirements during Covid-19

Emergency rule 6 (c)(3) - The child welfare agency is responsible for notice of remote hearings unless other arrangements have been made with counsel for parents and children. Notice is required for all parties and may include notice by telephone or other electronic means. The notice must also include instructions on how to participate in the court hearing remotely.

Possible areas of concern

1. Does notice have the correct information? Will the hearing take place in courtroom or by Zoom?
2. When was the parent provided with the code to participate by Zoom?
3. Were clear instructions provided as to how to join call?
4. Does notice inform parent of nature of hearing or any change in recommendation?

Continuances

1. Continuances, generally

Upon request of counsel for the parent, guardian, minor, or petitioner, the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that a continuance shall not be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. (WIC § 352(a)(1).)

In re D.N. (2020) 56 Cal. App.5th 741, the Court of Appeal found that father's request for continuance was not contrary to D.N.'s best interests.

2. Continuances during Covid-19

Emergency rule 6 (c)(6) - If a court hearing cannot occur either in the courthouse or remotely, the hearing may be continued up to 60 days, except as otherwise specified.

- (A) Disposition under section 360 should not be continued more than 6 months after detention hearing
- (B) Review hearings: A judicial determination of reasonable efforts must be made within 12 months of the date a child enters foster care to maintain title IV-E eligibility. If the review date is continued past the 12 month date, the court must review the case to determine if the agency has made reasonable efforts. This finding is without prejudice and may be reconsidered at a full hearing.

3. *In re M.P.* (2020) 52 Cal.App.5th 1013

The Second District Court of Appeal found that, as a response to the Covid-19 global pandemic, the juvenile court erred in continuing a dependency hearing six months beyond the 60-day time period allowed by statute (Cal. Welf. & Inst. Code § 364), as

modified by emergency executive order. The court explained that although the state chief justice’s statewide order authorized superior courts to adopt proposed rules or rule amendments intended to address the impact of the Covid-19 pandemic, none of the presiding superior court judge’s orders allowed the juvenile court’s continuance of the matter.

The Court also noted that § 352 allowed for continuances in juvenile cases in the interests of the child, and based on good cause. While agreeing with the general proposition that health quarantines to prevent the spread of infectious disease constituted good cause for a continuance, the Court pointed out that although the juvenile court stated that “good cause” supported the continuance, there was no indication that the Court relied on § 352 in continuing the hearing. The Court stated that the juvenile court's order did not reflect that it granted the continuance based upon its consideration of the children's interests, rather the juvenile court continued the hearing in accordance with the memoranda’s prioritization schedule, which precluded an individual bench officer from advancing a hearing in a manner contrary to the schedule without approval from a supervising judge.

Visitation

1. Visitation, generally

“Visitation is an essential component of any reunification plan.” (*In re Alvin R. Jr.* (2003) 108 Cal.App.4th 962, 972.)

Visitation must be provided “as frequently as possible consistent with the well-being of the child.” (§ 362.1, sub. (a)(1); Cal. Rules of Court, rule 5.695(g)(3).)

Visitation must also be provided among sibling unless the court finds that sibling interaction is detrimental to either child. (§§ 362.1, subd. (a)(2), 16002, subd. (b).)

The court must decide whether visitation is to occur and provide the department with guidelines on any prerequisites to or limitations on visitation; the visitation order may not give the department or the child total discretion to decide whether

visitation occurs. (*In re Kyle E.* (2010) 185 Cal.App.4th 1130, 1134; *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1237.)

The court may delegate some decisions over the time, place, and manner of visits, but it cannot delegate the visitation decision itself. (*In re Korbin Z.* (2016) 3 Cal.App.5th 511, 518.) The court may not delegate the decision regarding the frequency and duration of the visitation to the child's legal guardian or long term foster caretakers. (*In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1314.)

When the Agency limits visitation in the absence of evidence showing the parents' behavior has jeopardized or will jeopardize the child's safety, it unreasonably forecloses family reunification on the basis of the parents' labeled diagnoses, and does not constitute reasonable services. (*Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1419.)

2. Federal, state, and county guidance on visitation during pandemic

State guidance: Emergency rule 6 (c)(7)

During the state of emergency related to the Covid-19 pandemic, *previously authorized visitation must continue, but the child welfare agency is to determine the manner of visitation to ensure that the needs of the family are met.* If the child welfare agency changes the manner of visitation for a child and a parent or legal guardian in reunification, or for the child and a sibling(s), or a hearing is pending under Welfare and Institutions Code section 366.26, the child welfare agency *must notify the attorneys for the children and parents within 5 court days of the change.* All changes in manner of visitation during this time period must be made on a *case by case basis*, balance the public health directives and best interest of the child, and take into consideration whether in-person visitation may continue to be held safely. Family time is important for child and parent well-being, as well as for efforts toward reunification. Family time is especially important during times of crisis. *Visitation may only be suspended if a detriment finding is made in a particular case based on the facts unique to that case. A detriment finding must not be based solely on the existence of the impact of the state of*

emergency related to the Covid-19 pandemic or related public health directives.

(A) The attorney for the child or parent may ask the juvenile court to review the change in manner of visitation. *The child or parent has the burden of showing that the change is not in the best interest of the child or is not based on current public health directives.*

(B) *A request for the court to review the change in visitation during this time period must be made within 14 court days of the change.* In reviewing the change in visitation, the court should take into consideration the factors in (c)(7).

County Guidance: All County Letter No. 20-25

Providing Optimal Child Welfare And Probation Services To Children And Families During Coronavirus (Covid-19) California State Of Emergency (issued March 21, 2020)

<https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/ACL20-25.pdf>

PARENT/CHILD AND SIBLING VISITS During this time, it may not be prudent to have some children who are in out-of-home care visit face-to-face with other family members. It is recommended that counties assess each situation in order to make this determination. With respect to children under the age of 3, counties should work to maintain face-to-face visits, which allow them to continue to develop critical early bonds with their parent, unless there are individual health-related risks that prevent this from happening. All youth may struggle with changes to their visitation routines, and a lack of in-person visits may be especially difficult for children who are very young. When in-person visits do not occur, we recommend that the foster parent provide video conferencing, such as Facetime or Skype, and increased phone calls with family members and other social contacts to provide the child and family members with some comfort. This type of contact may assist children, their siblings and parent(s) by occurring more often than it would have in a face-to-face visit. *The following link: <https://haralambie.com/wp-content/uploads/2016/10/When-You-Cant-Be-There-in-Person.pdf>(also listed below) is a tool to assist with helping parent and caregivers use technology to stay connected to their children.*

Family connections that are essential to the wellbeing of the child should be maintained consistent with screening protocols and social distancing recommendations, including outside visits. The caseworker should also consider if the youth has had several overnight visits and is due to return home soon. An extended visit with the parent(s) during this time period may be appropriate if existing court orders permit. Video conferencing or telephonic contact with the youth and parent should be utilized several times during this time period to ensure safety and well-being if the caseworker is not able to have in-person contact.

Federal Guidance: March 27, 2020 Letter from DHHS addressing visitation

https://www.acf.hhs.gov/sites/default/files/cb/covid_19_childlegalandjudicial.pdf

Excerpt:

Children’s Bureau is also aware of instances where judges have issued blanket orders suspending or drastically reducing family time (visitation) between children in foster care and parents, sometimes indefinitely. Family time is important for child and parent well-being, as well as for efforts toward reunification. Family time is especially important during times of crisis. CB strongly discourages the issuance of blanket orders that are not specific to each child and family that suspend family time; doing so is contrary to the well-being and best interest of children, may contribute to additional child trauma, and may impede the likelihood of reunification. With respect to family time, CB urges all courts, Court Improvement Programs, and administrative offices of the courts to:

- Discourage or refrain from issuing blanket court orders reducing or suspending family time;
- Be mindful of the need for continued family time, especially in times of crisis and heightened anxiety;
- Remain cognizant that interruption or cessation of family time and parent-child contact can be traumatic for children;
- Continue to hold the child welfare agency accountable for ensuring that meaningful, frequent family time continues;

- Become familiar with ways in which in-person visitation may continue to be held safely;
- Encourage resource parents to provide transportation to, and supervision of, family time in order to limit additional people having to be involved to limit possible exposure to Covid-19;
- Consider the use of family members to supervise contact and to engage in visitation outdoors, where feasible;
- Inquire whether parents and resource parents have access to cell phones and computers with internet access to ensure virtual connections where in-person family time is not possible;
- Encourage use of technology such as video conferencing, phone calls and other readily available forms of communication to keep children, parents, and siblings connected;
- Ask parents their preference when deciding how to proceed with family time as some parents may prefer to meet via technology due to health concerns; and
- Consider whether children may be reunified with their parents in an expedited manner if the child's safety would not be jeopardized.

3. Possible Areas of Concern

What visitation is being offered?

Is the social worker following guidelines of All County Letter?

Has the court assessed visitation on a case-by-case basis?

Is the social worker providing resources to ensure successful virtual visits?

Is the social worker making sure parent has access to necessary technology to maintain contact with child?

Is visitation being provided as ordered?

What efforts are being made by parent's counsel?

Communicating with client, including before court hearings

Advocating for client

Bringing issues to agency and court

In-person vs. virtual visits

Could visits have been in-person with precautions?

Are virtual visits sufficient for the family?

Does parent have access to technology? Cell phone limitations; cell phone coverage; privacy and confidentiality concerns

Are visits as frequent as should be? For example, a one hour in-person visit per week for a baby does not translate well to a one-hour zoom

Did the parent get proper support in terms of how to adjust to visits?

Has age and development of child been considered in determining how to facilitate visits?

Who is supervising visits? Are supervisors assisting and supporting parent's efforts?

How has visitation been limited?

Foster parents

Undermining reunification intentionally or unintentionally

Have the foster parents been trained on how to assist parent with visits

4. Court of Appeal acknowledged difficulty with visitation during Covid-19

In re S.S. (2020) 55 Cal.App.5th 355

Appeal by father from termination of parental rights. This appeal poses the question whether a juvenile court may, consistent with due process and the dependency statutes, terminate the parental rights of a noncustodial father who seeks custody even though

the state detained and removed the child based only on allegations against mother and the court found giving father custody would be detrimental based on problems arising from his poverty.

Though father repeatedly told the social worker he was having trouble with transportation and consistently sought to supplement in-person visits with online video visits, the department did nothing to provide real assistance. *We can all appreciate now, in the midst of the Covid-19 quarantine, that video meetings are not an adequate substitute for meeting in person, even for adults. That's even more true for children, especially small children, who aren't cognitively developed enough to engage in that setting.* The department stood by and allowed father's reunification efforts to fail due to his lack of economic resources. (*Id.*, at p. 377.)

Reasonable Services

1. Reasonable services, generally

WIC § 16002.5(a): To the greatest extent possible, minor parents and nonminor dependent parents and their children shall be provided with access to existing services for which they may be eligible, that are specifically targeted at supporting, maintaining, and developing both the parent-child bond and the dependent parent's ability to provide a permanent and safe home for the child.

At the six- and twelve-month hearings, if the court will be ordering a hearing pursuant to WIC §366.26, the agency has the burden of proving that reasonable services have been provided by clear and convincing evidence. (WIC §§ 366.21(g)(1)(C)(ii), (g)(4).)

Child welfare agency must make reasonable efforts to make it possible for a child to safely return to their home. (42 U.S.C. § 671(a)(15); § 366.21 (e), (f); § 366.22 (a), (b).)

A half-hearted effort on the Agency's part – which leave the parent without services for months on end – does not amount to the provision of reasonable services. (*T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1251.)

Services are reasonable if Agency has made reasonable efforts to assist the parents in areas where compliance proved difficult.

“Family reunification services are not ‘reasonable’ if they consist of nothing more than handing the parent a list.” (*In re Taylor J.* (2014) 223 Cal.App.4th 1446, 1452.)

Court cannot “order a reunification plan with which the parent indisputably cannot comply...” “No parent should be placed in this trap.” (*In re J.P.* (2017) 14 Cal.App.5th 616, 627.)

Case plan must be specifically tailored to fit the circumstances of each family and designed to eliminate conditions which led to court jurisdiction. (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1790.)

The agency must “make a good faith effort” as it related to the development and implementation of the family reunification plan. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 424.)

The social worker must maintain adequate contact with service providers and accurately inform the juvenile court and the parent of the sufficiency of the enrolled programs to meet the case plan’s requirements. (*Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340, 1347.)

Delays in providing services also may be grounds for a finding of no reasonable services. (*T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1242.)

2. Reasonable efforts during the pandemic

Emergency Rule 6(c)(b)(B)

A judicial determination of reasonable efforts must be made within 12 months of the date a child enters foster care to maintain a child’s federal title IV-E availability. If a permanency hearing is continued beyond the 12-month date, the court must review the case to determine if the agency has made reasonable efforts to return the child home or arrange for the child to be placed permanently. This finding can be made without prejudice and may be reconsidered at a full hearing.

3. Federal, state, and county guidance relating to reunification services

County Guidance:

All County Letter 20-58: Child Welfare Reunification Assessments During the Covid-19 Related California State of Emergency

Excerpt:

CASE PLAN SERVICES AND RESOURCES DURING STAY-AT-HOME ORDER During this time, it may not be possible or prudent to attend in-person parenting classes, domestic violence classes, or other court-ordered services. However, some services may still be available in different delivery modalities. Counties are encouraged to contact local service providers to determine which services continue to be offered, any changes to locations, modalities or hours of services, and to share this information with their families to encourage them to stay connected and on track with their case plan. In addition, the caseworker should provide the family with resources that the family can access for parent(s) to continue working on their case plans so that this emergency does not cause unnecessary delays in reunification. CDSS recommends caseworkers use these tools to talk with parents about how they are using their new skills in parenting their children. Case managers may also request written documentation from parent(s) with a summary of the new parenting skills or knowledge obtained to improve their ability to properly care for their children, using material provided by the caseworker or through on-line resources, such as those contained in the Attachment to this letter.

All County Letter 20-25: Providing Optimal Child Welfare And Probation Services To Children And Families During Coronavirus (Covid-19) California State Of Emergency (issued March 21, 2020)
<https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/ACL20-25.pdf>

Excerpt:

CASEWORKER CONTACT WITH THE PARENT(S)/GUARDIAN(S) OF CHILDREN IN FOSTER CARE
It is important to maintain telephonic contact and to engage with

the parent(s)/guardian(s), as well to keep them abreast of what is happening with their child and their case to the best of a caseworker's ability. Depending on each individual case circumstances, this may require the caseworker to be in more consistent contact with the parent(s)/guardian(s). Relationships with parent(s)/guardian(s) are important and meeting their needs can be more challenging when they feel they have no control as to what is currently happening with COVID-19. Many of the parent(s) who have substance abuse or other behavioral health issues may not have not fully developed the coping skills to maintain sobriety or manage their condition; therefore, the current situation could easily cause more acute anxiety for them. It is important that caseworkers reassure and empower the parent(s) to utilize their community support system, such as their sponsors, parent partner programs, video conferencing or telephonic contact with a therapist or substance abuse treatment out-patient facility to help maintain their sobriety. If they are taking any prescribed medications, caseworkers should encourage parent(s) to maintain the effective dosage as prescribed. Caseworkers should reassure parents that services being discontinued or interrupted due to the pandemic will not impact the assessment of whether they are in compliance with their court-ordered reunification services.

Federal Guidance:

March 27, 2020 Letter from DHHS addressing visitation

https://www.acf.hhs.gov/sites/default/files/cb/covid_19_childlegalandjudicial.pdf

Excerpt:

It is also critical that agencies and courts take all measures possible to continue ensuring that parents and children receive services and treatment. Interruptions in court-ordered services or treatment in case plans due to lack of provider availability during the Covid-19 pandemic are likely to present significant barriers for parents working toward reunification. Lack of, or inability to access, treatment or services due to provider closures during the pandemic should not be interpreted as a lack of parental compliance, and might indicate an agency's failure to make reasonable efforts to reunify. This may constitute a compelling

reason not to file a petition to terminate parental rights under §475(5)(E) of the Act simply because a child has been in foster care for 15 months of the last 22 months. CB urges courts to be mindful of the circumstances in each case.

With respect to parental services and treatment, CB urges all courts, and administrative offices of the courts and CIPs to:

- 1) Inquire actively about, and monitor closely, the availability of treatment and other services for parents;
- 2) Inquire whether parents and resource parents have access to landlines, cell phones and computers with internet access to ensure virtual connections where in-person time is not possible; and
- 3) Encourage use of technology to continue treatment and services where in-person services or treatment may temporarily be unavailable.

4. If not available during the pandemic, were services assessed and modified?

Has case plan been reviewed to determine if modifications are necessary?

Lack of or inability to access services during pandemic should not be interpreted as lack of parental compliance; instead, it may indicate the agency's failure to make reasonable efforts.

The juvenile court "cannot arbitrarily order services that are 'not reasonably designed' to eliminate the behavior or circumstances that led to the court taking jurisdiction of the child." (*In re M.R.* (2020) 48 Cal.App.5th 412, 424.)

5. Remedy if reasonable services have not been provided

Generally

The remedy for the failure to provide court-ordered reunification services to a parent is to provide an additional period of reunification services to that parent and to make a finding on the record that reasonable services were not offered or provided to that parent. (*In re A.G.* (2017) 12 Cal.App.5th 994, 1005.)

If requested remedy will exceed twenty-four months of services

“...the provision to Mother of six months of reunification services on remand of this case will necessarily exceed section 361.5, subdivision (a)(4)(A)’s 24-month maximum period for extension of reunification services. *Nevertheless, we conclude that Mother and M.S.’s interest in reunification and the care and the companionship between a mother and daughter and Mother’s fundamental constitutional due process right in the care, companionship, and custody of M.S., as discussed above, must prevail over that statutory time limit in this case where Mother has been erroneously denied reunification services...*” (*In re M.S.* (2019) 41 Cal. App. 5th 568, 595.)

6. Court of Appeal response regarding reasonableness of services during the pandemic

Unpublished cases:

D.E. v. Superior Court of Kern County (Oct. 5, 2020, F081305) Fifth District

Father sought an extraordinary writ from the juvenile court's orders issued at a contested 12-month review hearing in June 2020 terminating his reunification services and setting a section 366.26 hearing. Father argued the court denied him due process by not continuing the hearing and by conducting it telephonically. He also argued there was insufficient evidence to find it would be detrimental to return P.E. to his custody, that the Kern County Department of Human Services provided mother reasonable reunification services and that there was not a substantial probability P.E. could be returned to his custody.

Father’s parenting class moved to on-line due to the pandemic. In-person visits were changed to video and telephone calls due to the pandemic.

The Court of Appeal denied father’s petition finding that even though it was a remote hearing, there was no violation of his right to due process. The Court acknowledged that some of the delays in services were caused by the pandemic but that father had the opportunity before services went online to enroll in the parenting class but had elected not to do so and sought employment instead.

S.I. v. Superior Court of Kern County (Oct. 5, 2020 F081306) Fifth District

This writ proceeding by mother is related to D.E. v. Superior Court case set forth above. Mother contends the juvenile court abused its discretion because it denied her the ability to produce evidence of the frequency of her visitation with P.E. By denying a continuance and by conducting the hearing telephonically, she asserts, the juvenile court “seriously crippled [her] ability to effectively put on ... [evidence,] present supporting evidence, and cross-examine and impeach the social worker with proposed exhibits and evidence.”

The Court denied mother’s petition stating “[c]ontrary to mother’s assertion, there is no evidence she was penalized for any delay caused by the Covid-19 pandemic in completing any of her services. In fact, the juvenile court stated that it took the virus into account. (“[T]he court is taking into account the delays necessitated by the Covid virus”].)”

Bobby J. v. Superior Court of Del Norte County (Nov. 9, 2020, A160724) First District, Division 5

Father filed a writ petition seeking to vacate the order setting a permanency planning hearing under section 366.26. Father argued the Department did not engage in active efforts to prevent the breakup of his Indian family or that he was provided with reasonable services. Father claimed that during the Covid-19 pandemic, at the end of his reunification period, the Department failed to communicate with him frequently enough or provide him enough assistance in meeting his case plan requirements. Father asserts that the Department “g[ave] up on father around the time of the Covid-19 outbreak” and that “[t]he record reflects that no one from the Department reached out to father to inform him about what [e]ffect Covid-19 would have on his case plan services

....

However, the supervising social worker testified that the providers *were* continuing to provide services during the pandemic, albeit by telephone or video. Moreover, Father’s social worker after mid-May, testified she tried to contact Father a few times, but had difficulty reaching him.

The Court stated it did appear the Department could have communicated more frequently with Father during the pandemic and that the mid-May change in social workers may have resulted in some temporary disruption. But part of that appears to have been due to the difficulty in reaching Father. In any event, the Court concluded “[t]he standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances.”

S.C. v. Superior Court of Monterey County (Nov. 23, 2020, H048483)
Sixth District

Father filed a petition for extraordinary writ after the juvenile court terminated his reunification services at the six-month review hearing and set a section 366.26 hearing contending that reasonable services and visitation were not provided to him. The Court found father had forfeited his claim and that even if the Court considered the claim, it lacked merit.

Visitation changed from in-person to video visits due to the pandemic. The parents were sometimes late to log on to Zoom “because of their unfamiliarity with the system and because of their limited reception.” The pandemic had also affected father’s ability to work (he was a cook by training).

The Court found father’s trial counsel failed to preserve his claim on appeal that reasonable services had not been provided and that is was forfeited. Even if not forfeited, the Court stated that “there were reasons, apart from the Covid-19 pandemic, that limited the progress of the parents’ visitation.”

B.W. v. Superior Court of Orange County (Oct. 1, 2020, G059198)
Fourth District, Division 3

Mother filed a petition for writ of mandate seeking relief from order terminating her reunification services and setting a section 366.26 hearing.

The Court denied mother’s petitions stating, “[t]he Covid-19 pandemic has affected nearly everybody, and it is unfortunate the pandemic has prevented Mother from having personal visits with the Child. The juvenile court found, however, that “[t]his is not a

Covid-related case or issue” because Mother had “plenty of time” to engage in services before March 2020.”

H.W. v. Superior Court of Riverside County (Nov. 13, 2020, E075561)
Fourth District, Division 2

Father filed a petition for extraordinary writ challenging the juvenile court’s order terminating reunification services and setting a section 366.26 hearing. Father argues that, because of the Covid-19 pandemic, his contested 12-month review hearing “was not litigated to the 18-month mark and the court could have exercised its discretion to extend [his] services.” Father argued, had the 12-month review hearing been held in March 2020, as originally scheduled, “any additional services that [he] would have needed could have been added to his service plan.”

Father claims that, because the pandemic “essentially precluded any type of meaningful access to Court oversight [*sic*] and input, there was [an] inadequate level of service provided” to him. However, the Court found father failed to identify what additional services he needed or how the court could have added them, even if the hearing had been held as originally scheduled. Moreover, he continued to receive services past 12 months. Thus, he was not prejudiced by the hearing being continued multiple times after March 2020, since he received services until the August 2020 hearing. The Court stated father actually benefitted and received additional services, past the 12-month period.

The Court denied the petition, found father received reasonable service, and stated “the pandemic did not negatively affect his services since the continuances have him more time to complete them.”

Section 388 petitions

1. Generally

The section 388 petition is the “escape mechanism” that allows a parent to show that changed circumstances require the modification of a prior order before the section 366.26 hearing occurs. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

“While these developments were new, the court’s determination that father had established only that his circumstances were “changing, not changed,” was too cavalier given the important role section 388 petitions play in the constitutionality of California’s dependency scheme.” (*In re S.S.* (2020) 55 Cal.App.5th 355, 380.)

The *J.M.* Court warned that if the comparison of households was the analysis, “any case involving a foster placement with excellent care and/or more resources and opportunities for the child than the biological parents may be able to offer, section 388 would not serve as the important due process check the California Supreme Court has described it to be.” (*In re J.M.*(2020) 50 Cal.App.5th 833, 847.)

2. Possible areas of concern during the pandemic

Difficulty in proving both prongs (change of circumstances and best interests of child) because of lack of access to services and visitation.

3. Court of Appeal response on petition for modification

Unpublished Case: In re N.A. (Nov. 30. 2020, D077761)

Mother appealed from the termination of parental rights and denial of her section 388 petition for modification. At the trial court, mother argued that her participation in services combined with positive visits constituted a change in circumstances. On appeal, mother contended that the pandemic made it more difficult for her to find treatment. The Court of Appeal, Fourth District, Division One, disagreed and noted that nothing in mother’s testimony suggested the pandemic prevented her from obtaining services.

In a footnote, the Court denied mother’s request to take notice of secondary source material regarding the effects of the pandemic on court proceedings. The Court stated that the materials were not proper matters for judicial notice and that none of the materials supported mother’s claim that the pandemic, “as applied specifically to her circumstances,” warranted a finding that the trial court abused its discretion.

Termination of Parental Rights

1. Termination of parental rights, generally

The court must determine whether the child is adoptable and what the appropriate permanent plan should be – either adoption, guardianship, or long term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297.)

“Dependency proceedings are simply not a conveyor belt leading to the termination of parental rights.” (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 676.)

Parent has burden of proof of establishing the existence of one of the six statutory exceptions set forth in section 366.26 (c)(1)(A)-(e). (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Beneficial relationship exception requires showing of regular and consistent visitation. (§ 366.26, subd. (c)(1)(B)(i).)

2. Importance of parent receiving reasonable services prior to termination of parental rights

Reasonable efforts finding required before terminating parental rights. (§ 366.26, subd. (c)(2); Cal. Rules of Court, Rule 5.725(f)(1); *In re P.C.* (2008) 165 Cal.App.4th 98, 103-4; *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1248.)

The state cannot initiate termination of parental rights unless the court finds reasonable services have been made or offered. (*Armando L., Sr. v. Superior Court of Los Angeles Count* (1995) 36 Cal.App.4th 549, 555.)

The Court reversed the termination of parental rights finding that in order to meet due process requirements at the termination stage, the trial court must be satisfied reasonable services have been offered during the reunification stage. (*In re Daniel G.* (1994) 25 Cal.App.4th 1205, 1214-1215.)

At the 12-month review hearing, the trial court found no reasonable efforts had been offered based on the lack of assistance in getting therapy and other issues. On appeal, the judgment was affirmed and the time for reunification extended to 24 months. The Court noted that statutory framework prohibits setting a section 366.26 hearing when reasonable services have not been provided or offered. (*In re M.F.* (2019) 32 Cal.App.5th 1, 8.)

3. Possible areas of concern during the pandemic

Ability to have regular and consistent visitation

Ability to “parent” during virtual visits

Ability to prove bond

4. Court of Appeal response on terminating parental rights

In re R.P. (Oct. 28, 2020, G059151) Fourth District, Division 3
In an appeal from the termination of parental rights, mother contended that her due process rights were violated because the Agency failed to ensure that she received visitation after she was taken into custody and because the juvenile court failed to ensure that its visitation order was followed. These failures prevented mother from developing the type of relationship necessary to establish the parental relationship exception or to file a petition for modification.

At the originally scheduled section 366.26 hearing in February 2020, the juvenile court learned mother was in custody and had not been transported to the hearing. The section 366.26 was initially continued to March and then continued several more times due to the pandemic. Mother was released from custody in April and left a message for the social worker stating that she wanted to visit. The social worker informed mother that due to the pandemic, the Agency’s offices would not be open until June 15. In addition, the minor had respiratory issues and would need

doctor approval prior to visitation. No alternative visitation options were suggested.

The Court found no due process violation during the period after mother was released from custody in April 2020. Upon her release, mother had not seen the minor in nearly seven months, and the Covid-19 pandemic had been ongoing for weeks. The concerns over the minor's health outweighed any potential benefit from visitation, particularly given that family reunification services had been denied months prior. At the time of the section 366.26 hearing, reunification of mother and the minor was not the primary goal of this case.

5. Out of-state case addressing effect of pandemic on termination of parental rights

Interest of W.L., 2020 WL 5229199 (Iowa Ct. App. 2020)

A father appealed the termination of his parental rights to his minor child, and in part argued that he should have been given additional time to work toward reunification, pointing to the fact he progressed to semi-supervised visits with the child before the Covid-19 pandemic curtailed the visits. He asserted that, but for the Covid-19 pandemic, he would have been receiving unsupervised visits by the time of the termination hearing and “it is likely [the] termination of parental rights hearing would have been continued or cancelled.”

The Court was not persuaded by this speculative claim by the father. The Court stated that while it is true that a juvenile court is permitted to deny a request to terminate a parent's parental rights and give the parent an additional six months to work toward reunification, before a court is permitted to grant such an extension it must make a “determination that the need for removal of the child from the child's home will no longer exist at the end of the additional six-month period.” The Court acknowledged that the father demonstrated an ability to care for the child during visits. However, the Court pointed out that being able to successfully parent during relatively brief visits was “a far cry from the ability to resume full-time care of a child.” The Court noted that the father's shortcomings that prevented him from resuming full-time care of the child existed before the Covid-19

pandemic began and continued thereafter. Therefore, the curtailment of visits due to the pandemic had little, if anything, to do with the decision to terminate the father's parental rights and the juvenile court properly declined to grant such an extension. (Source: Covid-19 Related Litigation: Effect of Pandemic on Deadlines for State Court Filings and Hearings, 55 A.L.R. 7th Art. 3, § 11.)

Incarcerated Parents

Incarcerated parents may remain in county jail for extended periods due to CDCR's Covid-related intake suspension for CDCR.

Incarcerated parents may not have access to services or more limited access to services.

May be more difficult for parent to be brought to court for hearings.

Penal Code section 2625, subd. (d) states that no proceeding shall be held under section 366.26 without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding. The court may permit an incarcerated parent to participate by videoconference or telephone. (Penal Code § 2625, subd. (g); Cal Rules of Court, Rule 5.530(f)(6).)

Education

1. Possible areas of concern

Decisions regarding education involve birth families, case workers, foster families, CASA, GAL's, judges, etc.

Pandemic related changes to school can result in socialization issues and additional trauma due to lack of school consistency, friends, and connections.

Foster children may not have access to free and reduced price lunch programs if not in school

2. Special education needs

Special Education Students Still Waiting for Help as New School Year Starts, Jeremy Loudenback, filed August 17, 2020.

<https://imprintnews.org/education/special-education-students-still-waiting-for-help-as-new-school-year-starts/46626>

Excerpt:

Prompted by stay-at-home orders and a hastily passed state law in March, many districts up and down California have not assessed students with disabilities in months, preventing them from obtaining services they need during the destabilizing times of the pandemic.

Emergency measures taken in response to the pandemic allowed schools to waive timelines for special education assessments and the specific plans they prompt – such as allowing students more time on tests, or access to audiobooks or an in-class aide. But that has led to a void as classes start again.

The federal Individuals with Disabilities Education Act, which first became law in 1975, requires that students with special needs are provided with the same opportunity for a “free and appropriate public education” as other students. The landmark legislation guarantees access to services like speech therapy or counseling, as well as classroom accommodations and modifications. By law, schools must quickly respond – not simply put off – a request to evaluate a child’s eligibility for special education services.

But California’s response to the pandemic has created confusion and threatened compliance with the federal law, legal experts and some parents say.

About 1 in 8 California students receive some type of special education services, according to a 2019 report from the Legislative Analyst’s Office. Those numbers include nearly 800,000 children who need help learning due to speech impairments and learning disorders like dyslexia, as well as more severe conditions such as autism and behavioral challenges.

Low-income and Black students are more likely to receive special education services than their peers, according to state analysts.

And as many as half of the roughly 60,000 California foster youth have a disability that can interfere with their ability to learn, said Kristin Power, government relations director with the Alliance for Children's Rights.

In the early days of the coronavirus, Gov. Gavin Newsom (D) and the state Legislature took quick action to help the state's education system deal with the pandemic's sudden spread. Senate Bill 117, signed into law on March 17, allowed schools to receive funding even without students physically attending class, allocated money for personal protective gear for educators and created guidelines for the shift to online learning.

Buried in the much larger bill was a provision easing the legal requirements to serve students with special needs. The emergency legislation freed school districts from having to respond within 15 days to a parent's request for a special education assessment.

Housing

1. Possible areas of concern

Experts predict that due to pandemic, up to 28 million Americans will lose their housing once federal protections end, which will include families with children. Families will become homeless or live in sub-standard housing. CPS may receive reports of these families but CPS is ill equipped to support struggling family who have concrete needs that must be met. What might begin as a referral regarding inadequate housing may turn into a broad inquiry on the family's entire life and an investigation. (The Looming Housing Crisis and Child Protection Agencies by Vivek Sankaran <https://imprintnews.org/opinion/looming-housing-crisis-child-protection-agencies/47437>.)

2. Youth in residential programs

Youth in residential programs have been particularly isolated during the pandemic. As a result of safety precautions, they have been cut off from visitors, including friends, family members and

court-appointed special advocates. Regular outings have also been curtailed.

The absence of those connections, including the inability to see classmates at school, has created a deeply lonely experience for foster youth at congregate facilities. (Coronavirus Cases Near 100 for Youth in California Residential Facilities, Jeremy Loudonback, Filed July 9, 2020 <https://imprintnews.org/child-welfare-2/coronavirus-cases-near-100-for-youth-in-california-residential-facilities/45164>.)

Forfeiture and Waiver

What if trial counsel does not make an objection or raise the issue?

Appellate courts have discretion to consider forfeited issues for:

- 1) An important legal issue (*In re Charles T.* (2002) 102Cal.App.4th 869), or
- 2) Involves a constitutional violation (*In re T.G.* (2013) 215 Cal.App.4th 1).

But, see

S.C. v. Superior Court of Monterey County (Nov. 23, 2020, H048483) Sixth District

Father filed a petition for extraordinary writ after the juvenile court terminated her reunification services and set a section 366.26 hearing contending that reasonable services and visitation were not provided to him. The Court found father had forfeited his claim and that even if the Court considered the claim, it lacked merit.

Visitation changed from in-person to video visits due to the pandemic. The parents were sometimes late to log on to Zoom “because of their unfamiliarity with the system and because of their limited reception.”

The pandemic had also affected father’s ability to work (he was a cook by training).

The Court found father's trial counsel failed to preserve his claim on appeal that reasonable services had not been provided and that is was forfeited. Even if not forfeited, the Court stated that "there were reasons, apart from the Covid-19 pandemic, that limited the progress of the parents' visitation."