DEPENDENCY UPDATE

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REPRESENTATION OF CHILDREN ON APPEAL: SOME QUESTIONS ANSWERED

Two years ago, the California Supreme Court's decision in *In re Zeth S.* (2003) 31 Cal.4th 396, raised questions about the ability of the children's appellate counsel to determine the child's best interests, and, specifically, the use of post-judgment facts in making that determination, and the consideration of those facts by the reviewing court. This confusion was caused in part by the holding in *Zeth S.*, which limited the situations in which juvenile court orders could be reversed based upon facts occurring after judgment, and held that the provisions of Welfare and Institutions Code section 317 requiring trial counsel to present the minor's current situation did not apply to appellate counsel. But the decision this July in *In re Josiah Z.* (2005) 36 Cal.4th 664, answers many of the questions raised by the decision in *Zeth S.* The case holds: 1) appellate counsel may move to dismiss a child's appeal and the court may rule on the motion even if that would include consideration of facts that were not before the trial court; 2) minor's appellate counsel may seek travel funds to investigate whether the child's best interests would be furthered by dismissal of the appeal; 3) but counsel can only file the motion to dismiss with the consent of the child or the child's guardian ad litem.

Josiah Z. was an appeal filed by trial counsel on behalf of children who were two and four-years-old, respectively, to challenge their non-placement with their paternal grandparents after reunification efforts with their family had failed. Their court-appointed counsel on appeal filed a request for travel funds to visit the children and thereby view them in their current non-relative placement, representing that if she determined that placement was in their best interests, she would move to dismiss the appeal. The Court of Appeal denied the application, holding that the children's appellate counsel had no authority to seek a dismissal, and the appellate court had no authority to grant a dismissal in light of the *Zeth S.* proscription against consideration of post-judgment facts by reviewing courts.

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On review, the Supreme Court held that voluntary dismissal of appeals is authorized by the civil rules -- California Rules of Court, rules 20 and 30.3 – and that dismissal of the minor's appeal can further the child's best interest by terminating litigation. When counsel faces the question whether an appeal should be pursued of should be dismissed to further the child's best interest, in order to make that determination, counsel may have to investigate the current situation as part of the duty to zealously represent the client.[2]

However, the Supreme Court held that appellate counsel may not make the final determination whether dismissal is to be sought because this requires the client's consent. When the child is incapable of giving consent, the decision is made by the child's guardian ad litem. In California, the trial court appoints a guardian ad litem in every case in which a dependency petition is filed, to comply with the federal Child Abuse Prevention and Treatment Act (CAPTA.), 42 U.S.C., sec. 1501 et seq. The guardian ad litem may be an attorney or a court appointed special advocate, and the appointment continues during the pendency of the appeal unless the trial or appellate court affirmatively changes the appointment. Here the application for travel money did not show how the counsel's visit to see the children could cause the children's trial counsel/ guardian ad litem to change her position so that the appeal should go forward. The decision of the Court of Appeal denying the application was affirmed without prejudice to the making of a new application.

Where the child is not able to consent to dismissal, *Josiah Z.* places the ultimate power with respect to the decision to dismiss the appeal with the guardian ad litem. *Josiah Z.* also empowers the minor's appellate counsel to investigate and contribute to that decision.

SIGNIFICANT FISCAL 2004-2005 CASES AND PENDING 2005 LEGISLATION AND RULES CHANGES BRIEFLY NOTED

A quick examination of what is happening indicates a continuing emphasis on specific needs of youth in foster care – teen parents, youths in transition to adulthood, youths who have immigration problems, and youths who qualify for special grants such as Supplemental Security Income (SSI). Also, parental rights termination, which in the

[2] In coming to this conclusion, the Supreme Court discussed California juvenile policy as stated in the case law, the specific requirements of Welfare and Institutions Code, section 317, subdivision (e), and, later in the opinion, ABA Model Rules of Professional Conduct, rule 1.4(b).

past has always been final, may turn out not to be so final if the child has become a legal orphan. I have grouped recent cases, proposed legislation and rules into topics, beginning with juvenile court procedure, followed by regulation of foster care, and finally by general topics – paternity, Indian Child Welfare Act, immigration, and appeals. All legislation listed below has a chance of passage at the time of the submission of this article – August, 2005

Jurisdictional Hearing - Due Process. In a case in which the mother took the children to Mexico upon learning that a dependency petition would be filed, the juvenile court found jurisdiction, ordered services, and conducted two review hearings in the absence of the parents and the minors and without appointing counsel. The orders were set aside as fundamentally unfair. The court should have awaited return of the family and appointment of counsel, so that the family's current situation could be ascertained. (*In re Claudia S.* (2005) 131 Cal.App.4th 236 [non-final].)

In a jurisdictional proceeding filed under Welfare and Institutions Code section 300, subdivision (g) (unavailable parent), the failure to bring the incarcerated parent to the jurisdictional hearing did not violate due process or the requirements of Penal Code section 2625 when the parent had received copies of the social studies and received active representation by counsel at the hearing (but section 2625 would have required her presence had jurisdiction been sought under any other subdivision). (*In re Iris R.* (2005) 131 Cal.App.4th 337 [non-final].)

Jurisdictional Hearing - Evidence. A dependency court's use of a minor's hearsay statements to establish jurisdiction does not violate *Crawford v. Washington* (2004) 541 U.S. 36, as the Sixth Amendment does not extend to parents in a state dependency proceeding according to the non-final opinion in *In re April C.* __ Cal.App.4th __ [2005 Cal.App. LEXIS 1180]. But the plurality opinion in *In re Lucero L.* (2000) 22 Cal.4th 1227, notes that confrontation may be required in some jurisdictional proceedings to ensure due process reliability.

Jurisdiction – Subject Matter - UCCJEA. The juvenile court gains neither home state jurisdiction nor emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, Family Code section 3400 et seq., by the act of the parents and their child (all who had Mexico as their home state) in coming to California for medical treatment for the child, even if the medical treatment may be better in California. (*In re A.C.* (2005) 130 Cal.App.4th 854 [non-final].)

Jurisdiction and Disposition - Abandonment of Newborns. SB 116 (Dutton) would make permanent the amendments to Welfare and Institutions Code sections 300 and 361.5 exempting "safe surrender" of babies to hospitals from the definition of abandonment. (Otherwise, these amendments "sunset" in 2006.)

Restraining Orders. Welfare and Institutions Code section 213.5, authorizing the issuance of domestic violence orders by the juvenile court, is not unconstitutionally vague or overbroad in including orders prohibiting "stalking," as that term is reasonably ascertainable. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497. And in *In re Cassandra B.* (2004) 125 Cal.App.4th 199, the juvenile court was held to have jurisdication to issue an order prohibiting the parent from harassing the child without a showing that domestic violence had occurred; proof of past harassment through phone calls, etc., was found sufficient under section 213.5.

The question whether a parent can be held in contempt under section 213 for not participating in a court-ordered reunification plan is currently on review in the California Supreme Court in *In re Olivia J.* (2004) 124 Cal.App.4th 698 (review granted March 16, 2005, S130457/D044457).

Review Hearings - Return of Children. In *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, the juvenile court at the 18-month hearing declined the parent's request for return of his child and set the section 366.26 hearing, where the parent had complied with the reunification plan except for moving out of his sister's home, a requirement the Department had not communicated to him. The Court of Appeal, Fourth District, Division 3, granted writ relief directing the court to reconsider after the parent had been given clear warning of what was expected of him. If the parent did not move out, and the brother-in-law continued to present a danger, the court was to consider whether the child could be protected within that home, such as by a restraining order.

One section of a bill pending this year, SB 500 (Kuehl), would help a teen parent obtain return of a child at review hearing, or might avoid removal of the teen parent's child in the first place. The bill would provide that a child may not be found at risk of abuse or neglect merely because of the age, dependent status, or foster case status of the child's parents.

Review Hearings - Termination of Services. In *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, the appellate court set aside an order terminating services where the parent's departure from the plan was a single ingestion of Tylenol.

Note that the standard of proof of the reasonable services is a preponderance of the evidence at the 18-month hearing rather than the clear and convincing proof standard used at 12- month limit of mandatory services. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586.)

Also, when the parent fails to contact the children, the normal 12-month period of services under section 361.5, subdivision (a) is not required. It is not necessary that the case was petitioned under a theory of abandonment. (*Sara M. v. Superior Court* (2005) __Cal.4th ___ (2005 Cal. LEXIS 8592) .

Parental Rights Termination and AB 519. In *In re Jerred H.* (2005) 121 Cal.App.4th 793, the First District Court of Appeal suggested the Legislature could amend section 366.26, subdivision (k), which currently does not permit any modification of a parental rights termination order, to permit modifications under certain limited circumstances when it is later determined that the child is not in fact adoptable, and thereby prevent these children from becoming legal orphans.

The result in *Jerred H.* is unfortunate. The tragedy of legally orphaned children has been noted by the 1994 Pew Commission report on children in foster care and in a January 12, 2005, article in the Los Angeles Daily Journal. In 2002, there were 5,846 legally freed children in California who were not placed in an adoptive home, of whom almost 1,000 were in long term plans of foster care or guardianship. In response, legislation co-sponsored by the Children's Law Center, AB 519 (Leno) permits a child to file for such a modification after three years or when the child is determined no longer to be adoptable.

The great majority of the parental rights termination appeals were resolved this year according to patterns previously established.[3] A case with some new twists was *In re Carl R.* (2005) 128 Cal.App.4th 1051. The proposed adoptive parents of a severely disabled child who would require intensive care for life, agreed to provide that care, but intended to home school him. On appeal the parents contended that since the proposed adoptive parents were supposed to commit to educating the child and they had no intent to seek educational benefits accorded them under the Individuals with Disabilities

[3] See, e.g., *In re Gregory A.* (2005) 126 Cal.App.4th 1554 [adoptability may be raised on appeal without objection below due to Department's burden of proof]; *In re Joshua G.* (2005) 129 Cal.App.4th 189 [Department not equitably estopped from changing its recommendation where parents given adequate notice of the change].

Education Act, 20 U.S.C. 1400 et seq., the child was not adoptable. The argument was rejected by the reviewing court. The prospective adoptive parents were required to show they would provide intensive care because not to do so would result in their not qualifying and might result in the child's becoming a legal orphan. However, their mere inclination toward home schooling the child was not a legal impediment to adoption.

Placement with Non-Custodial Parent. SB 726 (Florez) would require social workers to provide the caregiver an information form to fill out and return to the court when the non-custodial parent requests custody. When the non-custodial parent obtains custody, the social worker must visit and provide a report within 3 months.

Conflict of Interest Standards for Minor's Counsel - Rule 1438.5. Elaborating on the rules set forth in *In re Celine R.* (2003) 31 Cal.4th 45, California Rules of Court, rule 1438.5, proposed for adoption effective January 1, 2006, will provide conflict of interest guidelines for court-appointed counsel for children representing sibling groups in dependency cases.

Foster Placements - Relative Preference. Legislation proposed in 2005, AB 880 (Cohn), would state a policy that at the time of consideration of placement outside the parent's home every family member who may be able to provide a safe home is to be identified. The Department of Social Services would be required to set guidelines for use of advanced technology in locating relatives and non-relatives, and to identify best practices for implementing optimal placement opportunities, as outlined in kinship care programs.

Foster Placements - Record Checks. The courts continued to strictly enforce the criminal records check requirement as to all adults residing in the foster home, even on an emergency placement. (*Los Angeles County v. Superior Court* (*Sencere P.*) (2005) 126 Cal.App.4th 144.)

Legislation proposed this year (SB 358 Scott) would exempt babysitters engaged by a licensed or certified foster parent for 24 hours or less from licensing requirements, including the fingerprinting requirement, and would hold the foster parent to a "prudent parent" standard.

Foster Placement - Educational Requirements. AB 1260 (Leno), sponsored by the Children's Law Center, fills in gaps in the law as to who makes educational decisions for foster children. The bill requires educational agencies to have a process for dispute

resolution and to provide written explanation of school enrollment or placement decisions to the parent, guardian or other person having the right to make educational decisions. The bill also provides procedures by which the juvenile court may temporarily limit the right of the parent and/or appoint another party to make educational decisions pending the decision whether the child will be adjudged a dependent.

Foster Placement - Stability of Adoptive Placements. SB 218 (Scott), sponsored by the Los Angeles Affiliate of the National Association of Counsel for Children, would stabilize the child's placement at the time of parental rights termination, by deeming a placement of over six months in a home where the foster parent has expressed the desire to adopt to be the adoptive placement. A child could not be removed from the adoptive placement without a noticed hearing.

Foster Placement - Services Before and After Transition. SB 436 (Migden) supported by the Children's Law Center and others, would require counties providing transitional housing placement resources to provide in their annual reports a description of the currently available transitional housing resources as it relates to the need of emancipating pregnant or parenting foster youth, and a plan for meeting those needs. At the time of writing, $250,000 is budgeted to help implement these plans.

AB 1633 (Evans), sponsored by the National Center for Youth Law, would require that counties notify the Social Security Administration of the foster care status of any youth who is receiving benefits and apply to be the child's payee. Also, a state level workgroup will develop best practice guidelines to ensure that all eligible foster children obtain Social Security and SSI benefits. Counties will provide information about federal requirements to foster youth who are approaching their 18th birthday and may qualify for SSI benefits. The bill also extends to foster youth opportunities to remain in placement while pursuing a high school equivalency certificate.

AB 1412 (Leno) extends the requirement that social studies prepared for juvenile court hearings identify persons important to youths 10-years of age or older, which currently covers only youths in group homes, apply to all youths in out-of-home placements. The bill would also extends the right of children to participate in developing their case plans and permanent placement plans to youths 12-years-old or older.

SB 500 (Kuehl), mentioned above in connection with its proposal to redefine the concept of danger of abuse or neglect to exclude the mere fact of teen parentage, also helps teen parents by requiring shared responsibility plans be prepared for them when

they are placed in whole family foster homes under dependency court jurisdiction.

Paternity. The most recent case following *In re Jesusa V.* (2004) 32 Cal.4th 588, holds that a stepfather of a 15-year-old child who has been in her household for a dozen years and who she referred to as "Dad," could be considered by the juvenile court for presumed father status under Family Code section 7611, subdivision (d), notwithstanding the "conclusive"presumption in section 7540 of parentage by the biological father who was married to the mother at the time of the child's birth. (*In re Angela A.* (2005) 129 Cal.App.4th 912.)

Indian Child Welfare Act. The cases decided under the Indian Child Welfare Act this year seemed to contain nothing new.[4] However, legislation proposed this year, SB 678 (Ducheny) would permit Indian tribes not recognized under federal law to intervene in some guardianship and child custody proceedings where the child resides on an Indian reservation or has a special relationship with the tribe. In guardianship proceedings, the court would be required to appoint counsel for an Indian custodian or biological parent who showed financial need.

Immigration. An important bill protecting immigrant children, vetoed by the Governor last year, has been reintroduced this year. AB 1338 (Nation), sponsored by the National Youth Law Center, would require appointment of an attorney who specializes in immigration law for any child who is not a citizen, when parental reunification is no longer an option. The law would apply to both dependents and wards, but exempts certain counties. The bill also requires the Judicial Council to promulgate rules setting forth qualifications of attorneys appointed under this provision.

Appeals. A jurisdictional finding made on a petition to modify under section 387, like one made on an original section 300 petition, is an interlocutory order and is not immediately appealable. (*In re Javier G.* (2005) 130 Cal.App.4th 1195 [non-final].)

Juvenile Court Records. When an authorized individual establishes colorable good cause for accessing records of a dependent minor under Welfare and Institutions Code section 827, with sufficient specificity, the juvenile court should consider that application. (*In re Anthony H.* (2005) 129 Cal.App.4th 495.)

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[4] *In re Christopher W.* (2004) Cal.App.4th [ICWA requirements not triggered by a parent's vague and inconsistent statements]; *In re S.B.* (2005) Cal.App.4th [waiver of parent's right to challenge earlier non-compliance with ICWA where tribe had later intervened].