New Law Helps Families of Institutionalized Parents

Dependency Update[1]

By Bradley Bristow[2]

It appears at the end of 2008 that one of the most important new laws to take effect in 2009 will be the Keeping Families Whole Act, AB 2007, by Assembly Speaker Karen Bass, chaptered on September 29 (Chapter 482), amending Welfare and Institutions Code sections 361.5, 366.21, 366.22, 366.26, 366.27, 366.3, 366.35, and 16508.1, and adding new section 366.35. The bill addresses concerns that current law requires termination of reunification services for some parents and guardians after six or twelve months even though services were unavailable. The new law will permit an additional six months of services in some cases, especially for those parents and guardians who were institutionalized or participating in residential drug rehabilitation during that time period. Some of what this new law provides, as shown by the synopsis in the final Assembly report, includes:

- Permits the juvenile court in limited circumstances (generally where parents have been in institutions or participating in residential substance abuse programs) to extend the reunification period to 24 months if in the child's best interests and the court finds either a substantial probability that the child can be returned home during the extended period or that reasonable services have not been provided to the parent.

- Requires consideration by the court at several points, and documentation by the social worker of the special circumstances encountered by parents and guardians who are in institutions, prisons, or residential substance abuse treatment, including barriers to services and maintaining contact with the children.

- Permits a social worker not to recommend a section 366.26 hearing for a child who has been in foster care for 15 of the past 22 months if the parent or guardian has been institutionalized or in a residential substance abuse program and that was a significant factor in that placement, and termination of parental rights is not in child's best interests.

- In cases in which there has been modification reinstating reunification services, the court is to specify the services to be provided, and an

additional six months of family maintenance may be offered, as well.

Other new laws effective in 2009 will appear in the next issue.

In the past issue, I promised to list the legislation effective in 2008. Here it is:

Family Code	
8712	Adoption agencies may obtain criminal records on adoption applicants by submitting fingerprints to Department of Justice.
Penal Code	
11105.04	Court Appointed Special Advocate programs may seek child abuse and neglect records on job applicants from Department of Justice.
11170	Trial courts and tribal social welfare agencies have access to child abuse and neglect records on applicants for adoption and resident's of an applicant's home.
Welfare & Institutions Code	
291, 292, 293, 294	Notice must provided to care giver of dispositional hearings (where bypass is proposed), review hearings, selection and implementation hearings, and pose-permanency hearings. Care giver has right to be present and provide information at bypass and selection and implementation hearings.
366.4	Searches for prospective relative care givers are to include out-of-state relatives.
36.1.5, 366.21(e), 366.22	Assessments of care givers for selection and implementation hearing are not to recommend against relative care giver solely because of care giver's failure to accept financial or legal responsibility; care givers are to be provided with information on permanent placements other than adoption.

361.5(f), 366.21, 366.22, 366.26	Adoption assessments are to include out-of-state placements.
366.26 (b)(2), (c)(1)(A)	Adds current relative caretaker guardianship as the second preferred permanent plan, and this selection may be made without stating a compelling reason.
366.3(b)	When termination of a guardianship is sought, the assessment must identify family maintenance or reunification services that would assist the guardian.
826.7	Sets forth procedures for public access to case files of a child whose died from abuse or neglect.
5777.7	Standardized mental health services forms are to be provided for children placed out of their county of original jurisdiction.
7901.1 (a),(d), (e)	A study under the Interstate Compact on the Placement of Children (ICPC), requested by another state is to be completed within 60 days. A study from another state or Indian tribe is to be accepted unless contrary to the welfare of the child.
Significant Changes In California Rules of Court effective in 2007	
5.410	Form, Request for Sibling Contact Information under Family Code section 9205
5.480-5.487	Applies ICWA to Family Code, Probate Code, etc.
5.534(j)	Requires appointment of educational representative whenever the rights of parent or guardian are limited.
5.534(m)	Care giver's notice and right to be heard (Form JV-290). Notice on attorneys and interested partied is served by the clerk.
5.560	Appointment of educational representative**.**

5.640(c)(6)(B)	Psychotropic medication. Physicians form to include the maximum daily dosage and length of time the treatment will continue.
5.640(c)(9)	Psychotropic medication. Clerk to serve notice of hearing. (Previously done by party who opposed order.)
5.640(g)	Psychotropic medication. Defines "emergency situation."
5.651	Requires determination as to educational rights at hearings on detention, disposition, and review.
5.651	Describes changes of placement that may affect child's education, including removal of child from school of origin.
5.651	Requires child's counsel to discuss this issue with child if appropriate and file form JV-539 if a hearing is requested on the placement.
5.661	Requesting counsel for minor on appeal.
8.412(e)	Appellate briefs to be served on minor's trial counsel or guardian ad litem.

Jurisdiction - Procedure. A juvenile court's dismissal of a petition was reversed on the grounds that the court acted too soon in *Los Angeles County Department of Children and Family Services v. Superior Court* (*Stacey P.*) (2008) 162 Cal.App.4th 1408. In *Stacey P.* the Second District, Division 8 granted writ relief to the County because the trial court had acted prematurely in dismissing the petition for insufficient evidence at the detention hearing. The statutory scheme envisions that the sufficiency of the evidence will be considered at the jurisdictional hearing. Even if the petition was insufficient on its face there should be notice and a full opportunity to be heard.

In *In re Claudia E.* (2008) 163 Cal.App.4th 627, the Fourth District, Division 1, held that declaratory relief was a proper remedy where the Department had twice removed minors without filing and serving their counsel with the petition under Welfare and Institutions Code section 387, and where it was alleged that the Department had a policy of doing this. The mere fact that the minors may have another remedy such as habeas corpus relief does not bar declaratory relief as declaratory relief may be more effective.

Jurisdiction - Procedure - Personal Jurisdiction. In *In re Jorge G*. (2008) 164 Cal.App.4th 125, The Second District, Division one, reversed a juvenile court's jurisdictional and dispositional findings were reversed for lack of personal jurisdiction over the parents because the regular service by mail of the parents in Mexico did not comply with the notice requirements of The Hague Service Convention, art. 10. (Nov. 15, 1965, 20 U.S.T. 361 T.I.A.S. No. 6638). Under the Convention, service may be obtained either through the central authority of the country, or by a means satisfying the laws of both countries. Here the service was neither through Mexico's central authority, nor did it comply even with Welfare And Institutions Code section 391, subdivision (e)(1), which requires personal service or use of certified mail.

Jurisdiction – Procedure - Subject Matter. *In re Jorge G., supra*, 164 Cal.App.4th 125, also addressing an issue under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), defines the limits of the "emergency jurisdiction"provisions of UCCJEA found in Family Code section 3424. In *Jorge G*., the juvenile court sustained jurisdiction over a minor who was a legal resident of Mexico, and whose parents were in prison in Mexico. Although the appellate court reversed the jurisdictional and dispositional findings due to the improper service of process on the parents, the court held the juvenile court had emergency jurisdiction under UCCJEA because the child was abandoned within the meaning of section 3424.

Similarly, in *In re Angel L*. (2008) 159 Cal.App.4th 1129, the Second District, Division 8, on appeal from a parental rights termination order, held that the California had UCCJEA emergency jurisdiction over children of Nevada residents who left children with an inappropriate caretaker in California. The children had developmental disabilities, specific needs that could be helped with services available in California. Such services were unavailable in the rural part of Nevada where the parents lived. Moreover, as a custody order had not been issued in Nevada, there was no requirement under UCCJEA that the juvenile court contact a Nevada court as required under Family Code section 3407, subdivision (d).

J**urisdiction - Procedure - Evidence.** In *In re B.D.* (2007) 156 Cal.App.4th 975, the Third District reversed a dismissal of a petition after the County had submitted on social reports and the parent's attorney had objected to the reports as hearsay under section 355, subdivision (c)(1). The trial court had suggested that the evidence was insufficient and refused to permit minor's counsel to call the mother to corroborate the hearsay statements. The reversal was based in part on section 350, subdivision (c), which permits

the minor's counsel to put on evidence even without having reserved the right to do so when the county has not carried its burden.

In *In re Mark A.* (2007) 156 Cal.App.4th 1124, the juvenile court ordered the father to testify at a combined jurisdictional and dispositional hearing, and the father asserted the Fifth Amendment. The court offered him immunity under Welfare and Institutions Code section 355.1, subdivision (f), but the father continued to refuse to testify. As a sanction the court ordered the testimony of the father's three witnesses stricken. The Fourth District, Division Three, found two errors but still affirmed the judgment. The trial court erred because the immunity offered under section 355.1 was not co-extensive with the Fifth Amendment privilege as is provided under rule 5.548 (c), so the offer of immunity was not complete. Second, the court's striking the testimony of three witnesses other than the father would not have been the appropriate remedy even if the father's refusal to testify had been unjustified. But the error was found harmless beyond a reasonable doubt because the stricken testimony of the witnesses was insignificant.

In *In re Brenda M.* (2008) 160 Cal.App.4th 772, the juvenile court made an error similar to the second error in *Mark A., supra* – precluding the father from offering evidence or cross-examining witnesses as a sanction for his invocation of the Fifth Amendment. Here, unlike in *Mark A.*, the error was prejudicial because the father never was able to cross-examine the preparer of the reports, so it is unknown whether cross-examination would have undermined her credibility.

Jurisdiction - Sufficiency of Evidence. The jurisdictional cases in the past year were very typical in the types of evidence presented, but raised some very different legal issues. For example in *In re Mariah T.* (2008) 159 Cal.App.4th 428, the mother challenged the definition of harm within section 300, subdivision (a), that the "child has suffered or there is a substantial risk that the child will suffer serious physical harm," as unconstitutionally vague, noting that no statutory definition is provided for this term, unlike terms in subdivisions (c) ('serious emotional damage") and (e) ("serious physical abuse") which have lengthy definitions. The Second District, Division 8, rejected the challenge, noting that *In re Alexander K.* (1993) 14 Cal.App.4th 549, required only that the term have a sufficiently established meaning, and serious physical harm, like the term "great bodily injury" has a sufficiently established meaning.

Similarly, in another case, *In re Veronica G.* (2007) 157 Cal.App.4th 179, the First District, Division 3, held in that the above standard does not require that the investigator see bruises on the children at the time the complaints of abuse are made.

Disposition - Non-Custodial Parents. At the time proceedings were instituted in *In re V.F.* (2007) 157 Cal.App.4th 962, the father was in jail. Jurisdiction was based on the mother's drug and neglect of the children. The court denied services under sections (b)(12) and (e)(1), and the father appealed, contending that the court erred in removing the child under section (c)(1) and in not awarding him custody under section 361.2. The Fourth District, Division One, found no error in removing the child under section 361(c) as that concerned removal from the home where the child resided. But there was error in not addressing the father's request for custody, as section 361.2 provides for that in the absence of a showing of detriment. The dispositional finding was reversed and the matter was remanded to the trial court to make a written finding as to detriment.

Disposition - Other orders. In *In re Sylvia R.* The Second District, Division 4, set aside a dispositional order requiring the child's stepfather and brother to participate in counseling. Disagreeing with *In re Venus B.* (1990) 222 Cal.App.4th 931, the court found that the Welfare and Institutions Code provides no such authority to make such an order on a non-party with whom the child is not placed.

Transfers. In *In re R.D.* (2008) 163 Cal.App.4th 679, the Fourth District, Division Two found that a juvenile court erred in not accepting transfer of a case from another county. First, the correct procedure under rule 5.612 is to accept the case and then consider whether it should be transferred out. Second, a juvenile court may not just consider one factor from Welfare and Institutions Code section 17.1, subdivision (e) which defines residence of a minor for general purposes as the county where parental rights were terminated, over other considerations that more clearly govern the best interests of the child in coming to the determination of whether the court should keep the case. Here the case should have been supervised in the county where the minor and his guardian lived.

Review Hearings. A recurring issue in recent years has been when is "too early" to terminate services for the parents. But the Fourth District, Division One, in *In re Jesse W.* (2007) 157 Cal.App.4th 49, had little trouble resolving the question of whether services have to be continued in effect under Welfare and Institutions Code section 366.12, subdivision (e) for one parent (who had not maintained contact with the department or visited with the children and whose whereabouts were then unknown) because services had been continued for the other parent. The answer was, "No."

Another issue with the amount of time for services is how much time should be considered when the court is determining whether the child may be returned to the parents within the next review hearing? In *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, the California Supreme Court resolved a split of authority[3] whether the period

should be the normal six month period, or whether that period is limited by the time remaining on the total time for services (in this case twelve months under section 366.21, subdivision (e). The Supreme Court concluded that the latter choice was more consistent with legislative intent, even if it meant a very short review period, as the Legislature intended a speedier resolution for the child.

Modification Petitions. In *In re Angel S.* (2007) 156 Cal.App.4th 1202, the Third District found that, when seeking to terminate a Probate Code guardianship, the procedures set forth in Probate Code sections 728 and 1511 rather than the modification procedure set forth under Welfare and Institutions Code section 388 should be used. But the error here in using the incorrect notice procedure was not one of fundamental jurisdiction, since the juvenile court had jurisdiction. As the guardian had notice and did not claim any other errors specific to her, there was no basis to reverse the decision.

However, a modification petition under section 388 with its two-part showing *is* the correct remedy for a parent who wishes to terminate a guardianship under a permanent plan. In *In re Jacob B.* (2007) Cal.App.4th , the Second District, Division 7, held that, on a modification petition, there is no presumption that the child should be returned to parent as there would be earlier in the case in the review hearings conducted under Welfare and Institutions Code sections 366.21 and 366.22.

Modification Petitions – Hearings. In *In re C.J.W.* (2007) 157 Cal.App.4th 1075, the parents, who had been denied reunification services at disposition, sought services through modification petitions filed under Welfare and Institutions Code section 388 stating that they had completed programs to overcome their drug abuse problems and become better parents. On the hearing date, the court considered only written evidence, and found no change of circumstances and no showing that the best interests of the children would be furthered by offering services. The court terminated parental rights. On appeal the parents argued that the court had denied them a hearing at which they would testify and cross examine the social worker. The Fourth District, Division Two, while noting inconsistent findings made by the court on the JV-180 form, also found the parents forfeited the issue failing to object in the trial court. Nevertheless, the court addressed the contention on the merits. There was in fact a hearing. The parents had identified all that they wanted to present – their petitions. As to cross-examination, the court's decision was on the petition, not on the social study, so cross-examination of the social worker was not needed.

But in another case where the juvenile court entered "incoherent conflicting check marks" on the JV-180 form, *In re Lesly G.* (2008) 162 Cal.App.4th 904, the Second

District, Division 4, found a due process violation. Unlike the situation in *In re C.J.W.*, *supra*, the court neither summarily denied the petition nor set it for a hearing. When the petition states grounds for modification, the hearing must be set.

Parental Rights Termination - Adoptability. *In In re Valerie W*. (2008) 162 Cal.App.4th 1, the Fourth District, Division One reversed a parental rights termination order because the adoption assessment did not provide information on the proposed adoptive family, Vera and her adult daughter, Juana: (1) the qualifications of Juana to adopt the children; (2) the willingness of Vera to adopt as a single parent should Juana not qualify; and (3) whether there was any legal impediment against the proposed joint adoption. "Without this crucial information, the court was foreclosed from assessing whether each prospective adoptive parent had 'the capability to meet [Gregory's] needs, and the understanding of the legal and financial rights and responsibilities of adoption.' (§ 366.21, former subd. (i)(4).)" (*Id*. at p. 15.)

In *In re B.D.* (2008) 159 Cal.App.4th 1218, the juvenile court terminated parental rights as to five minors, although the minors were bonded to each other, some of them had emotional, developmental, and behavioral issues that made them not generally adoptable. Two of the children were seven years old or older. One did not want to be adopted and one only wanted to be adopted if the sibling group would stay together. A home had not been identified. An adoption assessment was not prepared. On this record, the Fourth District, Division 1, agreed with the parent that the court should have proceeded under section 366.26, subdivision (c)(3), which would permit, without terminating parental rights, continuing the case 180 days to determine if all five children could be placed together. However the court accepted additional evidence on appeal from the minor's counsel that the children had since been placed in a pre-adoptive home, rendering the trial court error harmless.

However, the adoptability finding was upheld in *In re Xavier G.* (2007) 157 Cal.App.4th 208, where the mother appealed the termination of her parental rights, challenging the finding of the children's adoptability on the grounds that the grandmother would prefer guardianship rather over adoption. However, the Fourth District, Division 1, affirmed the juvenile court's determination because the grandmother was able and willing to adopt and adoption was the permanent plan preferred by the legislature. [Note the new amendments effective in January 1, 2008, providing an exception to adoption for relative guardianship may change this result in similar cases in the future].)

For a discussion of stipulations on appeal that a child is no longer adoptable, see *In re Angel L.*, *supra*, 159 Cal.App.4th 396, discussed, *post*, in the section on appeals and writs.

Parental Rights Termination - Beneficial Relationship. In *In re S.B.* (2008) 164 Cal.App.4th 289, the father established at the selection and implementation hearing that the five-year-old minor had a strong attachment to him even after they lost day-to-day contact as a result of her out-of-home placement. The father's full completion of his case plan and his regular visits with his daughter showed he was committed. Also the child loved her father and wished to continue the relationship. On these facts, the Fourth District, Division One, reversed the parental rights termination order. The court rejected the Department's position that the parent had to establish that his relationship with his child was her "primary attachment."

Parental Rights Termination - Requirement of Unfitness Finding. In *In re G.S.R.* (2008) 159 Cal.App.4th 1202, the Second District, Division 8, reversed a parental rights termination order in case in which the father was involved in the dependency proceedings but was never able to obtain custody because he was homeless. The court further ordered the juvenile court to consider whether there was any need to assume jurisdiction over the minors and, if so, to determine whether there were services that should be offered to the family. Parental rights cannot be terminated without a showing of unfitness (citing *Santosky v. Kramer* (1982) 455 U.S. 748), and the parent's mere poverty, alone, is insufficient, even to establish juvenile court jurisdiction, especially when the agency has made no effort to help him obtain affordable housing.

Parental Rights Termination - Section 366.26, subdivision (a)(3) Continuances. In *In re A.G.* (2008) 161 Cal.App.4th 673, the Fifth District held that the juvenile court finds the child adoptable but continues the matter to find an adoptive home under Welfare and Institutions Code section 366.26, subdivision (a)(3), the court will not again litigate the issue of whether termination would be detrimental to the child unless there is new evidence or a change of circumstances. This is not a violation of due process because there was an opportunity to litigate the issue at the previous hearing, and new evidence may be presented in a petition under Welfare and Institutions Code section 388.

Termination of Jurisdiction. In *In re Alexandria M.* (2007) 156 Cal.App.4th 1088, the child had been placed with the father under juvenile court jurisdiction for several months. At the time of a subsequent review hearing under section 364, the parties, with assistance from the family court mediator and the social worker, reached a total settlement awarding physical custody of the children to the father and unsupervised visitation to the mother,

with termination of juvenile court jurisdiction. The court refused to accept the agreement, and its termination order provided for joint custody with scheduled visitation and, on the court's own motion, termination of child support. The Fourth District, Division One, reversed. Hearing rather than dismissing the case constituted an abuse of discretion because there was no showing of risk to the children. The settlement had to be approved as the following requirements of a valid settlement agreement had been set forth: 1) the material terms of the settlement had been set forth; 2) the parties had been questioned by the court about their understanding of the terms; and 3) the parties stated they understood the agreement and intended to be bound by it. Moreover, the juvenile court has no jurisdiction over child support.

In another appeal from an exit order including an apparent stipulation providing the father's visitation with the child be reduced by half, in *In re Elizabeth M.* (2008) 158 Cal.App.4th 1551, the Fourth District, Division 3, set aside a stipulation where the visitation provision seemed to have been modified by interlineation, the changes were not initialed, there was no request at the hearing for this change or any evidence supporting it and there was no inquiry on the record to show the parties in fact agreed to it.

Sanctions/Contempt. In *In re Nolan W.* (2007) 156 Cal.App.4th 1499, rev. granted, February 13, 2008 (S159524), the California Supreme Court has granted review on the following questions: (1) Did the juvenile court have the authority to order the minor's mother to participate in a substance abuse program as part of her reunification plan? (2) Did Welfare and Institutions Code 213 authorize the juvenile court to hold her in contempt and incarcerate her for failing to comply with that component of the reunification plan? The Fourth District had essentially held that this was a "civil contempt" proceeding not available to punish, but only to coerce her into complying with the plan, and since services had been terminated imposition of jail time was improper.

De Facto Parents. In *In re R.J.* (2008) 164 Cal.App.4th 219, the juvenile court summarily denied the application of a grandmother for de facto parent status in a case in which her two grandchildren had been adjudicated dependents. On appeal, her argument that this ruling was in error was rejected by the Third District. There is no authority that the de facto parent is constitutionally entitled to a hearing on de facto status. Also, although she had a positive and loving relationship with the children she had failed to establish a prima facie showing. A showing is established under the following factors: "(1) whether the minor is psychologically bonded to the adult; (2) whether the adult has assumed the role of a parent on a day-to-day basis for a substantial period of time; (3) whether the adult possesses information about the minor unique from other participants in the process; (4) whether the adult has regularly attended juvenile court hearings; and (5)

whether any proceeding may result in an order permanently foreclosing any future contact between the adult and the child."

Foster Placement. In *In re Lauren Z* (2008) 158 Cal.App.4th 1102, the Second District, Division One, found no error in the juvenile court's decision not to place the child with her aunt when the child had lived with another foster family for most of the first three years of her life and they wished to adopt.

Foster Placement – Removal. The Second District, Division 3, granted writ relief in *Los Angeles Dept of Children and Family Service*s v. *Superior Court* (*Deshawn W.*) (2007) 158 Cal.App.4th 1562, where the juvenile court had denied the Department's application under Welfare and Institutions Code section 388 to remove the child from his placement with his grandmother where the grandmother had permitted the parents to have unmonitored visits with him and the grandmother had lied about the visits. The child's sister had died while in the parents' care. Under these circumstances, any benefit that the child received from placement with the grandparent was outweighed by the danger and the court abused its discretion in not removing the child from this placement.

Foster Placement - Relative Preference. The relative preference of Welfare and Institutions Code, section 361.3 requires a grandmother's home be studied for placement. The mere fact that the child has previously been removed from the grandmother's home does not automatically make that home an unsuitable placement. (*In re Antonio G.* (2008) 159 Cal.App.4th 369.)

Also, the Second District, Division One, held in *In re Joseph T.* (2008) 163 Cal.App.4th 787, that this placement preference continues throughout the reunification period (but found the court's error in not considering the out-of-state placement constituted harmless error as this placement would have thwarted reunification).

Rights of Minors; Minors Representation. *In re Kristen B.* (2008) 163 Cal.App.4th 1535, is an important decision in minors' representation. In jurisdictional and dispositional proceedings on allegations of sexual abuse by the stepfather against Kristen B., his teenaged stepdaughter, the minor had recanted her allegations shortly after receiving an unauthorized visit from her mother. Trial counsel advocated her "best interests" – sustaining jurisdiction and out-of-home placement, and also communicated her position at disposition – that she would like to go home. On appeal from the dispositional order, mother acknowledged that counsel's primary duty under Welfare and Institutions Code section 317 was to advocate the child's best interests, but argued ineffective assistance of counsel in calling the minor to the stand to undermine her

credibility by inquiring about the circumstances of the recantation. The Fourth District, Division One, following *In re Zamer G.* (2007) 153 Cal.App.4th 1253, affirmed. Counsel's duty was to represent the minor's best interests. The calling of the minor to the stand was a reasonable trial tactic, and was just as easily viewed as permitting her to state her position more than an attempt to impeach her. To the extent any question was argumentative it was disallowed by the court. Also, it was not reasonably probable that a different result would have occurred had counsel not asked the argumentative questions.

In the last issue, I mentioned that review had been granted in *In re Charlisse C.* (2007) 149 Cal.App.4th 1554 (review granted July 18, 20007, S152822/B194568) on the standard to control disqualification of counsel from legal service agencies and public law firms in juvenile dependency proceedings due to successive representation of clients with potentially conflicting interests. This case was argued on September 3, and an opinion is due.

Guardians ad Litem (GAL). The California Supreme Court, in *In re James F.* (2008) 42 Cal.4th 901, resolving a split of authority, determined that trial court error in the procedure by which a guardian ad litem is appointed is subject to review for harmless error rather than structural error requiring automatic reversal.4 Another case applying a harmless error standard in reviewing error in GAL determinations was the Third District's decision in *In re M. F.* (2008) 161 Cal.App.4th 673 [failure to appoint GAL was prejudicial error where parental rights terminated and GAL may have contested jurisdiction, placement etc., in a case that was not open-and-shut].

Paternity – Overcoming Voluntary Declarations of Paternity. Two cases show the different results where biological fathers attempt to overcome a voluntary declarations of paternity (VDP) by others. First, the succesful attempt. In *In re J.L.* (2008) 159 Cal.App.4th 1010, Adrian L. executed a VDP. The mother told the biological father, Christopher W., that he was not the father, and when Christopher attempted to take the child into his home within the meaning of *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, Adrian threatened to harm him. Dependency proceedings were initiated when Adrian L. and the mother left the child when they went to Mexico. Christopher established paternity through blood tests. Later Adrian claimed the VDP could not be contested under Family Code section 7611, because biological fathers are not listed in section 7611 (e). The First District, Division One, affirmed, stating that, under *Kelsey S.*, Christopher W. had standing to litigate paternity and the juvenile court had jurisdiction to award custody to him. (Rejecting contrary holding in *In re Christopher M.* (2003) 113 Cal.App.4th 155.) In light of Adrian L.'s active and violent coercion of Christopher from

asserting his *Kelsey S.* rights, he was estopped from challenging Christopher's attempts now to raise them.

Second, an unsuccessful attempt. In *In re William K.* (2008) 161 Cal.App.4th 1, the juvenile court adjudicated the minor a dependent and declined under Family Code sections to set aside the voluntary declaration of paternity (VDP) executed by W.K., although Ronald F. was the biological father. Ronald F. had been present during the sonograms and had, after his subsequent imprisonment for a short time for failing to register as a sex offender, expressed interest in the child. The trial court found that he had not vigorously pursued custody while incarcerated, and that other factors in his background resulted in the child's best interests being favored by not setting aside W.K.'s VDP. The Third District affirmed, holding that under section 7648, even if Ronald F had actively satisfied the requirements of becoming a father under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, he also had to meet the "best interests" standard.

Paternity - Late Applications for Presumed Parent Status. In *In re Vincent M.* (2008) 161 Cal.App.4th 943, the child was surrendered for adoption at birth by his mother and she failed to identify the father when juvenile proceedings began. Eight months later, the biological father petitioned for modification under Welfare and Institutions Code section 388, requesting presumed father status and reunification services. The juvenile court granted the petition and the foster parents appealed. Reversing the juvenile court's determination, the Second District, Division 5, majority held that when the reunification period has ended the father still has the duty to establish that services would be in the child's best interest, even when his paternity was concealed from him, citing In re *Zacharia D.* (1993) 6 Cal.4th 453. In dissent, Justice Armstrong, citing, *In re J.L., supra,* took the position that *Zacharia D.* requirement should not apply when the sole reason the biological father could not make his *Kelsey S.* showing was that the fact of the child's birth had been withheld from him.

Indian Child Welfare Act – Notice Defects.

In *In re William K., supra,* 161 Cal. App.4th 1, the Third District held that California's new ICWA legislation effective January 1, 2007, including the new ICWA notice requirements set forth in Welfare and Institutions Code section 224.3, applied prospectively only and did not require updating of notices sent in this case in 2006.

In *In re Alice M.* (2008) 161 Cal.App.4th 1189, the Sixth District reversed a section 366.26 parental rights termination for a second time for failing to provide notices to Navajo tribes at the correct address and to the correct tribal chairman. As there were

no responses from these tribes there was no reason to believe they received notice. And notice to the Bureau of Indian Affairs is not notice to a federally recognized tribe. Citing *In re Amber F.* (2002) 150 Cal.App.4th 1152, and *In re X.V.* (2005) 132 Cal.App.4th 794, as authority, the department argued that the error came up on a previous reversal and remand for ICWA error, and since the parents did not object to the notice the second time, they should be found to have forfeited the objection. The Sixth District, noting some similarities between the current case and *Amber F*., declined to follow the result for two reasons. First, the error on the first remand was a different type of error, a complete failure to notify tribes, from the second error, which merely concerned defects in the notice. Second, applying a forfeiture rule in this situation could essentially leave serious errors unremedied.5

In *In re N.M.* (2008) 161 Cal.App.4th 253, the Second District, Division 8, held that the requirement of a 60-day waiting period in Welfare and Institutions Code section 224.3, subdivision (e), for responses from tribes only applies to the responses from the tribes in question (in this case the Apache and Yaqui tribe), and not to the notices that were sent as "courtesy notices." There is no basis in the record for believing that there would have been any different responses had the court awaited 60 days on the courtesy notices..

A harmless error analysis was applied to defective notice to the parents in *In re Miracle M*. (2008) 160 Cal.App.4th 834, where the mother did not receive ICWA notice, but the court had inquired of her whether she had Indian heritage. The Second District, Division 7, found the error harmless as the mother had not shown how notice would have provided the court with any additional information.

Failure to make the ICWA inquiry was found harmless by the Fourth District, Divsion 3, in *In re N.E.* (2008) 160 Cal.App.4th 760, and by the Second District, Division 7, in *In re H.B.* (2008) 161 Cal.App.4th 115. Although in both cases, the juvenile court had erred in failing to make an inquiry – failing to ask the mother to fill out Judicial Council form JV-130 – the error was harmless where the mother never claimed in the juvenile court or on appeal that she had Indian ancestry.

The decisions in *In re N.E.* and *In re H.B* raise a question. How might the mother claim Indian ancestry on appeal where there is no indication supporting that in the trial record? May the parent offer additional evidence through Code of Civil Procedure section 909? The *N.E.* and *H.B.* decisions suggest that an affirmative representation in the brief might be enough, but perhaps do not reach the point. But in a recent unpublished case, where there had been no inquiry in the juvenile court, the Third District

accepted the father's representation made in a brief filed in pro. per. that he had heritage in the "Hopa or Hoopa tribe, Klamoth (sic) River"as an adequate showing of Indian heritage to establish prejudicial error.

Indian Child Welfare Act -- Limited Remands. In *In re Rayna N*. (2008) 163 Cal.App.4th 262, the Second District, Division 4, followed *In re Veronica M., supra*, in continuing to use simple vacate and remand orders rather than setting aside the referral order completely. The decision in *Rayna R*. states that nothing in new section 224.2, subdivision (d) requires a different result. *Rayna R.* says nothing about the Third District's holding in *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, stating that a complete vacating of the order is the more appropriate remedy at the time of the extraordinary writ from the hearing setting the section 366.26 hearing, as the trial court may not have terminated services for an Indian child.

Appeals and Writs -Orders Final for Appeal. The California Supreme Court has granted review in *In re S.B.* (2008) 160 Cal.App.4th 21 (review granted May 21, 2008, S162156/C055838), on the question whether an order in a dependency proceeding - based upon a finding under Welfare and Institutions Code section 366.26, subdivision (c)(3), that termination of parental rights would not be detrimental to a minor and that the minor, although "difficult to place," has a "probability for adoption" is appealable at the time the finding is made. The Third District had held that the finding is not appealable because it is an interim finding.

Appeals and Writs - Rule 8.450 Writs. Disagreeing with *In re Merrick V*. (2004) 122 Cal.App.4th 235, the Second District, Division 3, in *Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, held that the remedy for the trial court's failure to advise the parties of the writ requirements under rules 5.600 and 8.450 is to deem the purported appeal from the order setting the selection and implementation order to be a traditional petition for writ of mandate. This provides the relaxed time requirements needed by the petitioner in light of the lack of advisement of the 7-day filing requirement for rule 8.450 notices of intent.

Appeals and Writs – Standing. In *In re D.S.* (2007) 156 Cal.App.4th 671, an appeal by the father of the juvenile court's orders 1) denying the mother's modification petition to reinstate reunification services, and 2) terminating parental rights, the Third District found the father did not have standing to challenge the ruling on the modification where he had not joined the mother's arguments in the trial court.

Similarly, in *In re Angel S., supra*, 156 Cal.App.4th 1202, finding erroneous use of the section 388 procedure to terminate a Probate Code guardianship, the guardian was found not to have standing to challenge the lack of notice to the probate court.

Appeals and Writs. **Consideration of Post-Appeal Evidence.** The general rule from *In re Zeth S.* (2003) 31 Cal.4th 396, is that a reviewing court will not take additional evidence on appeal. But as discussed above, the courts have been willing to take additional evidence to show mootness or harmless error. (*In re B.D., supra* 159 Cal.App.4th 1218.)

And in *In re Angel L., supra*, 159 Cal.App.4th 1129, in reversing the parental rights termination orders, the court accepted the parties' representation on appeal that the adoptive placement for the children had failed, which undermined the adoptability finding where the finding depended on that placement, noting that this procedure, previously followed by the California Supreme Court in *In re Elise K.* (1982) 33 Cal.3d 138, had been noted by the same court in *Zeth S.*, as being within the discretion of the appellate court when all parties agreed.

ENDNOTES

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1. This article covers developments from October 1, 2007 to June 30, 2008. The article is published at http//www.capcentral.org/resources/dep_case.aspx, © 2008, 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, Deanna Lamb, Melissa Nappan, and Laurel Thorpe for their assistance with this article.
3. The Supreme Court disapproved *Dawnel D. v. Superior Court* (1999) 74 Cal.App.4th 393.
4. The Supreme Court disapproved *In re C. G.* (2005) 129 Cal.App.4th 729.
5. The California Supreme Court denied a petition for review and a request that the decision not be certified for publication, although Justices Kennard and Chin were of the opinion review should be granted. The decision in *Alice M.* seems consistent with the result in *In re S.B.* (2004) 32 Cal.4th 1287, in which the reviewing court reached otherwise forfeited issues.