California's New Indian Child Welfare Law Interpreted

Dependency Update[1]

By Bradley Bristow[2]

A recent trend continues. The number of reversals for error under the Indian Child Welfare Act (ICWA) has again been high in the past year. And ICWA was the subject of about one-fourth of this year's published dependency decisions. Among these decisions were two interpreting the recent incorporation of ICWA into Welfare and Institutions Code[3] section 224 et seq.

In *In re J.T.* (2007) 154 Cal.App.4th 986, the First District, Division 5, held that the new incorporation of ICWA within the state dependency statute (sec. 224.2) requires heightened standards of notice. In this appeal from an order terminating parental rights the court rejected the Department's contention that notice to the Bureau of Indian Affairs was adequate when the child was reported to have Cherokee and Sioux heritage (disagreeing with *In re Edward H.* (2002) 100 Cal.App.4th 1). Notice to all of the federally recognized Cherokee and Sioux tribes was required. Also notice was required to be provided to the tribal chair or the alternative agent for service. Notice received by an unidentified person was not adequate.

In *In re A.C.* (2007) 155 Cal.App.4th 282, a parental rights termination, the parent alleged that the court erred in failing to provide notice to a tribe that was not at that time federally recognized. The parent noted that section 306.6, effective in 2007, permitted non-federally recognized tribes to participate in the proceedings. However, the Third District found that the statute expressly did not require notice to a non-federally recognized tribe, so the juvenile court did not err.

Several other ICWA cases are discussed elsewhere in this article.

One of the most important legislative changes effective in 2008 will be the amendments to sections 361.5, 366.26, and 366.3 (Stats. 2007, ch. 565 (AB 298)), which are likely to increase the number of relative guardianships approved in lieu of parental rights termination when the relative is willing to offer a stable and permanent environment for the child through the guardianship. This option will now be granted second preference within the section 366.26 alternatives, second only to adoption. Previously, the selection of adoption as the goal but continuing the hearing for up to 180 days to locate an appropriate adoptive placement was the second choice. Also previously, in order to qualify the reason for the guardian's wish not to adopt had to be an "exceptional circumstance." Now it does not have to be an exceptional circumstance. The guardianship option is only unavailable when it is shown that the relative is unwilling to assume legal and financial responsibility for the child. (See new sec. 366.26,

subdivisions (b), (c).) These changes are tracked in amendments to section 361.5, subdivision (g)(2)(A), and 366.21, subdivision (i)(2)(A), concerning the preparation of assessments for section 366.26 hearings. Also amendments to section 366.3 require in a hearing to terminate a legal guardianship, the study of whether the child can be safely returned to the guardian should include an assessment of the family maintenance and reunification services that can be provided to the guardian.

And among the recent rule changes, California Rules of Court, rule 5.661, effective July 1, 2007, now provides that a minor's appeal is to be filed by the minor's trial counsel, guardian ad litem, or the child when the child is seeking appellate relief. The rule also directs trial counsel for the child or the guardian ad litem to provide a recommendation that the appellate court appoint counsel for the child on appeal in cases where the minor is not the appellant and the child's best interests cannot be protected without the appointment of separate counsel on appeal. The rule lists a series of criteria for counsel to consider in determining whether to make such a recommendation. The recommendation must be filed in the appellate court within 20 days of the filing of the last appellant's opening brief. Judicial Council form JV-810 may be used in making the recommendation.

Jurisdiction. Must the juvenile court consider evidence of incidents occurring outside the county in determining jurisdiction? In reversing a juvenile court's dismissal of a petition after refusing to hear out-of-county evidence, the Fourth District, Division 3, in *In re Hadley B.* (2007) 148 Cal.App.4th 1041, held that the juvenile court was required to consider all relevant circumstances concerning the child, no matter where they occurred. General juvenile court principles compel this conclusion. The focus is on the child rather than political boundaries.

Jurisdiction – Subject Matter. In *In re S.W.* (2007) 148 Cal.App.4th 1501, a mother appealing from an order terminating her parental rights under section 366.26 alleged the juvenile court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code, sec. 3400 et seq.), as she and her children were from Nebraska and she was only staying in a van outside the residence of the mother of her boyfriend at the time the children were detained in November 2004. She had been born in Nebraska and lived there with her children for several years, only leaving because she believed Nebraska social workers would discover her substance abuse problem. The Fifth District, reviewing the juvenile court's finding de novo, agreed with the finding of that court. The mother and her children had lived in California for several months and aside from the fact a Nebraska social worker had a referral on her in September of that year, there was no evidence that she during the previous six months had lived continuously in Nebraska. Moreover, though the mother lived in the van, the children lived in the home. The mother also raised the related legal claim that the juvenile court was not the proper forum. (Fam. Code, sec. 3427.) However, the

contention that California was not a convenient forum was forfeited for purposes of appellate review, as it was not raised in the trial court.

Disposition - Reunification Orders. In *In re Neil D.* (2007) 155 Cal.App.4th 219, the Second District, Division 4, affirmed a dispositional order of the juvenile court requiring the mother to comply with a in-patient drug treatment program. Here the mother's baby had tested positive for methamphetamine at the time of birth, and the mother's drug usage had contributed to the child's death. Her other children were detained because of her drug abuse and domestic violence in the home. Given this history, and the mother's inability to recognize her drug problem, an in-patient drug program was a reasonable requirement to complete reunification. Also, the juvenile court's order did not constitute incarceration because the mother was permitted to leave at any time.

Disposition – Denial of Reunification Services. In *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, upon denying the father's petition for extraordinary relief, the Fourth District, Division 1, held that the services bypass provision set forth in section 361.5, subdivision (b)(6) (infliction of severe physical harm on minor's sibling) does not require a showing that the parent personally inflicted the harm where, as here, the petition alleged that the complicity of the parents. Both parents were the sole care givers and the injuries were not accidentally inflicted. An identification of who it was that inflicted harm is only important where the parent is alleged to have been negligent.

In *R.S. v. Superior Court* (2007) 154 Cal.App.4th 1262, the Second District, Division 8, granted a writ relief from a juvenile court's decision denying services to a non-custodial father under section 361.5, subdivisions (b)(10) and (11), for two reasons: section 361.5 applies only to custodial parents; and second, the court never made a determination whether the father was requesting custody.

In *In re Mary G.* (2007) 151 Cal.App.4th 184, the juvenile court terminated the parental rights of both parents, having denied presumed father status to the father on the grounds that his acknowledgment of paternity was made out-of-state – in Michigan. On appellate review, the Fourth District, Division 1, reversed as to both parents. As the disparate treatment was based solely on geography, the non-recognition of the father's paternity acknowledgment in Michigan constituted a violation of Equal Protection. The juvenile court's decision also failed to accord Full Faith and Credit.

In a case that pre-dates the new amendments favoring relative guardianship, *In re Jessica C.* (2007) 151 Cal.App.4th 474, the juvenile court acting on the County's petition under section 387, terminated a grandparent's guardianship over the dependent minors. The guardianship had been in effect for several years, and the children were bonded to the grandparents, but the grandmother had died, and the grandfather's health problems kept him from adequately supervising the children. The Fifth District reversed for two reasons. First, a section 388 petition rather than a section 387 petition was the correct

petition in this situation. But more importantly, the court was required to consider what types of services could be offered to avoid removal of the children. The error was not harmless, as services may have offered an acceptable alternative. These teenaged children had bonded with the grandfather and it would be difficult to find them another placement.

Jurisdiction and Disposition--Rehearing. In *Ricardo V. v. Superior Court* (2007) 147 Cal.App.4th 419, the question arose as to how long the referee's order permanently placing a child in the father's home remained valid after minor's counsel sought rehearing – the date of the rehearing grant or the date the matter was actually reheard? The Fourth District, Division 1, interpreting section 250, held that this section expressly requires that effect be given the referee's order until the matter covered by the order has actually been reheard.

Review Hearings. At the 18-month review hearing under section 366.22, the juvenile court is not limited to the options of either returning the child to the parents' care and dismissing jurisdiction on the one hand, or setting a section 366.26 hearing on the other. In *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, the Second District, Division 7, approved a middle option under the statute erroneously rejected by the trial court: return of the child to parental custody under a continued jurisdiction with the provision of family maintenance services.

Modification Petitions. As stated above in the section on jurisdiction, a modification petition under section 387 is an improper vehicle to terminate a grandparent's juvenile-court-established guardianship. Section 388 is the proper means. (*In re Jessica C., supra,* 151 Cal.App.4th 474.)

Parental Rights Termination - Adoptability. In two cases, *In re Y.R.* (2007) 152 Cal.App.4th 99, and *In re Helen W.* (2007) 150 Cal.App.4th 71, the Fourth District, Division 3, affirmed parental rights termination orders even though the minors were encountering problems that the parents alleged made the children unadoptable. In *Y.R.*, the child had behavioral problems and academic challenges, and had been removed from his previous placement. In *Helen W.,* the two children had numerous physical and developmental problems, including neurofibromatosis, autism, and bipolar disorder. In both cases, the fact that the foster parents had been effective and were committed, plus the fact that there were no known legal obstacles to adoption, provided substantial evidence of adoptability.

Parental Rights Termination - Sibling Detriment Exception. In a case in which the section 366.26, subdivision (c)(1)(E) exception was litigated extensively, *In re Valerie A.* (2007) 152 Cal.App.4th 987, the juvenile court terminated the parental rights of the mother to her twin four-year-old daughters, even though they were bonded to an older half-sibling who had not been placed with them. In this case the Fourth District, Division

1, noted the value of the bond but found no abuse of discretion in the juvenile court's determination that the twins would be better served by adoption. The appellate court also found no error in cutting off sibling visitation 10 months earlier, as the mother's family members who had placement of the half-sibling were hostile to the twins' foster parents, and the juvenile court could properly have concluded that the children were endangered by further visits. Further, the trial court's ruling did not prevent the parent from being able to show the strength of the sibling bond. Finally, there was no error in denying the mother's request to have a neutral observer (a person other than the social worker) present to monitor the visits. The social worker had not been shown to be biased, and the mother's expert witness was also permitted to testify on the strength of the sibling bond.

Termination of Jurisdiction. The question of whether there were grounds for continued jurisdiction in an out-of-country placement was addressed by the California Supreme Court in *In re Joshua S.* (2007) 41 Cal.4th 261. Here the dependent children had eventually had been placed in long term care with their grandmother in Canada. Although the grandmother preferred this permanent plan, she eventually became the children's guardian and the juvenile court terminated jurisdiction. The Court of Appeal reversed on the grounds that continued jurisdiction would be appropriate to permit the children to continue to remain eligible for federal aid. The Supreme Court granted review and reversed the determination of the Court of Appeal. The children would not qualify for federal aid even if they were in foster care, so there was no ground for continued jurisdiction.

In *In re D.R.* (2007) 155 Cal.App.4th 480, the juvenile court had approved legal guardianship and terminated jurisdiction. Subsequently, the court summarily denied a section 388 petition filed by the minor's counsel five days before the child's 18th birthday, upon concluding that it had no jurisdiction to hear the petition. The Second District, Division 1, reversed, with directions to the court to hear the petition on the merits. Although the juvenile court does not have jurisdiction to hear an original petition over a person who is 18 years old, it may assert jurisdiction over a person previously found to be a dependent child until that child is 21.

Sanctions. In *In re Mark B.* (2007) 149 Cal.App.4th 61, the Third District found that a referee of the juvenile court is authorized under Code of Civil Procedure section 128.5 to issue sanctions against court-appointed trial counsel.

Foster Placement - Out-of-Country. There is no per se prohibition on placing a child out-of-the country during the reunification period. (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403.) Here the parent lived in San Diego, and the paternal grandfather, a resident of Ensenada, Mexico, offered a home for all of the siblings. The Fourth District, Division 1, held that although placement of a child in a foreign country may not be desirable if that will interfere with parent-child visitation, that was not the case here where the placement was close to home. And a blanket prohibition on such placements

may violate the Legislative policy of placing children within their families where possible. For the same reasons, the decision of the juvenile court did not constitute an abuse of discretion. The mother waived her due process notice challenge by not objecting in the trial court, and any defect in statutory notice was harmless. However the matter was remanded for a more complete background check on the placement.

Foster Placement – Removal. In *In re M.V.* (2007) 146 Cal.App.4th 1048, the juvenile court granted the Department's petition under section 388 to modify a placement of 16 months where the child had been scratched on the face or bitten by the family dog. The court did not specify the standard of proof it had required or that removal of the child from the placement was in the best interests of the child. The First District, Division 2 granted writ relief, directing the juvenile court to reconsider the case using the current circumstances, including the foster parents' assertion that the dog had been removed from the home, and the child's current status.

Foster Placement - Caretaker Preference. The question of which preference prevails -- the relative placement or the caretaker preference -- when adoption is at issue arose in *In re Lauren R.* (2007) 148 Cal.App.4th 841. In that case, a ten-year-old minor had been placed with a non-relative extended family member, who applied for de facto parent standing and an adoption study. Also, pending the section 366.26 hearing, an aunt who resided in Oregon asked for placement and claimed the relative placement preference under section 361.3, subdivision (d). The trial court ruled in favor of the aunt, and on appeal the Fourth District, Division 3, reversed. Section 361.5, subdivision (d), applies only to temporary placements, not to adoption. Section 361.3, subdivision (k), provides a preference for certain caretakers. If the caretaker with whom the child was placed met the criteria of section 361,3, subdivision (k), the caretaker was entitled to first consideration; if not, then neither of the applicants was entitled to preference. The juvenile court was directed to determine whether the caretaker qualified for preference.

Rights of Minors; Minors Representation. It was mentioned above that in *In re Neil D., supra,* 155 Cal.App.4th 219, the appellate court found that the juvenile court did not err in ordering the mother into residential substance abuse treatment. In the same case, the appellate court also found that under these circumstances, the minor had no standing to contest the placement. [Note that this holding seems pretty case specific in that the minor's situation was not shown to be affected by the order – but it is easy to think of situations in which the minor *would* be aggrieved by such orders.]

In two recent cases, one currently on review in the California Supreme Court and one from the Court of Appeal, conflict of interest claims against the Children's Law Center (CLC) in Los Angeles were rejected under the analysis of *In re Celine R.* (2003) 31 Cal.4th 45. In the case currently before the Supreme Court, *In re Charlisse C.* (2007) 149 Cal.App.4th 1554 (review granted July 18, 2007, S153178/B194568), the appellate court reversed an order recusing CLC merely because its Unit 1 had represented the

mother several years earlier, Unit 2 had represented the minor's older sibling, and now Unit 3 was representing the minor. CLC has instituted formal mechanisms designed to prevent dissemination of confidential client information. The Second District, Division 5, held that question is neither one of compliance with safeguards on the one hand, nor the fact of an appearance of conflict on the other. The determinative factor in the appellate court was that there was no showing of an actual conflict of interest.

And *In re Celine R., supra*, and California Rules of Court, rule 5.660 (c), were found even more controlling on the question of the ongoing representation of two siblings by a single unit of CLC in *In re Jasmine S.* (2007) 153 Cal.App.4th 835. In that case, the Second District, Division 5, reversed an order recusing a CLC attorney from representing several siblings where it was not shown that the children had an actual conflict.

Guardians ad Litem. It is error for the juvenile court to fail to conduct a hearing before appointing a guardian ad litem for a mentally incompetent parent. (*In re Sara D.* (2001) 87 Cal.App.4th 661.) However the question of whether the Fifth District was correct in *Sara D.* in employing constitutional error (harmless beyond a reasonable doubt) standard of prejudice was correct, or whether such error is reversible per se as structural error is currently before the California Supreme Court in *In re James F.* (2007) 146 Cal.App.4th 599 (review granted March 28, 2007, S150316/B188863), and *In re Jaclyn S.* (2007) 150 Cal.App.4th 278 (review granted July 18, 2007, S153178/A114754).

Paternity. In *In re Kobe A.* (2007) 146 Cal.App.4th 1113, the minor's biological father was in prison during most of the dependency proceedings, was never served with Judicial Council Form JV-505, and was never notified of his right to seek adjudication of his paternity, nor of his right to counsel. On appeal from the order terminating parental rights, he alleged notice violations and ineffective assistance of his trial counsel in not objecting to the defects in notice. The Second District, Division 4, while not finding the father's "disinterest" in appearing at the jurisdictional hearing to be determinative, as the father had not been properly informed, did find the notice error harmless, since the father had not made any of the required steps under *Adoption of Kelsey S.* (1992) 1 Cal.App.4th 816, to support or take the minor into his home; and since he was imprisoned, the court's ability to offer reunification services was limited.

The other significant case in paternity, *In re Mary G., supra*, 151 Cal.App.4th 184, holding that the juvenile court must accord Full Faith and Credit to the paternity laws of other states, was discussed previously under the section on dispositions.

Indian Child Welfare Act – Transfer to Tribal Jurisdiction. In *In re Vincent M.* (2007) 150 Cal.App.4th 1247, the Sixth District reversed orders terminating parental rights. Although the mother notified the Department of her Indian heritage and her tribal enrollment in a federally recognized tribe, the juvenile court denied application of ICWA under the "Existing Indian Family Doctrine" announced in *In re Bridget R.* (1996) 41

Cal.App.4th 1483. However, the appellate court declined to follow the doctrine, noting that ICWA is not unconstitutional in violation of either the Tenth Amendment or Equal Protection.

Indian Child Welfare Act – Notice Defects. The enhanced scrutiny given to notice in *In re J. T., supra,* 154 Cal.App.4th 986, was discussed previously. Another case finding notice defects in a parental rights termination case, was *In re Mary G, supra,* 151 Cal.App.4th 184, discussed previously in the section on paternity.

In *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, the Third District discussed the standard of review and remedy to be applied on an extraordinary writ taken from a review hearing order terminating services when the juvenile court had failed to give proper ICWA notice. Here the notice to the United Keetoowah Tribe was sent to the wrong address.[4] The Department argued on appeal that the error was harmless. However, the appellate court found the error prejudicial, as the standards for terminating reunification services would be different had notice been properly provided and the child had been found to be an Indian child. Further, the Third District, found that the proper remedy in for error at this stage was reversal rather than a simple remand, as the decision to terminate services may have been resolved differently had the child been determined to be an Indian Child (disagreeing with *In re Brooke C.* (2005) 127 Cal.App.4th 377).

In *In re Robert A.* (2007) 147 Cal.App.4th 982, a case in which the minor had Cherokee heritage and the required notice was not sent to the federally recognized tribes, the Fourth District, Division 1, declined to take judicial notice of subsequent notices given to the tribes in the sibling's case. This notice was not before the court in the present case, and compliance in a sibling's case did not constitute compliance in this minor's case.

Indian Child Welfare Act – Enrollment. The Fifth District held in *In re Jose C.* (2007) 155 Cal.App.4th 844, that the court is under no duty to order children enrolled in a tribe when they qualify for enrollment. Here the notice was proper to the Caddo Nation, but the children were not enrolled by the tribe and the tribe did not intervene. The court properly found that ICWA did not apply, and there was no error in not continuing to send notice to the tribe after making that determination.

Indian Child Welfare Act -- Remands. Two cases provided reminders as to what happens at the remittitur hearing after an appellate court vacates a decision for improper compliance with the notice requirements of ICWA. First, *In re Justin S.* (2007) 150 Cal.App.4th 1426, a decision of the Sixth District, holds that when a parental rights termination has been vacated and the matter has been remanded for compliance with ICWA, the parents have the right to notice and to participate with counsel at the remand hearing.

However, the decision in *In re Amber F*. (2007) 150 Cal.App.4th 1152, echoed the recent opinion in *In re X.V.* (2005) 132 Cal.App.4th 794, not permitting a second ICWA notice challenge in a second appeal when, at the hearing in the juvenile court on the remand requiring further ICWA notice, there were no objections to the additional notice given. The issue was forfeited for purpose of appeal.

Appeals and Writs -Orders Final for Appeal. In *In re Q.D.* (2007) 155 Cal.App.4th 272, the juvenile court terminated a mother's parental rights. The mother immediately complained that her waiver of hearing was involuntary in that she misunderstood the concepts of adoption and foster care in the Vietnamese language. The question arose whether the court had jurisdiction to modify its previous order. The court continued the matter to the next day, at which time the court ruled that since a minute order issued the previous day stating that parental rights had been terminated, the court had no jurisdiction to modify the previous order. However, in fact, the minute order from the previous date stated that the hearing was trailed for a section 366.26 hearing. So, although The Fourth District, Division 3, dismissed the appeal from the first date as being from a non-final order, it also remanded for the juvenile court to determine whether to reopen and allow the mother to contest the termination of her parental rights.

Appeals and Writs – Forfeiture of Issues. As discussed previously, in *In re Amber F., supra,* 150 Cal.App.4th 1152, the appellate court found ICWA notice waived when, upon issuance of a remittitur in a previous successful appeal alleging incorrect ICWA notice, the mother did not challenge the court's finding of proper notice, although she had opportunity do so. Also, in *In re S.W, supra,* 148 Cal.App.4th 1501, discussed in the section on subject matter jurisdiction, the appellate court found the challenge to an inconvenient forum could not be made for the first time on appeal.

Appeals and Writs – Standing. As discussed above, the appellate court in *In re Neil D., supra,* 155 Cal.App.4th 219, held that the minor in that case did not have standing to challenge the reunification order requiring in-patient treatment of his mother in a drug treatment facility. Again, this holding is case-specific. In many situations, the minor would likely have standing to challenge the order upon a showing that he was potentially aggrieved.

In *In re Paul W.* (2007) 151 Cal.App.4th 37, the trial court issued an order to show cause on a petition for writ of habeas corpus in which the father alleged he had received ineffective assistance of counsel. Mother was not a party to these writ proceedings. Eventually the court granted the writ and set aside jurisdictional orders and orders made in subsequent proceedings. The mother appealed, but the Sixth District dismissed her appeal. She did not have standing as she was not a party below, and she was not legally aggrieved. This is another decision that may be case-specific.

Appeals and Writs – Need to Seek Stay. In *In re Brandy R.* (2007) 150 Cal.App.4th 607, the Fourth District, Division 3, held that a section 366.26 hearing was not stayed by the mere pendency of a petition for extraordinary relief challenging the order setting the section 366.26 hearing. This is in accordance with the general rule in child custody cases that decisions are not automatically stayed pending appeal. A stay should be sought.

ENDNOTES

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1. This article covers developments from January 1, 2007 to October 1, 2007. The article is published at http//www.capcentral.org/resources/dep_case.aspx, © 2007, Central California Appellate Program. Reprinted with permission.

2. Bradley Bristow is a Staff Attorney at Central California Appellate Program. He wishes to thank CCAP Staff Attorneys Colin Heran, 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. However, another notice error in failing to provide the mother's correct date of birth was found harmless, as the mother did not herself claim Indian heritage. (*Nicole K. v. Superior Court, supra,* 146 Cal.App.4th 779, 785, citing *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.)