

## **Probate Code Section 1516.5 Parental Rights Terminations Upheld - For Now**

### **Dependency Update<sup>1</sup>**

**By Bradley Bristow<sup>2</sup>**

In March 2009, the California Supreme Court resolved two cases challenging the constitutionality of the 2003-enacted parental rights termination scheme in Probate Code section 1516.5, subdivision (a)(2) which permits termination when a child has been in the physical custody of a guardian for two years. The court upheld facial challenges to the statute in both cases, but noted in each case that its ruling did not necessarily foreclose future “as applied” challenges to termination.

In *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, a mother whose child had been in guardianship for several years and whose parental rights were terminated, challenged the statute as being unconstitutional on its face by not requiring a finding of parental unfitness or at least requiring a finding that the termination of parental rights is the least detrimental alternative, findings mandated by dependency cases such as *Santosky v. Kramer* (1982) 455 U.S. 745. The California Supreme court held that the statute’s requirement of a weighing of the child’s best interests is in effect a consideration of the least detrimental alternative, and the failure of the parent to exercise any custodial responsibility except for visitation for two years obviates any need for an unfitness finding.

In *In re Charlotte D.* (2009) 45 Cal.4th 1140, decided the same day, the father asserted his *Kelsey S.*<sup>3</sup> rights, and challenged the Probate Code’s lack of a requirement of showing unfitness. Noting that the father had waived his rights at the time when the child had first been placed in guardianship and had failed in other ways to act as a responsible parent, the California Supreme court held that he did not qualify as a *Kelsey S.* father, and reversed the appellate court’s determination that his rights had been violated. The court again upheld Probate Code section 1516.5 against facial challenge, but noted that this did not foreclose “as applied” due process challenges by *Kelsey S.* fathers.

*Charlotte D.* and *Guardianship of Ann S.* were weak fact situations for “as applied” due process challenges. (For example, the parent in *Guardianship of Ann S.* had not even requested visitation with her child for over three years.) But each case suggested

a fact situation where the challenge might have a greater chance of success. In *Charlotte D.* it was suggested that a true *Kelsey S.* father might make an “as applied” challenge. And in *Guardianship of Ann S.* the parties proposed a hypothetical situation in which a parent had left the child in the care of a guardian for two years while on active duty in the military. These are examples of situations in which parental rights terminations under Probate Code section 1516.5 may be subject to due process challenge.

**Legislation effective January 1, 2009.**<sup>4</sup> In my last article I described the comprehensive changes in additional services available to parents who have been in institutions or residential substance abuse programs, under AB 2007, effective January 1, 2009. Other significant dependency legislation effective in 2009 includes:

<b>Family Code</b>	
8712, 8811, 8908	Amendments provide adoptive placements may not be approved when applicant or adult living in applicant’s home has been convicted of certain offenses. Applicant’s fingerprints to be submitted in federal-level record requests.
<b>Health &amp; Safety Code</b>	
1522	Clarifies criminal records requirements for community care facility, foster home, etc. applicants.
<b>Penal Code</b>	
11167.5, 11170	Amendments specify child abuse or neglect information is only to be provided to out-of-state agencies having safeguards to prevent unauthorized disclosure.
<b>Welfare and Institutions Code</b>	
309, 361.4	Permits placements of children in homes of relatives, etc., who have criminal records when convictions are of a type that the Director of Social Services can give an exemption and the county has given an exemption.

349	<p>New subdivision (c) clarifies that minor who is present for a hearing may address that court.</p> <p>New subdivision (d) requires a continuance so a minor 10 years of age or older who was not properly notified of the hearing can be present.</p>
362.05	Sets the “reasonable prudent parent” standard for group homes, facilities, and caregivers.
366.3	<p>Subdivision (b) amended to permit termination of guardianships under sections 360 and 366.26 in county where child now resides.</p> <p>Subdivision (e)(4) amended to specify that at permanent plan review hearings the court shall in cases having significant likelihood that child could safely return home within six months, determine what specific services are required.</p> <p>Subdivision (f) amended to add the option at permanent plan review hearings of providing six additional months of family maintenance services when return of the child to a safe home environment is the best alternative.</p>
391	Subdivision (a)(2)(A) and (B) now add to the list of items that must be provided to the minor when jurisdiction is terminated because of the minor’s legal majority: all non-forensic photographs of the child or family must be turned over to the minor, as well as the minor’s driver’s license, and a letter including information containing documentation for state and federal financial aid.

**Jurisdiction – Subject Matter – UCCJEA.** In *In re Jaheim B.* (2009) 169 Cal.App.4th 1343, the child’s parents were residents of Alabama where the father was imprisoned. The mother came to California for five months before neglecting the minor, as alleged in

the dependency petition. The father appealed on grounds that the court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Family Code section 3424, because the family had not resided in California for six consecutive months, but the Fourth District, Division 1 affirmed, holding that the juvenile court had emergency jurisdiction under section 3421 because the neglect had occurred in California and the child needed protection.

**Jurisdiction - Procedure - Effect of Mother's Adoption Agreement.** *In M.L. v. Superior Court* (2009) 172 Cal.App.4th 520, the mother signed adoption placement agreement forms shortly after the birth of her child, and the mother left the hospital about an hour after the child's birth. The child tested positive for amphetamines. The court sustained the dependency petition, subdivision (a), bypassed services, and set the matter for a section 366.26 hearing. In the mother's writ petition, she argued that the adoption agreement foreclosed a finding of jurisdiction, and the Second District, Division 6 rejected the contention. Although the parent has the constitutional right to select an adoptive parent, the juvenile court maintains jurisdiction to act in the interests of a child who is at risk.

**Jurisdiction – Procedure - SCRA.** In *In re A.R.* (2009) 170 Cal.App.4th 733, the Fourth District, Division 1, held a juvenile court must, upon notice that a member of the armed services is on active duty, stay the proceedings for a minimum of 90 days pursuant to the requirements of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. Appen. sec. 512.

**Jurisdiction - Procedure - Evidence.** The Fourth District, Division 1, held in *In re Cole C.* (2009) 174 Cal.App.4th 900, that a juvenile court did not err in sustaining the claim of psychotherapist privilege asserted by counsel for the child's two half-siblings. The petition alleged that the child was at risk because the father had used inappropriate disciplinary procedures with the sisters (locking them in garage and giving them cold showers with a hose), and said he would use harsher measures with the child, since the child was a boy. The testimony of the psychotherapist was sought hoping to show that the girls had given inconsistent statements in therapy. In affirming, the reviewing court noted that disclosure of matter privileged under Evidence Code section 1012 is sometimes permitted to protect the child's interest, but the need was not established in this case. The father was not deprived of due process because he was permitted to cross-examine witnesses and present his own witnesses. The girls had been consistent in their accounts given to all other persons.

## **Jurisdiction - Sufficiency of Evidence under Section 300**

*Subdivision (b) (Risk of Serious Physical Harm).*<sup>5</sup> In *In re Alexis E.* (2009) 171 Cal.App.4th 438, the parent challenged jurisdiction and a reunification condition based solely upon his marijuana use and specifically his use under the Compassionate Use Act, Health and Safety Code section 11362.5, subdivision (a), et seq. The Second District, Division 2 agreed that marijuana use alone could not provide a basis for jurisdiction. The court did, however, find a basis for jurisdiction in the fact that the children noticed changes in his behavior while using marijuana that scared them, the fact that appellant suffered from previous substance abuse problems and because (per the father's psychiatrist) his current panic attacks could be caused by marijuana usage.

*Subdivision (d) (Sexual Abuse).* In *In re Carlos T.* (2009) 174 Cal.App.4th 795, the Second District, Division 2, held the incarceration of a father who has sexually abused his children does not eliminate the future risk of harm to the children. The father had not been sentenced, nor had there been an appeal from the criminal conviction. Neither parent acknowledged the risks of harm occasioned by his future contact with the children. Were he released from custody there was a likelihood he would continue abusing the children. Subdivision (d), unlike other bases for jurisdiction, does not require a showing of an immediate risk of harm, and there was ample evidence of a future risk of harm to sustain jurisdiction.

*Subdivision (g) (Unavailable Parent).* In *D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, the Fourth District, Division 3, held the parents' statement in the dispositional report that they wanted no relationship with their nine-year-old adopted child and wanted the adoption set aside was sufficient to support a jurisdictional finding under subdivision (g). Delinquency proceedings based on the child's poisoning of the family dogs had been dismissed, and the child was moved to the children's home. She had no place to go. It was appropriate for the dependency court to assert jurisdiction.

*Subdivision (j) (Abuse of Sibling).* In *In re Cole C., supra*, the finding of jurisdiction as to the child based on the inappropriate discipline used by the father on the child's half-sisters was upheld because of the father's statement that he would discipline the boy more harshly than he had disciplined girls.

**Disposition – Removal of Children - Substantial Evidence.** In *In re H.E.* (2008) 169 Cal.App.4th 710, a petition was sustained on the grounds of serious emotional abuse based upon the parents' bitter custody battle in a marital dissolution. The mother engaged

in tirades in the presence of these younger children, alleging the father had sexually abused them. The First District, Division Two, held the evidence also supported removal of the children from parental custody under section 361, subdivision (c)(1) based on findings of both current emotional damage and the risk of future harm. Subdivision (c)(1) is not limited to threats of physical harm.

### **Disposition - Denial of Services Under Section 361.5**

*Subdivision (b)(3) (Prior Physical or Sexual Abuse).* In *In re D.F.* (2009) 172 Cal.App.4th 538, the father challenged the denial of reunification services to him under section 361.5, subdivision (b)(3) because the child who was removed in the current case was not the child who had been removed in the previous dependency proceeding. This contention was rejected. Subdivision (b)(3) expressly provides the subject of the prior may be *the child or the child's sibling*, and it was a sibling who had been abused in the prior case.

*Subdivision (b)(6) (Inflicting Severe Physical or Emotional Damage).* In *In Jose O. v. Superior Court* (2008) 169 Cal.App.4th 703, the Fourth District, Division One, held that the father's stabbing to death of the child's mother in the presence of the child constituted a torturous act which would cause serious emotional damage to the child such as to give the court discretion to deny services, the exception to services having been intended to be interpreted broadly.

*Subdivision (b)(13) (Resisting Treatment).* The First District, Division 5, held in *D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, a father's prior parole violation for failing to attend treatment programs and relapsing on two occasions may satisfy as the prior rehabilitation failure within the meaning of subdivision (b)(13) permitting bypass of services for resisting "court-ordered" treatment. The Legislature intended not to deny services to those who resist voluntary programs. But parole programs are involuntary and a person's resistance of treatment in the parole context demonstrates the intractable substance-abuse problem that makes further services wasteful.

**Disposition - Denial of Services Under Section 364.** In *In re Gabriel L.* (2009) 172 Cal.App.4th 644, the Fourth District, Division 1 upheld the denial of services to the father when the child had been placed with the mother under section 364. The court noted the statute does not expressly provide for services to the other parent when a court sustains jurisdiction but places the child with a parent under section 364 with a family maintenance plan. But the court has discretion to award reunification services to the

other parent. Here the court did not abuse its discretion in denying services because the father had made no progress in services in the previous 14 months. Also, he had been arrested, did not test for controlled substances, and did not visit with the child.

**Disposition - Family Maintenance Orders.** In *In re Alexis E.*, *supra*, 171 Cal.App.4th 438, the reviewing court approved inclusion in a family maintenance plan the requirement of drug counseling for the father, notwithstanding the fact that his marijuana usage was permitted under the Medical Marijuana Act, Health and Safety Code section 11362 et seq. The reviewing court held that the counseling did not necessarily mean he could not use marijuana. The counseling was necessary because the way he was using it was presenting a risk to his children.

**Disposition - Reunification Orders.** In *In re A.E.* (2008) 168 Cal.App.4th 1, the Second District, Division 8, affirmed a dispositional order requiring the father to participate in anger management counseling even though the mother was the one who had abused the children and he was the one who reported the incident in a 911 call. The juvenile court's concern was that the father's subsequent ambiguous statements minimized the mother's conduct and he regretted making the 911 call. This indicated he had an incorrect attitude with respect to corporal punishment.

**Review Hearings – Standard for Return of Children.** The Fourth District, Division 3, noted in *M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, the difference in the standard for return of the children at the six-month hearing under 366.21, subdivision (e) from that at subsequent review hearings for return of children who were under three years of age at time of detention. In the former, it is only “a substantial probability the child *may* be returned,” but the latter sets the probability at “will be returned.” So it is error for a court to use the higher standard at the six-month hearing, and the error was prejudicial here where the parent's prospects for reunification had significantly improved during the first six months of reunification.

**Review Hearings - Termination of Services.** *Amanda H. v. Superior Court* (2009) 166 Cal.App.4th 1340, involved a petition for writ of extraordinary relief taken from the juvenile court's order made at the 12-month hearing terminating reunification services and setting a section 366.26 hearing. The Second District, Division 8, held the finding of reasonable services was not supported by clear and convincing evidence where the social worker had told the mother and reported to the court that the mother was fully complying with her service plan even though her individualized counseling addressing domestic violence did not satisfy the domestic violence counseling requirement. Once it was

determined that the program did not qualify, the mother immediately enrolled in the domestic violence program. Nonetheless, the Department relied on her non-completion of the program as the basis for terminating services. The Department is supposed to identify the problems and assist the family in following the service plan. Here the Department thwarted the parent's compliance.

In *In re A.C.* (2008) 169 Cal.App.4th 636, the Fourth District, Division 3, determined how time limits for reunification of services are calculated at review hearings. In this case the children had originally been placed with the father under section 361.2, but were later removed pursuant to a modification petition under section 387. At the first review hearing, the juvenile court addressed the matter as if it were a six month hearing under section 366.21, subdivision (e) even though the parents had already received two years of services. Minor's counsel appealed, challenging the court's decision to offer an additional six month of reunification services. The determination awarding further services under subdivision (e) was affirmed. In this respect, a section 361.2 disposition is treated like a section 362 disposition in which the parents are offered services and the child remains in the home. (See *In re Joel T.* (1999) 70 Cal.App.4th 263.) The clock only starts running when the juvenile court removes the child from the custody of both parents, which did not occur in this case until the second removal.

In *S.W. v. Superior Court* (2009) 174 Cal.App.4th 277, the juvenile court terminated services to the father under section 366.21, subdivision (e) for his failure to visit and contact the child. One telephone contact in six months was not substantial contact, and the father did not show extenuating circumstances justifying his failure to visit. His decision to move out of state did not excuse his failure to visit.

**Modification Petitions - Section 387 and section 360 guardianships.** In *In re G.W.* (2009) 173 Cal.App.4th 1428, the Fifth District held that while sections 360 and 361.4 may authorize a guardianship at the time of original disposition, the option under section 360 is no longer available when a subsequent petition has been filed, and reunification services had been exhausted as to the parents. Rule 5.565(f) requires the setting of a section 366.26 hearing.

**Modification Petitions – Section 388.** In an atypical case,<sup>6</sup> the Third District in *In re S.R.* (2009) 173 Cal.App.4th 864, reversed a juvenile court's order granting the Department's modification petition to excuse the Department from obtaining a bonding study conducted by a Spanish-speaking professional. The court reversed the order terminating parental rights, as well. In this case, both parents were Spanish-speaking and required interpreters.



The ground for the modification was that the Department could not find a qualified professional in the area who could perform the assessment. The reviewing court found the juvenile court abused its discretion in granting modification upon such a scant showing of efforts. This demonstrated neither a change in circumstances nor that the modification would be in the child's best interests.

Does the juvenile court have jurisdiction to modify after terminating jurisdiction? The answer depends on whether the termination of jurisdiction was authorized or not. In the typical situation the court has no jurisdiction to modify. For example, in *In re A.S.* (2009) 174 Cal.App.4th 1511, a case in which the trial court was authorized in terminating its jurisdiction, the Fourth District, Division 2, held the juvenile court had no jurisdiction six years later to hear the father's modification petition requesting to set aside the jurisdictional findings. However in *In re Kenneth S.* 169 Cal.App.4th 1353, the Fourth District, Division 1 held that where the juvenile court had approved a guardianship, it had no authority to terminate jurisdiction in favor of the family court while the guardianship was still pending. The juvenile court deprived the parent of due process in refusing to hear his modification petition filed after the unauthorized termination of jurisdiction.

### **Parental Rights Termination - Adoptability.<sup>7</sup>**

**Parental Rights Termination – Indian Child Exception.** In *In re A.A.* (2008) 167 Cal.App.4th 1292, the Indian tribe stated that the child's "connection with family" was the compelling reason supporting the exception to adoption provided under section 366.26, subdivision (c)(1)(B)(vi). On review of the order terminating parental rights, the Fifth District held the compelling reasons may be more extensive than those expressly listed in the statute (impairment of child's relationship with the tribe or the tribe has proposed a planned permanent living arrangement). But the exception must be based on the child's connection to the tribal community, and a mere reference to "connection with family" does not suffice.

**Parental Rights Termination - Sibling Relationship Exception.** In *In re I.I.* (2008) 168 Cal.App.4th 857, a mother challenged the termination of her parental rights as to her four children. The children had previously been placed together and had strong relationships. Yet the children were now to be placed separately because each had significant behavior problems, and each caretaker could only manage one fragile child. On appeal, the mother argued that this demonstrated adoption would be detrimental within the meaning of the sibling relationship exception. The Fourth District, Division 2, affirmed, noting that although the children had strong bonds, they could not be placed together without

endangering their hopes of achieving permanence.

**Visitation.** An order denying visitation to the non-custodial parent was reversed in *In re C.C.* (2009) 172 Cal.App.4th 1481. When custody is awarded to one parent and jurisdiction terminated pursuant to section 362.1, visitation must be awarded to the other parent unless that would pose a threat to the child's safety. This is not the same "detriment" standard seen in other contexts, so the trial court's reliance on the detriment standard was incorrect. The matter was reversed and remanded for a determination under the correct standard.

Per the Fourth District, Division 2, in *In re S.J.* (2008) 167 Cal.App.4th 953, the amendment to section 366.26, subdivision (c)(4)(C), effective January 1, 2005, providing the juvenile court may not delegate to guardians the determination of whether visitation shall occur, does not apply retrospectively to visitation orders issued before 2005.

**Restraining Orders.** In *In re B.S.* (2009) 172 Cal.App.4th 183, the father challenged an order restraining him from contacting the child, the child's mother and the child's maternal grandmother. The basis for the challenge was that the criminal court had obtained exclusive jurisdiction by issuing a similar order. The Fourth District, Division 2, affirmed. The juvenile court had jurisdiction to issue an order where the order was not inconsistent with the order of the criminal court. The reviewing court also found evidentiary support for the order because the father had committed multiple acts of domestic violence against the mother, some of them in the presence of the minor.

**Sanctions/Contempt.** In *In re Nolan W.* (2007) 45 Cal.4th 1217, the California Supreme Court granted review on the questions: 1) whether a juvenile court may order the parent to participate in a drug rehabilitation program as part of a reunification plan; and 2) whether section 213 authorized the juvenile court to hold the parent in contempt and incarcerate her for failing to comply with that component of the reunification plan. The court easily found the rehabilitation program authorized, but held the juvenile court did not have authority to punish a parent for non-compliance with the reunification plan. The court noted that dependency proceedings are non-criminal in nature and their purpose is not to punish the parents. The court has traditional contempt power to enable it to control the parties behavior in litigation and in court. Reunification plans are far more "personal in nature," extending beyond the power of the court to preserve its own jurisdiction, so participation in the plans is not enforceable by contempt. The court noted that some court orders related to reunification may be enforceable by contempt, such as blatant violations of visitation orders, etc.

## **Foster Placement.**<sup>8</sup>

### **Rights of Minors – Minors Representation.**

In *In re Charlisse C.* (2009) 45 Cal.4th 145, review was granted on the question of what standard controls disqualification of counsel when legal service agencies and public law firms successively represent clients with potentially conflicting interests in juvenile dependency proceedings. In this case the mother alleged the public interest “umbrella” firm had previously represented her and this conflict prevented it from ethically providing representation to the child. On review, the California Supreme Court noted that this was a case of successive rather than simultaneous representation. The question was whether the public law office adequately protected and will continue to adequately protect the former client’s confidences through timely, appropriate, and effective screening measures and/or structural safeguards. The juvenile court erred in requiring automatic recusal of the firm under the rule applicable to simultaneous representation. The matter was remanded for a determination of whether the firm could establish that confidential information obtained from its prior representation of the mother was adequately protected.

In *In re Cole C., supra*, 174 Cal.App.4th 900, the counsel for the minor’s two half-siblings was, as their guardian ad litem, held to be the holder of their psychotherapist privilege under section 262.5, such that he could assert the privilege in the jurisdictional hearing.

**Educational Rights.** In *In re R.W.* (2009) 172 Cal.App.4th 1268, a rare case determining an educational rights issue in a dependency context, The Fourth District, Division 3, affirmed a juvenile court ruling limiting a parent’s educational rights over her 16-year-old child, identifying the Court Appointed Special Advocate (CASA) as educational representative, and approving an individualized education plan (IEP) specifying the minor’s placement in a group home in Wyoming. The appellate court noted the child had been in the dependency system for seven years and needed to find a suitable placement which was difficult to locate in light of the minor’s behavioral and emotional problems. The Wyoming home offered “a window of opportunity.” The mother’s visitation with the minor was inconsistent. She did not make good decisions, and her opposition to the current IEP was not in the minor’s best interest

### **Indian Child Welfare Act – Notice.**

In *In re E.G.* (2009) 170 Cal.App.4th 1530, the Third District, relying on 25 U.S.C. 1903(9), held that an alleged father's claim to Indian heritage does not trigger the notice provisions of the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901, et seq. until the father is proven to be the biological father. California law is the same. Nothing in the recent enactment of section 224.2, subdivision (a), changes the requirement. In this case, where the father's biological father had not yet been determined, the notice requirements of ICWA did not come into play.

Most of the other cases decided under the notice provisions of ICWA during the past year were on points previously established.<sup>9</sup>

**Indian Child Welfare Act – Active Efforts.** In *In re A.A.* (2008) 167 Cal.App.4th 1292, an appeal from the termination of mother's parental rights, the mother and the Tule River Tribe challenged the sufficiency of evidence supporting the finding of "active efforts" because the Department could have more timely placed the children with relatives who were members of the tribe. The Fifth District held that the placement decision is different than the "active efforts" issue -- the latter issue being a question of services that were provided to help the family stay together. Here there was no suggestion that the Department had not provided the mother with services, which was the important criteria. The Fourth District, Division 2 reached a similar result in *In re K.B.* (2009) 173 Cal.App.4th 1275.

**Appeals and Writs - Orders Final for Appeal.** The California Supreme Court held in *In re S.B.* (2008) 160 Cal.App.4th 21, an order entered under section 366.36, subdivision (a)(3) – that adoption of the child is probable but the child is difficult to place and continuing the matter for 180 days to find an adoptive family – is an appealable order. It is final rather than non-final for purposes of appeal.

**Appeals and Writs - Ripeness.** In *In re L.B.* (2009) 173 Cal.App.4th 562, the Second District, Division 5 dismissed an appeal from the first reunification review hearing. The parent had appealed the trial court's determination that, based on the date of detention, the hearing was a 12-month review hearing (sec. 366.21, subd. (f)) rather than a 6-month hearing. The reviewing court found the issue not yet ripe for review because the juvenile court had not yet terminated services.

**Appeals and Writs – Standing.** The Third District held in *In re Holly B.* (2009) 172 Cal.App.4th 1261, that a parent does not have standing to contest: 1) the grant of the Department's modification petition under section 388 to rescind a prior order that the child

undergo a psychological examination and, 2) the finding that adequate services had been awarded to the child when the child had not been given a psychological examination. Here, the evaluation had originally been sought only to help the Department determine what level of security was needed in the minor's placement, in light of her runaway status. The Third District held the parent had no legally cognizable personal interest in determination of that limited issue.

### **Appeals and Writs – Remands.<sup>10</sup>**

### **ENDNOTES**

1. This article covers developments from October 1, 2008 to June 30, 2009. The article is published at [http://www.capcentral.org/resources/dep\\_case.aspx](http://www.capcentral.org/resources/dep_case.aspx), Copyright 2009, Central California Appellate Program. Reprinted with permission.
2. Bradley Bristow is a Staff Attorney at Central California Appellate Program. He wishes to thank attorney Janet Sherwood and CCAP Staff Attorneys John Hargreaves, Colin Heran, Melissa Nappan, Laurel Thorpe, and Sandra Uribe for their assistance with this article.
3. *Adoption of Kelsey S.* (1992) 1 Cal.4th 816.
4. All statutory references are to the Welfare and Institutions Code unless otherwise stated.
5. Two recent cases found sufficient evidence to support jurisdiction under subdivision (b), based on past incidents. *In re Y.G.* (2009) 175 Cal.App.4th 109 (18-month old victim was not related and no serious physical harm, but victim same age as child and event close in time), and *In re J.K.* (2009) 174 Cal.App.4th 1426 (incidents two years and six years previous to filing of petition but each involving serious physical harm).
6. A more typical case affirming a denial of a modification petition for insufficient showing of the child's best interests would be furthered is *In re S.J.*, *supra*, 167 Cal.App.4th 953, where the mother waited four years before complaining that the visitation order was too sporadic and the children did not support modification.
7. In *In re R.C.* (2008) 169 Cal.App.4th 486, and *In re I.I.*, *supra*, 168 Cal.App.4th 857, courts affirmed adoptability findings despite the fact that the minor had significant disabilities or behavioral problems, but were "generally adoptable."
8. Compelling reasons for justifying placement of children in non-Indian homes were upheld in *In re N.M.* (2009) 174 Cal.App.4th 328, and *In re AA.*, *supra*, 167 Cal.App.4th 1292.

9. For example, in *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, the Third District held the juvenile court had no duty to provide notice when the mother denied Indian heritage and the father initially claimed possible Indian heritage, but later retracted it. In *In re Shane G.* (2009) 166 Cal.App.4th 1532, and *In re E.W.* (2009) 170 Cal.App.4th 396, the First and Second Divisions of the Fourth District found ICWA notice deficient but harmless where adequate notice was not given as to one minor but the notice had been given as to that minor's full sibling. In *In re K.M.* (2009) 175 Cal.App.4th 115, the Second District, Division 6, held there was no duty to contact the minor's maternal great-grandmother where the Department had contacted the mother and the grandmother. In *In S.B.* (2009) 174 Cal.App.4th 808, the Second District, Division 2, found the social worker's testimony that nine listed tribes had been notified was sufficient to satisfy ICWA requirements, even though return receipts were not included in the record. In *In re K.P.* (2009) 175 Cal.App.4th 1, the Third District held there was no need under ICWA to investigate any affiliation of the mother's non-federally recognized tribe with federally recognized tribes. In *In re K.B., supra*, 173 Cal.App.4th 1275, the Fourth District, Division 2, found no error in placing the children before notice had been made to the tribe (and even if there was an error, it was not jurisdictional).

10. In *In re S.B.* (2009) 174 Cal.App.4th 808, ICWA notice violations at hearing on remand from the appellate court for ICWA error, were forfeited when the parents did not object. Also, when the juvenile court is only to perform a ministerial act on remand, this does not constitute a "new trial" within the meaning of Civil Code section 170.6, subdivision (a)(2), such that a litigant may exercise a peremptory challenge. (*C.C. v. Superior Court* (2008) 166 Cal.App.4th 1019 [appellate court directed termination of services and the setting of a section 366.26 hearing].)