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HOT ISSUES ON REMOVAL, PLACEMENT, REASONABLE SERVICES, AND VISITATION

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FDAP

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INTRODUCTION

This article provides a review of the legal principles behind and areas of potential appellate change in the areas of removal, placement, and the related topics of reasonable services and visitation.

Constitutional Principles in Dependency

To get us in a weighty frame of mind for these issues, what follows is a summary of some overarching constitutional principles concerning these dependency-related issues.

Parents have a constitutional right to the care and custody of their children, and their children have a constitutional right to be in the care and custody of their parents under the First, Fourth, and Fourteenth Amendments to the United States Constitution. Under the First Amendment, a person has a right to association; freedom of intimate association is a fundamental element of personal liberty and receives protection against undue intrusion by the state. (*Roberts v. Jaycees* (1984) 468 U.S. 609, 617-618.)

The Fourth Amendment protects people from unreasonable searches and seizures. Taking a child out of the home constitutes a seizure of the person, and consequently the Fourth Amendment warrant requirement applies to removals by child welfare agencies. (*Wallis v. Spencer* (9th Cir. 2000) 202 F.3d 1126, 1138-1140; *Calabretta v. Floyd* (9th Cir. 1991) 189 F.3d 808, 817.)

Under the due process clause of the Fourteenth Amendment, parents have a fundamental liberty interest in the care, custody, and management of their children, which does not evaporate because they are not model parents or have lost temporary custody of the children. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753; *Wallis, supra,* 202 F.3d at p. 1141 [including medical decisions].)

> "The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal and the distinction between the parent-child and the child-parent relationships does not . . . justify constitutional protection for one but not the other. There is no reason to accord less constitutional value to the child-parent relationship than . . . to the parent-child relationship. Therefore, a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest." (*Hardwick v. City of Orange* (9th Cir. 2020) 980 F.3d 733, 741, internal quotation marks and citations omitted, ellipses in original.)

As has been aptly summarized, " '[a] parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood.' (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1828.) '[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. [Citations.]' (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 753.) Thus, the constitutional right of parents to make decisions regarding their children's upbringing precludes the state from intervening in the absence of clear and convincing evidence of a need to protect the child from severe neglect or physical abuse. (*Id*. at pp. 769-770.)" (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 696, limited on other grounds by the same panel in *In re H.E.* (2008) 169 Cal.App.5th 710, 721.)

Like parents, children have fundamental rights too – including the right to be protected from neglect and to "have a placement that is stable [and] permanent." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306; see also *In re Cynthia D.* (1993) 5 Cal.4th 242, 253.) "Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) At some point in the process, children likely achieve the "constitutional right to a settled life." (See *In re Arturo A.* (1992) 8 Cal.App.4th 229, 241 [noting but not deciding that children do attain that right at some stage].)

At its core, these federal constitutional principles require that whenever a state decides to remove a child from a parent, it must do so as a last resort to protect the child. " 'Because we abhor the involuntary separation of parent and child,' wrote Justice Baxter in *In re Kieshia E.* (1993) 6 Cal.4th 67, 76, 'the state may disturb an existing parent-child relationship only for strong reasons and subject to careful procedures.' Not surprisingly then, California law requires that there be no lesser alternative before a child may be removed from the home of his or her parent." (*In re Jasmine G*. (2000) 82 Cal.App.4th 282, 284.) " '[A] cardinal rule of our society that the custody, care, and nurture of a child resides first in the parents rather than in a public agency . . . "[T]he relationship of . . . natural parents . . . [and] . . . children is a vital human relationship which has far-reaching implications for the growth and development of the child. [Citation.] . . . [T]he involuntary termination of that relationship by state action must be viewed as a drastic remedy which should be resorted to only in the extreme cases of neglect or abandonment." [Citations.]' [Citations.]" (*In re Joanna Y*. (1992) 8 Cal.App.4th 433, 438, alterations in original.)

I. REMOVAL

A. Statutory Principles

After a juvenile court finds that a minor comes within the provisions of Welfare and Institutions Code section 300, the juvenile court moves to the question of disposition.[1] Disposition hearings are governed by sections 358 to 362.4. The disposition hearing is the most complex hearing in the dependency process due to the number of issues the juvenile court must address. These issues in order are:

1. Whether to declare the minor a dependent of the juvenile court (§ 360, subd. (d));
2. If minor is declared a dependent, the juvenile court also decides whether to keep the minor in the custodial parent's home (with or without supervision or the provision of social services) or to remove the minor from the custodial parent's home (see § 361);
3. If the minor is removed from the custodial parent's home of the custodial parent, the juvenile court must find an appropriate placement includes adherence to certain presumptions concerning the rights of the non-custodial parent and the presumption in favor of relative placement (§ 361.2; § 361, subds. (c) & (d));
4. Finally, the juvenile court must decide whether reunification services should be provided to the parent or parents, make visitation orders, and schedule future hearings (§ 361.5).

The first requirement is for evidence of substantial danger. At a disposition hearing, a "dependent child shall not be taken from the physical custody of his or her parents, guardian, or Indian custodian with whom the child did not reside at the time the petition was initiated, **unless the juvenile court finds clear and convincing evidence that there would be a substantial danger** to the physical health, safety, protection, or physical or emotional well-being of the child for the parent, guardian, or Indian custodian to live with the child or otherwise exercise the parent's, guardian's, or Indian custodian's right to physical custody, and there are no reasonable means by which the child's physical and emotional health can be protected without removing the child from the child's parent's, guardian's, or Indian custodian's physical custody." (361, subd. (d) & (c)(1).)

The department's elevated "clear and convincing" burden of proof for removal has been said to reflect "an effort to shift the emphasis of the child dependency laws to maintaining children in their natural parents' homes [when it is] safe to do so." (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1216; § 361.) In other words, unless the

[1] All future unspecified statutory references are to the Welfare and Institutions Code.

department meets its burden, the dependent child must remain in the custodial parent's home. (See *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.)

The second required finding that a juvenile court must make before it can order removal from a custodial parent is "whether reasonable efforts were made to prevent or to eliminate the need for removal . . . ." (§ 361, subd. (e).) Stated another way, before ordering removal, the juvenile court must ensure there are no reasonable means by which the child can be protected while residing with the custodial parent and thus must consider less drastic measures. (§ 361, subd. (c)(1); *In re James T.* (1987) 190 Cal.App.3d 58, 65; *In re Hailey T.* (2012) 212 Cal.App.4th 139, 148.) Examples of a less draconian outcome can include removal of the offending parent from the home (see *In re Silvia R.* (2008) 159 Cal.App.4th 337, 345), allowing the child to reside in an appropriate residential treatment facility with the offending parent (§ 361, subd. (a)(2)(C)), or permitting a relative to reside in the minor's home to allow continuity and stability for the child in their own home while the offending parent moves elsewhere.

Reasonable efforts must be made ***before*** the disposition hearing to avoid removal or the department must justify why efforts were not made. (*Ashly F.*, *supra*, 225 Cal.App.4th at pp. 809-810; *In re Basilio T.* (1992) 4 Cal.App.4th 155, 171-172.)

Finally, whenever a juvenile court orders removal, it must state the facts for why removal was necessary. (*In re D.P.* (2020) 44 Cal.App.5th 1058, 1067; *Ashly F.*, *supra*, 225 Cal.App.4th at p. 810.)

B. Constitutional Principles at Disposition

The Fourth Amendment protects people from unreasonable searches and seizures. Taking a child out of the home constitutes a seizure of the person, and consequently the Fourth Amendment warrant requirement applies to removals by child welfare agencies. (*Wallis v. Spencer*, *supra*, 202 F.3d at pp. 1138-1140; *Calabretta v. Floyd*, *supra*, 189 F.3d at p. 817.) There is generally a rebuttable presumption that a seizure without a warrant is unreasonable. "In cases of alleged child abuse, governmental failure to abide by constitutional constraints may have deleterious long-term consequences for the child and, indeed, for the entire family. Ill-considered and improper governmental action may create significant injury where no problem of any kind previously existed." (*Wallis v. Spencer*, *supra*, 202 F.3d at p. 1130.) "Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." (*Id.* at p. 1138.)

If the juvenile court orders removal under section § 361, subd. (d) & (c)(1), due process requires the department give notice of specific facts alleging reasons for removal. (*In re Rodger H.* (1991) 228 Cal.App.3d 1174, 1181; *In re Jeremy C.* (1980) 109 Cal.App.3d 384, 397.)

"A dispositional order removing a child from a parent's custody is 'a critical firebreak in California's juvenile dependency system' [Citation], after which a series of findings by a preponderance of the evidence may result in termination of parental rights. Due process requires the findings underlying the initial removal order to be based on clear and convincing evidence." (*In re Henry V.* (2004) 119 Cal.App.4th 522, 530.) "We understand and share in the overriding concern with the welfare of children who are dependents of the juvenile court. However, our dependency system is premised on the notion that 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 interests. 'Our society does recognize an 'essential' and "basic" presumptive right to retain the care, custody, management, and companionship of one's own child, free of intervention by the government. [Citations.] Maintenance of the familial bond between children and parents—even imperfect or separated parents—comports with our highest values and usually best serves the interests of parents, children, family, and community. Because we so abhor the involuntary separation of parent and child, the state may disturb an existing parent-child relationship only for strong reasons and subject to careful procedures." (*Id.* at pp. 530-531.)

C. Appellate Notes

≈ **Standing:** One parent has standing to challenge removal from the other parent. (*In re E.E.* (2020) 49 Cal.App.5th 195, 215, fn. 4; *In re R.V.* (2012) 208 Cal.App4th 837, 848-849.)

≈ **Forfeiture:** Usually, removal issues are cognizable on appeal. However, submitting on the disposition *recommendations* forfeits the issue. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589-590.)

≈ **Standard of review:** Removal is reviewed for substantial evidence. There were a number of cases that said if there was substantial evidence for jurisdiction, then there was substantial evidence for removal. This was based on the premise that the clear and convincing evidence standard for removal had no relevance on appeal. (See, e.g., *In re E.B.* (2010) 184 Cal.App.4th 568, 578.) The premise has been disapproved of in *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005.)

≈ **Prejudice:** Generally, errors by the juvenile court do not require reversal of the juvenile court orders unless there was a miscarriage of justice. (*In re*

Jesusa V. (2004) 32 Cal.4th 588, 624; *In re Celine R.* (2003) 31 Cal.4th 45, 59.) The advantage of also asserting a federal constitutional violation is that it can be argued a violation of a parent's substantive or procedural due process rights under the Fourteenth Amendment are presumed prejudicial unless the state can show beyond a reasonable doubt that error was harmless. (See, e.g., *In re Vanessa M.* (2006) 138 Cal.App.4th 1121, 1132.) Some cases, however, state constitutional error requires reversal only if procedures were fundamentally unfair. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1153.)

D. Potential Areas for Appellate Challenge

1. **Sufficiency of the evidence to support removal.** The burden is on the department, and it is significant. (§ 361; *In re Jason L.* (1990 222 Cal.App.3d 1206, 1216 [the department's elevated "clear and convincing" burden of proof for removal has been said to reflect "an effort to shift the emphasis of the child dependency laws to maintaining children in their natural parents' homes [when it is] safe to do so"].) Unless the department has met its burden, the dependent child must remain in the custodial parent's home. (See *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.)
2. **Was there substantial evidence that there was no reasonable alternative to removal?** (See e.g., *In re Hailey T.* (2012) 212 Cal.App.4th 139, 158.) This assumes the parent is a presumed parent. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 454; *In re A.J.* (2013) 214 Cal.App.4th 525, 536.)

II. PLACEMENT

Under section 361.2, subdivision (b), placement means the place where the child is during the dependency (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1131 & fn. 2), even if the minor is ordered to live with the noncustodial parent (*id.*, at pp. 1133, fn. 4, 1134). The relevant authority for the placement turns on **when** the juvenile court made the placement decision.

A. Placement Before the Disposition Hearing

1. Emergency placement

Section 309 applies to temporary placements before the detention hearing. (§ 309, subd. (c); *In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1414; *In re Miguel E.* (2004) 120 Cal.App.4th 521, 541-542.) Emergency placement is not the same as a court-ordered placement at the disposition hearing. (*In re M.L.* (2012) 205 Cal.App.4th 210, 224.) The standard for emergency placement is different than for placement at the disposition hearing. (§ 309, subd. (a)(2) ["[c]ontinued detention of the child is a matter of immediate and urgent necessity for the protection of the child and there are no

reasonable means by which the child can be protected in their home or the home of a relative"]; § 361, subd. (c) [clear and convincing evidence required and no reasonable means to protect the minor in the parent's home].) For emergency placement, unlike a disposition order, there is not a requirement for a full background check on the identified placement. (*M.L.*, *supra*, 205 Cal.App.4th at p. 225; *Sabrina H., supra,* 149 Cal.App.4th at pp. 1414-1415.) The social worker is required to exercise due diligence to identify, locate, and notify the child's relatives. (Cal. Rules of Court, rule 5.695(e).) This inquiry should be extensive. (See Cal. Rules of Court, rule 5.695(f).)

The Legislature has repeatedly said the relative placement is preferred, starting at the time of an emergency placement. (§§ 281.5, 306.5, 309, subds. (d)(1) & (e)(1), 319, subd. (h)(2), 361.3, 361.45, subd. (a), 366.26, subd. (k), 16000, subd. (a).)[2]

For purposes of emergency placement, the department is required to identify, locate, and assess relatives for possible placement within 30 days of removal. (§ 309, subd. (e)(1).) While input from the parents is always important, the responsibility rests with the department. "The social worker shall use due diligence in investigating the names and locations of the relatives . . . including, but not limited to, asking the child in an age-appropriate manner about relatives important to the child, consistent with the child's best interest, and obtaining information regarding the location of the child's adult relatives." (§ 309, subd. (e)(3).)

2. Detention hearing

Section 319 concerns temporary placement decisions made by the court at the detention hearing and, as is generally true, placement with relatives is preferred. (§ 319, subd. (h)(2).) This statutory preference also applies to detention hearings held upon the filing of a supplemental or subsequent petition. (See, e.g., *Miguel E., supra,* 120 Cal.App.4th at p. 541.)

B. Disposition Hearing – Hierarchy of Placement

1. Noncustodial parent

a. Statutory law

The Legislature has determined that there is a priority for the placement of children. The first option is the noncustodial parent. "If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that

[2] In this context, "relative" is defined as "an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons, even if the marriage was terminated by death or dissolution." (§ 319.)

parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."[3] (§ 361.2, subds. (a) & (e)(1); see, e.g., *In re Adam H.* (2019) 43 Cal.App.5th 27, 31-32.) The court may then terminate the dependency, order family reunification to that parent, or order reunification services for both the non-custodial parent and offending parent. (§ 361.2, subd. (b); *In re Abram L.* (2013) 219 Cal.App.4th 452, 461; *Austin P., supra,* 118 Cal.App.4th at pp. 1134-1135.) This preference applies even if the child is being removed from a guardian appointed by the family court. (*In re Catherine H.* (2002) 102 Cal.App.4th 1284, 1288, 1290, 1292, superseded by statute on other grounds as discussed in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57-58.) "To deny placement with a nonoffending and noncustodial parent, the juvenile court must find by clear and convincing evidence that placement would be detrimental to the health, safety, and/or well-being of the children." (*In re Solomon B.* (2021) 71 Cal.App.5th 69, 71.)

For purposes of the detriment finding for placement with the noncustodial parent, the lack of a relationship between the parent and the child or the child's desire to be with others does not in itself constitute detriment. (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1402; *In re John M.* (2006) 141 Cal.App.4th 1564, 1571; see also *In re K.B.* (2015) 239 Cal.App.4th 972, 979 [the statute states "the court *shall* place the child with the parent *unless* it finds that placement with that parent would be detrimental" to the child (emphasis in original)]; but see *In re A.C.* (2020) 54 Cal.App.5th 38, 43-46.) Nor is detriment established if placement with the noncustodial parent would make reunification with the offending parent more difficult. (*In re M.C.* (2011) 195 Cal.App.4th 197, 223-224, superseded by statute on other grounds.)

It is not necessary for the child to physically live with the noncustodial parent. For example, the court can "place" the child with an incarcerated parent who can arrange to have an appropriate caretaker. (*In re J.N.* (2021) 62 Cal.App.5th 767, 778; *In re V.F.* (2007) 157 Cal.App.4th 962, 970, superseded by statute on other grounds as discussed in *Adrianna P., supra,* 166 Cal.App.4th at pp. 57-58; *Isayah C.*, *supra*, 118 Cal.App.4th at p. 700; see *In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1263-1265 [father deployed in the navy].)

The preference for placement with the non-custodial parent under section 361.2, subdivision (a), applies even if the noncustodial parent is an 'offending' parent. (*In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 299 ["the word 'nonoffending' is not found in the text of section 361.2."]; *In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1504-1505; *V.F.*, *supra*, 157 Cal.App.4th at p. 970; contra *In re A.A.* (2012) 203 Cal.App.4th 597, 608.)

[3] This assumes the parent is a presumed parent. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 454; *In re A.J.* (2013) 214 Cal.App.4th 525, 536.)

Also note that the presumption under Family Code section 3044, that a child should not be placed with a parent who engaged in domestic violence, does not apply to the juvenile court. (*In re C.M.* (2019) 38 Cal.App.5th 101,109-110.)

b. Constitutional concerns

State and federal due process is violated if the non-custodial parent is denied custody without a detriment finding. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) "A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood." (*Abram L., supra,* 219 Cal.App.4th at p. 461, internal quotation marks omitted.) "[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 760; *C.M., supra,* 232 Cal.App.4th at p. 1400; *In re Z.K.* (2011) 201 Cal.App.4th 51, 64.) "California's dependency system comports with *Santosky's* requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court must have made prior findings that the parent was unfit." (*Z.K., supra*, 201 Cal.App.4th at p. 65, internal quotation marks omitted.) "California's dependency scheme no longer uses the term ' "parental unfitness," ' but instead requires the juvenile court make a finding that awarding custody of a dependent child to a parent would be detrimental to the child. [Citations.] Due process requires that a finding of detriment be made by clear and convincing evidence before terminating a parent's parental rights. [Citation.]" (*Ibid.*)

The noncustodial parent retains a due process right to preference, even if the noncustodial parent appears for the first time after the disposition hearing. (*Z.K., supra,* 201 Cal.App.4th at p. 65.) There is also an argument to be made that statutory authority under section 361.2, subdivision (a), supports this concept. The Supreme Court did say that "[n]othing in this statute suggests that custody must be immediately awarded to a noncustodial parent regardless of when in the dependency process the parent comes forward. Rather, its language suggests that the statute is applicable only at the time the child is first removed from the custodial parent or guardian's home." (*Zacharia D*., *supra*, 6 Cal.4th at p. 453.) The holding of the case, however, was that a non-presumed father was not entitled to placement under section 361.2. (*Id.* at p. 452.) Nonetheless, this language in *Zacharia D*. has been followed in court of appeal cases holding that the parental preference in section 361.2 did not apply after the disposition hearing. (See, e.g., *In re Liam L.* (2015) 240 Cal.App.4th 1068, 1083.) Other courts have held the preference to place with the noncustodial parent continues after the disposition hearing if the parent has not previously appeared. (See, e.g., *In re Jonathan P.* (2014) 226 Cal.App.4th 1240, 1255; *In re Suhey G.* (2013) 221 Cal.App.4th 732, 744-745; see *Z.K*., *supra*, 201 Cal.App.4th at pp. 70-72.)

2. Relative placement

If placement with the noncustodial parent is not an appropriate option, then "the home of a relative" is next in line. (§ 361.2, subd. (e)(2).) "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative, regardless of the relative's immigration status." (§ 361.3, subd. (a).) The relative placement preference does not constitute a relative placement guarantee. (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 798.) Nor does it create an evidentiary presumption that relative placement is in a child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320; *In re Lauren R.* (2007) 148 Cal.App.4th 841, 855.) But it does require that "the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) " 'Relative' means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons even if the marriage was terminated by death or dissolution." (§ 361.3, subd. (c)(2).) If the court does not place the child with a relative who has been considered for placement pursuant to this section, the court shall state for the record the reasons placement with that relative was denied. (§ 361.3, subd. (e).)

The relative placement statutes also apply to disposition hearings held upon the filing of a supplemental or subsequent petition. (See, e.g., *Miguel E., supra,* 120 Cal.App.4th at p. 541.) Even if the child has been removed from a relative under section 387, this does not preclude application of the relative preference for placement because the relative has not necessarily been found to be unsuitable. (*In re Antonio G.* (2008) 159 Cal.App.4th 369, 377-378; see also *In re N.V.* (2010) 189 Cal.App.4th 25, 31 [the juvenile court must follow section 361.3 to consider the parent's relative placement wishes even if that relative's administrative grievance against the department for failing to place the child with them was still pending]; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1027, 1033 [a history with child protective services did not in itself preclude application of the relative preference].) The court must make its independent judgment where to place the child. (*N.V.*, *supra*, 189 Cal.App.4th at p. 31; *Cesar V., supra*, 91 Cal.App.4th at pp. 1033-1034.)

The preference for relative placement under section 361.3 continues at least as long as reunification services are being offered. (§§ 361.3, subd. (d); 361.45, subd. (a); *In re R.T.* (2015) 232 Cal.App.4th 1284, 1299-1301; *Joseph T.*, *supra*, 163 Cal.App.4th at pp. 793-798; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1064.) This is so, even if no new placement is being contemplated, though a change in placement would not occur unless it is in the child's best interests. (*R.T., supra*, 232 Cal.App.4th at p. 1300; *Joseph T., supra*, 163 Cal.App.4th at pp. 795, 798; but see *Lauren R., supra,* 148 Cal.App.4th at pp. 844-845.)

It is not clear if the relative placement preference continues to apply when reunification is no longer the goal of the dependency. (See *Stephanie M.*, *supra*, 7 Cal.4th at p. 320.) Some cases hold that the relative placement preference did not apply once the termination of parental rights have been recommended. (*In re Maria Q.* (2018) 28 Cal.App.5th 577, 596-597 [despite the department's failure to assess the relative who sought placement earlier in the dependency]; *In re K.L.* (2016) 248 Cal.App.4th 52, 65-66; *In re M.M.* (2015) 235 Cal.App.4th 54, 63; *Lauren R., supra,* 148 Cal.App.4th at p. 855 and case cited therein.) Other cases hold that the relative placement preference continues to apply after reunification services have been terminated. (*In re Isabella G.* (2016) 246 Cal.App.4th 708, 720-721, 723 [when the relative sought placement before disposition but the department failed to do an assessment]; *R.T., supra,* 232 Cal.App.4th at p. 1300 [same]; *Cesar V., supra,*91 Cal.App.4th at p. 1032 [relative preference applied after reunification services were terminated but before the section 366.26 hearing].)

3. Nonrelative extended family member [NREFM]

If the child cannot be placed with the noncustodial parent or with a relative, the court shall consider placement at the home of a "nonrelative extended family member." (§ 361.2, subd. (e)(3).) A NREFM is "an adult caregiver who has an established familial relationship with a relative of the child . . . , or a familial or mentoring relationship with the child." (§ 362.7, ¶ 2.) Until 2013, a familial or mentoring relationship was a prerequisite to being recognized as a NREFM. (See, e.g., *In re Michael E.* (2013) 213 Cal.App.4th 670, 675-676; *Samantha T. v. Superior Court* (2011) 197 Cal.App.4th 94, 109-110.) The statute was expanded, however, to include anyone who has a relationship with the child's family, even if the individual lacks a relationship with the child. (*In re Joshua A.* (2015) 239 Cal.App.4th 208, 217.)

4. Sibling preference

A preference for placement of siblings together is articulated in section 16002, subdivision (a), along with authority for the juvenile court to provide visitation between siblings where not all siblings are removed from the family home. Section 16002, subdivision (a) provides:

> (1) It is the intent of the Legislature to maintain the continuity of the family unit, and ensure the preservation and strengthening of the child's family ties by ensuring that **when siblings have been removed from their home, either as a group on one occurrence or individually on separate occurrences, the siblings will be placed together, unless it has been determined that placement together is contrary to the safety or well-being of any sibling**. The Legislature recognizes that in order to ensure the placement of a sibling group in the same foster care placement, placement resources need to be expanded.

(2) It is also the intent of the Legislature to preserve and strengthen a child's sibling relationship so that when a child has been removed from the child's home and the child has a sibling or siblings who remain in the custody of a parent subject to the court's jurisdiction, **the court has the authority to develop a visitation plan for the siblings, unless it has been determined that visitation is contrary to the safety or well-being of any sibling**.

C. Geographical Restrictions on Placement

1. Placement out of county

Special procedures and considerations apply for placements outside the county. The Legislature has required that "if the social worker must change the placement of the child and is unable to find a suitable placement within the county and must place the child outside the county, the placement shall not be made until the social worker has served written notice . . . at least 14 days prior to the placement, unless the child's health or well-being is endangered by delaying the action or would be endangered if prior notice were given." (§ 361.2, subd. (h)(1).) If an objection is lodged within seven days of receiving notice, the court shall hold a hearing within five days of the objection and prior to the placement. (*Ibid.*) "The court shall order out-of-county placement if it finds that the child's particular needs require placement outside the county." (*Ibid.*) The child should not be placed with a non-relative out of county without a showing of a need to do so. (§ 361.2, subd. (g).)

There are additional considerations in determining whether to place a child out of the county. As in any placement decision, the court must also consider keeping siblings together (see generally *Abraham L. v. Superior Court* (2003) 112 Cal.App.4th 9, 14) or at least maintaining contact among siblings (see generally *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1003 [" '[m]aintaining [sibling] relationships, under the right circumstances, is imperative for the emotional well-being of the [dependent] child' "]). It is often important for the child's well-being to maintain and build ties with the extended family as well.

Further, frequent visitation with the parents is necessary for there to be reasonable services. "An obvious prerequisite to family reunification is regular visits between the noncustodial parent or parents and the dependent children 'as frequent[ly] as possible, consistent with the well-being of the minor.' " (*In re Julie M.* (1999) 69 Cal.App.4th 41, 49.) Reunification services can be unreasonable when visitation is unduly limited. (*In re T.W.* (2017) 9 Cal.App.5th 339, 346-348; *Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1425-1427; *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 508-509 [services were unreasonable when a planned trial visit with the parent never occurred].)

2. Placement out of state

In addition to the factors the court must consider in placing a child out of county, the Interstate Compact on the Placement of Children (ICPC) applies to placements with nonparents outside of California. (Fam. Code, § 7900 et seq.) "Interstate compacts, like the ICPC, are formal agreements among and between states that have the characteristics of both statutory law and contractual agreements. They are enacted by state legislatures that adopt reciprocal laws that substantively mirror one another. [Citation.] The ICPC has been enacted in all fifty states, the District of Columbia and the U.S. Virgin Islands. [Citations.] . . . The purpose of the ICPC is to facilitate cooperation between participating states in the placement and monitoring of dependent children. [Citation.]" (*In re C.B.* (2010) 188 Cal.App.4th 1024, 1031-1032, internal quotation marks omitted.)

"The key provisions of the ICPC state: 'Before sending, bringing, or causing any child to be sent or brought into a receiving state *for placement in foster care or as a preliminary to a possible adoption*, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state.' (Fam. Code, § 7901, art. 3, subd. (b), italics added.) 'The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.' (*Id*., subd. (d).)" (*C.B., supra,* 188 Cal.App.4th at p. 1032; *In re Luke L.* (1996) 44 Cal.App.4th 670, 682.) Thus, a court cannot send a minor to a placement out of state without first complying with the ICPC. (*Id*. at p. 682; *In re Eli F.* (1989) 212 Cal.App.3d 228, 239-240.)

In the ICPC context, " 'Placement' means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution, but does not include any institution caring for persons with developmental disabilities or mental health disorders or any institution primarily educational in character, and any hospital or other medical." (Fam. Code, § 7901, art. 2, subd. (d).)

The ICPC does not apply when the child is sent to a parent living out of state. (*Z.K.*, *supra*, 201 Cal.App.4th 51, 69-70; *C.B., supra,* 188 Cal.App.4th at p. 1032; *In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 458; *In re Johnny S.* (1995) 40 Cal.App.4th 969, 979; *Tara S. v. Superior Court* (1993) 13 Cal.App.4th 1834, 1837-1838.) However, the ICPC process can be used to obtain information about a parent in another state. (See, e.g., *Suhey G.*, *supra*, 221 Cal.App.4th at p. 743; *John M.*, *supra*, 141 Cal.App.4th at pp. 1572-1575.)

3. Placement outside the United States

In addition to the factors the court must consider in placing a child out of county, the court should not place the minor in another country and continue the dependency unless it can be assured its orders will be followed. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1261-1270.) When the minor is placed outside of the country, the minor is not eligible to receive AFDC. (*In re Joshua S.* (2007) 41 Cal.4th 261, 277-278.) A party wishing to place a child with someone other than a parent to a home outside the United States must prove by clear and convincing evidence that it is in the child's best interests. (§ 361.2, subd. (f).) The potential foster parent or relative must be fully assessed. (See *Sabrina H., supra,* 149 Cal.App.4th at pp. 1417-1418.)

D. Appellate Notes

≈ **Standing:** A parent has standing to challenge the failure to place the minor according to relative placement rules, at least so long as reunification services are being offered. (*In re N.V.* (2010) 189 Cal.App.4th 25, 27, fn. 1; see *In re H.G.* (2006) 146 Cal.App.4th 1,9-10 [after termination of services but before a section 366.26 hearing].) However, a parent did not have standing to challenge placement after termination of services when it would not affect the eventual termination of parental rights. (*In re J.Y.* (2018) 30 Cal.App.5th 712, 718; *In re Isaiah S.* (2016) 5 Cal.App.5th 428, 435-437.)

≈ **Mootness:** Parent's challenge to the evidence supporting the jurisdictional findings rendered moot due to their stipulation at the six-month review to various findings including that it would be detrimental to return the child. (*In re Dani R.* (2001) 89 Cal.App.4th 402, 406.)

≈ **Standard of Review:** Placement decisions are reviewed for an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) The court reviews a decision to remove a child from a relative caretaker under the substantial evidence test. (*In re A.O.* (2004) 120 Cal.App.4th 1054, 1061; see *H.G., supra,* 146 Cal.App.4th 1, 10.)

≈ **Remedy:** The case should be remanded for a new hearing when the juvenile court and the department failed to properly consider relative placement, but the court must take into account the minor's current circumstances. (*In re R.T.* (2015) 232 Cal.App.4th 1284, 1308.) In one case, the erroneous grant of supplemental petition removing the minor from the grandparent before the section 366.26 hearing required reversal of the order terminating parental rights as well because placement with the relative could affect the parent-child bond exception. (*H.G., supra,* 146 Cal.App.4th at p. 19.)

E. Potential Areas for Appellate Challenge

1. If the child is removed from the parents' custody at disposition, was there substantial evidence to support the juvenile court's conclusion that the "the social worker has exercised due diligence in conducting the investigation . . . to identify, locate, and notify the child's relatives." (§ 358, subd. (b)(2); *In re S.K*. (2018) 22 Cal.App.5th 29, 37.)
2. If the court does not place the child with a relative who has been considered for placement at the time of disposition, did the court state for the record the reasons placement with that relative was denied. (§ 361.3, subd. (e).)
3. If the non-custodial parent or a relative placement emerges after disposition, was the placement preference honored?
4. If the child's placement was out of county, out of state, or out of the country, was the governing law followed?
5. At subsequent review hearings:
    a. If the child resides in foster care, was there substantial evidence to support the juvenile court's finding that the child's placement was still necessary and appropriate? (see § 366, subd. (a)(1)(A).)
    b. Was there substantial evidence to show the Department complied with the case plan in making reasonable efforts to return the child to a safe home? (See e.g., *In re J.E.* (2016) 3 Cal.App.5th 557, 566 [to support a finding reasonable services were provided, "the record should show that the supervising agency identified the problems leading to the loss of custody, 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"].)

III. REASONABLE SERVICES – Issues during the reunification period

A. Introduction.

"It is difficult, if not impossible, to exaggerate the importance of reunification in the dependency system. With but few exceptions, whenever a minor is removed from parental custody, the juvenile court is required to provide services to the parent for the purpose of facilitating reunification of the family. (§ 361.5.)" (*Luke L.*, *supra*, 44 Cal.App.4th at p. 678.)

The juvenile courts "discretion in fashioning reunification orders is not unfettered. Its orders must be 'reasonable' and 'designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300.' " (§ 362, subd. (c).) (*In re D.C.* (2015) 243 Cal.App.4th 41, 56, superseded by statute on other grounds as stated in *In re A.M.* (2020) 47 Cal.App.5th 303, 322.)

Each reunification plan must be appropriate to the parent's circumstances. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The plan should be specific and internally consistent, with the overall goal of resumption of a family relationship. *(In re Mario C.* (1990) 226 Cal. App. 3d 599, 603-604; see also *In re Dino E.* (1992) 6 Cal.App.4th 1768, 1777 [the plan "must be appropriate for each family and be based on the unique facts relating to that family"].) The agency must make reasonable efforts to provide suitable services, "in spite of the difficulties of doing so or the prospects of success." (*Id*. at p. 1777.)

A parent's "difficulty meeting the case plan's requirements does not excuse the [Department] from continuing its effort[s] to bring [the parent] into compliance with the court's orders." (*In re Taylor J.* (2014) 223 Cal.App.4th 1446, 1451.) And, "[a] parent is 'not required to complain about the lack of reunification services as a prerequisite to the department fulfilling its statutory obligations.'" (*Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1158.)

B. Reunification services after disposition

Welfare and Institutions Code section 366.21, states that if at the six month review hearing, "the child is not returned to his or her parent or legal guardian, the court shall determine whether **reasonable services** that were designed to aid the parent or legal guardian in overcoming the problems that led to the initial removal and the continued custody of the child have been provided or offered to the parent or legal guardian." (§ 366.21, subd. (e)(8).) The same finding must be made at subsequent review hearings. (§§ 366.21, subds. (f)(1)(A) & (g)(1)(C)(ii), 366.22, subd. (a)(3).) The court cannot schedule a section 366.26 hearing if reasonable services have not been provided. (§§ 366.21, subd. (g)(4), 366.22, subd. (b)(3) (C).) Section 366.26 states the court cannot terminate parental rights if "[a]t each hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided." (§ 366.26, subd. (c)(2)(A).)

Appellate Practioner's Tip: Always consider the feasibility of the ordered case plan. The department is required to develop a case plan if the child is removed, unless the court decides not to provide services. (*In re Kristin W.* (1990) 222 Cal.App.3d 234, 254.) "This statutory scheme contemplates immediate and intensive support services to reunify a family where a dependency disposition removes a child from parental custody. A good faith effort to develop and implement a family reunification plan is required. A reunification plan must be appropriate for each family and be based on the unique facts relating to that family. This reunification plan is a crucial part of the disposition order." (*Ibid.*, internal quotation marks and citations omitted.)

"Family preservation, with the attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced." (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787.) The "reunification plan, including the social services to be provided, must accommodate the family's unique hardship. The objective of the plan must be to provide services to facilitate 'the resumption of a normal family relationship . . .' [Citation.] and 'must be designed to eliminate those conditions which led to the juvenile court's jurisdictional finding.' [Citation.]" (*Id.* at p. 1790; § 362, subd. (d); see also *In re Daniel B.* (2014) 231 Cal.App.4th 663, 675.)

The reasonableness of services is judged on content and implementation. As for the content of a case plan, the "effort must be made to provide suitable services, in spite of the difficulties of doing so or the prospects of success." (*Dino E.*, *supra*, 6 Cal.App.4th at p. 1777.) To support a finding reasonable services were provided, " 'the record should show that the supervising agency identified the problems leading to the loss of custody, 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.)" (*In re J.E.* (2016) 3 Cal.App.5th 557, 566, emphasis in original; cf. *Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397, 427 [a "mechanical approach to a reunification plan is not what the Legislature intended" (internal quotation marks omitted)]; *Taylor J.*, *supra*, 223 Cal.App.4th at p. 1452 ["Family reunification services are not 'reasonable' if they consist of nothing more than handing the parent a list"].)

"[W]here reasonable services have not been provided or offered to a parent, there is a substantial likelihood the juvenile court's finding the parent is not likely capable of safely resuming custody of his or her child may be erroneous. [Citation.] Providing reasonable services is one of 'the precise and demanding substantive and procedural requirements … carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents.' (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 256.) Therefore, 'to meet due process requirements at the termination stage, the court must be satisfied reasonable services have been offered during the reunification stage.' [Citations.]" (*In re M.F.* (2019) 32 Cal.App.5th 1, 19.)

C. Examples: Where Reasonable Services Were Not Provided

1. Where the juvenile court improperly delegates judicial authority

While the court may delegate how to implement the case plan, the court has the duty to determine what the parent is expected to do to have the child returned. This is because "the power to regulate visitation between minors determined to be dependent children and their parents rests in the judiciary. The judicial power in this state is vested

in the courts. (Cal. Const., art. VI, § 1.) The judicial function is to declare the law and define the rights of the parties under it. . . . and to make binding orders or judgments." (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 756, internal quotation marks and citations omitted.)

Further, the social worker is required to *identify* specific services. (§ 16501.1, subd. (g)(2).) It is not sufficient to refer the parent to an evaluation with directions to follow the ensuing recommendations of the evaluator. (*In re M.R.* (2020) 48 Cal.App.5th 412, 426-427 [case plan to participate in a substance abuse evaluation and follow the recommendations for substance abuse treatment was improper].)

Improper delegation occurs most often in determining the frequency and length of visitation. (See, e.g., *In re E.T.* (2013) 217 Cal.App.4th 426, 439 [order that the department "create a detailed visitation schedule" was insufficient]; *Julie M.*, *supra*, 69 Cal.App.4th at pp. 48-50 [giving minor veto power during reunification was an abuse of discretion].) However, it can arise in other areas. For example, the court can order counseling for a parent and rely on the program's reports of the parent's progress, but it cannot completely delegate when there has been satisfactory progress. (See *Daniel B., supra,* 231 Cal.App.4th at pp. 675-676.) In other words, a determination by the court that the parent failed to comply with reunification services because the program said so amounts to an unjustified delegation of judicial authority.

2. Where changes in the case plan leave the parent with inadequate time to complete them

The department must adjust the case plan as new problems arise. (See, e.g., *Elizabeth R.*, *supra*, 35 Cal.App.4th at pp. 1789-1796 [unreasonable services when there was no adjustment to services when the mother became hospitalized].) In addition, services can be unreasonable if the parent is not given enough time to do them. (See, e.g., *In re M.F., supra* 32 Cal.App.5th at page 15-16; *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1242 [on waiting lists for most of the reunification period]; see also *Rita L.*, *supra*, 128 Cal.App.4th at pp. 508-509; *Kristin W., supra,* 222 Cal.App.3d at p. 255.)

Services can also be unreasonable when the social worker fails to inform the parent of the need to do an essential program. In *Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340, the social worker assured the mother and the court she was enrolled in all programs but then argued at the review hearing returning the child would be detrimental based on her failure to enroll in the correct program. (*Id.* at pp. 1346-1347.)

3. When inadequate visitation inhibits reunification efforts

Reunification services can be unreasonable when visitation is unduly limited. (*T.W.*, *supra*, 9 Cal.App.5th at pp. 346-348; *Tracy J.*, *supra*, 202 Cal.App.4th at pp. 1425-

1427; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 973-974.) This can be the result of a failure to progress to more liberal visitation. For example, in *Rita L.*, *supra*, 128 Cal.App.4th at pages 508 to 509, a trial home visit was not arranged until near the end of the reunification period and then delayed beyond the hearing when the court terminated services.

Sometimes there is a failure to adjust to a change in circumstances. In *In re Brittany S.* (1993) 17 Cal.App.4th 1399, visitation did not occur when the mother was in custody. (*Id.* at p. 1407 ["Unfortunately, this appears to be a case where an incarcerated parent was destined to lose her child no matter what she did. We cannot condone such a result."]; see also *Elizabeth R.*, *supra*, 35 Cal.App.4th at pp. 1791-1792 [failure to provide services while the parent was committed to a mental institution].)

Sometimes the difficulty is a child who displays signs of emotional trauma. It is not acceptable to halt or limit visitation in the hopes that therapy might someday remedy the situation. (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1138; see also *Julie M.*, *supra*, 69 Cal.App.4th at pp. 49-51.) "It is hard to imagine how the problems faced by this family could be resolved without . . . visitation. To provide the minor and/or his therapist with a veto power over this essential reunification service seems to us to undermine any hope of actual reunification." (*Id.* at p. 1139.) Instead, it is incumbent on the court to facilitate the means by which visitation can occur without detriment. "Visitation is an essential component of any reunification plan. To promote reunification, visitation must be as frequent as possible. Where the minor is reluctant to visit, and family therapy is needed to promote visitation, such therapy may be critical to reunification." (*Alvin R., supra,* 108 Cal.App.4th at p. 972, citations omitted; *In re David D.* (1994) 28 Cal.App.4th 941, 953 ["Due to the court's order prohibiting visitation between this mother and her children, adequate reunification services were not provided."].)

It is important to maintain regular visitation if the child is displaying fear around the time of visits. The proper purpose of supervised visitation is to facilitate visitation when the child is fearful. If reunification efforts are eventually going to be terminated because, in part, there is a lack of a trusting relationship between the child and the parent, then reasonable services would necessarily include efforts to repair and strengthen the relationship. (See, e.g., *Alvin R.*, *supra*, 108 Cal.App.4th at p. 973 ["The longer parent and child live with no visitation, the less likely there will ever be any meaningful relationship."]; *Kristin W., supra,* 222 Cal.App.3d at p. 255 ["[T]he problems leading to the dependency could only have been resolved by petitioner having some responsibility for the care of the children. The plan's limitation on visitation prevented petitioner from demonstrating and improving his skills with respect to the care of the children."].) If the child continues to have little or minimal contact with the parent, then the strain between them only becomes worse. Reasonable services have not been

provided when the parent is not given the tools for reunifying with the child. While the wishes of the child are relevant in the court's visitation ruling, "[i]n no case may a child be allowed to control whether visitation occurs." (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1505.)

4. Where services failed to account for a parent's poverty

Services are unreasonable when the parent's poverty interferes with the ability to do the services. For example, reasonable services are not provided if the parent cannot afford them and financial assistance is insufficient. (*In re D.N.* (2020) 56 Cal.App.5th 741, 763-764; *In re S.S.* (2020) 55 Cal.App.5th 355, 373-379; *Taylor J.*, *supra*, 223 Cal.App.4th 1446, 1452.) In *David B. v. Superior Court* (2004) 123 Cal.App.4th 768 at pages 795 to 796, the department was concerned with the parent's homelessness, but there had been no effort to assist in finding housing.

5. Where inadequate mental health services inhibited reunification efforts

A case plan is unreasonable when a problem in the dependency is the parent's mental health issues but there are not adequate services to address them. In *Patricia W., supra,* 244 Cal.App.4th 397, the mother ran out of medication and became psychotic. (*Id.* at p. 401.) The only service provided was to schedule two psychological evaluations to determine if she should be denied services. (*Ibid.*) In the meantime, the mother got her own medication refilled and was functioning again. The social worker, however, did not investigate whether she could safely care for the child or if services could alleviate the problem. (*Ibid.*) The court concluded reasonable services had not been provided. (*Ibid.*)

In *In re K.C.* (2012) 212 Cal.App.4th 323 at page 330, the department appropriately had the father assessed to determine his mental health needs, but it quickly recommended terminating services when he expressed resistance to taking medication. "It is true that the reasonableness of the services provided may depend to some degree upon the parent's willingness to cooperate in the completion of his or her reunification plan . . . . The psychologist's report indicated, however, that this less-than-full cooperativeness was itself a product of psychological conditions that might be responsive to pharmacological treatment." (*Ibid.*) Due to the Catch-22 that the father's mental illness was a barrier in him obtaining the help he needed to treat the mental illness, the department was required to make an effort to resolve the problem, such as a medication evaluation. (*Ibid.*)

6. Services are inadequate when the parent cannot understand them

In *In re J.P.* (2017) 14 Cal.App.5th 616 at pages 625 to 626, services were in a language the parent could not understand, making them ineffective. The *J.P.* court noted too that "due process consideration" informed its conclusion that the juvenile court "abuse[d] [its] discretion to make a dispositional order with the knowledge that a

parent cannot participate in the ordered services. No parent should be placed in this trap." (Id. at p. 626.) In *In re Victoria M.* (1989) 207 Cal.App.3d 1317 at page 1327, there was a failure to provide services that the developmentally disabled parent could comprehend. Analogously, in *Tracy J.*, *supra*, 202 Cal.App.4th at page 1428, there were not services provided to overcome problems with the parent's physical and developmental disabilities.

7. Reasonable services must be provided for a parent in custody

When a parent is incarcerated and offered reunification services, the department must identify the services available to the parent. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1013, superseded by statute on other grounds as stated in *Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1490, 1504; *In re Monica C.* (1995) 31 Cal.App.4th 296, 307; *Brittany S.*, *supra*, 17 Cal.App.4th at pp. 1406-1407; see also *In re Maria S.* (2000) 82 Cal.App.4th 1032, 1040.) The department cannot delegate to an incarcerated parent the responsibility for identifying the services (*Monica C., supra*, 31 Cal.App.4th at pp. 307-308), and it may not simply be concluded reunification efforts are not feasible on the sole ground the parent is incarcerated (see *Elizabeth R., supra,* 35 Cal.App.4th at pp. 1791-1792).

8. Reasonable services must be provided for a parent being deported

If services have been ordered, the department must make efforts to provide services for a parent being deported. (*In re A.G.* (2017) 12 Cal.App.5th 994, 1003.)

D. Appellate Notes

- **Standing:** A parent cannot argue there were inadequate services provided to the other parent. (*In re Sarah M*. (1991) 233 Cal.App.3d 1486, 1503, disapproved on other grounds in *In re Chantel S.* (1996) 13 Cal.4th 196, 204.) The minor does not have standing to challenge mother being ordered to do certain things for reunification services. (*In re Neil D.* (2007) 155 Cal.App.4th 219, 224.) And a parent does not have standing to object to a psychological evaluation of the minor. (*In re Holly B.* (2009) 172 Cal.App.4th 1261, 1265-1266.)
- **Forfeiture:** Because the department has a statutory duty to provide reasonable services, a parent is not required to object to lack of reasonable services in the juvenile court in order to raise the issue on an appeal from the disposition hearing. (*Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1157.) "A parent is 'not required to complain about the lack of reunification services as a prerequisite to the department fulfilling its statutory obligations.' " (*Id*. at p. 1158; *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1014, superseded by statute as stated on other grounds in *Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1490, 1504.)

≈ **Failure to appeal the case plan waives the claim of unreasonable services as designed.** (*V.C. v. Superior Court* (2010) 188 Cal.App.4th 521, 527-528; *In re Julie M.* (1999) 69 Cal.App.4th 41, 47; but see *In re T.G.* (2010) 188 Cal.App.4th 687, 691-696.)

≈ **Standard of review:** The propriety of court-ordered reunification services is reviewed for an abuse of discretion. (See *In re J.P.* (2017) 14 Cal.App.5th 616.) The reunification plan must match the facts and the petition. (See e.g., *In re Sergio C.* (1990) 70 Cal.App.4th 957.) When considering disposition orders, the juvenile court can broaden the scope when it considers what orders would be in the best interests of the children. (See *In re Christopher H.* (1996) 50 Cal.App.4th 1001 [affirming drug testing order even though substance abuse allegation were stricken from the petition].)

≈ **When reviewing a case plan for appropriateness, one must consider the practicalities of a parent's ability to comply with the requirements**. For example, does the parent have access to a vehicle to get themselves to testing locations or visits. If there are other non-dependent siblings involved, is contact with the dependent child a part of the plan? The juvenile courts " 'discretion in fashioning reunification orders is not unfettered. Its orders must be "reasonable" and "designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300." (§ 362, subd. (c).)' " (*D.C.*, *supra*, 243 Cal.App.4th at p. 56.)

≈ **Prejudice:** Failure to provide reasonable services is reversible per se. (*In re A.G.* (2017) 12 Cal.App.5th 994, 1004-1005.)

≈ **Remedy:** Most courts have held that the remedy for unreasonable services is for the juvenile court to provide six more months of services. (§§ 366.21, subd. (g)(2), 366.22, subd. (b); *M.F., supra,* 32 Cal.App.5th at p. 23 [beyond the 18 month review hearing]; *J.E., supra,* 3 Cal.App.5th at pp. 564-566 [same]; *Elizabeth R., supra,* 35 Cal.App.4th at p. 1793; *In re Monica C.* (1995) 31 Cal.App.4th 296, 310; *Dino E., supra,* 6 Cal.App.4th at p. 1776.) A court has recently disagreed, and the Supreme Court is considering the issue. (*Michael G. v. Superior Court* (2021) 69 Cal.App.5th 1133, 1142-1143, review granted Jan. 19, 2022, S271809.)

E. Reasonable services during the COVID-19 pandemic

Heading into the pandemic back in early 2020, many questions arose as to how reunification services would be handled when treatment facilities, drug testing sites, in-person visitation, and many other services were either unavailable or extremely limited. The question was whether Departments and the courts would by sympathetic to this

additional level of difficulty for parents and their children within the dependency system. Case law is just beginning to emerge on this point.

A review of some published opinions shows a certain level of understanding from the Department, but a cognizance that COVID-related service issues turn on the then-current status of the case and may not be ripe for appellate review. (See *In re M.F.* (2022) 74 Cal.App.5th 86, 107-108 [parent's claim that the COVID restrictions caused unfair delay in the disposition hearing and implementation of court-ordered services, was not ripe for review because the children had since been returned to mother and so any question about a shortened reunification period was premature at best].)

In the unpublished realm, a frequent problem for parents seeking relief on appeal was their efforts prior to the pandemic and then their efforts after the initial lock-down phase. If the parent was not taking the necessary responsibility in those periods, it tended to negatively impact their covid-related reasonable services claims. Not that it should. The key for appellate change in such circumstances is to ensure that the issue is framed not as what was reasonable under the circumstance of the COVID pandemic, but whether the services were properly adapted to remain unique and relevant to the family in the midst of the dependency action.

F. Potential Areas for Appellate Challenge

1. Did substantial evidence support the juvenile court's determination that reasonable services were provided by the agency in the period preceding the review hearing? (§§ 366, subd. (a)(1)(B); 366.21, subds (e) & (f), 366.22, subd. (a).)

- **a.** Was the reunification plan designed to eliminate the conditions that brought the child to the attention of the juvenile court? (See *In re Jasmin C.* (2003) 106 Cal.App.4th 177, 180.)
- **b.** If there were orders for drug testing, counseling, or a psychological evaluation, were they justified by the record? (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 172 [reunification plan must be "appropriate for each family and based on the unique facts relating to that family"]; § 362, subd. (c).)
- **c.** Did the juvenile court fail to order additional services that would facilitate the return of the child to the parent's custody? (See § 366.21, subd. (a).)

IV. VISITATION

"Meaningful visitation is the lifeblood of the parent-child relationship, even after reunification services are terminated … [I]t is a foregone conclusion that a parent deprived of visitation … is destined to lose" their parental rights. (*In re Ethan J.* (2015) 236 Cal.App.4th 654, 660-661.)

"Visitation rights arise from the very 'fact of parenthood' and the constitutionally protected right ' "to marry, establish a home and bring up children." ' [Citation.]" (*In re Julie M.*, *supra*, 69 Cal.App.4th at p. 49.) Due process (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) requires visitation to be as often as possible, unless the visits themselves are detrimental to the child. (*Jennifer G.* , *supra*, 221 Cal.App.3d at pp. 756-757.) "As to visitation, '[t]he relationship between parent and child is so basic to the human equation as to be considered a fundamental right, and that relationship should be recognized and protected by all of society . . . . " (*In re Smith* (1980) 112 Cal.App.3d 456, 428.)

"[C]hildren have strong emotional ties to even the worst of parents." (*In re James R.* (2007) 153 Cal.App.4th 413, 429.) Indeed, "the child's interest in the parent-child relationship is at least as important and worthy of protection of the parent's interest." (*Ibid.*) "Continuity of the relationships is extremely important to children." (*Hansen v. California Dept. of Social Srvs.* (1987) 193 Cal.App.3d 283, 292, internal quotation marks omitted.)

As Judge Leonard Edwards (Ret.) wrote: "Whatever the reason for the removal, it is a traumatic event for the child and the parents. A child who is placed in foster care fears the unknown and may feel abandoned, helpless, and hopeless. She may worry about her family, imagining that her parents have died or are looking for and cannot find her. She may feel guilty for whatever has happened to her parents. The trauma of separation is potentially overwhelming to children. They may become despondent and depressed. They are often angry. The trauma can be increased when they are separated from both their parents and their siblings. These observations are true even in many cases of serious abuse and cases in which the child expresses fear of a parent or a reluctance to visit. In these situations the child will often express a wish to return home after a short period in out-of-home placement." (Edwards, *Judicial Oversight of Parental Visitation* (Summer 2003) Juvenile and Family Court Journal 1, 2, fns. omitted.)[4]

[4] See www.judgeleonardedwards.com/docs/JudicialOversightofVisitationSummer03.pdf (as of Feb 22, 2022); see also https://judgeedwards.wordpress.com/category/publications (as of Feb 22, 2022).

"Separation in these circumstances can affect the connections that a child has formed with her parents, siblings, and family members. Depending on the age of the child, the separation can damage relationships and have long-term implications for a child's ability to form new attachments and relationships. Connectedness is necessary for healthy child development." (Edwards, *Judicial Oversight of Parental Visitation* (Summer 2003) Juvenile and Family Court Journal 1, 2, fns. omitted.)

A. An Appropriate Visitation Order is Important at Detention hearings

There is little law on the right to visitation during detention hearings. "With respect to detention hearings, subdivision (e) of section 319 provides that, if the juvenile court orders a minor detained, it shall also 'order services to be provided as soon as possible to reunify the child and his or her family if appropriate.' And, our rules of court indicate that, at a detention hearing, '[t]he court must consider the issue of visitation between the child and other persons, determine if contact pending the jurisdiction hearing would be beneficial or detrimental to the child, and make appropriate orders.' (Rule 5.670(c)(1).) Thus, it appears that parental visitation can be denied at detention based on a basic detriment finding." (*In re Matthew C*. (2017) 9 Cal.App.5th 1090, 1103.) But as a consequence, an area of potential appellate challenge arises.

Liberal visitation is also required under due process to preserve the parent-child relationship. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7; *Julie M., supra,* 69 Cal.App.4th at p. 49.) Further, if the court orders removal at the disposition hearing, then it must determine if reasonable efforts were made to avoid removal. (§ 361, subd. (e); Cal. Rules of Court, rule 5.695(d).) Questions about the quality of the parent-child relationship or the parent's ability to safely handle the child cannot be adequately answered without permitting liberal visitation from the start of the proceeding. Thus, reasonable efforts would include adequate visitation.

B. Liberal Visitation is Required for There to be Reasonable Services

1. Visitation is an important part of the disposition order

The court, in "ordering reunification services, shall provide . . . [¶] . . . for visitation between the parent[5] or guardian and the child. Visitation shall be as frequent as possible, consistent with the well-being of the child." (§ 361.2, subd. (a)(1)(A).)[6]

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[5] Only a presumed father is entitled to visitation if it would not be detrimental. A biological father who is not a presumed father may be granted services or visitation, but it is not mandatory. (§ 361.5, subd. (a); *Zacharia D.*, *supra*, 6 Cal.4th at p. 451; *In re D.M.* (2012) 210 Cal.App.4th 541, 544.)

[6] When the minor under the juvenile court's protection is a teen parent, but the child of the teen parent is not a minor in the juvenile court system, the court may decide not to

However, "[n]o visitation order shall jeopardize the safety of the child." (§ 361.2, subd. (a)(1)(B).) "It is the purpose of the Juvenile Court Act that the bond between the minor and his or her family be '[preserved] and [strengthened]' (§ 202) through the provision of appropriate services. (§ 307, subd. (a).) 'The legislative scheme contemplates immediate and intensive support services to reunify a family where a dependency disposition removes a child from parental custody.' [Citation.]" (*Hansen, supra,*193 Cal.App.3d at pp. 292-293.) "An obvious prerequisite to family reunification is regular visits between the noncustodial parent or parents and the dependent children 'as frequent[ly] as possible, consistent with the well-being of the minor.' " (*Julie M., supra,* 69 Cal.App.4th at p. 49; accord, *Serena M. v. Superior Court* (2020) 52 Cal.App.5th 659, 674.)

This means visitation must be more frequent than an hour or two once or twice a week. Visitation should be longer, more frequent and unsupervised whenever possible. Contact with the child should include appointments with doctors and other services, participation in preschool, scholastic, and extracurricular activities, as well as involvement in the activities and hobbies of the child. The relationship should also be maintained through telephone calls, video meetings, and letters as is appropriate for the child. "When the Agency limits visitation in the absence of evidence showing the parents' behavior has jeopardized or will jeopardize the child's safety, it unreasonably forecloses family reunification . . . and does not constitute reasonable services." (*Tracy J.*, *supra*, 202 Cal.App.4th at p. 1427.)

The juvenile court can delegate to the department how to do the visits, but the court generally must decide how frequently and how long the visits occur. (*In re Korbin Z.* (2016) 3 Cal.App.5th 511, 518-519 [could not delegate to child when visitation would occur, even when the parent had no reunification services]; *E.T.*, *supra* 217 Cal.App.4th at p. 439 [order that the department "create a detailed visitation schedule" was insufficient]; *Julie M., supra,* 69 Cal.App.4th at pp. 48-50 [giving child veto power during reunification was an abuse of discretion]; but see *In re F.P.* (2021) 61 Cal.App.5th 966, 975 [can have counselor decide when conjoint counseling would start, which was necessary for visitation to commence].) This is because "the power to regulate visitation between minors determined to be dependent children and their parents rests in the judiciary. The judicial power in this state is vested in the courts. (Cal. Const., art. VI, § 1.) The judicial function is to declare the law and define the rights of the parties under it . . . and to make binding orders or judgments." (*Jennifer G., supra,* 221 Cal.App.3d at p. 756, internal quotation marks and citations omitted.)

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permit visitation if it "finds by clear and convincing evidence that visitation would be detrimental to the teen parent." (§ 362.1, subd. (a)(4).)

2. Visitation should be unsupervised as soon as possible

Visitation should be unsupervised within a couple of months, if not immediately, unless there is new evidence to warrant otherwise. Properly utilized, supervised visits serve to protect children when there is concern over abuse or that the child could be significantly neglected during the short period of visitation. If threatening or significant neglectful behavior is not exhibited at visits, then visitation should progress to unsupervised. This serves several important functions. First, it provides a more realistic assessment of the parent's skills when he or she is alone with the children for a few hours. Second, it allows the parent an opportunity to implement what has been learned from services in a more realistic setting. Third, it builds the bond between the children and the parent. Fourth, reunification cannot occur if visitation never progresses and reunification can even be jeopardized if visitation progresses to long unsupervised hours too quickly. Fifth, it permits more frequent visitation without overtaxing the resources for supervised visits while making resources available for supervised visitation in other cases.

Appellate Practitioner's Tip: Consider a parent's ability to pay for court-ordered supervised visitation whenever it is orders at the parent's expense. If the record lacks sufficient evidence to show that the parent could afford it, consider an argument that the juvenile court abused its discretion and violated the constitution.[7]

3. Visitation should occur even if the child displays anxiety

Sometimes the court must consider evidence that the child might be exhibiting anxiety or fear around the time of visits. "There is currently a split of authority as to whether section 362.1 mandates visitation absent evidence of a threat to the minor's physical safety (see, e.g., *In re C.C.* (2009) 172 Cal.App.4th 1481, 1491–1492) or whether courts may also deny visitation based on potential harm to the minor's emotional well-being ([*In re*] *T.M.* [(2016)] 4 Cal.App.5th [1214,] 1219-1220.)" (*Matthew C.*, *supra*, 9 Cal.App.5th at p. 1101.) Nonetheless, if the child displays anxiety around the time of visits, this is insufficient evidence of detriment because it cannot be shown what the source of the anxiety is. The social worker might assume the anxiety stems from past experience of neglect or abuse. Child specialists, however, caution that although children are often not be able to articulate it, they grieve and become more anxious when they perceive the loss of parent. This threatens their ability to form healthy bonds later in life. Frequent visitation is necessary to minimize the trauma. (Edwards, *Judicial Oversight of Parental Visitation,* at p. 3.) The child's display of anxiety around visits could just as likely be a result of a fear of losing the parent. Decreasing visitation might diminish the symptoms but contribute to long-term harm to the child. (*Id.* at pp. 2, 3.)

[7] For those interested, SDAP Staff Attorney Anna L. Stuart has some sample briefing on this (anna@sdap.org)

Even if the child displays signs of more significant emotional trauma around visits, it would not be acceptable to halt visitation in the hopes that therapy might some day remedy the situation. (*Nicholas B.*, *supra*, 88 Cal.App.4th at p. 1138; see also *Julie M., supra,* 69 Cal.App.4th at pp. 49-51.) "It is hard to imagine how the problems faced by this family could be resolved without . . . visitation. To provide the minor and/or his therapist with a veto power over this essential reunification service seems to us to undermine any hope of actual reunification." (*Id.* at p. 1139.) Instead, it is incumbent on the court to facilitate the means by which visitation can occur without detriment. "Visitation is an essential component of any reunification plan. To promote reunification, visitation must be as frequent as possible. Where the minor is reluctant to visit, and family therapy is needed to promote visitation, such therapy may be critical to reunification." (*Alvin R.*, *supra*, 108 Cal.App.4th at p. 972, citations omitted; *David D.*, *supra*, 28 Cal.App.4th at p. 953 ["Due to the court's order prohibiting visitation between this mother and her children, adequate reunification services were not provided."].)

It might be somewhat counterintuitive, but it is important to maintain regular visitation if the child is displaying fear of visiting a parent. The proper purpose of supervised visitation is to facilitate visitation when the child is fearful, when there are concerns of the parent being abusive, or there is a substantial chance of the child suffering harm from neglect during the hours of the visitation. If reunification efforts are eventually going to be terminated because, in part, there is a lack of a trusting relationship between the child and the parent, then reasonable services would necessarily include efforts to repair and strengthen the relationship. (See, e.g., *Alvin R.*, *supra*, 108 Cal.App.4th at p. 973 ["The longer parent and child live with no visitation, the less likely there will ever be any meaningful relationship."]; *Kristin W.*, *supra*, 222 Cal.App.3d at p. 255 ["[T]he problems leading to the dependency could only have been resolved by petitioner having some responsibility for the care of the children. The plan's limitation on visitation prevented petitioner from demonstrating and improving his skills with respect to the care of the children."].) If the child continues to have little or minimal contact with the parent, then the strain between them only becomes worse. Reasonable services have not been provided when the parent is not given the tools for reunifying with the child. While the wishes of the child are relevant in the court's visitation ruling, "[i]n no case may a child be allowed to control whether visitation occurs." (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1505.)

C. Visitation Shall Normally Occur When the Parent is in Custody

"[G]o to prison, lose your child" is not the law. (*Brittany S.*, *supra*, 17 Cal.App.4th at p. 1402.) "Section 361.5, subdivision (e)(1) provides that if a parent is incarcerated, the court shall order reasonable services unless the court determines, by clear and convincing evidence, that services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child

bonding, the length of the sentence, the nature of the crime, and the degree of detriment to the child if services are not offered. Reunification services for an incarcerated parent are subject to the time limitations imposed in section 361.5, subdivision (a), and may include, among others, telephone calls and '[v]isitation services, where appropriate.' "[8] (*In re J.N.* (2006) 138 Cal.App.4th 450, 456-457.)

Detriment cannot be based on the mere fact the parent is in custody. (*Brittany S., supra,* 17 Cal.App.4th at p. 1402.) Nor may visitation be denied merely because the parent is incarcerated at least 50 miles away. (*In re Jonathan M.* (1997) 53 Cal.App.4th 1234, 1237, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.)

Visitation should not be denied simply because the child is young. On the contrary, the younger the child, the more compelling an argument that there be face-to-face visits. "We simply cannot agree with the following provision of the revised service plan: 'Due to the minor's tender age and the distance to California Institute from the minor's home, a visitation schedule more frequent than every three months would create an undue hardship for the minor.' First of all, as mentioned above, the 'distance' was only 36 miles. Second, the lack of personal contact with her mother created at least as much of an 'undue hardship' on Brittany as limiting contact to telephone calls and letters." (*Brittany S., supra,* 17 Cal.App.4th at p. 1407, fn. 7.) "We fail to see how visitation could not have been appropriate when [the mother] was incarcerated at either county jail or Frontera. Particularly where the child is young (and Brittany was two to three years of age during the pertinent time period), limiting contact to letters and telephone calls should be used only as a last resort. By not providing visitation, SSA [Orange County Social Services Agency] virtually assured the erosion (and termination) of any meaningful relationship between [the mother] and Brittany." (*Id.* at p. 1407, fns. omitted.)

"If the Legislature believed visitation with an incarcerated parent by a child of a young age would be detrimental based on age alone, it could have set forth an age restriction or at the least set forth some sort of presumption that visitation of an incarcerated parent by a child under the age of two years, as an example, is presumed to be detrimental unless shown otherwise. Its failure to set forth either indicates that there should not be a blanket restriction on visitation based solely on age." (*In re Dylan*

[8] The court has greater authority to deny visitation when the parent has been convicted of murder (§ 361.2, subd. (a)(1)(B)) or a sex offense (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 684-688; *Robin J. v. Superior Court* (2004) 124 Cal.App.4th 414, 424).

T. (1998) 65 Cal.App.4th 765, 774.) There is no legal requirement that visits can occur only if the child is permitted a contact visit or in certain settings. (See *id.* at pp. 774-775.) The failure to provide visitation for a parent in custody who is receiving reunification services can result in a finding of unreasonable services. (See, e.g., *In re Precious J.* (1996) 42 Cal.App.4th 1463, 1479; *Monica C.*, *supra*, 31 Cal.App.4th at p. 307.)

D. Visitation Should Be Ordered Even If Reunification is not Ordered for an Incarcerated Parent

The denial or termination of reunification services for an incarcerated parent does not necessarily justify the lack of visitation. "Section 361.5, subdivision (f) provides that when a court does not order reunification services . . . '[t]he court may continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child.' " (*J.N., supra*, 138 Cal.App.4th at p. 457, emphasis deleted.) As shown above, visitation is important not only for the parent but also for the child. It is no less important if the parent is incarcerated. Fostering the bond between the child and the parent re-assures the child and creates options for the court concerning the ultimate outcome of the case.

Even if the parent has been incarcerated for a period of time before dependency proceedings began, the same benefits to the child are available through regular visitation. And those in custody continue to enjoy a due process right to visitation.[9] (*James R., supra,* 153 Cal.App.4th at pp. 428-429 [delinquent minor's right to visitation with parents while the minor is in placement]; *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 641 [family court matter]; *Smith, supra,* 112 Cal.App.3d at pp. 968-969 [civil rights action against a jail's policy prohibition of most visits with children].)

E. Visitation Should not be Reduced When Services are Terminated

When the court terminates reunification services, "[t]he court shall continue to permit the parent or legal guardian to visit the child pending the hearing unless it finds that visitation would be detrimental to the child." (§§ 366.21, subd. (h), 366.22, subd. (a)(3).)

It is important not to reduce visitation when terminating services for two reasons. First, as explained above, there is a due process right to maintaining the parent-child relationship, and the child naturally benefits from continuing the relationship unless there is overriding evidence to the contrary. "Absent a showing of detriment caused by visitation, ordinarily it is improper to suspend or halt visits even after the end of the reunification period. [Citations.] Visitation may be seen as an

[9] The court may prohibit visitation if the parent molested the child. (*Robin J. v. Superior Court*, *supra*, 124 Cal.App.4th at p. 424.)

element critical to promotion of the parents' interest in the care and management of their children, even if actual physical custody is not the outcome. [Citation.]" (*Luke L.*, *supra*, 44 Cal.App.4th at p. 679.) "Courts have long recognized that, in the context of dependency proceedings, a lack of visitation may 'virtually assure[ ] the erosion (and termination) of any meaningful relationship' between mother and child. [Citation.] Even after family reunification services are terminated, visitation must continue unless the court finds it would be detrimental to the child. (§ 366.21, subd. (h).)" (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1504.)

Second, a strong parent-child relationship through regular visitation is a reason for not terminating parental rights. While it is proper to terminate parental rights when the relationship between the child and the parent drifts apart on its own, it violates due process for the state to interfere with the relationship leading up to the section 366.26 hearing. (*David D.*, *supra*, 28 Cal.App.4th at pp. 954-955.) "The Supreme Court has held the statutory procedures used for termination of parental rights satisfy due process requirements only because of the demanding requirements and multiple safeguards built into the dependency scheme at the early stages of the process. [Citations.] If a parent is denied those safeguards through no fault of her own, her due process rights are compromised. Meaningful visitation is pivotal to the parent-child relationship, even after reunification services are terminated. [Citation.] Under section 366.26, subdivision (c)(1)(A) [now subdivision (c)(1)(A)(i)], the Legislature has provided a means by which even a parent to whose custody a child cannot currently be returned has a final chance to avoid termination of parental rights if she can show she has maintained regular contact and visitation with her child, and the child would benefit from continuing the relationship. Obviously, the only way a parent has any hope of satisfying this statutory exception is if she maintains regular contact with her child." (*Hunter S., supra,* 142 Cal.App.4th at pp. 1504-1505.)

F. Visitation Should Continue after the Section 366.26 Hearing If the Court Does Not Terminate Parental Rights

"The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child." (§ 366.26, subd. (c)(4)(C).) Again, this is imperative because the child naturally desires a continued relationship with the parent unless there is evidence to the contrary. "[T]he Legislature made clear its intent to require juvenile courts to make visitation orders in both long-term foster care placements [as it was called at the time] and legal guardianships." (*In re M.R.* (2005) 132 Cal.App.4th 269, 274.) Further, "visitation is a significant issue in connection with a later section 366.26 hearing to determine whether parental rights should be terminated." (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 420.) "Because the trial court was required to make a visitation order unless it found that visitation was not

in the children's best interest, it could not delegate authority to the legal guardian to decide whether visitation would occur. [Citation.] The court may delegate authority to the legal guardian to decide the time, place, and manner in which visitation will take place." (*M.R., supra*, 132 Cal.App.4th at p. 274.)

G. Appellate Notes

≈ **Standard of review:** Some courts state that visitation orders are reviewed for abuse of discretion. (See, e.g., *In re James R.* (2007) 153 Cal.App.4th 413, 434-435; *In re J.N.* (2006) 138 Cal.App.4th 450, 459 [visitation for prisoners]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351-1352; *In re Julie M.* (1999) 69 Cal.App.4th 41, 48.) Other courts have reviewed the decision for substantial evidence. (See, e.g., *In re Mark L.* (2001) 94 Cal.App.4th 573, 581, disapproved on other grounds in *Conservatorship of O.B., supra,* 9 Cal.5th 989, 1010 [denying visitation]; *In re David D.* (1994) 28 Cal.App.4th 941, 954.)

H. Potential Areas for Appellate Challenge

1. If there was removal at disposition, was their adequate provision for visitation?

2. Did the juvenile court improperly delegate its judicial authority regarding visitation?[10]

   a. Was there an improper delegation to the Department? (See *In re Shawna M.* (1993) 19 Cal.App.4th 1686, 1690 [it was error for a juvenile court to omit minimum visitation requirements and to delegate supervised visitation to be "arranged through, and approved by" the Department].)

   b. Was there improper delegation to a therapist? (See e.g., *In re Donnovan J.* (1997) 58 Cal.App.4th 1474, 1477.)

   c. Was there an improper delegation to the children? (See *In re S.H.* (2003) 111 Cal.App.4th 310, 316 [visitation order that allowed the children to veto visitation entirely was a violation of the separation of powers, and the additional failure to specify a minimum number of visits was error].)

3. Did the juvenile court inadequately define the rights of the parties to visitation? (See e.g., *In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757 [juvenile court must decide whether there should be any visitation and the frequency

[10] For those interested, SDAP Staff Attorney Anna L. Stuart has some sample briefing on improper delegation, which includes where the juvenile court delegated to the custodial parent the ability to decide the step-down decision from supervised to unsupervised visitation for the non-custodial parent (anna@sdap.org).

and length of such visitation where only "ministerial tasks of overseeing the rights" can be delegated].)

4. Was there any impermissible interference with the parent's right to visitation? (See e.g., *In re Dylan T.* (1998) 65 Cal.App.4th 765, 770 [lack of all visitation during a significant period of reunification is an error which could alter the outcome of subsequent proceedings]; § 362.1, subd. (a) ["any order placing a child in foster care, and ordering reunification services, shall provide . . . for visitation between the parent and the child and visitation shall be as frequent as possible, consistent with the well-being of the child"]; *In re Luke L.* (1996) 44 Cal.App.4th 670, 681 [order placing minors with relatives in southern California was erroneous while Mother still in reunification because the distant placement made visitation impractical].)
5. Did the juvenile court make the proper findings to preclude visitation with siblings under section 16002, which provides "the court has the authority to develop a visitation plan for the siblings, unless it has been determined that visitation is contrary to the safety or well-being of any sibling"?