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2021 YEAR IN REVIEW: MINING RECENT DEPENDENCY CASE FOR ISSUES – SPOTTING THE GOLD

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MINING RECENT DEPENDENCY CASES FOR ISSUES—SPOTTING THE GOLD 2021 UPDATE

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Reviewing the published case law from 2021, this article hopes to provide an updated highlight of the various evolving issues in juvenile dependency law from the prior year.

I. Notice/Due Process

A. When Notice Issues are Raised by Way of a Welfare and Institutions Code[1] Section 388 Petition, a Best Interest Showing is Not Required.

Parents are entitled to notice of juvenile dependency proceedings.[2] Generally, when bringing a section 388 petition a parent is required to show that revoking the previous order would be in the best interests of the child.[3] However, in *In re R.A.* (2021) 61 Cal.App.5th 826 (*R.A.*)**,** the First Appellate District clarified that "**[w]hen a section 388 petition is based on lack of notice, a separate showing of best interest is not required."** This is because the jurisdictional defect caused by the lack of notice voids a judgment. It is always in the best interests of a child to have a dependency adjudication based upon all material facts and circumstances and the participation of all interested parties entitled to notice. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 490-491.)

In *R.A.*, Father's whereabouts remained unknown for over a year, despite being easy to locate in a California prison. Shortly after Father was located, he filed a section 388 petition seeking to set aside all prior findings and orders because he was not sufficiently notified of the proceedings. The court denied his section 388 petition because he had not met the "best interests" prong of the section 388 motion. The First Appellate District reversed, noting that "[w]e cannot accept the idea that an agency may completely ignore its duty to search for a missing parent and then, should the missing parent show up, rely on the best interest of the child to preclude that parent from participating in the dependency case." (*R.A.* at p. 839.)

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[1] All references are to the Welfare and Institutions Code unless otherwise noted.

[2] Due process requires that a parent is entitled to notice that is reasonably calculated to inform him or her of the dependency proceedings and afford him an opportunity to object. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The Child Welfare Agency (Agency) must act with reasonable diligence to locate a missing parent by way of a thorough, systematic investigation conducted in good faith. (*Ibid.*) A parent may raise the Agency's failure to provide him with adequate notice through a petition under Welfare and Institutions Code[2] section 388. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 483.)

[3] When bringing a section 388 petition, generally a parent must demonstrate: (1) a genuine change of circumstances or new evidence, and (2) that revoking the previous order would be in the best interests of the child. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

B. The Juvenile Court's Dismissal of Jurisdiction with an "Approval Packet" and Non-Appearance Review Hearing Denied Parent of Due Process.

When a child is declared a dependent but remains in the custody of one of their parents, the court is required to conduct a noticed review hearing to determine if continued supervision is necessary.[4] If jurisdiction is to be terminated, the noncustodial parent is entitled to an evidentiary hearing regarding custody and visitation.[5]

In *In re R.F.* (2021) 71 Cal.App.5th 459, the Fourth Appellate District found that the juvenile court violated Father's right to notice and an opportunity to be heard when it authorized the Child Welfare Agency (hereinafter "Agency") to request dismissal of dependency jurisdiction by way of the local court "approval packet" procedure and a non-appearance review hearing. The juvenile court's attempt at an expedited procedure violated Father's rights because it allowed for email notice when there was no evidence in the record that Father had consented to receive notice by email. Further, Father was denied an opportunity to be heard on the issue of the exit orders. The exit orders required that visitation be supervised by a paid professional monitor at Father's expense, whereas Father had previously been able to have his visitation supervised by a qualifying relative. This was a meaningful change to the visitation orders and there was no accompanying report from the Agency recommending why the change was necessary. The error was therefore not harmless because if Father had been given the opportunity to be heard on this issue, it was reasonably probable that the court would not have mandated a paid professional visitation monitor. **Father was entitled to notice and an opportunity to be heard before the court dismissed the dependency proceedings and imposed modified visitation orders.** (*In re R.F.* (2021) 71 Cal.App.5th 459, 471.)

C. It is a Denial of Due Process when the Juvenile Court Amends the Petition to Conform to Proof in a Way that Materially Varies from the Original Petition.

Following the jurisdiction hearing, the juvenile court may amend a petition to conform to the evidence presented at that hearing, so long as the gravamen of the petition remains the same.[6]

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[4] When a child is declared a dependent but not removed from both of her parents, section 364 governs. Section 364 states that the court shall advise the parties of all hearings and of their rights to be present and be represented by counsel. (§ 364, subd. (a).) At least ten calendar days before a review hearing, the Agency is required to file a report describing the services offered to the family and the progress made by the family in eliminating the conditions or factors requiring court supervision as well as a recommendation regarding the necessity of continued supervision. (§ 364, subd. (b).) After conducting the review hearing and considering any evidence presented by the parties, the juvenile court shall determine, based on the totality of the evidence, whether continued supervision is necessary. (§ 364, subd. (c).)

[5] A noncustodial parent is entitled to an evidentiary hearing regarding custody and visitation issues ancillary to the termination of jurisdiction. (*In re Michael W.* (1997) 54 Cal.App.4th 190, 192.)

[6] A juvenile court may amend a petition to conform to the evidence received at the jurisdiction hearing so long as the amendments do not mislead a party to his or her prejudice. (Code Civ. Proc., §§

In re I.S. (2021) 67 Cal.App.5th 918 (*I.S.*) gives us an example of a juvenile court amending jurisdictional allegations such that they materially varied from the original petition and thus denied a parent due process. In *I.S.*, the minor was removed from Mother due to sexual abuse in the home. The section 300 petition included subdivision (b) and (d) allegations, alleging that Mother knew about the abuse but said that the minor was making it up. Following the jurisdictional hearing, the court amended the petition to "conform to proof" by including allegations that Mother did not take sufficient steps to investigate the circumstances that might have led to the discovery of the sexual abuse, permitted other household members to ostracize the minor, pressured the minor into allowing her abuser to return to the home, continued to live in the home with the abuser, and caused the minor to feel unsafe and unsupported.

The First Appellate District reversed the jurisdictional findings, holding that the juvenile court's additional allegations sought to establish jurisdiction over the minor under a different legal theory than the original allegations. The amended allegations sought to establish jurisdiction based on Mother's infliction of emotional abuse, whereas the original petition alleged a failure to protect. Mother did not have notice that evidence would be presented concerning this alternative theory. Further, the finding that Mother did not take sufficient steps to investigate the abuse is also a different theory, alleging a lack of reasonable investigation rather than actual knowledge. Mother would have possibly prepared her defense differently had she been on notice that the allegations were based on a lack of diligence.

D. Parent's Right to Due Process was Violated When the Juvenile Court Appointed a Guardian Ad Litem Without Finding the Parent Lacked Capacity.

When a parent lacks the capacity to understand the nature of the proceedings or to assist their counsel in preparing the case, a guardian ad litem should be appointed.[7]

In *In re Samuel A.* (2021) 69 Cal.App.5th 67 (*Samuel A.*), the Second Appellate District found that the juvenile court's guardian ad litem finding was not supported by substantial evidence. *Samuel A.* involved a mother who had incredibly difficult behaviors. After months of delays caused by Mother's obstructionist behavior, the juvenile court appointed a guardian ad litem, commenting that it believed that Mother did understand the proceedings and her disruptive behavior did not arise from a mental health incapacity, but rather, Mother's conduct was a

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469 – 470; Welf. & Inst. Code, § 348.) Allowable amendments require that the gravamen of the petition remain the same. (*In re I.S.* (2021) 67 Cal.App.5th 918, 928.) The juvenile court exceeds its authority when it includes amendments to the allegations which change the grounds for establishing jurisdiction or seek to establish jurisdiction under a different legal theory or based on a new set of facts. (*In re G.B.* (2018) 28 Cal.App.5th 475, 486.)

[7] A parent who is mentally incompetent must appear by a guardian ad litem in dependency proceedings. (*In re James F.* (2008) 42 Cal.App.4th 901, 910 (*James F.*)) The test for mental competence is whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case. (Pen. Code § 1367.) Before a guardian ad litem can be appointed for a nonconsenting parent, the parent must be given notice and an opportunity to be heard. (*James F.* at p. 904.) The juvenile court should make an inquiry sufficient to satisfy itself whether the parent is competent. (*James F.* at 910-911.) If a guardian ad litem is appointed without the parent's consent, the record must contain substantial evidence of the parent's incompetence. (*Ibid.*)

"knowing and deliberate effort to obstruct proceedings she believed were not going to be favorable to her." (*Samuel A.* at p. 77.) The Second Appellate District reversed the guardian ad litem finding and all subsequent findings, pointing out that "a guardian ad litem is not a tool to restrain a problematic parent, even one who unreasonably interferes with the orderly proceedings of the court or who persistently acts against her own interests or those of her child." (*Samuel A.* at p. 70.) **Because there was no finding or evidence that Mother lacked the capacity to either understand the nature of the proceedings or to assist counsel in a rational manner, appointment of a guardian ad litem was inappropriate**. A parent's due process right to communicate directly with counsel in proceedings that could culminate in the termination of her parental rights is fundamental. (*In re Sara D.* (2001) 87 Cal.App.4th 661, 669.)

II. Jurisdiction

A. Is Exposure to Domestic Violence Sufficient for a Finding of Serious Physical Harm Under Section 300, Subdivision (a)?

Section 300, subdivision (a) applies in cases of serious physical harm inflicted nonaccidentally by a child's parent or guardian.[8] "Nonaccidental" generally means a parent or guardian acted intentionally or willfully.[9] Competing cases were published this year regarding whether parents' domestic violence meets the nonaccidental requirement of subdivision (a).

In *In re Nathan E.* (2021) 61 Cal.App.5th 114 (*Nathan E.*), the Second Appellate District, Division One found that the application of subdivision (a) is appropriate when a child suffers, or is at substantial risk of suffering, harm due to the exposure to domestic violence. The *Nathan E.* court relied on *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598-599, which states that: "Domestic violence is nonaccidental." The *Nathan E.* opinion noted that although many cases based on exposure to domestic violence are filed under subdivision (b), subdivision (a) may also apply. Based on the history of domestic violence between the parents and the presence of one or more of the children during the parents' violent altercations, sufficient evidence existed to sustain subdivision (a) allegations.

In re Cole L. (2021) 70 Cal.App.5th 591 (*Cole L.)*, published eight months later by the Second Appellate District, Division Seven, found that the parents' domestic violence was insufficient for a subdivision (a) finding. *Cole L.* found that **the "unintended injury to a bystander child that results from an intentional act directed at another . . . does not satisfy [the nonaccidental] statutory requirement.** (*Cole L.* at p. 603.) This accidental injury could be the basis for subdivision (b) or (c) jurisdiction, but not subdivision (a) jurisdiction.

In *Cole L.*, the minors were asleep in another room when the domestic violence occurred, which included yelling and shoving. The *Cole L.* court acknowledged that under certain

[8] Section 300, subdivision (a) creates jurisdiction over a child when there is "a substantial risk that the child will suffer serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian."

[9] *In re R.T.* (2017) 3 Cal.App.5th 622, 629.

circumstances domestic violence can support a subdivision (a) finding, "[f]or example, if a father strikes an infant's mother while she is holding the child or an older child intervenes, during a fight to protect her mother from her father's abuse, the risk of harm to the child may be properly viewed as nonaccidental." (*Cole L.* at p. 603.)

B. Parent's Criminal Record Alone is Insufficient to Sustain Section 300, Subdivision (b) Allegations.

When section 300, subdivision (b) allegations are based on a parent's past conduct, the Agency must show a nexus to a current risk of harm.[10]

In *In re J.N.* (2021) 62 Cal.App.5th 767 (*J.N.*), the Second Appellate District reversed jurisdiction orders that were based solely on Father's violent criminal history. Father had convictions for criminal threats, assault with a deadly weapon, exhibiting a deadly weapon, and arson and was serving an eight-year prison sentence. While there was a reasonable inference that Father would commit future crimes, there was no evidence that the minor would be harmed by this. While violent crime, on an abstract level, is incompatible with child safety, such generalities are insufficient to prove an "identified, specific hazard in the child's environment" that poses a substantial risk of serious physical harm to the minor. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) **A parent's violent criminal record, without more, does not necessarily establish that a parent has a violent disposition sufficient to establish the requisite risk of physical harm to a particular child to support a jurisdictional allegation.** (*J.N.* at p. 776.) Evidence of domestic violence might, under certain circumstances, support such a nexus. (*Ibid.*)

C. Minor Displaying Sexualized Behavior After Having Witnessed Parent Engaged in Sexual Activity Sufficient for Jurisdiction Under Section 300, Subdivision (b) but not Subdivision (d).

Due to the seriousness of section 300, subdivision (d) allegations, its application is limited to those situations in which a child has suffered sexual abuse as defined by Penal Code section 11165.1.[11]

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[10] Under section 300, subdivision (b), the court can assume jurisdiction if it finds there is a substantial risk the child will suffer serious physical harm as a result of the parent's failure or inability to provide regular care. In order to sustain a petition under section 300, a significant risk to the child must exist at the time of the jurisdiction hearing. (*In re David M.* (2005) 134 Cal.App.4th 822, 829.) The Agency has the burden of showing specifically how the minor has been or will be harmed. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318.) Evidence of a parent's past conduct may be probative of current risk of harm, but the Agency must establish a nexus. (*In re D.L.* (2018) 22 Cal.App.5th 1142, 1146; *In re Roger S.* (2018) 31 Cal.App.5th 572, 583.)

[11] Section 300, subdivision (d) requires a showing that a child is suffering or at risk of suffering sexual abuse because of a parent or guardian's conduct or failure to protect. (*In re I.J.* (2013) 56 Cal.4th 766; Welf. & Inst. Code § 300, subd. (d).) Sexual abuse is described in Penal Code section 11165.1, which enumerates the various offenses that qualify as sexual assault or exploitation. Allegations under subdivision (d) are assessed under a higher standard because they carry significant consequences. A true finding under subdivision (d) has consequences beyond jurisdiction, such as a presumption in future

In *In re L.O.* (2021) 67 Cal.App.5th 227 (*L.O.*), the Fourth Appellate District found that a child's sexualized behavior after having possibly witnessed a parent engaging in sexual activity was not sufficient to support subdivision (d) allegations. **Exposing a minor to sexualized behavior would only fall within subdivision (d) if the conduct was motivated by an unnatural or abnormal sexual interest in the minor.** In *L.O.*, the court found there was no evidence that the parent's lapse was sexually motivated, rather than accidental. Thus, it does not fall into any enumerated sexual abuse category and is ineligible to support a subdivision (d) finding. The court did note that jurisdiction could have been established under subdivision (b), but the Agency did not allege it.

III. Disposition

A. An Isolated Incident of Domestic Violence was Insufficient to Support Removal Where There is not Substantial Evidence that the Domestic Violence is Likely to Continue.

Despite a finding that the court has jurisdiction, removal at disposition may not be warranted due to the heightened standard of proof[12] or changes in circumstances during the passage of time.[13]

In *In re I.R.* (2021) 61 Cal.App.5th 510, the Second Appellate District found that there was insufficient evidence to justify removing a minor under section 361, subdivision (c)(1). Jurisdiction over the minor was based on a single incident of domestic violence between the parents, where Father slapped Mother. By disposition, Father no longer lived or communicated with Mother and did not display violent behavior outside of the relationship with Mother. The Second Appellate District found that the sole source of potential danger to the minor while in Father's care, that was supported in the record, was his history of domestic violence with Mother, but **the record did not contain substantial evidence that the domestic violence between**

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proceedings that a child is at substantial risk for abuse or neglect. (§ 355, subd. (d).) The consequences of being wrong are so great that "it is hard to imagine an area of the law where there is a greater need for reliable findings by the trier of fact." (*Blanca P. v Superior Court* (1996) 45 Cal.App.4th 1738, 1754.)

[12] Even though jurisdictional findings may be based on substantial evidence, dispositional findings have a different focus and a heightened burden of proof—clear and convincing evidence. (§ 361, subd. (c)(1); *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 995-996, 1011.) This heightened standard is premised on the notion that even after parents have been found to have abused or neglected their children, "keeping children with their parents while proceedings are pending, whenever safely possible, serves not only to protect parents' rights but also children's and society's best interest. (*In re D.P.* (2020) 44 Cal.App.5th 1058, 1066-1067.)

[13] Even though children may be dependents of the juvenile court, they shall not be removed from their parents unless there is clear and convincing evidence of a substantial danger to the child's physical health, safety, protection, or physical or emotional well-being and there are no "reasonable means" by which the child can be protected without removal. (§ 361, subd. (c)(1).) When considering if the child will be in substantial danger if permitted to remain in the parent's custody, the court must consider not only the parent's past conduct, but also current circumstances and the parent's response to the conditions that gave rise to juvenile court intervention. (*In re Alexzander C.* (2017) 18 Cal.App.5th 438, 451-452.)

Mother and Father was likely to continue. There had been no contact between Father and Mother since the minor's detention and neither Mother nor Father expressed an intention to reconcile their relationship and there was no demonstrated unwillingness to stay away from each other.

B. Leaving Minors with Domestic Abuser is not Substantial Evidence of Detriment to Justify Removal from a Noncustodial Parent.

When a child is removed from a custodial parent, the juvenile court must place the child with a noncustodial parent unless it finds by clear and convincing evidence that such placement would be detrimental to the child.[14] Failure to keep in contact with a child is not sufficient to support a finding of detriment.[15]

In *In re Solomon B.* (2021) 71 Cal.App.5th 69, Mother fled a violent relationship with Father, leaving her four and five-year-old sons in his care. Mother did not believe Father's abusive conduct towards her meant that he would also abuse their children. A year later, the minors were removed from Father due to his drug use and neglect of the minors. Mother came forward and requested placement of the minors. The court denied her request for placement, finding she had abandoned the minors.

The Second Appellate District disagreed, finding that there was insufficient evidence to support a detriment finding. Mother did not abandon the minors because she had come forward as soon as she learned there was Agency involvement and communicated with the minors when they visited with maternal grandmother. Further, Mother had no reason to believe Father would abuse the minors because his abusive conduct towards her did not mean that he would also be physically or emotionally abusive to the minors.

IV. Status Review Hearings

A. Is the Court Required to Set a Section 366.26 Hearing if the Minor Cannot be Returned at the 18-Month Hearing, Even With a No Reasonable Services Finding?

At each review hearing, the juvenile court must make a finding as to whether the Agency has met their duty to offer reasonable reunification services.[16] With a few enumerated exceptions, the

[14] § 361.2, subd. (a).

[15] *In re Adam H.* (2019) 43 Cal.App.5th 27, 33.

[16] At each status review hearing, the court must find that reasonable services were offered. (§ 366.22, subd. (a).) To make such a finding, the record should show that the Agency identified the problems leading to their involvement, offered services designed to remedy those problems, maintained reasonable contact with the parents during the course of the service plan, and made reasonable efforts to assist the parents in areas where compliance proved difficult. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 414.) Reunification services need not be perfect and services are not unreasonable merely because more services could have been provided. (*Elijah R. v Superior Court* (1998) 66 Cal. App.4th 965, 969; *In re Misako R.* (1991) 2 Cal.App.4th 538, 547.) However, the Agency must make a good faith effort to

last possible review hearing before the court establishes a permanent plan for the child is the 18-month permanency review hearing.[17]

In *Michael G. v. Superior Court* (2021) 69 Cal.App.5th 1133, the Fourth Appellate District asserted that reunification services should be terminated at the 18-month review hearing even if the court makes a no reasonable services finding at that hearing. **Because the parent did not fall into one of the three categories put forth by section 366.26, subdivision (b), the court was obligated to terminate services and set the section 366.26 hearing.**

Update: On January 19, 2022 the Supreme Court has granted review in this case. See Michael G. v. Superior Court, (S271809) This case presents the following issue: Are juvenile courts required to extend reunification efforts beyond the 18-month review when families have been denied adequate reunification services in the preceding review period?

V. 366.26 Hearing

A. Exceptions to the Termination of Parental Rights: Parental-Benefit Exception.

The parental-benefit exception provides parents with an exception to the general rule that the court should choose adoption as the permanent plan for a dependent child at the section 366.26 hearing.[18]

This year, the California Supreme Court decided *In re Caden C.* (2021) 11 Cal.5th 614 (*Caden C.*), a seminal case regarding the parental-benefit exception. In *Caden C.*, the Supreme Court clarified that the parental-benefit exception has three components: (1) whether the parent

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provide services tailored to the unique needs of each family. (*In re Monica C.* (1995) 31 Cal.App.4th 296, 306.)

[17] In most instances, the last possible review hearing before the court establishes a permanent plan for the child is the 18-month permanency review hearing. (§ 366.22, subd. (a)(3).) There are three exceptions to this rule: (1) parent is making good progress in substance abuse treatment, (2) parent was recently discharged from incarceration or institutionalization, or (3) parent was a minor or nonminor dependent at the initial hearing. (*Earl L. v. Superior Court* (2011) 199 Cal.4th 1490; § 366.22, subd. (b).)

[18] At a section 366.26 hearing, the court may select one of three alternative permanency plans for the dependent child—adoption, guardianship or long-term foster care. At this stage of the dependency proceedings, adoption is preferred because it ensures permanency and stability for the minors. (*In re A.S.* (2018) 28 Cal.App.5th 131, 152.) Thus, as a general rule, at a section 366.26 hearing, if the trial court finds that the child is adoptable, it must select adoption as the permanent plan and terminate parental rights. (§ 366.26, subds. (b)(1) & (c)(1).) The parental-benefit exception is an exception to the general rule that the court must choose adoption where possible. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) Under this exception, the juvenile court will not terminate parental rights if it finds a compelling reason for determining termination would be detrimental to the child because the parent/s have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. (Welf. & Inst. Code, § 366.26, subd. (C)(1)(B)(i).)

has maintained regular visitation and contact with the child, (2) whether the child has a substantial and positive emotional attachment to the parent, such that the child would benefit from continuing the relationship, and (3) whether terminating that relationship would be detrimental to the child when balanced against the benefit of a permanent adoptive home.

1. Standard of Review.

Caden C. clarified that a hybrid standard of review should be applied to the parental-benefit exception. The substantial evidence standard of review is applied to the first two elements, whether there has been regular visitation and whether there is a beneficial relationship. (*Caden C.* at p. 639.) The abuse of discretion standard is applied to the third element, whether termination would be detrimental to the child. (*Ibid.*) The Supreme Court noted that there is likely no practical difference in the application of the two standards. (*Id.* at p. 641.)

2. Beneficial Relationship.

To meet the second component of the exception, the beneficial relationship component, "[t]he parent must show that the child has a substantial, positive, emotional attachment to the parent—the kind of attachment implying that the child would benefit from continuing the relationship." (*Caden C.* at p. 636.) There are a "slew of factors" which illustrate this relationship, such as "'[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs.'" (*Ibid.*) The inquiry is focused on the child, though courts must "remain mindful that rarely do '[p]arent-child relationships' conform to an entirely consistent pattern." (*Ibid.*)

Interpretation of *Caden C.* has led to some confusion about the use of the term "parental role." In *In re D.M.* (2021) 71 Cal.App.5th 261 (*D.M.*), decided following the *Caden C.* decision, the Second Appellate District found that the juvenile court erred when it focused on whether Father occupied a "parental role" in his children's lives. The court equated a parental role with attendance at medical appointments and understanding the children's medical needs. "*Caden C.* made clear the beneficial relationship exception is not focused on a parent's ability to care for a child or some narrow view of what a parent-child relationship should look like." (*D.M.* at p. 270.) Additionally, *In re J.D.* (2021) 70 Cal.App.5th 833 (*J.D.*) the First Appellate District found that the juvenile court erred when it found that Mother's relationship did not amount to a "parental bond" because this finding could have encompassed factors which were not relevant under *Caden C.* In *J.D* the court clarified that a parent does not have to prove they have a "primary bond" with their child and that the parent's relationship should not be evaluated in the context of the relationship that the child may have with their primary caretaker. (*J.D.* at p. 859.)

In *In re L.A.-O* (2021) 73 Cal.App.5th 197 (*L.A.-O*), the Fourth Appellate District similarly remanded for a new section 366.26 hearing to consider the parental-benefit exception in light of *Caden C.* The court noted that the words "parental role" are ambiguous and can have several different meanings. (*L.A.-O.* at p. 210.) Some of the meanings encompass factors which may still be considered under *Caden C.*, while others may not. The trial court's ruling that the

parents "ha[d] not acted in a parental role in a long time" did not provide enough information to determine if the court had relied on improper factors. (*Id.* at p. 211.)

3. Detriment to the Child.

The third component of the parental-benefit exception analysis, whether terminating the relationship would be detrimental to the child, requires balancing whether "the benefit of a placement in a new, adoptive home outweighs 'the harm [the child] would experience from the loss of [a] significant, positive, emotional relationship with [the parent].'" (*Caden C.* at p. 633.) The court must decide "whether the harm of severing the relationship outweighs 'the security and the sense of belonging a new family would confer.'" (*Ibid.,* citing *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The *Caden C.* court noted that "understanding the harm associated with severing the relationship is a subtle enterprise" and that balancing the positive and negative aspects of the relationship "can be a daunting prospect for trial courts." (*Caden C.* at pp. 634, 635.)

Because terminating parental rights eliminates any legal basis for the parent or child to maintain the relationship, courts must assume that terminating parental rights terminates the relationship. (*Ibid.*) The court is not to compare the parent's attributes as a custodial caregiver relative to those of any potential adoptive parent. (*Caden C.* at p. 634.) The hearing is not a contest of who would be the better custodial caregiver as nothing happens at the section 366.26 hearing which would allow the child to return to live with a parent. (*Ibid.*) Even where it may never make sense to permit the child to live with the parent, termination may be detrimental. (*Ibid.*)

While *J.D.* reversed based on the court's reliance on improper factors regarding the second element of the exception, it also addressed the third element. *J.D.* noted that "[c]ourts must determine 'how the child would be affected by losing the parental relationship – in effect, what life would be like for the child in a new adoptive home *without the parent in the child's life*.'" (*J.D.* at p. 866.)

4. Parents' Failure to Overcome the Issues that led to Removal does Not Create a Categorical Bar to the Exception.

Caden C. further held that a parent's inability to overcome the issues that led to the dependency is not a categorical bar to applying the parental-benefit exception. The Supreme Court rejected the "paradoxical proposition, without any basis in the statute or its history, that the exception can only apply when the parent has made sufficient progress in addressing the problems that led to dependency." (*Caden C.* at p. 637.) However, the issues that led to dependency can be relevant to applying the exception. While a parent need not show that they are actively involved in complying substantially with their case plan, their struggles may create a negative effect on their interactions with their child/ren and affect the beneficial nature of their relationship. (*Caden C.* at p. 639.)

In *In re B.D.* (2021) 66 Cal.App.5th 1219 (*B.D.*), the Fourth Appellate District reversed the termination of parental rights where the juvenile court "relied heavily, if not exclusively, on

the fact that the parents had not completed their reunification plans and were unable to care for the children based on their long-term and continued substance abuse." (*B.D.* at p. 1228.)

VI. Placement Issues

A. A Section 387 Petition is Not Required to Terminate a Dependency Guardianship But is Required to Remove a Minor From Placement With a Relative.

When guardianship has been ordered at the section 366.26 hearing, jurisdiction remains with the juvenile court.[19] California Rules of Court, rule 5.740(d) provides that a petition pursuant to section 388 must be filed in the juvenile court to terminate a guardianship. However, *In re Jessica C.* (2007) 151 Cal.App.4th 474 (*Jessica C.*) held that the appropriate procedural mechanism to terminate a guardianship is by way of a section 387 petition, when termination will result in the minor's placement in foster care. A section 387 petition requires procedural prerequisites before removing a minor from their placement and removal findings under section 361, subdivision (c).[20]

In *In re N.B.* (2021) 67 Cal.App.5th 1139 (*N.B.*), the First Appellate District disagreed with *Jessica C.*, holding that a section 387 petition was not required to terminate a guardianship with a relative. Rather, a section 388 petition is the proper vehicle. The *N.B.* court mentioned, but did not address the language from *Jessica C.* which states that "[i]n contrast to section 388, section 387 provides a more detailed procedure[.]" (*Jessica C.* at p. 480.) Section 387 requires bifurcated proceedings in which the juvenile court "must conduct a contested hearing to resolve factual disputes and determine whether the allegations of the supplemental petition are true. (*Jessica C.* at p. 481.)

In *In re Brianna S.* (2021) 60 Cal.App.5th 303, the Second Appellate District held that when a minor is removed from a placement with a relative, a section 387 petition is required. If, in fact, a section 387 petition requires a "more detailed procedure" which provides more protection to relatives than the a section 388 petition, then a relative has less protection in a

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[19] At the section 366.26 hearing, the juvenile court may appoint a legal guardian for a minor and issue letters of guardianship. (§ 366.26, subd. (b)(3).) Any minor for whom such a guardianship has been established remains within the jurisdiction of the juvenile court. (§ 366.4, subd. (a).)

[20] Section 387 requires three procedural prerequisites before removing a minor from their placement: (1) a petition which sets forth "a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the . . . protection of the child or, in the case of a placement with a relative, sufficient to show that the placement is not appropriate in view of the criteria in section 361.3," (2) a noticed hearing within 30 days of the filing of the supplemental petition, and (3) the court must decide whether the allegations in the supplemental petition are true and whether it is appropriate to remove the child from their placement. (§ 387.) If the section 387 petition seeks to remove the child from a guardian, the court must make removal findings under section 361, subdivision (c), which requires clear and convincing evidence of substantial danger to the minor, no reasonable means to protect the minor, and that reasonable efforts have been made to avoid removal.

guardianship ordered at the permanency hearing than when the minor is in their care as a mere placement.

VII. Indian Child Welfare Act ("ICWA")

A. Evolving Definition of Adequate Further Inquiry

If an initial ICWA inquiry[21] gives the juvenile court or the Agency a "reason to believe" that an Indian child is involved, then further inquiry must be conducted.[22] This further inquiry includes, but is not limited to, interviewing parents and extended family members and notifying the Bureau of Indian Affairs and any tribes that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility.[23]

1. A Change in Reporting Does Not Alleviate the Agency of its Duty to Further Inquire.

In *Josiah T.,* the Second Appellate District found that the Agency failed in its duty to further inquire where a grandmother said she had Cherokee ancestry and the Agency did not seek any additional information regarding ICWA for seven months. The grandmother's later denial of Indian ancestry did not alleviate the Agency's duty to further inquire. **"[A] mere change in reporting, without more, is not an automatic ICWA free pass[.]"** (*Josiah T.* at p. 405.) **"[W]hen there is a conflict in the evidence and no supporting information, [the Agency] may not rely on the denial alone without making some effort to clarify the relative's claim."** (*Ibid.*; see also *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167-1168.)

2. If ICWA was Found Not to Apply to Full Siblings in a Previous Dependency Case, Then it is Not Likely to Apply in a Subsequent Case.

In re Charles W. (2021) 66 Cal.App.5th 483 (*Charles W.*) found that the juvenile court made an adequate ICWA inquiry where ICWA had been found not to apply to full siblings in a previous dependency case and parents had no change in information regarding Indian ancestry.

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[21] Under ICWA, the juvenile court and the Agency have an affirmative and continuing duty to inquire whether a child is or may be an Indian child. (§ 224.2, subd. (a)) This continuing duty can be divided into three phases: (1) the initial duty to inquire, (2) the duty of further inquiry, and (3) the duty to provide formal ICWA notice. (*In re D.F.* (2020) 55 Cal.App.5th 558, 566.) As part of its duty of initial inquiry, the Agency must ask "the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect" whether the child may be Indian. (§ 224.2, subd. (b).) The duty of initial inquiry requires the juvenile court and Agency to ask participants who appear before the court about the child's potential Indian status. (§ 224.2, subd. (c).) The Agency fails in this duty when it neglects to inquire of known relatives of a parent whose whereabouts are unknown. (*In re Josiah T.* (2021) 71 Cal.App.5th 388, 403-404. (*Josiah T.*))

[22] There is a "reason to believe" a child involved in a proceeding is an Indian child whenever the court social worker, or probation officer has information suggesting that either the parent or the child is a member or may be eligible for membership in an Indian tribe. (§ 224.2, subd. (e)(1).)

[23] § 224.2, subd. (e)(2)(A)-(C).

ICWA was found not to apply to two older minors, who were full siblings, in January 2019. In December 2020, the older siblings and a new baby were detained and ICWA was found not to apply to all three siblings. If "ICWA did not apply to the two older children, then it would not apply to the baby." (*Charles W.* at p. 490.) The court noted that no new evidence regarding ICWA was presented to the court or asserted on appeal. **Without any new evidence the children are Indian children, a prior finding that ICWA was inapplicable to full siblings makes it unlikely that additional inquiry or notice would have revealed the children to be within ICWA**, rendering any error harmless. (*Charles W.* at p. 492.)

3. Ancestry.com Results are Insufficient Evidence to Require Further ICWA Inquiry.

In *In re J.S.* (2021) 62 Cal.App.5th 678, the Second Appellate District found that a grandparent's Ancestry.com results that she was 58% Native American were insufficient to require the department to carry out further inquiry because the term "Native American" has a different connotation for purposes of Ancestry.com. The results did not specify any particular tribe. The term "Native American" for purposes of Ancestry.com includes ethnic origins from North and South America. The grandparent was of Mexican ancestry and was "nearly 100% certain that none of her relatives/family have been eligible and/or enrolled in any tribe(s)." Because the Ancestry.com results did not contain the identity of a possible tribe or any specific geographical region, the results have little usefulness in determining whether the minors were Indian children as defined under ICWA.

B. Must a Parent Allege Indian Ancestry to Show Prejudice?

Because the Agency's failure in their duty of initial inquiry involves state law, the reviewing court applies the *Watson*[24] standard and may not reverse the juvenile court findings unless it finds that the error was prejudicial. (Cal. Const., art VI, § 13.)

In *In re A.C.* (2021) 65 Cal.App.5th 1060 (*A.C.*), the Fourth Appellate District found that the juvenile court erred by failing to ask Father whether he had Indian ancestry. However, the error was harmless because Father did not claim at any stage of the proceedings that he has any Indian ancestry. A failure to comply with the duty of inquiry "must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error." (*A.C.* at p. 1069.) The Fourth Appellate District interpreted this to mean that a parent asserting an ICWA failure to inquire must show that he or she would have claimed some kind of Indian ancestry. (*Ibid.*) While a requirement that an appellant submit evidence outside the record is a substantial departure from normal appellate procedure, in a case in which a parent is claiming a failure of the duty of inquiry, the court will make an exception to that general rule. (*A.C.* at p. 1071.)

Promptly, both the Second Appellate District and the Fourth Appellate District came forward with opinions disagreeing with *A.C.* In *In re Y.W.* (2021) 70 Cal.App.5th 542 (*Y.W.*), the Second Appellate District said that a parent "does not need to assert he or she has Indian ancestry

[24] *People v. Watson* (1956) 46 Cal.2d 818.

to show a child protective agency's failure to make an appropriate inquiry under ICWA and related law is prejudicial." *Y.W.* stated that *A.C.* "missed the point," noting that "[i]t is unreasonable to require a parent to make an affirmative representation of Indian ancestry where the Department's failure to conduct an adequate inquiry deprived the parent of the very knowledge to make such a claim." (*Y.W.* at p. 556.)

In *In re Benjamin M.* (2021) 70 Cal.App.5th 735 (*Benjamin M.*), the Fourth Appellate District also disagreed with *A.C.,* finding that when there has been a failure to carry out ICWA inquiry duties, the best option is for the court to "reverse where the record demonstrates that the agency has not only failed in its duty of initial inquiry, but where the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child." (*Benjamin M.* at p. 744.) The right at issue in the ICWA context is as much an Indian tribe's right to a determination of a child's Indian status as it is a right of any sort of favorable outcome for the litigants already in a dependency case. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8; *Benjamin M.* at p. 746.)

VIII. Competent Counsel

A. Failure to File a Timely Notice of Appeal is Ineffective Assistance of Counsel.

The California Supreme Court held this year in *In re A.R.* (2021) 11 Cal.5th 234 (*A.R.*) that relief may be sought when an attorney fails to file a timely notice of appeal in accordance with a client's instruction in a parental rights termination case. The Supreme Court extended this relief, which has existed in the context of criminal cases since *In re Benoit* (1973) 10 Cal.3d 72, to parents in dependency cases.

There is a due process and statutory right to counsel for a parent facing the termination of parental rights. (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 32; Welf. & Inst. Code, § 366.26, subd. (f)(2).) When a parent asks court appointed counsel to appeal an order and the attorney has failed to timely file a notice of appeal of an order terminating parental rights, parents whose rights have been terminated may seek relief based on the denial of the statutory right to the assistance of competent counsel. Additionally, parents have a right to appeal and the denial of competent counsel threatens this right to appeal.

To succeed in a claim for relief from default, a parent must show that they would have filed a timely appeal absent attorney error and that they diligently sought relief from default within a reasonable time frame. A reasonable time frame should consider the child's strong interest in finality. (*A.R.* at p. 258.) "Because time is of the essence in matters affecting children's long-term placement, whether relief is granted will depend on the parent's promptness and diligence in pursuing the appeal." (*A.R.* at p. 242.) It is not required that the parent demonstrate that the appeal would have been successful. (*A.R.* at p. 252-253.)

Given the potentially slow habeas process and the need for swift resolution in dependency cases, a court has substantial discretion to determine the specific procedures to

handle relief from default based on an attorney's late filing. (*A.R.* at p. 257.) The application for relief should be directed to the Court of Appeal rather than the superior court. (*Ibid.*)

The language of *A.R.* seems to limit itself to cases involving the termination of parental rights—"we today hold that when their court-appointed attorneys have failed to timely file a notice of appeal of an order terminating parental rights, parents whose rights have been terminated may seek relief based on the denial of the statutory right to assistance of competent counsel." (*Ibid.*) However, it could be argued that the rights to competent counsel and to appeal, upon which the *A.R.* holding is based, would also apply to any appealable order throughout the process. The Fourth Appellate District found such, in an unpublished decision, in *In re M.M.* (Dec. 2, 2021, G060175) [nonpub. opn.] [the protections illustrated in *A.R.* also apply to appeals from the denial of a section 388 petition.]

IX. Appealability Issues

A. Must Subsequent Orders be Appealed to Preserve Appeal of Erroneous Jurisdictional Findings?

An order terminating juvenile court jurisdiction does not necessarily render an appeal from jurisdictional findings moot because erroneous jurisdictional findings can have unfavorable consequences extending beyond termination of dependency jurisdiction or touch on matters of public concern.[25] Mootness must be decided on a case-by-case basis.[26]

In *In re Rashad D.* (2021) 63 Cal.App.5th 156 (*Rashad D.*), the Second Appellate District found Mother's appeal of erroneous jurisdictional findings moot because Mother did not appeal the exit orders terminating jurisdiction and issuing custody orders. Mother argued that the appeal was not moot because the exit custody orders were different than the original orders, and the issue was one of broad public interest. The appellate court rejected Mother's argument, finding that for the court to provide effective relief, a parent must appeal not only from the jurisdiction finding, but also from the orders terminating jurisdiction and modifying the parent's prior custody status. (*Rashad D.* at p. 159.) The court's reasoning was that unless the appellate court can reverse the order terminating dependency, the juvenile court has no jurisdiction to conduct any further hearings because the case is closed. (*Rashad D.* at p. 164.)

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[25] A final judgment in a dependency proceeding may be appealed and any subsequent order may be appealed from as an order after judgment. (§ 395.) Because the courts resolve only controversies, an appeal may become moot when a change in circumstances makes it impossible for the reviewing court to grant effective relief. (*In re E.T.* (2013) 217 Cal.App.4th 426, 436.) Generally, an order terminating juvenile court jurisdiction renders an appeal from an earlier order moot. (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.) However, this mootness is not automatic, but must be decided on a case-by-case basis. (*Ibid.*) An appeal from jurisdiction findings is not necessarily mooted by termination of jurisdiction because an erroneous jurisdiction finding can have unfavorable consequences extending beyond termination of dependency jurisdiction. (*Ibid.*) Even if the issue is moot, an appeal can still be decided if needed to resolve an issue of continuing public concern. (*Laurie S. v. Superior Court* (1994) 26 Cal.App.4th 195, 199.)

[26] *In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.

In re S.G. (2021) 71 Cal.App.5th 654 (*S.G.*) disagreed with *Rashad D.*'s "broad proposition that an appellate court can never grant effective relief in a dependency appeal following the unappealed termination of juvenile court jurisdiction." (*S.G.* at p. 658) When there is a decision on appeal, the trial court is reinvested with jurisdiction of the case, defined by the remittitur. (*S.G.* at p. 664.) The remittitur creates the limited jurisdiction needed for the juvenile court to correct reversible errors. (*Ibid.*) The termination of juvenile court jurisdiction does not categorically prevent a reviewing court from granting effective relief in all cases. (*S.G.* at p. 663-664.) Mootness must be decided on a case-by-case basis, based on the facts of the particular case. (*S.G.* at p. 664.)

The *S.G.* court agreed with the conclusion that the *Rashad D.* appeal was moot, to the extent that its holding is limited to a scenario in which an appellant challenges custody findings in an unappealed exit order. (*S.G.* at p. 667.)

X. Miscellaneous

A. Does the Section 361.5, Subdivision (e) Bypass Provision Violate Equal Protection?

Section 361.5, subdivision (e) allows the court to deny an incarcerated parent reunification services if it finds by clear and convincing evidence that those services would be detrimental to the child.[27]

In *In re Joshua S.* (June 14, 2021, F082100) [nonpub. opn.], review denied 9/29/2021 (S269868) (*Joshua S.*)), Mother was in jail awaiting the resolution of a criminal case and was unable to post bail. The court bypassed Mother as an incarcerated parent. Mother appealed. The Fifth Appellate District affirmed the decision, finding that the term "incarcerated" plainly means "jailed" and that the obvious purpose of section 361.5 subdivision (e)(1) is to address reunification services in cases where parents are not at liberty to come and go or to schedule activities as they please. (*Edgar O. v. Superior Court* (2000) 84 Cal.App.4th 13, 17-18.) Mother petitioned for review, which was denied.

Justice Liu issued a concurring statement stating: "I write to call attention to a separate issue not directly raised by Mother's Petition for Review: whether the statutory scheme, as construed by the Court of Appeal, violates principles of equal protection." (*Joshua S.* at pp. 3-4.) Justice Liu points to two ways in which parents who cannot post bail are treated differently than those who can: (1) a parent who can post bail is entitled to reunification services while the parent

[27] Section 361.5, subdivision (e) contains a bypass procedure for a parent or guardian who is "incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to the parent's or guardian's country of origin." (§ 361.5, subd. (e)(1)) The juvenile court may deny reunification services if it finds by clear and convincing evidence that those services would be detrimental to the child. (*Ibid*.) In making that determination, the juvenile court shall consider factors such as the length of the sentence, the nature of the crime, and the likelihood of the parent's discharge from incarceration. (*Ibid*.)

in custody pending charges are subject to a detriment analysis and can be denied reunification services and (2) because the juvenile court can consider "the nature of the crime," only parents who are in custody pending trial are subject to the court's consideration of their moral culpability. (*Joshua S.* at pp. 4-5.) The above cannot be reasons for denying reunification services to people who can post bail.

Justice Liu quoted the recent criminal case addressing the unconstitutionality of bail, *In re Humphrey* (2021) 11 Cal.5th 135, 147 "[t]he common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional." "The disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound." (*Joshua S.* at p. 7.) One of these potential disadvantages is the possible termination of parental rights.

Finally, Justice Liu made a call to action, stating that the courts may need to resolve "[w]hether principles of equal protection permit disparate treatment in the provision of reunification services to parents who can afford bail and those who cannot[.]" (*Ibid.*) Justice Liu suggests that the section 361.5, subdivision (e)(1) factors may be considered to decide what type of reunification services are appropriate but not to deny reunification services altogether.

B. Special Immigrant Juvenile Status Findings are Mandatory When Sufficient Evidence of the Elements is Presented.

The Special Immigrant Juvenile (SIJ) classification provides relief to undocumented children by providing a means to seek lawful permanent residence in the United States.[28] While the federal government has exclusive jurisdiction over immigration, state courts make the preliminary SIJ findings, which serve as the prerequisite to obtaining SIJ status.[29]

In re Scarlett V. (2021) 72 Cal.App.5th 495 (*Scarlett V.*) reiterated that the juvenile court must make SIJ findings. **"[T]he court's duty to enter an order with the [SIJ] findings was mandatory, not discretionary."** (*Scarlett V.* at p. 502.) In *Scarlett V.*, the minor was declared a dependent, placed with her mother, and reunification with her father was found not to be viable. The seven-year-old minor had come to the United States when she was two years of age and did not have family able to care for her in her country of origin, Honduras. No evidence was

[28] The Special Immigrant Juvenile (SIJ) classification provides relief to immigrant children whose interests would not be served by returning to their country of origin. (*Bianka M. v Superior Court* (2018) 5 Cal.5th 1004, 1012.) A child is eligible for SIJ status if: (1) the child is a dependent of a juvenile court or in the custody of an individual, entity or agency by court order; (2) the child cannot reunify with one or both parents due to abuse, neglect, abandonment, or similar; and (3) it is not in the child's best interest to return to his or her home country or the home country of his or her parents. (*Id.* at p. 1013.) SIJ status permits a recipient to seek lawful permanent residence in the United States, which, in turn, permits the recipient to seek citizenship after five years. (*Ibid.*)

[29] While the federal government has exclusive jurisdiction over immigration, state juvenile courts are charged with making the preliminary determinations that serve as a prerequisite to obtaining SIJ status. (*In re Israel O.* (2015) 233 Cal.App.4th 279, 284; Cal. Code of Civ Proc. § 155.) A court shall make SIJ findings if "there is evidence to support those findings, which may consist solely of, but is not limited to, a declaration by the child who is the subject of the petition[.]" (*Ibid.*)

presented to contradict these assertions. The juvenile court's ruling that making SIJ findings was discretionary was in error because there was uncontradicted and unimpeached evidence that supported the minor's request.

XI. Pending Supreme Court Issues

There are three dependency cases currently pending before the California Supreme Court.

A. Whether the Appeal of Jurisdictional Findings is Moot When Jurisdiction Had Been Terminated in the Interim, Even though Parents Might Be Registered on the Child Abuse Central Index?

The court granted review in *In re D.P.* (Feb. 10, 2021, B301135; S267429) [nonpub. opn.] on 5/26/2021 on the following issues: (1) Is an appeal of a juvenile court's jurisdictional finding moot when a parent asserts that he or she has been or will be stigmatized by the finding? (2) Is an appeal of a juvenile court's jurisdictional finding moot when a parent asserts that he or she may be barred from challenging a current or future placement on the Child Abuse Central Index as a result of the finding?

In *In re D.P.*, dependency proceedings were initiated when two-month-old minor was brought to the hospital and a healing rib fracture was detected. Parents could not explain how the injury occurred and the doctor noted that the injury could have been sustained accidentally, though intentional conduct could not be ruled out. The juvenile court sustained subdivision (b) allegations, noting that this was "at its most—a possible neglectful act [.]" The minors remained with the parents under informal supervision pursuant to section 360, subdivision (b) until jurisdiction was eventually terminated.

The parents argued that their appeal was not mooted by the termination of jurisdiction because the jurisdictional finding would impair their ability to serve as a placement option for other family members and the jurisdictional finding subjects them to registration on the Child Abuse Central Index (CACI), which is stigmatizing and will negatively impact their ability to participate in their children's extracurricular school activities and jeopardizes mother's employment as a teacher. The Second Appellate District found that the appeal was moot, noting that the Agency's reporting duty is triggered when an investigator determines it is more likely than not that child abuse or neglect has occurred and is not dependent on the juvenile court sustaining a section 300 petition.

B. Is it Structural Error for a Juvenile Court to Proceed With Jurisdiction and Disposition Hearings Without an Incarcerated Parent's Presence?

The court granted review in *In re Christopher L.* (2020) 56 Cal.App.5th 1172 (S265910/B305225) on 2/17/2021 on the following issue: Is it structural error, and thus reversible per se, for a juvenile court to proceed with jurisdiction and disposition hearings without an incarcerated parent's presence and without appointing the parent an attorney?

In *In re Christopher L.*, Father was incarcerated when minors were removed from Mother. Father was provided with notice of the detention hearing and sent a letter in response to the social worker requesting that he be able to attend the jurisdiction/disposition hearing telephonically. Despite this request and the provision of Penal Code section 2625, subdivision (d), Father was neither present at the hearing nor represented by counsel. Father was bypassed at the disposition hearing and his parental rights were ultimately terminated.

The Second Appellate District found that Father was denied due process when the court held the jurisdiction/disposition hearing without his or his counsel's presence and by failing to find him presumed father of the minors. However, applying the *Watson* harmless error standard, the court found the juvenile court's errors did not warrant automatic reversal. Citing *In re James F.* (2008) 42 Cal.4th 901, 915-919, the court rejected the argument that all due process errors are reversible per se. While this is the case in criminal proceedings, '[t]he rights and protections afforded parents in a dependency proceeding are not the same as those afforded to the accused in a criminal proceeding." (*Id.* at 915.) This is because "the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child[.]" Because Father was bypassable under subdivisions (b)(10) and (b)(12), had never met the minor, and would be incarcerated longer than any reunification period, "there is no basis on which even the most competent counsel could have shown it was in [Minor]'s best interest to override the statutory presumption that reunification services should be denied."

C. Are Juvenile Courts Required to Extend Reunification Efforts Beyond the 18-Month Review When Families Have Been Denied Adequate Reunification Services in the Preceding Review Period?

Update: The Supreme Court has granted review in Michael G. v. Superior Court, S271809. (G060407; 69 Cal.App.5th 1133; Orange County Superior Court; 19DP1381.) This case presents the following issue: Are juvenile courts required to extend reunification efforts beyond the 18-month review when families have been denied adequate reunification services in the preceding review period?

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I. Notice/Due Process

***In re R.A.* (2021) 61 Cal.App.5th 826**
District: 1 DCA , Division: 2 , Case #: A161510 , Opinion Date: 3/11/2021
Case Holding: **When a Welfare and Institutions Code section 388 petition raises notice issues, a separate showing of best interests of the child is not required to warrant an evidentiary hearing.** The minor came to the Agency's attention in October 2018. Father's name was listed on the section 300 petition, but his whereabouts were unknown. In subsequent reports, the Agency stated that a search was conducted for father, but the reports included no description of any search efforts. At the time of the six-month review hearing, father's whereabouts, at a California State Prison, finally became known. Father filed a section 388 petition requesting that all prior findings be set aside because father was not notified of those proceedings. The juvenile court denied father's section 388 motion, finding that father had shown changed circumstances by his recent release from prison, but had failed to meet the "best interests of the child" prong of the 388 petition. Father appealed the denial of the 388 petition and sought extraordinary relief from the order setting a section 366.26 hearing. The appellate court vacated the prior orders with direction to the juvenile court to conduct an evidentiary hearing on the 388 petition. Due process requires that a parent is entitled to notice that is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object. A parent may raise an Agency's failure to provide him with adequate notice through a petition under section 388. When a section 388 petition is based on lack of notice, a separate showing of best interest is not required because a judgment that is proven void due to lack of due process notice suffers from a jurisdictional defect. Here, the trial court abused its discretion in denying father an evidentiary hearing on his section 388 petition because father sufficiently stated a notice violation where the record raised the possibility that the Agency failed to use due diligence to locate him. The error was not harmless because father had a relationship with the minor, and incarcerated parents are entitled to reunification services.

***In re Daniel F.* (2021) 64 Cal.App.5th 701**
District: 1 DCA , Division: 3 , Case # A160929 , Opinion Date: 5/24/2021
Case Holding: **Reversal and remand for an evidentiary hearing was required where the Agency failed to pursue the most likely means of finding alleged father.** The minor was detained due to mother's untreated substance abuse issues. The petition filed alleged that father's whereabouts were unknown, although mother believed he lived in Mexico. Following the jurisdiction and disposition hearing, a paternal aunt was located in March 2019. A September 2019 declaration of search efforts stated that the Agency had searched various government records and other databases in California, despite believing that father was living in Mexico. In October 2019, mother's reunification services were terminated and the matter was set for a Welfare and Institutions Code section 366.26 hearing. In November 2019, the paternal aunt provided the Agency with a telephone number and date of birth for father and said he was living in Mexico City with no stable address. Following a due diligence hearing in January 2020, the

court found the Agency had exercised due diligence and father could be served by publication. In May 2020, the paternal aunt facilitated a phone call between father and the Agency. Father provided the Agency with an address and telephone number in Mexico and requested an attorney and custody of his son. Father then filed a section 388 petition requesting reversal of the disposition order and setting of the section 366.26 hearing. The court found that father had failed to state prima facie evidence to hold an evidentiary hearing as father had no relationship with the minor and it would not serve the minor's best interest to hold a hearing. The court then terminated parental rights as to both parents. The appellate court reversed and remanded to hold an evidentiary hearing. Alleged fathers have a due process right to be given notice and an opportunity to appear, to assert a position, and to attempt to change their paternity status. A section 388 petition is the appropriate method for raising a due process challenge based on lack of notice, and a separate showing of best interest is not required. The Agency is required to make every reasonable effort in attempting to inform parents of all hearings. Reasonable diligence denotes a thorough, systematic investigation and inquiry conducted in good faith. Here, the Agency located paternal aunt in May 2019, but did not inquire about father's whereabouts until November 2019. Paternal aunt was eventually able to put the Agency in contact with father, but this may have happened much sooner if the Agency had been more diligent. Despite knowing that father was in Mexico, the Agency only searched California databases while neglecting the avenue that was most likely to yield father's contact information, the paternal aunt. The Agency's failure to timely provide father with a JV-505 form denied him adequate notice and this error was not harmless because it cannot be assumed, based on the facts in evidence, that had father established paternity he would not have received reunification services or been able to assert his parental rights.

***In re I.S.* (2021) 67 Cal.App.5th 918**
District: 1 DCA , Division: 2 , Case #: A161417 , Opinion Date: 8/16/2021
Case Holding: **Mother was denied due process when the juvenile court's amendments to the Welfare and Institutions Code section 300, subdivision (b) allegations materially varied from the original petition.** The minor I.S. was removed after she reported to authorities that she had been touched inappropriately by a member of her household. I.S. reported that she told Mother, who initially kicked this person out of the house, but then allowed him to return. Mother denied that she had knowledge of the abuse prior to the dependency case. The petition filed by the Department alleged that I.S. had been sexually abused and that Mother knew about the abuse but maintained I.S. was a liar and was making the allegations up. Following a contested jurisdiction hearing, the court found there was sufficient evidence to support the subdivision (b) allegations, but amended count b-1 to conform to proof, including allegations that Mother did not take sufficient steps to investigate the circumstances surrounding the sexual abuse, permitted other family members to ostracize I.S. after she disclosed the abuse, and pressured I.S. into permitting the abuser to move back into the home. At the dispositional hearing, the court found that I.S could not be protected without removal. The appellate court reversed the orders. A

juvenile court may amend a petition to conform to the evidence received at the jurisdiction hearing to remedy immaterial variances between the petition and proof. However, material amendments are not allowed. The court's additional allegations sought to establish jurisdiction over I.S. under a different legal theory than the original allegations. The allegations in the amended b-1 allegation sought to establish jurisdiction based on Mother's infliction of emotional abuse whereas the original petition sought to establish jurisdiction based on Mother's failure to protect I.S by means of her denial that the abuse had occurred. Mother had no notice evidence would be presented concerning the nature and severity of any emotional damage I.S. may have been suffering and Mother's responsibility for this emotional damage.

The juvenile court's amendments to the section 300, subdivision (d) allegation compromised Mother's due process rights to notice and an opportunity to be heard. The court did not discuss the subdivision (d) allegations also alleged in the petition at the jurisdiction hearing. The written order following the hearing noted that count d-1 was dismissed. At a following hearing, the juvenile court was asked to clarify its jurisdictional findings with respect to d-1. The court stated it was amending count d-1 to conform to proof by including allegations that I.S. was sexually abused, that Mother knew of the abuse and did not take sufficient steps to investigate it, and that Mother failed to protect I.S. by allowing her abuser to move back into the home. A juvenile court may, *sua sponte*, change, modify, or set aside a prior order, so long as it provides the parties notice and an opportunity to be heard prior to the modification. Here, the juvenile court reinstated the d-1 count after dismissing it and also substantially amended the count by including new allegations. Mother lacked sufficient notice of the allegations against her and thus a reasonable opportunity to prepare for the hearing. The jurisdiction hearing should have been reopened to allow Mother to present evidence to refute the amended allegations. Therefore, the jurisdictional findings must be reversed.

***In re Samuel A.* (2021) 69 Cal.App.5th 67**
District: 2 DCA , Division: 7 , Case #: B306103 , Opinion Date: 9/21/2021
Case Holding: **The juvenile court erred in appointing a Guardian Ad Litem (GAL) for Mother where there was no finding that she was mentally incompetent.** The minor, Samuel, was removed from Mother due to her alcohol abuse. Mother had outbursts in court and had to be subdued by bailiffs. The social worker, foster parent, and minor were granted a restraining order to protect them from Mother's threats and harassment. Mother went through at least ten attorneys, which often delayed the court proceedings. Following a contested hearing, the court appointed a GAL for Mother, noting that it believed that Mother understood the proceedings and her behavior did not arise from a mental health incapacity, but rather, her conduct was a knowing and deliberate effort to obstruct proceedings she believed were not going to be favorable to her. The appellate court reversed the orders appointing the GAL and the subsequent orders. A person may be found incompetent in dependency proceedings, such that a GAL should be appointed, if the person is either incapable of understanding the nature and purpose of the proceeding or

unable to assist counsel in a rational manner. (*In re M.P.* (2013) 217 Cal.App.4th 441, 452.) If the court appoints a GAL without the parent's consent, the record must contain substantial evidence of the parent's incompetence. (*In re James F.* (2008) 42 Cal.4th 901, 910-911.) "[A]ppointment of a GAL is not a tool to restrain a problematic parent, even one who unreasonably interferes with the orderly proceedings of the court or who persistently acts against her own interests or those of her child." Here, there was no evidence that Mother lacked the capacity to either understand the nature of the proceedings or to assist counsel in a rational manner. Rather, the court found that her lack of cooperation was strategic. A parent's due process right to communicate directly with counsel in proceedings that could culminate in the termination of her parental rights is fundamental and may not be disregarded for the sake of expediency. The error was not harmless, so in addition to the GAL orders, all subsequent orders made during proceedings in which Mother was denied the benefit of communicating directly with her counsel also had to be reversed.

***In re R.F.* (2021) 71 Cal.App.5th 459**

District: 4 DCA , Division: 2 , Case #: E076526 , Opinion Date: 10/29/2021 (ordered published 11/10/2021)

Case Holding: **Non-appearance review hearing violated parent's right to notice and an opportunity to be heard prior to dismissing jurisdiction and issuing exit orders.** The minors were removed from Father following a true finding of a petition which alleged substance abuse. The minors were placed with Mother with family maintenance services. Father was granted weekly visitation, to be supervised by relatives. Two months later, in December 2020, the court conducted a non-appearance review hearing in accordance with a local court authorized "approval packet" procedure, with the parties' attorneys noticed by email four days prior. In January 2021, the juvenile court entered a final judgment dismissing jurisdiction and issuing exit orders awarding sole legal and physical custody of the minors to Mother, and ordering that Father have visitation supervised by a professional monitor at Father's expense. Father appealed, and the appellate court reversed the orders. Welfare and Institutions Code section 364, which guides proceedings when children are in placement with a parent, requires the court to advise the parties of hearing dates and their rights to be present and represented by counsel. A noncustodial parent is entitled to an evidentiary hearing before the juvenile court decides custody and visitation issues ancillary to the termination of jurisdiction. (*In re Michael W.* (1997) 54 Cal.App.4th 190, 192.) The court's dismissal of jurisdiction by "approval packet" with a non-appearance review hearing did not comply with section 364. Father did not receive proper notice of the non-appearance review hearing because nothing in the record showed that Father consented to service of notice by email. Father therefore did not have a meaningful opportunity to object to the non-appearance hearing and request an evidentiary hearing. Further, Father did not receive notice of any supporting evidence relied upon by the court when changing the custody and visitation orders. Father was prejudiced by these violations because it was reasonably probable the juvenile court would not have decreased his visitation and mandated a

paid professional visitation monitor if he had been properly noticed and provided with an opportunity to be heard.

II. Jurisdiction

***In re K.B.* (2021) 59 Cal.App.5th 593**
District: 2 DCA , Division: 8 , Case #: B305420 , Opinion Date: 1/5/2021
Case Holding: **Sufficient evidence supported the findings that parents' substance abuse put minors at risk of serious physical harm and that removal was necessary.** K.B., J.B., and J.N. were ordered removed from their parents after mother tested positive for methamphetamine and marijuana during a hospital visit while 18 weeks pregnant and the parents neglected to enroll in a substance abuse program required by their safety plan. Mother initially denied having a history of substance use and denied present substance use, but later admitted she had used methamphetamine and marijuana. Her criminal record showed an arrest for possession of a controlled substance in 2012. Minors told the social worker that mother goes to sleep at 5 p.m. and they have to wake her up the following morning when it is time for school. Father also tested positive for amphetamine and methamphetamine but denied any recent drug use. Father had been arrested multiple times for substance-related offenses. Minors told the social worker that their parents fought about father's drinking. The court exercised jurisdiction over the minors and ordered them removed from their parents. The parents appealed, and the appellate court affirmed. Under Welfare and Institutions Code section 300, subdivision (b)(1), the court may exercise jurisdiction over a child who has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness as a result of the failure of the parent to adequately supervise or protect the child or to provide regular care for the child due to the parent's substance abuse. The trial court properly found that mother's conduct put her children at substantial risk of serious physical harm because mother routinely disappeared from her children's lives after 5:00 p.m. until they woke her the next morning. The resulting failure to supervise the children put them at serious risk. Father's criminal history and denial of his present substance abuse issues is sufficient evidence to support the court's finding. A court is entitled to infer past conduct will continue where the parent denies there is a problem. (*In re A.F.* (2016) 3 Cal.App.5th 283, 293.) The evidence supporting the jurisdictional findings was also sufficient to support the removal findings.

***In re Nathan E.* (2021) 61 Cal.App.5th 114**
District: 2 DCA , Division: 1 , Case #: B306909 , Opinion Date: 2/22/2021
Case Holding: **Exposure to domestic violence was sufficient to sustain a finding of serious physical harm under Welfare and Institutions Code section 300 subdivision (a).** Parents had a history of participating in domestic violence throughout their marriage, including an incident in 2015 where mother stabbed father. Previous peaceful contact restraining orders and mother's completion of a 52-week domestic violence course had been insufficient to end the domestic violence. The minors were removed from their parents in March 2020, following a police

response to a domestic violence call. Mother did not cooperate with the social worker investigation and failed to follow through in getting a restraining order to protect the minors from father. Minor Nathan told social workers that he was present when the most recent domestic violence incident had occurred, and that he had previously witnessed other violent acts between the parents. A joint jurisdictional and dispositional hearing was held and the juvenile court found true section 300(a) and (b) allegations based on the domestic violence between the parents. The court found that removal was necessary to protect the children. Mother appealed, arguing there was insufficient evidence to support the jurisdictional and dispositional orders. The appellate court rejected the argument and affirmed. Section 300(a) creates jurisdiction over a child when there is "a substantial risk that the child will suffer serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." The application of 300(a) is appropriate when a child suffers, or is at substantial risk of suffering, harm due to the exposure to a parent's domestic violence. "Domestic violence is nonaccidental." (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598-599.) Although many cases based on exposure to domestic violence are filed under section 300(b), 300(a) may also apply. Based on the history of domestic violence between the parents and the presence of one or more of the children during the parents' violent altercations, sufficient evidence existed to sustain 300(a) allegations. Mother's continued participation in domestic violence despite completing a domestic violence course, her prior failure to comply with court ordered restrictions, and her uncooperativeness with the social worker during the investigation constituted clear and convincing evidence that returning the children to mother's custody at the time of the disposition hearing posed a risk of substantial danger.

***In re J.N.* (2021) 62 Cal.App.5th 767**

District: 2 DCA , Division: 1 , Case #: B308879 , Opinion Date: 4/2/2021

Case Holding: **Jurisdiction finding was reversed because a parent's violent criminal record, without more, does not necessarily establish the requisite risk of physical harm to a minor.** The minor J.N. was detained when his infant half-sibling tested positive for marijuana at birth. The petition alleged J.N. was at risk of serious physical harm as a result of father's violent criminal history. Father had convictions for criminal threats, assault with a deadly weapon, exhibiting a deadly weapon, and arson and was serving an eight-year prison sentence. The court sustained the allegations, found that placement with father would be detrimental to J.N., and denied father reunification services pursuant to section 361.5(e)(1). The appellate court reversed the jurisdiction orders. Evidence of a parent's past conduct may be probative of current risk of harm, but DCFS must establish a nexus between them. Here, the sole evidentiary basis for the jurisdictional finding as to father was his incarceration and criminal record. While there was a reasonable inference that father would commit future crimes, there was no evidence that J.N. would be harmed by this as there was no information in the record that father's criminal conduct ever placed J.N. in danger, that J.N. was ever exposed to father's criminal activity, or that J.N. had access to weapons or was in father's care at the time father committed the crimes. While

violent crime, on an abstract level, is incompatible with child safety, such generalities are insufficient to prove an "identified, specific hazard in the child's environment" that poses a substantial risk of serious physical harm to the minor. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) A parent's violent criminal record, without more, does not necessarily establish that a parent has a violent disposition sufficient to establish the requisite risk of physical harm to a particular child to support a jurisdictional allegation. The disposition order was also reversed. When a parent is incarcerated, the test is whether the incarcerated parent exercising their right to physical custody by making arrangements for the minor's living situation while they are incarcerated would create a substantial risk to the child. (See *Isayah C.* (2004) 118 Cal.App.4th 684, 696.) Nothing in the record suggests that DCFS' request for removal from father supports a finding that there would be a requisite danger to J.N. Further, the order denying father reunification services was also reversed. The juvenile court denied father services based on section 361.5(e)(1). However, J.N. was placed with his mother, a previously custodial parent and thus, under such circumstances, neither parent was entitled to reunification services. The detriment finding made under section 361.5(e)(1) to deny father services could constitute a sufficient basis for termination of parental rights if J.N. were ultimately removed from both parents and parents failed to reunify. Because there is a risk that the erroneous detriment finding could prejudice father later in the case, the order was vacated.

***In re Ma.V.* (2021) 64 Cal.App.5th 11**

District: 4 DCA , Division: 3 , Case #: G059433 , Opinion Date: 5/6/2021

Case Holding: **There was insufficient evidence to support jurisdictional findings where there was no current evidence of drug abuse and the evidence of domestic violence was stale and did not present a current risk of harm.** Ma. and her two younger siblings were removed from their mother after mother was the victim of domestic violence. The petition alleged that mother suffered from PTSD, used marijuana, and that Ma. was suffering emotional damage because mother failed to obtain necessary mental health services for her. Mother ceased living with the perpetrator of the domestic violence. Mother reported that she used medical marijuana because it helped her refrain from using stronger medications, such as anti-anxiety and prescription pain medications. Maternal grandmother lived in the same apartment complex and often assisted with childcare. The jurisdictional and dispositional hearings began in February 2020, but were continued almost 10 months after the removal of the minors. The court sustained the domestic violence allegation, noting that the allegation was old but also that mother had not been involved in relevant services. The court also found true that mother may have unresolved substance abuse problems that include marijuana. The court ordered the minors removed. The appellate court reversed the orders. The test for jurisdiction under Welfare and Institutions Code section 300 subdivision (b)(1) includes: (1) inability to provide necessary supervision or protection of children; (2) causation; (3) serious physical harm or illness, or the substantial risk of either. While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the

defined risk of harm. Here, the court's jurisdictional findings focused on old issues that were resolved by the time of the hearing. Mother had a valid prescription for medical marijuana and used it to avoid using other drugs. Mother had ended her relationship with the perpetrator of the domestic violence and had not engaged in any new relationships. There was no reoccurrence of domestic violence during the 10 months that the case was pending. The court also noted that a "recent, and troubling trend, of what we perceive as mothers being punished as victims of domestic violence."

There was insufficient evidence to support jurisdictional findings based on section 300, subdivision (c) where mother had sought mental health assistance for minor, and the minor did not have any additional mental health problems during the pendency of the case. Mother told social workers that she had sought treatment and therapy for Ma., but Ma. was refusing to attend school or therapy and refused to take her medication. Ma. testified that mother had taken her to the hospital when she expressed suicidal thoughts. Section 300, subdivision (c) provides for intervention by the dependency system in two situations: (1) when parental action or inaction causes the emotional harm; and (2) when the child is suffering serious emotional damage due to no parental fault or neglect, but the parent is unable themselves to provide adequate mental health treatment. The reviewing court deemed Ma.'s mental health the most serious concern, but noted that the SSA had not placed Ma in individual therapy during the 10 months prior to the jurisdictional hearing and Ma had not suffered any mental health breakdowns during this time. There was insufficient evidence to support jurisdiction under section 300, subdivision (c).

***In re L.O.* (2021) 67 Cal.App.5th 227**
District: 4 DCA , Division: 2 , Case #: E075921 , Opinion Date: 7/29/2021
Case Holding: **Insufficient evidence supported the juvenile court's finding under Welfare and Institutions Code section 300, subdivision (d) where minor displayed sexualized behavior after having possibly witnessed a parent engaging in sexual activity.** Following removal from his parents, L.O. was exhibiting troubling sexualized behavior and each parent blamed the other for exposing L.O. to inappropriate sexual conduct. At the jurisdictional and dispositional hearing, jurisdictional allegations under section 300, subdivision (d) were found true as to Father. The appellate court reversed in part, and affirmed in part. A child comes under section 300, subdivision (d), when the child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in section 11165.1 of the Penal Code. Here, there was no evidence that Father had inappropriately touched L.O., so Father's conduct must be shown to be motivated by an unnatural or abnormal sexual interest. There was no evidence here that Father's conduct was sexually motivated, but rather was an accidental viewing. Due to the seriousness of allegations of child molestation, jurisdiction in the circumstances of this case where a child has witnessed a parent engaging in sexual acts and the parent is aware of the child

acting out sexually can been established under section 300, subdivision (b)(1), but not under section 300, subdivision (d).

Substantial evidence supported the juvenile court's finding under Welfare and Institutions Code section 300, subdivision (b) where parents had historically engaged in domestic violence in front of minor and continued to have custody disagreements. L.O. was removed from the parents after he disclosed physical abuse by Mother's boyfriend, and had marks and bruises consistent with his statements. The parents shared joint custody of L.O. and had been in a physical altercation involving Mother, Father and Mother's boyfriend. Mother and Father both reported previous domestic violence in their relationship. A section 300(b) allegation was found true as to Father, alleging that Father's history of domestic violence placed L.O. at risk. Exposure to domestic violence may support jurisdiction under section 300, subdivision (b)(1). Although there must be a present risk of harm to the minor, the juvenile court may consider past events to determine whether the child is presently in need of juvenile court protection. Here, Father admitted that he and Mother had previous incidents of domestic violence and L.O. may have witnessed some of these incidents. Mother also reported times when arguments had become physical and a time where she had tried to stop an altercation between Father and her boyfriend while L.O. was in her arms. Father and Mother were still involved in an acrimonious family law matter and had domestic violence issues during custody exchanges. L.O. was acting out violently. This amounted to substantial evidence to support the section 300, subdivision (b) jurisdictional finding against Father.

***In re Cole L.* (2021) 70 Cal.App.5th 591**
District: 2 DCA , Division: 7 , Case #: B310319 , Opinion Date: 10/19/2021
Case Holding: **Substantial evidence did not support jurisdiction findings under Welfare and Institutions Code section 300, subdivision (a), where the domestic violence between the parents did not occur in the presence of the minors.** The three and five-year old minors were removed from their parents after a domestic violence incident between the parents which involved shoving and the breaking of a phone, while the minors were asleep in another room. At the jurisdiction hearing, the court sustained the petition on both section 300(a)(1) and (b)(1) allegations. The court removed the minors from Father and placed them with Mother under Department supervision. The appellate court reversed the orders on appeal. Jurisdiction may be assumed under section 300, subdivision (a) if the child has suffered, or there is a substantial risk the child will suffer, serious physical harm inflicted nonaccidentally by the child's parent or guardian. "Nonaccidental" means that the parent or guardian "acted intentionally or willfully." Under certain circumstances, incidents of domestic violence between a child's parents, if they occur in the child's immediate presence, may support a jurisdiction finding under section 300, subdivision (a). "For example, if a father strikes an infant's mother while she is holding the child or an older child intervenes during a fight to protect her mother from her father's abuse, the risk of harm to the child may be properly viewed as nonaccidental." An unintended injury to a

bystander child that results from an intentional act directed at another may be the basis for jurisdiction under section 300, subdivision (b)(1) or (c), but not subdivision (a). Here, however, the minors were asleep in another room and there was no evidence the minors were bystanders or that any violence took place in their presence. Thus, there was not evidence to support section 300, subdivision (a) or (b) findings.

In re Emily L. **(2021) 73 Cal.App.5th 1**
District: 2 DCA , Division: 8 , Case #: B309567 , Opinion Date: 11/29/2021 (ordered published 12/21/2021)
Case Holding: **Where a family's situation had dramatically improved in the year before the jurisdiction hearing, there was no evidence of risk of future harm despite earlier physical altercations between Mother and her teenaged daughter, and reversal and dismissal of the petition were required.** DCFS filed a petition alleging that Mother had physically abused and medically neglected her teenaged daughter, Emily, and put Emily's brother, Andrew, at risk of abuse. Emily had behavioral problems, including assaultive behavior, and the parents were having difficulty controlling her. Emily self reported that when she got angry, she could not control herself. She smoked marijuana and had "bad friends." Emily's brother Andrew was homeschooled because he had kidney cancer and was undergoing treatment. There had been a physical altercation between Mother and Emily where Mother pushed and forcibly grabbed Emily and grabbed her neck, causing her to choke. There had been an earlier incident where Mother slapped Emily, and Emily subsequently charged and assaulted her. Both grandmother and the siblings confirmed that Emily was violent towards her parents and had thrown things around the house and stolen money. The juvenile court placed Emily with Father and ordered Mother to participate in six months of services under the informal supervision of DCFS, pursuant to section 360, subdivision (b). Emily started receiving wraparound services. During the course of the informal supervision, Andrew died. A few months later, Emily's behavior had markedly improved, so much that she was no longer eligible for wraparound services. Both parents reported that she was doing well at home and during visits with mother. She had improved her grades and was on track to graduate. There had been no further incidents. The juvenile court held the jurisdictional and disposition hearing over a year after the original altercation. It found the petition true against Mother, but dismissed Father from the petition. On appeal, DCFS argued mootness because Emily had turned 18. The appellate court found that although Emily was no longer subject to juvenile court jurisdiction, the appeal should not be dismissed as moot, because the erroneous jurisdictional findings could subject Mother to inclusion in the Child Abuse Central Index, which could jeopardize future employment or licensing. It also found that substantial evidence did not support the jurisdictional finding of the juvenile court. By the time of the hearing in Emily's case, familial circumstances had undergone epic changes. At the time of the hearing, there was no evidence that Emily was still quick to anger, prone to violence, or engaging in challenging behaviors. She was attending school, getting good grades, and not fighting verbally or physically with family members, including Mother. She had no further

confrontations with Mother in over a year, including during a three-month extended stay with Mother. There was no evidence of a risk of future harm. The appellate court reversed with directions to dismiss the petition.

III. Disposition

In re I.R. **(2021) 61 Cal.App.5th 510**
District: 2 DCA , Division: 1 , Case #: B307093 , Opinion Date: 2/24/2021
Case Holding: **An isolated incident of domestic violence constituted insufficient evidence to justify removal under Welfare and Institutions Code section 361, subdivision (c)(1) where father no longer lived with or communicated with mother and did not display violent behavior outside of the relationship with mother.** Dependency proceedings were initiated following an incident of domestic violence where father slapped mother. Following the incident, father moved out of the home. Father was not immediately cooperative but did sign up for a domestic violence course following the detention of I.R. Father had no criminal history and did not display violent behavior outside of the relationship with mother. I.R. was placed with mother and removed from father. Father and minor appealed, and the appellate court reversed the dispositional order. The sole source of potential danger to I.R. while in father's care, that is supported in the record, derives from his history of domestic violence with mother. Nothing in the record suggested father had ever been violent or aggressive outside the context of his relationship with mother. The record did not reflect any contact between father and mother since I.R.'s detention. Neither mother nor father expressed an intention to reconcile their relationship and there was no demonstrated unwillingness to stay away from each other. There was no basis to conclude there would be occasion for further domestic violence between the parents and thus there was not substantial evidence upon which the court could conclude that father posed a danger to minor.

In re Ma.V. **(2021) 64 Cal.App.5th 11**
District: 4 DCA , Division: 3 , Case #: G059433 , Opinion Date: 5/6/2021
Case Holding: **There was insufficient evidence to support removal of the minors from mother where SSA did not meet its burden of following up with mother's care providers.** Mother signed a release of information, allowing the social worker to speak with her care providers at the Veterans Association (VA). The social worker called the VA three times, but never sent a letter or e-mail and never tried to reach a supervisor or case manager. The juvenile court found a substantial risk of harm to return the minors to mother and concluded that mother had "thwarted" the efforts of SSA to confirm she was participating in services through the VA. The juvenile court's justification that a removal order for the minors was necessary because mother was uncooperative with SSA did not amount to clear and convincing evidence that removal was necessary. It was undisputed that mother had executed a release prior to the disposition hearing so that SSA could contact mother's VA providers. SSA's failure to do so should not be held against mother. Further, the ability of a parent to get along with a social

worker is not evidence which can support a removal order. While a social worker or juvenile court may feel more comfortable and confident about a parent who is friendly and gets along with them, that is not what the law requires.

***In re L.O.* (2021) 67 Cal.App.5th 227**
District: 4 DCA , Division: 2 , Case #: E075921 , Opinion Date: 7/29/2021
Case Holding: **Substantial evidence supported the juvenile court's removal order under section 361, subdivision (c) where the child displayed troubling behaviors and it was unclear which parent caused the issues.** In his placement, L.O. displayed troubling behavior such as cursing, sexually inappropriate behaviors, and attempting to strangle his six-year-old cousin. L.O. was removed from the custody of both parents and Father appealed the dispositional order. The appellate court affirmed the orders. Substantial evidence supported removal of L.O. from Father's custody because the parents could not agree who had caused the physical harm to L.O. or how L.O. had learned his sexualized behavior. Without acknowledgment by the perpetrator, L.O. remained unsafe in the custody of either parent. Until it was determined how or where L.O. had learned this inappropriate behavior, he was at a substantial risk of serious physical harm if returned to Father's care.

***In re Solomon B.* (2021) 71 Cal.App.5th 69**
District: 2 DCA , Division: 1 , Case #: B311250 , Opinion Date: 10/1/2021
Case Holding: **The fact that mother left the minors in father's care when she fled his domestic violence was not substantial evidence to support a detriment finding where mother did not believe father would harm the minors**. Mother and Father had a history of domestic violence. Mother left the three and four-year-old minors in the care of Father, and moved out of state in order to separate from him. Mother had not observed Father directing any abusive behaviors toward the minors. Mother spoke with the minors when they stayed at the maternal grandmother's home on the weekends. About a year after Mother left, the minors were detained due to Father's neglect and drug abuse, and a petition was filed. Mother returned to California and requested that the minors be released to her care. At the jurisdiction and disposition hearing, the juvenile court struck all allegations made against Mother but found that placement with her would be detrimental due to her "abandonment" of the minors. The appellate court reversed the orders. A juvenile court must place a minor with their previously noncustodial parent unless it finds that such placement would be detrimental to the safety, protection, or physical or emotional well-being of the child. A failure to keep in close contact is not, by itself, sufficient to support a finding of detriment. Because Mother did not believe Father's abuse of her indicated that he would similarly abuse the minors, she did not have any reason to think that Father posed a risk to the minors. Further, Mother returned to California and sought placement as soon as she learned that the minors had been removed from Father, and there was no current risk that Mother would fail to protect them. Since there was no evidence that placement with Mother

would be detrimental to the minors, reversal was required for the trial court to change the placement order.

IV. Parentage

M.M. v. D.V. **(2021) 66 Cal.App.5th 733**
District: 4 DCA , Division: 1 , Case # D077468 , Opinion Date: 7/19/2021
Case Holding: **Family Code section 7612, subdivision (c), applies where there is an existing parent-child relationship between the child and the person seeking to be considered a third parent.** M.M. and Mother were in a relationship which overlapped with Mother's relationship with T.M. When Minor was born, T.M. believed he was the father. When Minor was two years old, M.M. discovered he was the biological father of Minor. Mother did not allow M.M. to develop a relationship with Minor. M.M filed a petition to establish a parental relationship with Minor, requesting to be recognized as a third parent. The court concluded that because M.M. did not have an existing relationship with Minor there was no detriment to Minor by having only two parents. The appellate court affirmed the orders. Under Family Code section 7612, subdivision (c), a court may find that more than two persons with a claim to parentage are parents if the court finds that recognizing only two parents would be detrimental to the child. The Legislature intended section 7612, subdivision (c) to be narrow in scope and to apply only in rare cases in which a child has more than two parents with true parental relationships. Section 7612, subdivision (c) applies where there is an existing parent-child relationship between the child and the putative third parent. The ultimate focus in this proceeding must be on whether it would be detrimental to the child to have only two parents, not on whether it is in the putative parent's interest to obtain third parent status. Here, Minor did not have an established relationship with M.M. and thus it would not be detrimental to Minor to have only two parents.

V. UCCJEA

In re Ari S. **(2021) 69 Cal.App.5th 1125**
District: 2 DCA , Division: 8 , Case #: B311334 , Opinion Date: 10/6/2021
Case Holding: **A transient family had significant connections to California sufficient for jurisdiction where the family intended to continue their stay in California, Mother owned property there, and an older sibling lived in the state.** Ari, the minor, lived and traveled in a van with Mother. In 2019, Ari was removed from Mother in Montana but was ultimately returned to her care. In May 2020, Washington child protective services was investigating the family. In June 2020, California child welfare agencies began receiving reports about the family and Mother filed a lawsuit in federal district court in California, listing a California address. Mother owned property in California. In July 2020, Mother was placed on a psychiatric hold and Ari was removed from her care. Following detention, the court found that California was Ari's home state after contacting Washington State, which did not assert jurisdiction. Mother appealed the subsequent jurisdiction and disposition orders as well as the six-month review orders on the

basis of lack of jurisdiction. The appellate court rejected the argument and affirmed the orders. The Uniform Child Custody Jurisdiction and Enforcement Act (Act) has four ways for a state to gain jurisdiction: (1) home state jurisdiction, (2) significant connections jurisdiction, (3) all courts having jurisdiction under the first two grounds have declined to exercise jurisdiction, and (4) no court of any state would have jurisdiction under the first three grounds. Significant connections jurisdiction applies where no state has home state jurisdiction, or if the home state declines to exercise jurisdiction, and the child and at least one parent has a significant connection with the state, and substantial evidence is available in the target state "concerning the child's care, protection, training, and personal relationships." (Fam. Code, § 3421, subd. (a)(1).) The court here had significant connections jurisdiction because in the year preceding the proceedings, Mother and Ari had lived in various parts of California and intended to keep traveling there, Mother owned land in California, there were several referrals about the family within California, and Ari had an older sibling who lived in California. This constitutes substantial evidence of significant connections to the state.

VI. Status Review Hearings

Michael G. v. Superior Court **(2021) 69 Cal.App.5th 1133**
District: 4 DCA , Division: 3 , Case #: G060407 , Opinion Date: 10/6/2021
Case Holding: **The juvenile court is obligated to terminate reunification services and set a Welfare and Institutions Code section 366.26 hearing at the 18-month review hearing unless a parent falls within the narrow exceptions of section 366.22, subdivision (b).** A.G., the minor, left home due to Father's mental health issues. The court assumed jurisdiction over A.G. and ordered the parents to undergo counseling and other services. At the 18-month review hearing, the trial court found that the Agency had not provided reasonable services to the parents in the most recent review period, but also found by a preponderance of the evidence that returning A.G. to her parents would create a substantial risk of detriment. It terminated reunification services and ordered a section 366.26 hearing. Father and Mother both filed writ petitions. The appellate court found no error. Generally, if a child is not returned to a parent's custody at the 18-month review hearing, the court must terminate reunification services and set a section 366.26 hearing. Section 366.22, subdivision (b) provides a narrow exception to this rule when: (1) a parent is making significant and consistent progress in a court-ordered residential substance abuse treatment program, (2) the parent was a minor at the time of the initial hearing, or (3) the parent was recently discharged from incarceration or other institutionalization. Except in these limited circumstances, a section 366.26 hearing must be set and the setting is not conditioned on a finding that reasonable services were provided. Because neither of the parents fell into one of the section 366.22, subdivision (b) exceptions, the court was obligated under section 366.22, subdivision (a)(3) to terminate services and set the section 366.26 hearing. There was no error. [**Editor's Note:** The California Supreme Court granted review in this case on 1/19/2022 (S271809) to address the following issue: Are juvenile courts required to extend

reunification efforts beyond the 18-month review when families have been denied adequate reunification services in the preceding review period?]

VII. Visitation

In re F.P. **(2021) 61 Cal.App.5th 966**
District: 2 DCA , Division: 2 , Case #: B307313 , Opinion Date: 2/24/2021
Case Holding: **Substantial evidence supported the juvenile court's finding that visitation between mother and the minor would be detrimental where mother's abuse of the minor caused him distress, and he refused to communicate with her.** The minor was detained after telling police that mother physically and emotionally abused him and that he was afraid of her. Mother appeared paranoid, believed people were following her, and stated that she observed U.F.O.s. Mother often talked about killing herself or purposely crashing her car. The minor's adult siblings told social workers that mother had physically and mentally abused them when they were in her care. Following detention, the minor was hospitalized for suicidal ideation. He refused all contact with mother, and became upset when mother called his caregiver demanding to speak with him. The juvenile court found that visitation with mother would be detrimental to the minor and ordered no visitation. Mother appealed, and the appellate court affirmed. The juvenile court has the discretion to deny visitation when it would be inconsistent with the well-being of, or detrimental to, the child. (*In re Matthew C.* (2017) 9 Cal.App.5th 1090, 1101-1102.) Mother's physical and emotional abuse of the minor, and his subsequent self-harming behaviors and refusal to communicate with mother constituted substantial evidence to support the juvenile court's finding that visitation would be detrimental.

The juvenile court did not abuse its discretion when it ordered that conjoint counseling between mother and the minor commence when deemed appropriate by the minor's therapist. A juvenile dependency court has the power to issue "all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of [a dependent] child." (Welf. & Inst. Code, § 362(a).) The juvenile court has broad discretion to determine what would best serve and protect the child's interests. Having the minor's therapist decide when conjoint counseling would be appropriate was not an unlawful delegation of judicial power because, unlike visitation, there is no statutory right to counseling. The juvenile court did not abuse its discretion by ordering conjoint counseling with mother and the minor when deemed appropriate by minor's therapist. The appellate court also held that this issue was forfeited for failure to raise any objection in the juvenile court.

VIII. Petition for Modification (388)

***In re N.F.* (2021) 68 Cal.App.5th 112**
District: 4 DCA , Division: 2 , Case #: E076330 , Opinion Date: 8/20/2021
Case Holding: **Mother's completion of a 90-day drug treatment program did not demonstrate a material change of circumstances necessary to grant a Welfare and Institutions Code section 388 petition.** The minor N.F. was removed after she and Mother tested positive for methamphetamine and amphetamine at her birth. Following three years of services, N.F. was returned to her parents and jurisdiction was terminated. Five months later, N.F. was again detained when both parents relapsed. Following a hearing on a new petition, the parents were denied reunification services pursuant to section 361.5, subdivision (b)(13). Six months later, both Mother and Father filed petitions under section 388, asking for reunification services. The court denied both 388 petitions and terminated parental rights. Mother and Father appealed, and the appellate court affirmed the orders. A section 388 petition requesting the court modify an earlier order based on changed circumstances requires that the change in circumstances be material. Here, Mother had a history of completing treatment programs and then relapsing. Despite Mother's claims that she had completed a 90-day treatment program and had been sober since shortly after N.F.'s most recent removal, Mother had been recently charged with possession of a controlled substance. Mother's assertions that she had obtained employment and housing did not show changed circumstances because the denial of reunification services was based on her unresolved history of substance abuse. Further, granting reunification services would not be in N.F.'s best interests because of Mother's instability and recurrent substance abuse.

IX. 366.26 Hearing

***In re Caden C.* (2021) 11 Cal.5th 614**
CalSup , Case #: S255839 , Opinion Date: 5/27/2021
Case Holding: **It was error to treat a parent's lack of progress in addressing substance abuse and mental health issues as a categorical bar to establishing the parental benefit exception.** Caden C. was removed from mother at four years old, due to mother's drug use and mental health concerns. At the Welfare and Institutions Code section 366.26 hearing, mother argued that the parental benefit exception applied and the trial court agreed, ordering that Caden remain in foster care. County counsel appealed and the Court of Appeal reversed, holding that because the parent continued to struggle with substance abuse and mental health issues and because of the risks of foster care and benefits of the potential adoptive home, no reasonable court could find the child's relationship with his parent outweighed the benefits of adoption. The California Supreme Court reversed the opinion of the appellate court. At the section 366.26 hearing, if the parent shows that termination would be detrimental to the child for at least one specifically enumerated reason, the court should decline to terminate parental rights and select another permanent plan. The parental benefit exception requires that a parent must establish, by a

preponderance of the evidence, that (1) the parent has regularly visited with the child (2) that the child would benefit from continuing the relationship and (3) that terminating the relationship would be detrimental to the child. This exception applies in situations where a child cannot be in a parent's custody but where severing the child's relationship with the parent, even when balanced against the benefits of a new adoptive home, would be harmful for the child. Thus, the court should not look to whether the parent can provide a home for the child; the question is just whether losing the relationship with the parent would harm the child to an extent not outweighed, on balance, by the security of a new, adoptive home. While parents need not show that they are actively involved in maintaining their sobriety or complying substantially with their case plan, their struggles are relevant because they may create a negative effect on the interaction with the minor such that the beneficial nature of the relationship may be affected. Because the Court of Appeal relied on mother's failure to address her drug and mental health issues as the basis for its decision and did not connect mother's substance abuse or mental health to its assessment of whether the relationship with the minor was detrimental, the decision was reversed.

A hybrid standard of review applies to the parental-benefit exception to the termination of parental rights at the section 366.26 hearing. The substantial evidence standard of review applies to the first two elements of the beneficial relationship exception, as these are factual determinations. The third element – whether termination of parental rights would be detrimental to the child – is reviewed for abuse of discretion as this element focuses on the application of a legal standard. At its core, the hybrid standard embodies the principle that the statutory scheme does not authorize a reviewing court to substitute its own judgment as to what is in the child's best interests for the trial court's determinations.

In re B.D. **(2021) 66 Cal.App.5th 1218**
District: 4 DCA , Division: 1 , Case # D078014 , Opinion Date: 7/27/2021
Case Holding: **The juvenile court considered improper factors when addressing whether the parents had met their burden regarding the parental benefit exception to adoption.** The minors were removed due to their parents' domestic violence and substance abuse issues. Reunification services to the parents were terminated due to their failure to make significant progress. At a contested 366.26 hearing, the juvenile court found that the parents had consistently visited the minors but they did not fulfill a parental role, and terminated parental rights. The appellate court reversed the orders. For the beneficial parent-child relationship exception to apply, a parent must show (1) regular visitation; (2) that the child has a substantial, positive, emotional attachment to the parent, and (3) terminating that attachment would be detrimental to the child. The readiness of parents to have a child returned to their custody is not relevant to the application of the parental benefit exception. The record suggests that in finding the parents did not meet their burden of proof, the juvenile court relied heavily, if not exclusively, on the fact that the parents had not completed their reunification plans and were unable to care for the children based on their long term and continued substance abuse. The

juvenile court considered improper factors at the second step of the analysis and thus, the case was remanded for the juvenile court to hold a new section 366.26 hearing in conformity with the principles articulated in *In re Caden C.* (2021) 11 Cal.5th 614. On remand the juvenile court shall consider whether the parents' continued struggles with the issues that resulted in the dependency proceeding impacted the amount of visitation, the nature of that contact, or otherwise negatively affected the parent-child relationship.

***In re D.M.* (2021) 71 Cal.App.5th 261**

District: 2 DCA , Division: 8 , Case #: B312479 , Opinion Date: 11/1/2021

Case Holding: **Case must be remanded to the juvenile court to conduct a new Welfare and Institutions Code section 366.26 hearing in accordance with *In re Caden C.* (2021) 11 Cal.5th 614.** The minors were removed from Father following a domestic violence incident. They were subsequently removed from Mother, after the youngest child was found wandering in a parking lot unsupervised. Reunification of the family was unsuccessful, and parental rights were eventually terminated at a section 366.26 hearing. At the 366.26 hearing, the court found that Father had not "risen to the level of a parent" because he did not know his children's medical needs or attend their medical appointments. On appeal, the appellate court reversed the orders. *Caden C.* laid out the elements of the beneficial relationship exception, and also discussed improper considerations in deciding whether termination of parental rights would be detrimental to the child. "The beneficial relationship exception is not focused on a parent's ability to care for a child or some narrow view of what a parent-child relationship should look like." Because the court focused on whether Father occupied a "parental role" in the children's lives, equating that role with attendance at medical appointments and understanding their medical needs, and said nothing about the attachment between Father and his children, the matter had to be remanded. Further, the Agency's reports gave the court little evidence about the quality of visitation or how the minors felt about Father, and thus did not adequately address the factors that the court must consider in accordance with *Caden C.*

***In re L.A.-O.* (2021) 73 Cal.App.5th 197**

District: 4 DCA , Division: 2 , Case #: E077196 , Opinion Date: 12/27/2021

Case Holding: **Where juvenile court found that the parental benefit exception did not apply because the parents had not acted in a "parental role" for a long time, remand was required for reconsideration under *In re Caden C.*** The Agency became involved with a family based on reports that their home was filthy, and that the parents and grandparents were methamphetamine addicts. The Agency filed dependency petitions but could not find the family to serve the warrants. The minors were detained when police officers on an unrelated call discovered that the trailer was still filthy, and the children were dirty and had bruises and head lice. A section 300, subdivision (b) petition was found true, and the minors were removed. Reunification services were ordered. Parents continued to use methamphetamine throughout the dependency, and services were terminated. By the time of the 366.26 hearing, the minors had

been with the B. family for 10 months, and the B.'s wanted to adopt them. The juvenile court found that the parents' visits had been regular but of poor quality, and always supervised. The court noted that the parents had not acted in "a parental role" for a long time, contrasted with the foster parents, who had. It found the children adoptable and that there was no applicable exception to termination of parental rights. On appeal, the parents argued that the juvenile court ignored the evidence from reports earlier than the 366.26 report. The appellate court rejected that argument, finding that earlier reports were not introduced at the 366.26 hearing and did not need to be considered. Parents also argued that the juvenile court erred by reasoning that the parents did not occupy a "parental role" whereas the foster parents did. Parents contended that this is no longer required under the Supreme Court's recent decision in *In re Caden C.* The appellate court noted that the *Caden C.* opinion did not use the words "parental role" and that "parental role" is not well-defined. Since the juvenile court used this terminology here, the court could not discern whether its ruling conformed with *Caden C.,* and therefore remanded for reconsideration of the parental-benefit exception.

X. Placement Issues

***In re Brianna S.* (2021) 60 Cal.App.5th 303**
District: 2 DCA , Division: 2 , Case #: B301802 , Opinion Date: 1/28/2021
Case Holding: **The requirements of Welfare and Institutions Code section 387 apply where the Agency seeks to remove a child from placement with a relative.** Brianna and two of her younger siblings were placed with their maternal grandmother, who was declared the minors' de facto parent. While in grandmother's care, the mental and emotional health of all three minors deteriorated. Grandmother admitted she was overwhelmed by the children's behaviors and that she threatened the children with being placed elsewhere or institutionalized. The Department filed a Welfare and Institutions Code section 387 petition, alleging that grandmother's home did not meet RFA requirements and that grandmother had failed to obtain mental health treatment and emotionally abused one of the minors by threatening to have her institutionalized. On the date of the hearing, the Department withdrew its section 387 petition, arguing that it was not needed to remove a child from a de facto parent. The juvenile court construed the section 387 petition as a section 385 request to change a prior court order, and found that it was in the best interest of the minors to be removed from grandmother's care. Grandmother appealed, and the appellate court affirmed the order. Where the Department seeks to change or modify a prior order placing a dependent child with a relative, the juvenile court must proceed under section 387. Section 387 authorizes a juvenile court to change or modify a previous placement order by removing a child from the physical custody of a parent, guardian, relative, or friend and ordering a different placement. If the section 387 petition seeks to remove a child from her parent or guardian, the court must make removal findings under section 361, subdivision (c), but if the petition seeks to remove the child from other caregivers, such as a relative, the court need only find that the relative is no longer able to provide the child a secure and stable environment. The court erred when it applied section 385, however, this error was not prejudicial. The Department

followed all the procedural requirements of section 387, including filing a petition, providing grandmother adequate notice, and holding a timely hearing. These procedures satisfied due process, and the juvenile court's modification order was supported by substantial evidence.

***In re N.B.* (2021) 67 Cal.App.5th 1139**
District: 1 DCA , Division: 1 , Case #: A161425 , Opinion Date: 7/27/2021
Case Holding: **Terminating a guardianship by Welfare and Institutions Code section 388 petition was not error.** The minor N.B. was in a guardianship with her grandmother following her parents' unsuccessful attempts at reunification. Several years later, N.B. was removed from the grandmother due to N.B.'s emotional issues. The juvenile court found that the grandmother was not capable of meeting N.B.'s emotional needs, and terminated the guardianship. The appellate court affirmed the orders. Where a guardian is appointed at the section 366.26 hearing, the juvenile court retains jurisdiction over the minor. California Rules of Court, rule 5.740(d) provides that a petition pursuant to section 388 must be filed in the juvenile court to terminate a guardianship. Alternatively, a section 387 petition may be filed to remove a minor from the current caregiver and place the child in a more restrictive placement. Grandmother argued that the court should have followed the section 387 petition procedure, which requires an adjudicatory hearing, followed by a dispositional hearing, rather than the section 388 procedure, and that she was prejudiced by the failure to do so. The appellate court chose to break from the holding of *In re Jessica C.* (2007) 151 Cal.App.4th 474, which supported Grandmother's position, as an improper interpretation of the law, and concluded that the juvenile court did not err in proceeding under section 388.

XI. De Facto Parent

***In re B.S.* (2021) 65 Cal.App.5th 888**
District: 3 DCA , Division: , Case #: C091678 , Opinion Date: 6/18/2021
Case Holding: **De facto parent did not have standing to appeal a placement order with maternal relatives.** The minor B.S. was abandoned by mother at the hospital upon birth and the parents' whereabouts remained unknown throughout the case. B.S. was placed in a foster home while maternal relatives were assessed for placement. Initially, placement with the maternal relatives was denied because an individual with a nonwaivable conviction resided in the home. This individual moved out of the home three days after the denial and maternal relatives filed a grievance request seeking review of the denial. Meanwhile, the foster parents requested de facto parent status. The maternal grandparents were then approved for placement of B.S. The court held a combined relative placement hearing and section 366.26 hearing where it found that it was in the minor's best interests to be placed in the home of the maternal relatives. The court then terminated parental rights and freed B.S. for adoption. The de facto parents appealed, but the court affirmed the orders. The court chose to follow *In re P.L.* (2005) 134 Cal.App.4th 1357, 1361 which held that a de facto parent does not have standing to appeal a placement decision because they have no right to custody or continued placement. The court chose not to follow the

holding in *In re Vincent M.* (2008) 161 Cal.App.4th 943, which had found that de facto parents had standing to appeal the court's decision to grant a father reunification services, agreeing with the dissent in that opinion, which found that de facto parents had no legal right to adopt and therefore could not show how their legal interests were aggrieved.

XII. ICWA

***In re J.S.* (2021) 62 Cal.App.5th 678**
District: 2 DCA , Division: 7 , Case #: B301715 , Opinion Date: 3/2/2021
Case Holding: **Ancestry.com results that a relative has significant Native American ancestry, without additional information regarding a possible tribe or geographic area of origin, is not sufficient to trigger a duty to further inquire under the Indian Child Welfare Act (ICWA).** Paternal grandmother submitted her DNA to Ancestry.com, the results of which indicated that she was 54% Native American. Paternal grandmother was shocked by these results and was not aware that any of her relatives were eligible for enrollment in any tribe. The results did not provide an associated tribe of descent. Based on this information, the court found that ICWA did not apply. Mother appealed the jurisdictional and dispositional findings and contended that the department had not complied with ICWA. The appellate court rejected the argument and affirmed. Federal regulations implementing ICWA require that state courts ask each participant in a child custody proceeding whether they have a reason to know if a child is an Indian child. An Indian child is a member of, or is eligible for membership in, a federally recognized Indian tribe or is the biological child of a member of a federally recognized tribe. The term "Native American" has a different connotation for purposes of Ancestry.com, which includes ethnic origins from North and South America. Because the Ancestry.com results did not contain the identity of a possible tribe or any specific geographical region, the results have little usefulness in determining whether the minors were Indian children as defined under ICWA. Transmission of notice to the Bureau of Indian Affairs would have been an idle act as they could not have assisted the Department in identifying a tribal agent for any relevant federally-recognized tribe without the identity of the tribe or at least a specific geographic area of possible ancestry origin.

***In re A.T.* (2021) 63 Cal.App.5th 267**
District: 1 DCA , Division: 3 , Case #: A160454 , Opinion Date: 4/20/2021
Case Holding: **The Indian Child Welfare Act (ICWA) is not applicable when a minor is removed from one parent and placed with the other.** A.T. was detained from mother in California after concerns arose regarding mother's mental health. Mother had taken A.T. from Washington two months prior, in violation of Washington family court orders. The juvenile court asserted emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and placed A.T. temporarily with father in Washington. The Washington family court found mother in contempt, issued a restraining order against her, and ordered her to return A.T. to father's care in Washington. The Wiyot tribe intervened in the California dependency

case and confirmed that A.T. was eligible for enrollment in that tribe. Mother and the tribe asserted that A.T. was an Indian child and requested that the California court retain jurisdiction. The court found that Washington had exclusive jurisdiction over the case and that the ICWA was inapplicable because A.T. was not an Indian child. While A.T. was eligible for membership in the Wiyot tribe, Mother was not an enrolled member. Further, because A.T. had been placed with a nonoffending parent, the ICWA did not apply. The court dismissed the case and mother appealed. The appellate court affirmed the dismissal order. Child custody proceedings are not subject to the UCCJEA to the extent they are governed by the ICWA. Although the ICWA empowers an Indian child's tribe to intervene in any "Indian child custody proceeding," the ICWA is not implicated in every dependency case in which the child may have some degree of Native American heritage. An "Indian child custody proceeding" includes proceedings for temporary or long-foster care or guardianship placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement. This list does not include a proceeding in which a dependent child is removed from one parent and placed with the other. The conclusion that ICWA does not apply to placement with a parent comports with the legislative intent behind the ICWA, as well as the related California statutory scheme, which expressly focus on the removal of Indian children from their homes and parents. The juvenile court correctly terminated its emergency jurisdiction in favor of the Washington family court proceedings, in conformance with the UCCJEA.

***In re S.R.* (2021) 64 Cal.App.5th 303**

District: 4 DCA , Division: 2 , Case #: E076177 , Opinion Date: 4/28/2021

Case Holding: **Grandparents' disclosure that minor children had Indian heritage triggered a duty for the Agency to further inquire.** The minors were removed due to mother's drug and mental health issues, an unsanitary home, and domestic violence between the parents. At the detention hearing, both parents claimed they had no known Indian ancestry. Following an unsuccessful reunification period, the maternal grandparents sought placement. At a permanency hearing, maternal grandfather reported that the minors' great-grandmother was an enrolled member of the Yaqui tribe. No further inquiry was conducted. Parental rights were terminated at the Welfare and Institutions Code section 366.26 hearing and the Indian Child Welfare Act (ICWA) was found not to apply. The appellate court reversed and remanded to comply with the inquiry and notice provisions of ICWA. ICWA defines an "Indian child" as a minor who is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." In addition to the initial duty of inquiry if a minor is an "Indian child," the Legislature has imposed a duty of further inquiry if information becomes available suggesting a child may have an affiliation with a tribe, even if the information is not strong enough to trigger the notice requirement. The required inquiry must include interviewing the parents and extended family members, contacting the Bureau of Indian Affairs and State Department of Social Services, and contacting the tribe or tribes and any other person that may reasonably be expected to have information regarding the child's membership,

citizenship status, or eligibility. Here, the grandparents' information about the minors' maternal great-grandmother gave the Agency a reason to believe that either the parent of the child or the child is a member or may be eligible for membership in an Indian tribe and thus triggered a duty for the Agency to inquire further, including by contacting the Yaqui tribe of Arizona.

***In re A.C.* (2021) 65 Cal.App.5th 1060**

District: 4 DCA , Division: 2 , Case #: E075333 , Opinion Date: 6/25/2021

Case Holding: **The juvenile court erred by failing to ask father whether he had Indian ancestry, but the error was harmless.** The minor A.C. was removed from parents, who subsequently failed to reunify. Mother was an enrolled member of an Indian tribe. Father was never asked whether he had any Indian ancestry. When mother's tribe declared A.C. was not eligible for membership, the juvenile court found that the Indian Child Welfare Act (ICWA) did not apply. Parental rights were terminated at the 366.26 hearing. Father appealed, and the appellate court affirmed the order. By failing to ask father at his first appearance, or at any other time, whether he had Indian ancestry, the juvenile court failed in its affirmative and continuing duty to inquire whether a child who is the subject of a dependency petition is or may be an Indian child. However, a failure to comply with this duty of inquiry must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error. This means that a parent asserting a failure to inquire must show that he or she would have claimed some kind of Indian ancestry. While a requirement that an appellant submit evidence outside the record is a substantial departure from normal appellate procedure, in a case in which a parent is claiming the child has Indian ancestry, but the social services agency failed to carry out its duty of inquiry, the court will make an exception to that general rule. Here, father had not ever claimed at any stage that he has any Indian ancestry. Thus, reversal is not required. [**Editor's Note:** Justice Menentrez dissented, relying on the holdings of *In re K.R.* (2018) 20 Cal.App.5th 701, 708 (appellate review of rulings that are preserved for review irrespective of action on the part of the parent should not fail simply because the parent is unable to produce an adequate record) and *In re N.G.* (2018) 27 Cal.App.5th 474, 484 (the burden of making an adequate record of the court's and the agency's ICWA inquiry efforts falls squarely and affirmatively on the court and the agency).]

***In re Charles W*. (2021) 66 Cal.App.5th 483**

District: 4 DCA , Division: 1 , Case #: D078574 , Opinion Date: 6/17/2021 (ordered published 7/9/2021)

Case Holding: **The juvenile court made an adequate Indian Child Welfare Act (ICWA) inquiry where ICWA had been found not to apply to full siblings in a previous dependency case and parents denied Indian ancestry.** Minors Jr., and S.W. were detained in 2018 due to their parents' drug abuse. In January 2019, the court found that ICWA did not apply. Shortly after Mother reunified with the minors in July 2020, she gave birth to R.W., a full sibling to her older children. A few months later, all three minors were removed due to parents' drug abuse.

Mother told the assigned social worker she had Yaqui and Aztec heritage but she had already gone through the court process and the court had found that ICWA did not apply. At a further hearing, Mother informed the court that she did not have any Native American ancestry. The court found that ICWA did not apply. The court assumed jurisdiction over the children and removed them from their parents, and father appealed. The appellate court affirmed the orders. The Agency is required to make a further inquiry concerning Indian heritage only if an initial inquiry creates a reason to believe a child is an Indian child, There is reason to believe a child is an Indian child whenever the court or social worker has information suggesting that either the parent of the child or the child is a member or may be eligible for membership in an Indian tribe. Here, the juvenile court made an adequate inquiry under ICWA. If ICWA did not apply to the older two minors, then it would not apply to R.W. At a subsequent hearing, Mother also denied Indian heritage, as did Father, and thus, the court had no reason to believe the children were Indian children. The "Agency is not required to 'cast about' for information or pursue unproductive investigate leads." Even if the Agency's inquiry was inadequate, any error was harmless because Father does not assert on appeal that Mother or a relative has any new or pertinent information regarding Indian ancestry.

***In re Y.W. et al.* (2021) 70 Cal.App.5th 542**
District: 2 DCA , Division: 7 , Case #: B310566 , Opinion Date: 10/19/2021
Case Holding: **A parent need not assert Indian ancestry to show that the Agency's failure to make an appropriate inquiry under the Indian Child Welfare Act (ICWA) was prejudicial.**
The minors were removed due to the parents' substance abuse. At the detention hearing, Father said he believed his grandmother was 95% Cherokee. Mother, who was adopted, said she did not have Indian ancestry. The Agency mailed ICWA-030 forms to the various Cherokee tribes. The notice listed Mother's biological parents as unknown, and specified some of Father's paternal grandmother's information, but neglected to include her date and place of birth. The Agency located Mother's adoptive parents who stated that they knew the name of Mother's biological father and had contact information for a maternal aunt. The Agency did not follow up to obtain further information about Mother's biological parents. At the section 366.26 hearing, the court found that ICWA notice was proper, that ICWA did not apply, and terminated parental rights. The appellate court affirmed the orders, but remanded the case with directions to comply with ICWA. If the court or Agency has reason to believe that an Indian child is involved in a proceeding, but does not have sufficient information to determine that there is a reason to know that the child is an Indian child, the court and the Agency shall make further inquiry regarding the possible Indian status of the child. (§ 224.2, subd. (e).) As part of its inquiry, section 224.2, subdivision (b) requires the Agency to ask extended family members whether the child is or may be an Indian child. Here, the Agency failed to satisfy its duty to inquire because once the social worker learned of a potentially viable lead to locate Mother's biological parents, it did not make meaningful efforts to locate and interview them. Further, the Agency omitted key information about Father's relative on the ICWA-030 forms. The appellate court disagreed with *In re*

Rebecca R. (2006) 143 Cal.App.4th 1426 and *In re A.C.* (2021) 54 Cal.App.5th 1060, finding that "[i]t is unreasonable to require a parent to make an affirmative representation of Indian ancestry where the Department's failure to conduct an adequate inquiry deprived the parent of the very knowledge needed to make such a claim." A parent does not need to assert he or she has Indian ancestry to show the Agency's failure to make an appropriate inquiry under ICWA is prejudicial.

In re Josiah T. **(2021) 71 Cal.App.5th 388**
District: 2 DCA , Division: 8 , Case #: B311213 , Opinion Date: 11/8/2021
Case Holding: **Termination of parental rights was reversed where the Agency failed to fulfill its duties of initial and further inquiry under the Indian Child Welfare Act (ICWA), and relative later contradicted her initial statement regarding her Indian heritage.** Josiah, the minor, was removed due to domestic violence, Father's alcohol abuse, and Mother's prior abuse of an older sibling. Father never participated in the dependency proceedings, but the Agency was in contact with paternal relatives throughout the case. The Agency did not inquire about possible Indian heritage of paternal relatives for over one and a half years. Paternal grandmother then reported that she had Cherokee ancestry. The Agency did not follow up this report with any further investigation or inquiry, or disclose it to the court for almost a year. Paternal Grandmother later reported she did not have any Indian ancestry. The juvenile court found it had no reason to know Josiah was an Indian child. Mother failed to reunify and parental rights were terminated. Mother appealed the order, and the appellate court reversed. As part of its duty of initial inquiry, the Agency must ask extended family members if a child may be Indian. If this initial inquiry creates a reason to believe the child may be eligible for membership in an Indian tribe, the Agency must make further inquiry, including notifying the Bureau of Indian Affairs and any tribes reasonably expected to have information regarding the child's eligibility for membership. Here, the Agency did not meet its ICWA initial inquiry duties by failing to consult with paternal relatives for the initial 18 months of the case. Paternal grandmother's representation that she had Cherokee ancestry triggered the duty of further inquiry. Paternal grandmother's later report that she did not have Indian ancestry did not excuse the Agency's inactivity regarding her disclosure for seven months. "A mere change in reporting, without more, is not an automatic ICWA free pass; when there is a conflict in the evidence and no supporting information, [the Agency] may not rely on the denial alone without making some effort to clarify the relative's claim." (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160.)

XIII. Competent Counsel

In re A.R. **(2021) 11 Cal.5th 234**
CalSup , Case #: S260928 , Opinion Date: 4/5/2021
Case Holding: **When an attorney fails to file a timely appeal in accordance with a client's instruction in a parental rights termination case, relief may be sought based on the**

attorney's failure to provide competent representation. Mother asked her court-appointed counsel to appeal the court's order terminating her parental rights. The attorney did not file the notice of appeal until four days after the 60-day filing deadline had passed. Mother timely filed her opening brief and requested relief from default. The Court of Appeal denied the application and dismissed mother's appeal for lack of jurisdiction. Mother then filed a petition for writ of habeas corpus, alleging that her attorney's incompetence denied her the right to pursue an appeal. This habeas corpus petition was denied. The California Supreme Court reversed and remanded. There is a due process and statutory right to counsel for a parent facing the termination of parental rights. (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 32; Welf. & Inst. Code, § 366.26(f)(2).) When a court appointed attorney has failed to timely file a notice of appeal of an order terminating parental rights, parents whose rights have been terminated may seek relief based on the denial of the statutory right to the assistance of competent counsel. "To succeed in such a claim, parents must show that they would have filed a timely appeal absent attorney error and that they diligently sought relief from default within a reasonable time frame, considering the child's unusually strong interest in finality." (Internal quotations omitted.) It is not required that the parent demonstrate that the appeal would have been successful. Given the potentially slow habeas process and the need for swift resolution in dependency cases, a court has substantial discretion to determine the specific procedures to handle relief from default based on an attorney's late filing. The application for relief should be directed to the Court of Appeal rather than the superior court.

XIV. Appealable Orders

In re Rashad D. **(2021) 63 Cal.App.5th 156**
District: 2 DCA , Division: 7 , Case #: B307061 , Opinion Date: 4/19/2021
Case Holding: **Mother's appeal of juvenile court's erroneous jurisdictional findings became moot at the subsequent termination of jurisdiction because mother did not subsequently appeal the court's custody modification order or the order terminating jurisdiction.** Mother successfully reunified with Rashad in 2019 and was awarded sole physical and legal custody. In March 2020, the Department filed a new dependency petition alleging that mother had a history of illicit drug use which rendered her incapable of providing regular care and supervision of Rashad. Mother denied any current drug use and tested negative five times. The Department initially recommended the court sustain the petition, but two months later requested the court dismiss the petition for lack of evidence. The court declared Rashad a dependent and ordered family maintenance services for mother. Mother appealed, challenging the erroneous jurisdictional findings. Three months later, the court terminated jurisdiction and awarded sole physical custody to mother and joint legal custody to mother and father with monitored visits for father. Mother did not appeal the orders terminating jurisdiction and issuing custody orders. Mother argued that the appeal was not moot because the new custody orders were different than the original orders, and the issue was one of broad public interest. The appellate court rejected the argument and dismissed the appeal for mootness. Generally, an order terminating juvenile

court jurisdiction renders an appeal from an earlier order moot. However, this mootness is not automatic, but must be decided on a case-by-case basis. Here, for the court to provide effective relief, a parent must appeal not only from the jurisdiction finding and disposition order but also from the orders terminating jurisdiction and modifying the parent's prior custody status. Without the second appeal, the court cannot correct the continuing adverse consequences of the allegedly erroneous jurisdiction finding.

***In re S.G.* (2021) 71 Cal.App.5th 654**
District: 2 DCA , Division: 1 , Case #: B307988 , Opinion Date: 11/15/2021
Case Holding: **Mother's appeal was not moot despite the termination of jurisdiction because an appellate court's order creates the limited jurisdiction needed to afford Mother effective relief.** The parents had an ongoing custody dispute over the minors, which resulted in the juvenile court taking jurisdiction over the minors under Welfare and Institutions Code section 300, subdivision (c). Minors' counsel and the Agency had observed that the parents' accusations of misconduct regarding each other were strategic and without merit, and that it appeared Mother was coaching the minors. The trial court denied Mother's request for a permanent restraining order against Father. Mother appealed the denial of her request for a restraining order. While Mother's appeal was pending, the juvenile court terminated jurisdiction, which order Mother did not appeal. The appellate court affirmed the orders. Termination of juvenile court jurisdiction does not categorically prevent a reviewing court from providing effective relief because the remittitur creates the limited jurisdiction needed for a juvenile court to correct reversible errors. The blanket rule espoused in *In re Michelle M.* (1992) 8 Cal.App.4th 326 and its progeny, that unless the appellate court reverses the order terminating dependency the juvenile court has no jurisdiction to conduct further hearings in the now-closed case and remand would be meaningless, is incorrect. Mootness should be determined based on the specific facts of the case. Here, Mother's appeal is not moot because issuing her the desired restraining order would afford Mother effective relief. However, the evidence supports the juvenile court's denial of Mother's restraining order request and thus, there was no reversible error. [Editor's Note: Justice Chaney dissented, arguing that the appeal is moot and should be dismissed because the issuance of a remittitur "does not create a person described by section 300 where the juvenile court has said none exists and no party has challenged that finding." Further, the language of section 213.5 itself limits the jurisdiction of the court to make orders under its purview after the termination of the dependency case.]

XV. Nonminor Dependents

***In re N.A.* (2021) 64 Cal.App.5th 494**
District: 4 DCA , Division: 1 , Case #: D077956 , Opinion Date: 4/27/2021
Case Holding: **The juvenile court properly denied a nonminor's petition for reentry where she left her placement, and therefore become ineligible for foster care payments, prior to turning 18.** N.A. became a dependent of the court at age 11. When she was 15, a permanent plan

of legal guardianship was ordered. When N.A. was 17, her relationship with the guardian deteriorated. N.A. moved out and the guardian paid her rent at a different residence, but continued to report that N.A. lived with her. When N.A. moved in with her boyfriend, the guardian stopped assisting her financially. N.A. then petitioned to return to juvenile court jurisdiction which would provide her with services and financial aid under Welfare and Institutions Code section 388.1. The Agency determined N.A. and the guardian became ineligible for aid to families with dependent children-foster care (AFDC-FC) payments when N.A. moved out of the guardian's home before turning 18. The juvenile court denied N.A.'s petition for reentry under section 388.1. N.A. appealed, but the appellate court affirmed the order. N.A.'s position was that she was eligible for assistance because the guardian received AFDC-FC payments on N.A.'s behalf after she turned 18. The Agency's position, which the court found to be the correct one, was that a section 388.1 petitioner must have validly received AFDC-FC payments after turning 18. In this case, the payments made on N.A.'s behalf after she left the guardian's home were improper and invalid overpayments, subject to collection. While the result is regrettable because it appears the Agency may not have fully advised N.A. of her options, the court did not err in denying N.A.'s petition under 388.1.

The juvenile court did not err when it declined to determine N.A.'s eligibility for AFDC-FC payments. N.A. further contended that the juvenile court should have decided whether she was eligible for AFDC-FC without requiring her to exhaust administrative remedies. Determining eligibility for AFDC-FC is a function that rests with the Agency. Judicial review of eligibility determinations is ordinarily limited to the consideration of a petition for writ of administrative mandate of the eligibility decision. The futility exception to the administrative exhaustion requirement applies only when the petitioner is able to state with assurance that the Agency would rule adversely in the petitioner's case, which usually cannot be done when the issue has never been presented for hearing. Here, N.A. did not make an adequate showing of futility. Despite the Agency's position that N.A. was not eligible, the administrative process may cause the Agency to review its determination of eligibility. Further, N.A. did not make an adequate showing of irreparable injury because if the Agency's eligibility determination is found to be erroneous, the Agency can make corrective payments.

XVI. Miscellaneous

***J.H. v. G.H.* (2021) 63 Cal.App.5th 633**
District: 1 DCA , Division: 3 , Case #: A160303 , Opinion Date: 4/28/2021
Case Holding: **The court did not err when it issued a domestic violence restraining order protecting mother from harassment by father, but which did not include the minors.** G.H. and J.H. separated in August 2018, following an act of domestic violence perpetrated by J.H. against G.H. in the presence of their two minor children. A dependency case was initiated at the time, which resolved in January 2019, with a stipulation that the parents would share joint legal

custody, G.H. would have sole physical custody, and J.H. would have supervised visitation. In August 2019, G.H. filed a request for a domestic violence restraining order (DVRO), seeking a stay away order from herself and the minors, and requested that visitation with J.H be stopped. The court granted a two-year DVRO enjoining J.H. from attacking, harassing, or contacting G.H., but declined to include the minors as protected parties, and ordered supervised visitation. The appellate court affirmed the orders. Pursuant to Family Code section 6340, subdivision (a)(1), a court may issue orders enjoining a party from attacking, threatening, contacting, or disturbing the peace of the other party, and also of other named family or household members following notice and a hearing. When determining whether to make any of these orders, the court shall consider whether the failure to make any of these orders may jeopardize the safety of the petitioner and the children for whom the custody or visitation orders are sought. The court has the discretion to make these orders on a showing of good cause. The court must consider the totality of the circumstances and consider whether the failure to issue the order would jeopardize the safety of the child. In declining to include the children here as protected parties, the court provided two reasons: (1) it did not believe J.H. presently posed any threat or danger to the children; and (2) it wanted the children and J.H. to begin working on repairing their relationship, which was in the children's long-term best interests. Based on the totality of the circumstances, the court's decision to exclude the children from the DVRO was not outside the bounds of reason and thus, the trial court did not err.

***In re Scarlett V.* (2021) 72 Cal.App.5th 495**

District: 2 DCA , Division: 7 , Case #: B311089 , Opinion Date: 12/8/2021

Case Holding: **The juvenile court erred in failing to make Special Immigrant Juvenile (SIJ) findings.** The minor came to the United States from Honduras when she was two years old. She had limited family in Honduras, and there was no evidence to suggest that this family was able to care for her. When she was six years old, the minor came under juvenile court jurisdiction due to domestic violence and physical abuse perpetrated by her father. The court placed the minor with her mother with family maintenance services. The minor requested that the juvenile court make Special Immigrant Juvenile (SIJ) findings. The juvenile court declined the request, stating that it was discretionary, and terminated jurisdiction. Following appeal by the minor, the appellate court reversed the orders. Code of Civil Procedure section 155 gives juvenile courts jurisdiction to make the findings necessary to petition the United States Citizenship and Immigration Services for SIJ status. A child is eligible for SIJ status if: (1) the child is a dependent of a juvenile court, (2) the child cannot reunify with one or both parents due to abuse, neglect, abandonment, or similar, and (3) it is not in the child's best interest to return to his or her home country. (8 U.S.C. Section 1101(a)(27)(J)(i)-(ii).) While the federal government has exclusive jurisdiction with respect to immigration, state juvenile courts are charged with making a preliminary determination of the child's dependency and his or her best interests, which is a prerequisite to SIJ status. A court shall make SIJ findings if there is evidence to support those findings. This is mandatory, not discretionary. Here, the minor provided uncontradicted evidence

that she was a dependent child, could not be reunified with her father, and that it was not in her best interest to return to Honduras. Thus, the juvenile court erred in failing to make SIJ findings.