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New Tribal Customary Adoption Order (TCAO) Permits Continuing Child/Parent Contact

Dependency Update[1]

By Bradley Bristow[2]

A new state law, Welfare and Institutions Code[3] section 336.24 (stats. 2009, ch. 287, sec. 12, operative July 1, 2010, and repealed January 1, 2014, unless extended), authorizes California courts to give Full Faith and Credit to Tribal Customary Adoption Orders (TCAO's). This law will permit some parents of Indian children to maintain contact with their children because the tribal adoptions do not terminate parental rights.

Under the new law, the assessment prepared for the section 366.26 hearing must address the option of tribal customary adoption. The tribe or its designee prepares a home study of the proposed tribal customary adoptive home, and the home is checked through the Child Abuse Central Index and the Department of Justice. A court may not approve a TCAO under section 366.14 when the adoptive parent has been convicted of certain child abuse offenses or violent felonies, or certain assaults or batteries within the last five years. Also, a licensed public adoption agency must provide the child's medical background information to the proposed adoptive parent.

The court may continue the section 366.26 hearing up to 120 days for final adoption approval, and the tribe should submit the TCAO to the court 20 days before the new hearing date. The TCAO must describe how the parent-child legal relationship is affected by the adoption, including any contact between the birth parents and the child, the responsibilities of the birth parents and the Indian custodian, the inheritance rights of the child, and the child's relationship with the tribe.

After the juvenile court accords the TCAO Full Faith and Credit, the adoptive parents receive all rights and responsibilities under the California adoption,[4] and the juvenile court dismisses dependency jurisdiction.

Other Important Legislation effective January 1, 2010. Section 309, concerning the county welfare department's initial investigation upon removal of children, now contains subdivision (e), requiring the social worker to identify and locate relatives. In gathering this information, the investigator may question the minor in an age-appropriate manner. The social worker must notify the relatives of the child's detention and that they may participate in caring for the child and may apply for placement of the child. The

department is to make public the procedures by which relatives may identify themselves to the department. (Stats. 2009, c. 261, sec. 1.)

Several 2010 amendments make it easier to terminate reunification services, beginning with section 361.49, which now sets the date the child entered foster care as the earlier of: 1) the date of the jurisdictional hearing, or 2) 60 days after the date the child was originally removed from the physical custody of his or her parent or guardian. This definition is also incorporated into the time limitations on services set forth in sections 361.5, subdivision (a), and 366.21. (Stats. 2009, ch. 120, sec. 1.)

Another amendment to section 361.5, subdivision (a), making it easier to terminate services, provides that the motion to terminate services normally needed prior to the hearing set pursuant to section 366.21, subdivision (f), is not needed in one of three situations: where jurisdiction was sustained under section 300, subdivision (g), because the parent's whereabouts was unknown and this condition continues to exist; or where the parent has failed to contact and visit the child; or, where the parent has been convicted of a felony indicating parental unfitness. (Stats. 2009, ch. 120, sec. 2.)

In 2010, case plans must include three additional items. First, under section 16501.1, subdivision (b), case plan descriptions of reunification services must, to the extent possible, include information about the parent's incarceration in a county jail or state prison. (Stats. 2009-2010 4th Ex sess, ch 339, sec 11.5.)

Second, under section 16501.1, subdivision (f), case plans must now discuss the appropriateness of the child's educational setting. It must either provide for the child's enrollment in the child's school of origin, or, if enrollment in that school is not in the child's best interest, contain assurances the school records will be forwarded to the child's new school. (Stats 2009-2010 Ex sess, ch 4, sec. 37.)

Third, under subdivision (f)(16), the case plan must with respect to a minor in foster care who is within 90 days of attaining age 18, and who receives federal funds, address options regarding housing, health insurance, education, local opportunities for mentors and continuing support services, and workforce supports and employment services. (Stats 2009-2010 4th Ex. sess, ch 339, sec. 11.5.)

Another new provision may relieve the family of some of the financial burdens incurred in the reunification process. Section 903.45 now provides that when a county's chief financial officer seeking reimbursement for the cost of legal services provided in a juvenile case in which the child has been reunified with his or her parent or guardian, concludes repayment would be pose a barrier to reunification, repayment shall not be

sought. Also, if, during reunification, the court finds the cost of repayment would interfere with the parent or guardian's ability to complete the plan, the court shall not order repayment. (Stats 2009, ch. 413, sec. 2.)

Procedure - Challenges Per Code of Civil Procedure Section 170.6. In *Manuel C. v. Superior Court* (2010) 181 Cal.App.4th 382, a juvenile court commissioner denied a peremptory challenge on the grounds that challenge was not made within 10 days of the party's appearance on the original petition. Although the current petition had not been pending for 10 days, the commissioner found the challenge untimely because the commissioner had, 10 months earlier, heard another original petition in the matter, which was subsequently dismissed after return of the children to the parents with a family law custody order. The Second District, Division 4, granted writ relief, holding the new petition, unlike a supplemental petition, constituted a new case. The peremptory challenge was timely.

Jurisdiction – Procedure on Reconsideration. In *In re Andrew A.* (2010) 18 Cal.App.4th 1518, the mother entered a plea of no contest to a petition alleging jurisdiction under subdivision (b). Prior to disposition, the matter came before the court on a new petition under section 342. The court dismissed the new petition and, reconsidering the original petition on the mother's motion, dismissed the original petition over the objections of the minor and the Department. The Fifth District held this was procedurally incorrect. The mother's no contest plea barred her from seeking reconsideration of the initial finding. Also, the hearing on the supplemental petition had not been noticed as a dispositional hearing on the original petition, and although the court may dismiss a petition at a dispositional hearing, the dispositional report had not yet been prepared in this case.

Jurisdiction - Sufficiency of Evidence - Failure to Protect. In the past year, the appellate courts set aside several jurisdictional findings under section 300, subdivision (b), for insufficient evidence. In the first case, *In re R.M.* (2009) 175 Cal.App.4th 655, the petition alleged there had been "periodic episodes of inadequate supervision" of the minor children who had engaged in inappropriate sexual behavior with each other. The Second District, noted the record did not establish how long or how often this behavior had occurred. To the contrary, when the mother learned of it, she took steps to prevent it, and her efforts were apparently successful. Another allegation that the childrens' behavioral problems resulted from the mother's emotional problems and physical disabilities was also not supported by any evidence of a parenting problem. Based on this record, the evidence supporting jurisdiction was insufficient.

In the second case, *In re James R.* (2009) 176 Cal.App.4th 129, jurisdiction was

alleged based upon the mother's mental health issues and the fact she had a negative reaction after consuming eight prescription ibuprofen pills and beer while caring for the minors (all four years old or younger). The Fourth District, Division 1, found the evidence insufficient to support jurisdiction. Although the mother had a history of instability, she did not have a long history of alcohol abuse. She signed up for AA meetings before the dependency action was initiated. She had not abused or neglected the minors. They were healthy and well cared for. Also, the father was able to protect and supervise the minors. So, harm or risk of harm to the minors was not established.

In the most recent case, *In re J.N* (2010) 181 Cal.App.4th 1010, the father was arrested for driving under the influence and both parents were arrested for child endangerment when the family was involved in an auto accident and the children were injured in the accident. The detention of the children was based on substance abuse and incarceration of the parents. But the Sixth District reversed the jurisdictional finding, noting this was the first referral on the family. The parents had provided a loving home. The children were healthy. As in *James R., supr*a, 176 Cal.App.4th 129, there was no prior history of substance abuse by the parents. They were remorseful. At the time of the hearing, the mother was no longer incarcerated and was available to care for the children. She had accepted substance abuse and parenting programs as part of her probation grant in the criminal case. Thus the evidence at the time of the hearing was insufficient to establish a substantial risk of harm to the children.[5]

Jurisdiction – Sufficiency of Evidence – Sexual Abuse. Unlike the results seen in the "failure to protect" cases, in the three cases in the past year involving more serious allegations under section 300, subdivision (d), sexual abuse, the courts affirmed jurisdictional findings. In *In re Andy G.* (2010) 183 Cal.App.4th 1405, the juvenile court sustained jurisdiction under subdivisions (b), (d), and (j). On appeal, the Second District, Division 8, faced the controversial question whether the sexual abuse of one child places other children in the home at risk of aberrant sexual behavior. Here the answer was "Yes," because the father's misconduct occurred in the presence of at least one of the other minors, indicating a lack of concern for other children who might observe the behavior.

In the second case, *In re S.A.* (2010) 182 Cal.App.4th 1128, jurisdiction under subdivision (d), was based on the in-court testimony of the 15-year-old child who had complained of sexual abuse by her father. The father contended on appeal the minor's testimony was inconsistent (e.g., she had not reported the abuse at the time nor recorded it in her diary), and therefore the jurisdictional finding should be set aside as inherently improbable. The Fourth District, Division 1, affirmed, holding that testimony is not inherently improbable because of inconsistencies. Conflicts and inconsistencies are to be

resolved by the trial court. Where there is no physical impossibility, apparent falsity, or outlandishness, the testimony is not inherently improbable.

And, most recently in *In re E.B.* (April 9, 2010, B215774) ___ Cal.App.4th ___ [10 DJDAR 6742], the Second District, Division 1, held the single fact of the father's required registration under Penal Code section 290 as a sex offender provided evidence sufficient to sustain jurisdiction under subdivisions (b) and (d). As section 355.1, subdivision (d), states, this factor is prima facie evidence affecting the burden of proof, and since the father presented no evidence countering the presumption, jurisdiction was upheld.

Jurisdiction – Sufficiency of Evidence – Emotional Climate. Also, jurisdictional findings were affirmed in the one case alleging jurisdiction under an "emotional climate" theory, *In re Christopher C.* (2010) 182 Cal.App.4th 73. The original complaint was one of sexual abuse, but the juvenile court had difficulty determining whether any of the allegations were true because of the minors' inconsistent accounts. One minor said his brother sexually abused him in his father's presence. The minors who did not accuse the father, accused the mother of physically abusing them and coaching them to tell lies about the father. One of the evaluators noted the seven-year-old was suffering from "anxiety and over-interviewing." The juvenile court sustained jurisdiction under subdivisions (b) and (c) in light of the family conflict and cross-allegations. The Second District, Division 4, affirmed. There was a substantial risk of emotional harm because the children had been used as "weapons in a family fight." Unlike the parents in *In re Brison C.* (2000) 81 Cal.App.4th 1373, the parents in the current case had shown little recognition of the problem by the time of the hearing.

Disposition - Guardianship. Section 360, subdivision (a), authorizes a court, at disposition, to order guardianship when the parents and child agree to the guardianship, an assessment has been prepared, and the guardianship is in the child's best interests. In *In re L.A.*. (2009) 180 Cal.App.4th 413, the Sixth District held that when these conditions exist, the court should not disapprove the guardianship merely because the non-custodial parent who has not taken an interest in the proceedings has not supported the guardianship. In this case the matter was remanded to the court to exercise its discretion.

Review Hearings - Termination of Services. Three recent cases support a careful examination by the juvenile court of the adequacy of reunification services. *S.T. v. Superior Court* (2009) 177 Cal.App.4th 412, is one of the first to examine the impact of amendments effective in 2009 attempting to improve the opportunities for incarcerated parents to reunify. (Stats. 2008, ch. 482, sec. 1.7.) At the review hearing pursuant to section 366.21, subdivision(e), the facts represented to the court were that the father was in prison and had attempted to enroll in programs to reunify with his daughter. However, other than attending Narcotics Anonymous, he probably would not be able to avail

himself of prison programs because his sentence was almost up and he was on a waiting list. In denying the father further services, the trial court found that only the three factors set forth in section 366.21, subdivision (g)(1)-(3) applied – the parent's regular contact with the child, substantial participation in resolving the issues leading to initial jurisdiction, and ability and capacity to complete services. The court concluded it could not extend further services, having found against the parent on each of the three criteria. The Second District, Division 2, granted writ relief, holding the trial court had failed to exercise its discretion. The juvenile court must take into account the particular barriers placed by incarceration to the parent's access to services and ability to maintain contact with the child.

The father in *In re A.H.* (2010) 182 Cal.App.4th 1050, like the father in *S.T v. Superior Court*, had been in imprisoned during the services period. As of the time of the hearing pursuant to section 366.21, subdivision (f), he had maintained contact with his children, but had not demonstrated sufficient rehabilitation, and he was scheduled to be released from prison only 30 days before the services time period was to end. The juvenile court terminated services and set a section 366.26 hearing. The Fourth District, Division 3, denied writ relief, finding the juvenile court had adequately considered the barriers to reunification placed by the institutional setting. The trial court had found that the father had not taken advantage of services during the time period that he was out of custody. In light of this finding, the court properly found it unlikely that the father would be able to resume care of the children within the reunification period.

In *In re Calvin P.* (2009) 178 Cal.App.4th 958, the Fourth District, Divison 1, issued an important decision enforcing a juvenile court's previously issued order for reunification services. In this case, in a previous review hearing, the juvenile court had placed the child with the father and ordered 12 months of reunification services for the mother and family maintenance services for the father. At a subsequent hearing, the court ordered family maintenance services for both parents, finding moot the mother's claim that no reunification services were provided her while she was in prison, despite the fact the social worker essentially acknowledged this at the hearing. The Fourth District reversed the order, and ordered the mother be provided with reunification services. Provision of family maintenance services did not satisfy the original order of reunification services because family maintenance services are not necessarily the equivalent of reunification services. Family maintenance and family reunification have different goals set forth in Welfare and Institutions Code section 16501, subdivisions (g) (family maintenance services) and (h) (reunification services).

Modification Petitions – Section 388. In *In re R.N.* (2009) 178 Cal.App.4th 557, the Second District, Division 7, held a parent need not file a section petition 388 petition to be considered for reunification services when a change in a section 366.3 guardian is proposed. Under section 366.3, subdivision (f), notice is to be given to parents and the

court is to consider all possible custody solutions and whether to provide reunification services to the parent.

Parental Rights Termination - Failure to Offer Reunification Services. In *In re T.M.* (2009) 175 Cal.App.4th 1166, reunification services were not offered the mother at disposition, pursuant to section 361.5, subdivision (b)(1), because the mother could not be located. A similar finding was made at the six-month review hearing, although the mother was known to have been in a locked psychiatric facility, because the parties agreed that she was receiving some services in the facility. Later, after services had been terminated to the other parent, the juvenile court terminated mother's parental rights. The Third District reversed, interpreting the terms of section 366, subdivision (c)(2)(A), to require either a finding that reasonable services were provided, or a finding that services would be detrimental or non-productive, before parental rights can be terminated. When services are denied under section 361.5, subdivision (b)(1), neither finding is made and section (c)(2)(A) is not complied with. So, the court is limited to the options of guardianship or foster care.

Parental Rights Termination - Adoptability. In *In re I.W.* (2010) 180 Cal.App.4th 1517, an appeal from an order terminating her parental rights as to three children, the mother argued the finding that the children were adoptable was not adequately supported as to the oldest child who had been diagnosed with PTSD, ADHD, and learning disabilities. The mother alleged the child was not generally adoptable, and she could not be found specifically adoptable without a home study which had not been completed in this case. The Sixth District affirmed, noting the possibility that the child was not specifically as opposed to generally adoptable, as the record showed only interest by the foster family. But the mother's interest in the child could also show this minor was generally adoptable and the allegation that the minor was only adoptable by this family was not developed in the trial court. Also, the court stated that no authority had been submitted that a home study was needed even if the child's suitability for adoption was family-specific.

In *In re G.M.* (2010) 181 Cal.App.4th 552, the Fifth District resolved a case similarly to the result in *In re I.W.*, *supra*, holding questions of whether there was a legal impediment to adoption, such as whether the foster parent was legally separated or had her husband's consent to adopting the minor, related only to the aunt's willingness to adopt. The issue was not developed below, as in *In re I.W.* The failure of the adoption assessment to consider this issue was forfeited, as there was no objection in the trial court. Finally, mother argued the court erred in not permitting inquiry by the mother's counsel as to the suitability of the aunt to adopt. The Fifth District held that if the inquiry had been made as to the legal impediment, the question would have been proper. But the legal

impediment was not litigated below, so this theory of admissibility was not preserved for appeal.

Parental Rights Termination - Beneficial Relationship. In *In re I.W., supra,* 180 Cal.App.4th 1517, the Sixth District also rejected a claim that the mother had presented sufficient evidence to support a finding under section 366.26, subdivision (c)(1)(B)(i), that the parent had established a continuing beneficial relation with the child such that it would be detrimental to terminate parental rights. However, the evidence was conflicting on this question, so the reviewing court refused to revisit the trial court's finding.

Parental Rights Termination – Indian Child Guardianship Exception. At the section 366.26 hearing in *In re T.S.* (2009) 175 Cal.App.4th 1031, the child's tribe identified guardianship as the appropriate plan, an exception to adoption under section 366.26, subdivision (c)(1)(B)(vi)(II). The social study stated the minor was adoptable, and there were no family or tribal members who were willing to assume the role of guardian. The Department had located an Indian placement for the child, and stated an intent to place the child with another Indian family in the event this placement did not succeed. The father appealed the juvenile court order terminating parental rights and argued that the juvenile court was required to select guardianship as it had been recommended by the tribe. The Third District, citing *In re A.A.* (2008) 167 Cal.App.4th 1292, rejected the argument. The juvenile court's decision is reviewed for abuse of discretion. The juvenile court may make an independent assessment of detriment. Here the juvenile court acted within its discretion as there was a basis for concluding the Department's plan had a greatest chance of obtaining tribal goals, there being no potential guardian available.

Parental Rights Termination – Probate Code 1516.5. In *In re Noreen G.* (2009) 181 Cal.App.4th 1359, the parents raised several issues challenging the termination of their parental rights under Probate Code section 1516.5. The First District, Division 3, rejected all but one (the claim under ICWA). As to the due process challenges to the statute, the court noted the statute had been upheld in *In re Ann S.* (2009) 45 Cal.4th 1110, and *In re Charlotte D.* (2009) 45 Cal.4th 1140, and rejected notice and void-for-vagueness challenges to section 1516.5. The parents also challenged the failure of the court investigator to interview the minors when preparing the court report. The First District found this objection forfeited by the parent's failure to object in the trial court. The court also noted that the evidence presented at trial covered this, and the evidence as a whole supported the finding that termination of parental rights was in the minors' best interest.

Parental Rights Termination – Effect of Relinquishment. The First District, Division 1, Division 1, held in *In re R.S.* (2009) 179 Cal.App.4th 1137, when a relinquishment pursuant to Family Code section 8700 has become final before the date set for the section

366.26 hearing, there is no longer a need for the section 366.26 hearing. As the juvenile court is not permitted to make any order interfering with the parents unlimited right to relinquish to a public adoption agency, it may not terminate parental rights under section 366.26.

Post-Permanency Plans – Reunification Services for Guardians. In *In re Z.C.* (2009) 178 Cal.App.4th 1271, the First District, Division 2, rejected the Department's appeal of an order granting services to a guardian. Interpreting an amendment to section 366.3, subdivision (b), effective in 2008, the First District held the Legislature intended to permit services be granted to the guardian where maintaining the child in the guardian's home is in the child's best interest, and where the services are necessary to meet that goal.

Post-Permanency Plans -- Right to Contested Hearings. In *M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, an extraordinary writ, the issue arose whether the parent must make an offer of proof in order to receive a contested hearing on a section 366.3 review where the issue is whether a section 366.26 hearing will be set. The First District, Division 3, held the parent is required to make a showing, as the parent has the burden to show why the hearing should not be set.

Post-Permanency Plans – Guardianship – Visitation Orders. In *In re Rebecca S.* (2010) 181 Cal.App.4th 1370, the Second District, Division 1, following *In re M.R.* (2005) 132 Cal.App.4th 269, and *In re S.J.* (2008) 167 Cal.App.4th 953, and relying on amended language within section 366.26, subdivision (c)(4)(C), held the trial court may not delegate the question of time, place, and manner of visits to the guardian. Also, as in *In re M.R.*, the court reached the issue without an objection below.

Parent's Right to Counsel. *In In re Z.N.* (2009) 181 Cal.App.4th 282, the Fourth District, Division 2, stated the factors to be used by the juvenile court in resolving a motion under *People v. Marsden* (1970) 2 Cal.3d 118, to discharge appointed counsel in a dependency case, are the same factors as those applied in a criminal case – the timeliness of the motion, whether the court adequately listened to the complaints of inadequacy, and whether the breakdown between attorney and client had caused a complete breakdown in representation. The Fourth District found the juvenile court had not erred in denying the *Marsden* motion, and held any error would have been harmless beyond a reasonable doubt in that counsel's representation of appellant was vigorous and the breakdown in the attorney-client relationship had been recent.

Rights of Minors; Minors Representation.[6]

Paternity – Establishing Presumed Parent Status. In *In re J.O.* (2009) 178 Cal.App.4th 139, the juvenile court denied presumed father status to a father who had received the

children into his home, held them out as his children, and supported them for several years, but later failed to support them. On appeal, the Second District, Division 4, reversed. Once the foundational facts of presumed parent status are established, the subsequent conduct did not rebut presumption of paternity under Family Code, section 7611, subdivision (d), where the order would effectively leave the children fatherless.

By contrast, in *In re E.O.* (2010) 182 Cal.App.4th 722, the First District, Division 5, affirmed a finding that the biological father seeking presumed parent status did not come within any of the provisions of Family Code section 7611, when he had never lived with the child. The fact the mother had prevented him from visiting with the children and he did not know he could establish a relationship with them when he was not providing support did not change the outcome.

Paternity - Late Applications for Presumed Parent Status. In two cases, the courts recently rejected contentions by biological fathers that their paternal rights could not be terminated without a finding of unfitness. In *In re Jason J.* (2009) 175 Cal.App.4th 922, the Fourth District, Division 1 found the father forfeited for appeal his contention that he was a father within the meaning of *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, and the trial court could not terminate his parental rights without making a finding of parental unfitness, where he did not maintain *Kelsey S.* status in the trial court. The father was merely a biological father, and there was no requirement of a finding of unfitness (citing *Adoption of Kelsey S., supra,* 1 Cal.4th at 849, and other authorities).

In the second case, *In re A.S.* (2009) 180 Cal.App.4th 351, the father, unlike the father in *Jason J.*, had raised the paternity question by filing a petition for modification under section 388. The Fourth District, Division 1, again found the father had forfeited his contention that services should have been offered, as his petition in the trial court had merely requested a continuance of the proceedings. He had not shown that he could offer the child a placement. As to the father's final contention, that the jurisdictional findings had only established the unfitness of the mother, and the father had never been shown unfit, Division 1, again held the finding was not required as to a mere biological father, disagreeing with *In re Gladys L.* (2006) 141 Cal.App.4th 845.

Finally, in *In re Marcos G.* (2010) 182 Cal.App.4th 369, the Second District, Division 3, affirmed a denial of an alleged father's modification petition under section 388. The father's petition alleged previous notice errors in the dependency proceedings in that the notices sent to the father in prison did not state that he had the right to establish his paternity in the dependency proceedings. The Second District found no error. The father's plan was to have the child live with his relatives until he was released from prison. As his proposed placement would not have been appropriate, and as the minor had

succeeded in his current foster placement for over two years, it was not in the child's best interest to grant the modification petition.

Indian Child Welfare Act – Notice. Several recent cases have clarified notice requirements under the Indian Child Welfare Act, 25 U.S.C. 1901, et seq. First in *In re B.R.* (2009) 176 Cal.App.4th 773, the presumed father, who had been adopted, claimed Apache heritage through his adoptive family. But the Department did not send ICWA notices to the Apache tribes. On appeal he claimed ICWA had not been complied with. The First District, Division 1, agreed. ICWA focuses on tribal membership, not racial origins.

In *In re Damian C.* (2009) 178 Cal.App.4th 192, the question arose as to whether the mother's statement that the maternal grandfather had descended from the Yaqui tribe was negated by the maternal grandfather's statement that his own efforts to determine whether he had Indian heritage had been unsuccessful. The Fourth District, Division 1, found the failure to send notice to the Yaqui tribe was in error. The notice requirement was triggered by the information provided in the mother's Parental Notification of Indian Status form.

In *In re Noreen G., supra*, 181 Cal.App.4th 1359, the probate court terminated parental rights under Probate Code section 1516.5. The First District, Division 1, vacated the order, and remanded because inquiry had not been made under ICWA.

Also, in *In re G.L.* (2009) 177 Cal.App.4th 683, the Fourth District, Division 1, held the requirement of notice to an Indian custodian in an ICWA case does not require notice to a person who no longer has custody of the child. In this case the child had been removed from the custody of the caretaker, the maternal grandmother, at the time of the filing of the supplemental petition, so notice was not required.[7]

Finally, In *In re Melissa R.* (2009) 177 Cal.App.4th 24, the First District, Division 3, dismissed an appeal grounded on failure to provide proper ICWA notice, where the child was 20 years old. The court held any errror was moot as the appellate court could offer no relief in a case in which the minor was no longer an "Indian Child" within the ICWA definition.

Indian Child Welfare Act – Indian Experts. In *In re M.B.* (2010) 182 Cal.App.4th 1496, the parents, appealed from a juvenile court order terminating parental rights. The father, who was an enrolled member of the Choctaw Nation of Oklahoma, challenged the sufficiency of the study by the Indian expert who had not interviewed them. The Fourth District, Division 2, held the expert is not required under the Indian Child Welfare Act to

interview parents in every case; this is required only when relevant in the context of Indian culture, which was not needed here. The expert had viewed the child in placement and interviewed the child's caregiver and the social workers. Also, other evidence in this case supported the court's finding that continued custody by the parents was likely to result in serious physical or emotional damage to the child.

In *In re J.B.* (2009) 178 Cal.App.4th 751, a mother appealed from an order awarding custody of the minors, Indian children, to the father and terminating jurisdiction. She claimed the court erred in not requiring the testimony of an Indian expert. The Fifth District affirmed, holding that expert testimony is neither required by section 361, subdivision (b)(6), nor by ICWA, as the child was not placed in a foster home.

Appeals and Writs – No Issues Briefs. The most important decision in dependency appeals in the past year was *In re Phoenix H*. (2009) 47 Cal.4th 835. In *Phoenix H.*, the California Supreme Court, expanded on its previous holding in *In re Sade C.* (1996) 13 Cal.4th 952, that the criminal law case, *People v. Wende* (1979) 25 Cal.3d 436, requiring the reviewing court independently review the record in a criminal case when appointed counsel cannot find an arguable issue on appeal, did not apply in dependency cases. The court held the reviewing court was not even required to accept a supplemental brief filed by the appellant, in pro. per. However, the appellate court maintains discretion to permit the appellant to file a brief, and must do so on a showing of good cause that an arguable issue, in fact, exists.

Appeals and Writs – Standing. In two cases the appellate court found the parent's counsel did not have standing to assert errors with respect to the minor's representation by counsel. In *In re A.S.* (2010) 182 Cal.App.4th 1128, the Fourth District, Division 1, held the father did not have standing in his appeal to allege the ineffective assistance of minor's counsel in not interviewing the minor's therapist and thereby learning that her statements supporting the section 300, subdivision (d), were untrue. The Fourth District held the father was not aggrieved as the right to counsel was personal to the minor.[8]

In a third case, *In re Desiree M.* (2010) 181 Cal.App.4th 329, the Fourth District, Division 1, held the mother did not have standing on appeal from an order terminating her parental rights to challenge the failure of the juvenile court at the continued hearing to inquire as to why the 12 and 14-year-old minors were not present, an inquiry mandated by section 394, subdivision (d). As in the previously discussed case, the Fourth District found the right to notice belonged only to the minors. The error was also forfeited for purposes of appeal because the parent did not object in the trial court. Finally, the minors had received notice of the original hearing date.

Finally, in *In re K.C.* (2010) 184 Cal.App.4th 120, the Fifth District held the father, appealing the termination of his parental rights, did not have standing to challenge an order made at the same hearing denying placement of the child with the paternal grandparents. He did not have standing merely because there was a chance the grandparents would have granted him contact with the child. His fundamental interest in the child's companionship, custody, management, and care was not injuriously affected. The termination of his parental rights was independent of the placement decision.

Appeals and Writs - Taking Evidence on Appeal. In *In re Z.N., supra,* 182 Cal.App.4th 282, the First District, Division 2, granted the Department's motion for judicial notice of the tribal notices in the half-sibling's case. This did not violate the proscription in *In re Zeth S.* (2003) 31 Cal.4th 396, of taking facts on appeal to reverse a judgment. Here judicial notice was taken only to show that any error under ICWA was harmless, and thus judicial notice was not utilized to *reverse* the order.

Appeals and Writs – Remittiturs. In *In re Anna S.* (2010) 180 Cal.App.4th 1489, the Fourth District, Division 1, held that although a juvenile court has continuing jurisdiction to make orders pending resolution of an appeal, the court's rulings should be based on the family's current circumstances and needs, not upon matters stated in the appellate court's non-final opinion. Here, the court erred in altering its procedures prior to the filing of the remittitur.

ENDNOTES

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1. This article covers developments from July 1, 2009 to May 1, 2010. The article is published at http//www.capcentral.org/resources/dep_case.aspx, Copyright 2010, Central California Appellate Program. Reprinted with permission.
2. Bradley Bristow is a Staff Attorney at Central California Appellate Program. He wishes to thank attorney Janet Sherwood and CCAP Staff Attorneys Colin Heran, Deanna Lamb, Melissa Nappan, and Laurel Thorpe for their assistance with this article.
3. All statutory references are to the Welfare and Institutions Code unless otherwise stated.
4. Section 366.24, subdivision (13). But a TCAO may, in fact, limit the terms of the adoption.
5. By comparison, in *In re Adam D.* (2010) 183 Cal.App.4th 1250, the five-and-one-half old minor failed to thrive because of lengthy neglect by the parents. The Second District, Division 3, found sufficient evidence to support a jurisdictional finding and informal supervision under section 360, subdivision (b).
6. The cases on minors' representation and right to counsel are contained in the section on appeals and writs because the issues were generally resolved under theories of forfeiture, lack of standing, and or harmless error.

7. The court also found that good cause existed to bypass the placement preference in this case as the grandmother was unable to provide the child with a stable home. (*In G.L., supra,* 187 Cal.App.4th 683.)
8. The court also found the minor was not deprived of effective assistance of counsel when counsel did not interview the psychotherapist because counsel already knew the views of the psychotherapist and rejected them. (*In re S.A., supra,* 182 Cal.App.4th 1128.)