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EMERGING AND RECURRING ISSUES IN DEPENDENCY APPEALS

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FDAP

Emerging and Recurring Issues in Dependency Appeals[1]

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Notice to fathers/due process

Issue: Fathers are entitled to adequate notice of the proceedings. This is an issue that continues to result in favorable opinions.

Take aways:

Adequacy of notice can be raised from the 366.26 hearing.

The issue can be raised by either parent.

Due diligence requirements must be adhered to by the Department.

The issue will survive waiver/forfeiture.

Standing of mother to raise the issue:

In re Jayden G. (2023) 88 Cal.App.5th 301 - In an appeal by mother from the termination of parental rights, mother can argue that the Department failed to exercise due diligence in locating father. (*Id.* at p. 303.)

Unpublished opinion: *In re E.C-S.* (4th Dist., Div. 2, E081138) August 4, 2023 - Mother argued she had standing to invoke the violation of father's due process rights. The Department did not challenge mother's standing. The Court found mother had standing to raise this issue "which would otherwise forever evade review given that mother's 'appeal is the only practicable means by which the agency's contravention of [father's] due process rights can be remedied.'" (*In re J.R.* (2022) 82 Cal.App.5th 569, 573.) (Opn. at p. 5.)

[1] The following is not meant to be an exhaustive compilation but provides an overview of some of the issues appellate attorneys may consider on appeal.

What is due diligence:

In re Jayden G. (2023) 88 Cal.App.5th 301 – The Department ignored information it had about father, such as his middle name, birth year, it knew he had recently been arrested but failed to check court arraignment or transport records, and it knew that father lived down the street from mother. (*Id.* at p. 309.)

Due diligence requires a thorough and systematic investigation to protect a parent's fundamental liberty interest. (*In re Mia M.* (2022) 75 Cal.App.5th 792, 808.) In *Jayden G.*, the Department did not "explore the more specific information provided by mother…" (*Id.* at p. 309.)

Standard of review:

In re Jayden G. (2023) 88 Cal.App.5th 301 - De novo review of whether inadequate notice of a dependency proceeding violated a parent's due process rights. (*Id.* at p. 308.)

Whether a due process violation in the dependency context is structural error requiring automatic reversal is an open question. (See *In re Christopher L.* (2022) 12 Cal.5th 1063, 1083 ["We express no view on the cases that have applied a rule of automatic reversal where there was a complete absence of notice."].) (*In re Jayden G., supra*, 88 Cal.App.5th at p. 308.)

Due process violation:

In re Jayden G. (2023) 88 Cal.App.5th 301 – In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them that an action is pending and afford them an opportunity to defend. (*Id.* at p. 309.)

In re A.K. (2024) 99 Cal.App.5th 252 -The juvenile court and the Department did not comply with its duties (1) to try to identify all of the minor's alleged fathers (including C.B.) early in the dependency proceedings, (2) to give adequate notice to C.B. that his parental rights were at stake in the proceedings, or (3) to give C.B. notice of specific important hearings. (*Id.* at p. 256.)

Forfeiture of issue

In re A.K. (2024) 99 Cal.App.5th 252 -In an appeal from the termination of parental rights, the Court found that father had not forfeited the issue. "For the due process exception to the forfeiture rule to apply, the parent must show there was a defect in the proceedings that 'fundamentally undermined the statutory scheme' so as to prevent the parent 'from availing himself or herself of the protections afforded by the scheme as a whole'." (*Id*. at p. 268.)

Issue raised by alleged father

Unpublished: *In re S.W.* (2nd Dist., Div. 6, B327560) September 18, 2023 - In an appeal from a section 366.26 hearing, the Department conceded that it did not exercise due diligence in locating father and giving him notice of the dependency proceedings.

Jurisdiction

Issue: What is sufficient evidence for jurisdiction? The main trends in this area arose from the California Supreme Court's decision in *In re N.R.* (2023) 15 Cal.5th 520.

Take Aways:

The Department needs to prove a connection between the conduct of the parent and the harm to the child.

Substance abuse is generally going to be enough for jurisdiction. For a parent to be able to overcome jurisdiction, courts want to see some effort by parent (for example, that the parent was honest and responsive, stopped using, admitted extent, submitted to drug testing.)

Courts will usually find a way to connect harm to child to conduct other than simply homelessness or indigence.

Focus is on substance abuse not just use.

Tender Years Presumption

The tender years presumption suggested that when a child is under the age of 6, any evidence of substance use amounts to prima facie evidence of an inability to care for a child.

In re N.R. (2023) 15 Cal.5th 520 - The tender years presumption was rejected as conflicting with legislative intent, disapproving *In re Drake M.* (2012) 211 Cal.App.4th 754 and *In re K.B.* (2021) 59 Cal.App.5th 593. (*Id.* at pp. 556-557.)

A finding of "substance abuse" is not prima facie evidence of a parent's inability to provide regular care resulting in a substantial risk of physical harm to a child of tender years. (*In re N.R.* (2023) 15 Cal.5th at pp. 558-559.)

Substance Abuse

Substance abuse carries its "ordinary meaning" of an "excessive use of drugs or alcohol." There is no need for DSM diagnosis. (*In re N.R.* (2023) 15 Cal.5th 520, 531, 538.)

"Substance abuse, when shown to exist, should not be regarded as automatically amounting to prima facie evidence of the other facts required for dependency jurisdiction. Courts must undertake a further inquiry to ascertain whether the government has met its burden as to each of the elements involved, without shifting the burden to a parent ... to rebut a presumption created by a finding of substance abuse." (*Id.* at p. 559.)

But, Courts "may in appropriate circumstances discern an inability to provide regular care and a substantial risk of serious physical harm or illness from the evidence ..., including evidence relating to substance abuse, and the reasonable inferences that can be drawn from this evidence." (*Ibid.*)

Key for parents to show: Parent should be able to show some or all of the following: that the parent was honest and responsive, admitted the extent of their use, stopped using, submitted to drug testing, and immediately began treatment. (*In re L.C.* (2019) 38 Cal.App.5th 646, 648-649, 652*; In re Destiny S.* (2012) 210 Cal.App.4th 999, 1004.)

Parent failing to protect child from other parent's substance abuse.

Published opinions: *In re Ca.M.* (2024) 100 Cal.App.5th 938 - The Court sustained allegation regarding **mother's failure to protect from father's** excessive alcohol abuse. (319 Cal.Rptr. 369, 375.)

Unpublished opinions: *In re M.D.* (2nd Dist., Div. 3, B326420) March 29, 2024 - "Father could not simply put his head in the sand as to the risk mother's substance abuse posed to his preteen daughter and then claim to have been unaware of any risk. (See *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1104 ['The purpose of dependency proceedings is to prevent risk, not ignore it.'].)" (Opn. at p. 10.)

Marijuana use

Appellate courts seem open to finding insufficient evidence of harm when only marijuana use is at issue.

In re J.A. (2020) 47 Cal.App.5th 1036 – "The evidence of mother's substance use is, at most, that she used edible marijuana while pregnant, to address her pregnancy symptoms, after having researched that it was a relatively safe alternative. She claims that she was never high or under the influence when she used it. She claims that she easily stopped using as soon as she was told to do so; her drug tests support this. This is not substantial evidence – or any evidence – of substance abuse." (*Id.* at p. 1047.)

Unpublished decision: *In re Sky W.* (5th Dist., F085709) October 17, 2023 - Mother used edibles to treat her severe morning sickness with doctor's permission. The Court finds the evidence "patently insufficient to support an allegation of substance abuse." (Opn. at p. 8.)

Prior substance abuse alone may not be enough for jurisdiction

In re S.F. (2023) 91 Cal.App.5th 696 - The Department had the burden of proving father's substance abuse history presented a substantial risk of serious physical harm to minor. However, it presented no evidence father's reported sobriety was false, let alone, that any prior or current drug use presented a substantial risk of serious physical harm to minor. (*Id.* at p. 717.)

While "concern" that an addict will relapse is understandable, such "concern" untethered to any evidence that this is more than a

theoretical possibility (as it is in the case of every addict) does not establish a substantial risk of serious physical injury to a minor. (*Id.* at p. 718.)

Risk to the child must be at time of hearing

In re F.V. (2024) 100 Cal.App.5th 219 - There was insufficient evidence to support the jurisdiction findings where there was no evidence of future risk to the minor at the time of the jurisdiction hearing. The juvenile court found jurisdiction based on subdivision (b)(1), due to the parents sending the minor to the United States without a plan for her care. Father appealed and the reviewing court reversed. Here, there was no evidence at the time of the jurisdiction hearing that the harm the minor suffered by entering the United States alone would recur. (319 Cal.Rptr.3d 1, 8.)

Indigence and recent amendment to WIC 300(b)

As of January 1, 2022, section 300, subd. (b)(2) was amended to provide: "A child shall not be found to be a person described by this subdivision solely due to any of the following: [¶] (A) Homelessness or the lack of an emergency shelter for the family. [¶] (B) The failure of the child's parent or alleged parent to seek court orders for custody of the child. [¶] (C) Indigence or other conditions of financial difficulty, including, but not limited to, poverty, the inability to provide or obtain clothing, home or property repair, or childcare."

However, courts will most likely find there are other factors to support jurisdiction.

In re L.B. (2023) 88 Cal.App.5th 402 - "[I]ndigence may be a factor considered under section 300, subdivision (b), so long as [it is not] the only factor. For example, substance abuse or mental health issues that lead to homelessness or indigence, putting children at risk, could potentially support jurisdiction under subdivision (b) of section 300." (*Id*. at pp. 413–414.) The "lack of appropriate custody orders was only one of many factors placing L.B. at risk of harm." (*Id.* at p. 416.)

In re M.D. (2023) 93 Cal.App.5th 836 – "In this case, however, we disagree that the record supports the inference Father's indigence was the only condition that exposed M.D. to harm. Instead, his failure to adequately protect and supervise M.D. and provide her a safe home

was attributable to his negligent disregard for her basic needs." (*Id*. at p. 854.) Senate Bill 1085 did not change that "the purpose of [juvenile dependency law] is to provide maximum safety and protection for children who are currently ... being neglected, ... and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2, subd. (a).) (*Id*. at p. 912.)

Domestic violence

In re S.F. (2023) 91 Cal.App.5th 696(1st Dist., Div. 1) – Court of Appeal reversed jurisdictional and dispositional findings and orders. The Court also determined the case was not moot even though mother had not challenged the jurisdictional findings. (*Id.* at pp. 711-712.)

"While these incidents apparently involved some physical touching, there was no evidence of any physical injury and there was no evidence these arguments (and any pushing) ever occurred in the presence of minor." (*Id*. at p. 715.)

But certainly a parent's desire to reunify his or her family is a laudable goal and not a basis for "inferring" that there is a "substantial risk" of "serious" physical harm to the minor in the absence of any evidence that reasonably suggests that is the case. (*Id*. at p. 716.)

Was there a significant history of past domestic violence?

If so, that falls in favor of establishing jurisdiction. (*In re L.B.* (2023) 88 Cal.App.5th 402, 416-417.)

Factors the courts will consider.

Did the parent deny any domestic violence, did the parent maintain a restraining order, did the parent engage in services, was the domestic violence likely to continue, did the parents separate.

Incarceration

Incarceration alone does not support jurisdiction under 300 (b)(1) or (g). The parent must be unable or unwilling to make appropriate custody arrangements.

In re R.M. (2024) 99 Cal.App.5th 240 - The Court of Appeal reversed the jurisdictional and dispositional findings, holding that, without more, a parent's inability to care for or financially support a child due

to incarceration is not grounds for dependency jurisdiction under either WIC 300(b)(1) or (g). The Court observed that, under subdivision (g), the issue was whether the parent could arrange for care, not whether the parent has already done so. (*Id.* at p. 249.)

One jurisdictional finding may be sufficient

In re Ca.M. (2024) 100 Cal.App.5th 938 - On appeal from jurisdiction and disposition, mother challenged the sufficiency of the evidence for only one of the several jurisdictional findings. Following the decision in *In re I.J.* (2013) 56 Cal.4th 766, the Court found that because substantial evidence supported the other jurisdictional findings, it declined to address mother's challenge to one specific finding. (319 Cal.Rptr. 369, 374.)

Jurisdiction over non-minor dependent

In re Jonathan C.M. (2023) 91 Cal.App.5th 1039 (1st Dist., Div. 1) (Deborah Dentler) - The Court of Appeal reversed the order terminating jurisdiction over appellant, a nonminor dependent, finding that the juvenile court failed to give any consideration to whether termination of jurisdiction was in his best interests. (*Id.* at pp. 1046-1047.)

Disposition

Issue: A heightened burden of proof is required for removal of the child from a parent.

Take aways:

Courts will require that the Department meet the higher standard of clear and convincing evidence for removal.

The best interests of the child remain paramount and may include staying with their parents.

New Legislation:

Effective January 1, 2024: SB 578 amended WIC 319 to: (1) require the social worker's detention report to include various information regarding the harms to the child that may result from removal and the

"least disruptive alternatives to returning the child to the custody of their parent, guardian, or Indian custodian"; and (2) require the juvenile court, if it finds that removal is necessary, to set forth various information in a written order or on the record, including the basis for its findings, whether its placement determination "complies with … less disruptive alternatives," and "any orders necessary to alleviate any disruption or harm to the child resulting from removal."

Removal as the "critical firebreak"

In re S.F. (2023) 91 Cal.App.5th 696 (1st Dist., Div.1) - The jurisdictional allegations were not supported so removal not supported either. The Court noted the elevated burden required for removal.

Unpublished decision:

In re Sky W. (5th Dist., F085709) October 17, 2023 - Removal order reversed "Although troubling, [a parent's] 'lack of transparency' or subsequent denial of the events that led to dependency is not sufficient, by itself, to justify removal of the [c]hildren from [that] parent's custody." (*M.V., supra*, 78 Cal.App.5th at p. 962, citing *In re Henry V.* (2004) 119 Cal.App.4th 522.) It bears repeating "that out-of-home placement is not a proper means of hedging against the possibility of failed reunification efforts, or of securing parental cooperation with those efforts. It is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent." (Opn. at p. 11.)

Best interests of the child are paramount when deciding placement

In re R.Q. (2023) 96 Cal.App.5th 462 - In a presumed father's appeal from the juvenile court's order placing the child with her biological father, the Court of Appeal holds that the juvenile court does not have authority under WIC 361.2 to place a child with a "mere biological parent." However, the juvenile court has broad authority to craft orders for the well-being of a dependent child. Here, the juvenile court acted within its broad discretion in determining that the child's placement with her biological father was in her best interest. (*Id.* at p. 468.)

Placement with previously non-custodial parent

In re M.C. (2023) 88 Cal.App.5th 137 (1st Dist., Div. 2) - The Court was sympathetic to a non-custodial parent. Father was a long haul truck driver and on the road for days at a time. He had arranged for the aunt and uncle to care for child while he was working. The juvenile court did not like the plan because caretakers spoke Spanish only and child spoke English. The appellate court reversed finding that "[t]he law, however, does not take a child away from a parent based on a less than ideal situation during a parent's working hours or because of language barriers." (*Id.* at p. 154.)

The juvenile court "flipped the burden of proof" and required father to show there was no detriment. Rather, when a parent requests custody, the court shall place the child with the parent unless the Department proves that placement would be detrimental to the child. (§ 361.2(a).)

Bypass provisions

Generally, parents will have a difficult time overcoming an order bypassing them for reunification services.

In re L.B. (2023) 98 Cal.App.5th 827 - The children appealed the juvenile court's dispositional order declining to apply WIC 361.5(b)(13) and granting mother and father reunification services. The Court found that the juvenile court's conclusion that it was unable to apply the bypass provision because the parents were "engaging in treatment" was in error. The Court stated that participation in treatment at the time of the disposition hearing did not preclude determination that they parents actively resisted prior court ordered treatment during the 3-year period which immediately preceded the petition at issue. (*Id.* at p. 841.)

In re Jayden M. (2023) 93 Cal.App.5th 1261 - The Court of Appeal affirmed the order bypassing mother for reunification services pursuant to WIC 361.5 (b)(10) and (11). The Court held that in assessing whether a parent made a reasonable effort to address a problem from a prior dependency, the juvenile court should consider the entire time span between the earliest time a sibling or half-sibling was removed from the parent's custody due to that problem and the dispositional hearing

in the current case not just since the filing of the instant case. (*Id*. at p. 1266.)

> The juvenile court was allowed to give dispositive weight to factors tending to show reunification efforts were unlikely to succeed. (*Id*. at p. 1273.) *Mother's efforts were not reasonable against the backdrop of her entire drug history*. (*Id*. at p. 1276.)

Case plan

Services: In re M.C. (2023) 88 Cal.App.5th 137, 155 (1st Dist., Div. 2) - The juvenile court "cannot arbitrarily order services that are 'not reasonably designed' to eliminate the behavior or circumstances that led to the court taking jurisdiction of the child."

> Father was required to participate in a parent partner program. "While this program was not an explicit item in the written case plan, Father argues that the Department nonetheless used it against him at the disposition hearing and indicated that it would be used to measure his subsequent performance for reunification." (*Id*. at p. 156.) The Court of Appeal agreed.

Visitation order- Improper delegation of authority: *In re P.L*. (2024) 100 Cal.App.5th 406 - At the jurisdiction/disposition hearing, father did not object to the visitation orders. On appeal, the Court found that the issue was forfeited. (319 Cal.Rptr.3d 9, 11.) However, even if the issue had not been forfeited, the Court of Appeal determined that the juvenile court did not abuse its discretion in allowing the children to decide if they wanted to visit with father. The Court stated that when a child refuses visitation, it is the parent's burden to request a specific type of enforcement. It is not the court's burden to sua sponte find a solution to a child's refusal to visit. (319 Cal.Rptr.3rd 9, 12-13.)

Review Hearings

Issue: The services provided to the family must be reasonable and designed to address the issues that brought the family to the Department's attention.

Take aways:

It is still very difficult to succeed on a no reasonable services argument. However, there are some glimmers of hope.

Highest chance of success is with reasonableness of visitation offered and provided.

Change can come through legislative action.

New legislation enacted January 1, 2024:

AB 937: Amends WIC 366.22 to require a juvenile court, when it finds at an 18-month review hearing that reasonable reunification services were not provided to the parent, to order that an additional six additional months of services be provided, unless the court finds, by clear and convincing evidence, that continuing the matter would be detrimental to the child.

AB 954: Adds WIC 362.8 to provide, "At a review hearing where a parent or guardian's participation in reunification or family maintenance services is considered by the court, … the parent or guardian shall not be considered to be noncompliant with the court-ordered case plan when the court finds that the parent or guardian is unable to pay for a service or that payment for a service would create an undue financial hardship for the parent or guardian, and the social worker did not provide a comparable free service that was accessible and available to the parent or guardian to comply with the case plan during the period subject to the court's review."

SB 463: Amends WIC 366.21 and 366.22 to remove the presumption that a parent's failure to "participate regularly and make substantive progress in court-ordered treatment programs" is prima facie evidence that return of the child to the parent's custody would be detrimental.

2024 proposed legislation:

Proposed AB 2664 will ensure that families with child welfare cases receive a fair opportunity to reunify. It also reaffirms that the timeline for reunification services is triggered when the Court orders 1) the child(ren) to be removed from the custodial parent or legal guardian and 2) reunification services, both of which are made at the dispositional hearing. CLC, DLS, LADL co-sponsors.

***Michael G. v. Superior Court* (2023) 14 Cal.5th 609**

Once a child has been out of the parent's custody for 18 months, the law ordinarily requires the court to proceed to set a hearing to determine a permanent plan for the child's care. A parent who has not received reasonable services may seek an extension of services beyond 18 months, but such extensions are not automatic: In addition to ensuring other statutory conditions are met, the juvenile court must consider the child's interests in deciding whether the extension, and consequent delay to the child's permanent placement, is warranted.

Post-decision, AB 937 was enacted January 1, 2024 and amended WIC 366.22.

Visitation:

Most likely to prevail on reasonable services argument based on lack of visitation.

"'Visitation is a critical component, probably the most critical component, of a reunification plan.'" (*Serena M. v. Superior Court* (2020) 52 Cal.App.5th 659, 673.) The juvenile court may suspend or deny visitation if "such visitation would be inconsistent with the physical or emotional well-being of the child," which, in essence, requires a basic detriment finding. (*In re Matthew C.* (2017) 9 Cal.App.5th 1090, 1102.)

Unpublished opinion: *In re Javon H.* (1st Dist., Div. 3, A167632) March 12, 2024

> Father did not receive visitation for the entire 18-month review period because the Department mistakenly believed the court had made a detriment finding. A court order that states nothing more than, a "father shall have supervised visitation with [the

minor] as frequent as is consistent with the well-being of [the minor]" is an order that improperly delegates judicial authority to the social services agency regarding whether visitation will occur at all. (Opn. at p. 12.)

Disposition: "Because the juvenile court erroneously concluded Father received reasonable services leading up to the 18-month review hearing, Father did not have the opportunity to bring a motion under section 352. We accordingly remand to afford him that opportunity and, should he avail himself of it, to allow the juvenile court in the first instance to adjudicate the motion. We express no view on the dispositive questions of where the Minors' interests now lie or whether this is an exceptional case under section 352." (Opn. at p. 14.)

Continued services at the six-month review hearing

F.K. v. Superior Court (2024) 100 Cal.App.5th 928 - The juvenile court has discretion at the six-month review hearing to continue reunification services even if it finds there is not a substantial probability the child will be returned to the parent. At the six-month review, the juvenile court should weigh evidence pertaining to the factors identified in section 366.21, subdivision (g)(1), "along with any other relevant evidence (such as extenuating circumstances excusing noncompliance with the three factors) in considering whether is there substantial evidence of a possible return to the mother by the 12-month hearing." (*M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 181.) (319 Cal.Rptr.3d 363, 368.)

WIC 366.26 – Termination of Parental Rights

Issue: Continued difficulties for a parent to establish the beneficial parent-child relationship exception and to receive a bonding study.

Take Aways:

Bonding studies still a difficult issue to prevail on.

Focus remains on the child at the section 366.26 hearing. After reunification services are terminated, the court's focus shifts to

permanency and stability for the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 304.)

Future legislative changes to the ASFA?:

Former U.S. Rep. Karen Bass previously introduced a bill to rewrite the federal rules involving terminating parental rights – "The 21st Century Children and Families Act." Her successor, Rep. Sydney Kamlager-Dove, reintroduced the bill with some minor revisions.

The main provisions of the act:

Parental Rights: The bill rewrites the timelines around termination of parental rights (TPR) that became law in 1997 via the Adoption and Safe Families Act (ASFA). That law requires state child welfare agencies to begin pursuing a termination if a child had been in foster care for 15 of the past 22 months.

There are some notable exceptions, the biggest being children living in kinship care. There is also a somewhat malleable "aggravated circumstances" rule that permits states to seek termination much faster in certain cases.

This bill would eliminate a federal requirement to pursue termination of parental rights, and goes further by saying that states could not initiate such a proceeding unless 24 months had passed, with the exception of aggravated circumstances cases.

Discrimination: The bill adds sexual orientation, gender identity and religion to federal child welfare nondiscrimination protections that previously only included race and ethnicity. Under the proposed law, states and agencies that contract with the federal government could not "deny to any person the opportunity to become an adoptive or a foster parent" based on those additional factors.

The legislation retains current legal requirements that adoptions cannot be delayed to match children with families of the same race, gender, culture and religion. But it instructs states to consider those factors if that is requested by the child or their birth parent.

However, the likelihood of such a sweeping overhaul of the AFSA is unlikely.

Post-Caden C. parent-child beneficial-relationship exception

Child-by-child inquiry: In re N.R. (2023) 87 Cal.App.5th 1187 - Mother argued that return of one child to her care rebutted the earlier finding of detriment. The Court of Appeal disagreed that "ascertainment of parent fitness or child detriment is a child-by-child by child inquiry." (*Id.* at p. 1190.) "Whereas a parent may be "fit" to have custody of one child, the same may not be true of a sibling with different needs. "Parental rights to one of several children may be constitutionally severed because it would be detrimental to that particular child to maintain them, while it would not be as to the others." (*In re Cody W.* (1994) 31 Cal.App.4th 221, 226)" (*Id.* at p. 1201.)

Due process claims: "Due process claims relating to the adequacy of findings to support termination of parental rights have been recognized as sufficiently important to evade forfeiture." (*In re N.R.* (2023) 87 Cal.App.5th 1187, 1197.)

Statements of child: In re I.E. (2023) 91 Cal.App.5th 683 - When considering the third element, "[t]he child's unequivocal (and uncontradicted) statements in this case powerfully demonstrate the child did not have the type of attachment with mother that would cause the child to suffer detriment in the event of a termination of parental rights." (*Id.* at p. 694.) Child was 6 years old and wanted caretaker to be her "forever mother." (*Id.* at p. 689.)

Evidence the child "experienced no distress at the end of visits" supported the juvenile court's finding "the relationship was not so substantial that its severance would be detrimental to the child." *(Id. at p. 692.)*

Unpublished decision which provides a good analysis by Court of the three elements of the exception.

In re A.G. (6th Dist., H051064) February 20, 2024 - Courts finds that a proper analysis of the third element of the parental-benefit exception was not conducted. "The findings suggest the juvenile court reached its conclusion based, at least in part, upon the expectation that maternal

aunt would permit A.G. to have continued contact with Mother after adoption." (Opn. at p. 17.)

Lack of notice to father throughout proceedings can be raised at section 366.26 hearing

In re A.K. (2024) 99 Cal.App.5th 252 - The Court of Appeal reversed the order terminating parental rights, finding that the juvenile court and Agency failed to comply with the notice and parentage inquiry requirements early in the proceedings, and that father was denied due process as a result. (*Id.* at p. 266.) The Court of Appeal disagrees with the Agency's contentions that father's arguments were untimely and had been forfeited. (*Id.* at pp. 268-269.)

Bonding studies

In re M.V. (2023) 87 Cal.App.5th 1155 - Court of Appeal reversed the order denying parent a bonding study. The minor was 7 years old at the time of the 366.26 hearing and had a "complex relationship" with the parent. (*Id.* at p. 1179.) The juvenile court did order a bonding study but the bonding study focused on parent's personal weaknesses and not the relationship with the child and did not observe any visits. "Although DCFS regularly reported M.V.'s statements about her parents and observed that she and her parents were bonded, there was not a great deal of independently obtained information in the reports about the quality of her interactions with them or the importance of those relationships to her." (*Id.* at p. 1180.) The Court of Appeal found it was an abuse of discretion to not order another bonding study when the study provided was inadequate and nonresponsive. (*Id.* at p. 1182.)

However, the abuse of discretion standard is difficult to overcome. Courts will usually find that the report contains sufficient information regarding the quality of visits and relationship.

The focus of the court's inquiry at the section 366.26 hearing on the child's permanency and stability does not change even for a minor parent.

In re S.G. (2nd Dist., Div. 3, B330106) March 28, 2024 - The Court of Appeal affirmed the denial of mother's WIC 388 petition and the termination of her parental rights. Relying on California Supreme Court precedent, the Court found that the application of WIC sections

388 and 366.26 to a teenage parent was not a violation of the parent's substantive due process rights. The Court noted that a parent's youth does not change or lessen the child's need for permanency and stability. (Opn. at pp. 7-8.)

Relatives

Issue: The Department has statutory rights and obligations towards relatives.

Take aways:

This is an area for possible change. Relatives are interviewed as part of ICWA inquiry and that type of inquiry and documentation should be extended to relatives.

Legislation: AB 2929 would strengthen existing requirements involving social workers' documentation of family finding efforts when children are not placed with relatives. CLC sponsored.

Due diligence to locate and identify relatives

In re K.B. (2023) 97 Cal.App.5th 689 (1st. Dist., Div. 2) In an appeal from jurisdiction and disposition, the Court of Appeal agreed that there was insufficient evidence to support due diligence for relative finding. (Id. at p. 693.) The Court noted that relatives were identified for ICWA inquiry but not asked about relative placement. (*Id.* at p. 698.)

The issue was not forfeited because mother had no notice of the due diligence findings. Section 309 is "not conditioned on parents' cooperation and its impact is not limited to placement." (*Id.* at p. 696.)

Notice to relatives when child removed from their care

In re R.F. (2023) 94 Cal.App.5th 718 - The Court of Appeal reversed the order summarily denying appellant's paternal grandparents' WIC 388 petition, finding a prima facie showing was made that they were not properly notified of the children's emergency removals. (*Id.* at p. 733-734.)

Standing for grandparents/Resource family approval

In re C.P. (2023) 91 Cal.App.5th 145 - Maternal grandparents appealed the juvenile court's order of legal guardianship rather than adoption at the WIC 366.26 hearing. The Court of Appeal found the grandparents had standing to appeal because their fundamental interest in their relationship with the child was injuriously affected by the juvenile court's order. (*Id.* at pp. 152-153.) The Court further found the WIC 366.26(c)(1)(A) exception to adoption did not apply as there was no legal impediment rendering the grandparents unable to adopt. (*Id.* at p. 154.)

Restraining Orders

Issue: The court's ability to issue restraining orders.

Take Aways: The juvenile court's authority to issue a restraining order protecting a child is broad.

In re H.D. (2024) 99 Cal.App.5th 814 - On appeal, mother argued the juvenile court lacked authority under WIC 213.5 to issue a restraining order. Even though the issue had been forfeited, the Court of Appeal exercised its discretion to reach the issue because it involved an important legal issue of statutory interpretation that could reoccur. (*Id.* at p. 818.) The Court disagreed with mother and found that the juvenile court's authority to issue a restraining order under WIC 213.5 applied to petitions filed by social workers and/or probation officers. (*Id.* at p. 820.)

In re Lilianna C. (2024) 99 Cal.App.5th 638 - Addressing an issue of statutory construction and "drafting error," the Court of Appeal rejected a literal reading of WIC 213.5 and held that a juvenile court's authority under WIC 213.5 to issue a restraining order protecting the "child or any other child in the household" applies whenever a dependency petition has been filed, including a petition filed by a social worker. (*Id.* at pp. 645-646.)

Disabilities

Issues: Parents with disabilities in dependency proceedings face higher removal rates and termination of parental rights than parents without disabilities.

Take aways:

It is still very difficult for parents with disabilities from detention through the WIC 366.26 hearing.

Over 20 years ago, the Fourth District Court of Appeal found that the ADA does not directly apply and cannot be used as a defense by parents in juvenile dependency proceedings. (*In re Anthony P.* (2000) 84 Cal.App.4th 1112, 1116; *In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1139.)

There has been some movement in other states towards incorporating the ADA, but not much traction in California. For example, the Michigan Supreme Court in *In re Hicks/Brown* (Mich. 2017) 893 N.W.2d 637 reversed the termination of parental rights of a mother with an intellectual disability finding that the state's child welfare agency violated the ADA. (*Id.* at p. 642.) In New York in the *Matter of Lacee L.* (2018) 32 N.Y.3d 219, that "[f]amily Court should not blind itself to the ADA's requirements placed on ACS and like agencies. The courts may look at the accommodations that have been ordered in ADA cases to provide guidance as to what courts have determined in other contexts to be feasible or appropriate with respect to a given disability." (*Id*. at p. 231.) In 2019, the Colorado Court of Appeals ruled that a child welfare agency fails to comply with its duties under the ADA, as well as its reasonable efforts mandates, if it does not make reasonable modifications to case plans and services offered to disabled parents. (*People ex rel. S.K.* (Colo. App. 2019) 440 P.3d 1240, 1249.)

Title II and its application to dependency proceedings. Title II is the most relevant because it governs "public entities" and "anything a public entity does." (28 C.F.R. § 35.102 [Application]; 28 C.F.R. pt. 35, App. B (2019) ["Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their

instrumentalities or agencies, regardless of the receipt of Federal financial assistance."]) An argument can be made that dependency courts and child welfare entities are public entities covered by the ADA, and reunification services are "services, programs, and activities" of these covered entities.

Legislation:

2023 enacted legislation: SB 407 amended WIC 16519.5 to: (1) … and (2) require counties to ensure that their caregiver training supports children "of all races, ethnic group identifications, ancestries, national origins, colors, religions, sexes, sexual orientations, gender identities, **mental or physical disabilities**, or HIV statuses."

2024 Proposed Legislation: SB 1197 will clarify the availability of respite services through regional centers for certain children and non-minor dependents in the foster care system. CLC, DRA, and Public Counsel co-sponsored.

UCCJEA

Issue: Does parent forfeit a claim involving the UCCJEA on appeal if not raised below?

Take away: The Courts are split.

In re L.C. (2023) 90 Cal.App.5th 718 (2nd Dist., Div. 5) UCCJEA can't be forfeited by parent. Reasons issue not forfeited: "the purpose of forfeiture rules generally, the comity-driven purpose of the UCCJEA, and the comprehensive statutory scheme that our Legislature enacted when adopting the UCCJEA." (*Id.* at p. 738.)

But,

In re Kayla W. (2023) 97 Cal.App.5th 99 (2nd. Dist., Div. 3) Parent forfeited the issue because not raised below. The Kayla W. Court distinguished *In re L.C.*, stating that the lower court in L.C. never addressed the UCCJEA. *In Kayla W.*, the California court consulted with the Nevada court. (*Id.* at p. 107.)

Mootness

Issue: Mootness is ever present in dependency appeals and issues are routinely found to be moot by the Court of Appeal.

Take away: The issue must be addressed on a case-by-case basis.

In re D.P. (2023) 14 Cal.5th 266

> Stigma alone is not enough to avoid mootness. The possibility of inclusion on the CACI was too tenuous. The parent must show a specific legal or practical consequence that would be avoided. (*Id.* at p. 278.) However, the Supreme Court reminded appellate courts that they can exercise discretion to hear cases that may be moot.

Current split in appellate courts

Filing of subsequent notice of appeal is required

> *In re Rashad D.* (2021) 63 Cal.App.5th 156 (2nd Dist., Div. 7)
>
> Mother's appeal from jurisdiction/disposition was moot after the juvenile court terminated jurisdiction at a subsequent hearing and no notice of appeal was filed. The Court of Appeal stated it had no jurisdiction in the "now closed case."
>
> Following *Rashad D.*
>
> > *In re Gael C.* (2023) 96 Cal.App.5th 220

Subsequent notice of appeal not required because remittitur vests juvenile court with jurisdiction

> *In re S.G.* (2021) 71 Cal.App.5th 654 (2nd Dist., Div. 1.) Mother's failure to appeal the termination of juvenile court jurisdiction did not render her restraining order appeal moot. Case-by-case determination required.