



Children's Law Center of California

“DEPENDENCY LEGAL NEWS”

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NEW DEPENDENCY CASELAW

WIC 364; Juvenile Custody Order—WIC 362.4

In re T.S.—filed 7/21/20; Second Dist., Div. Seven

Docket No. B293453

Link to case: <https://www.courts.ca.gov/opinions/documents/B293453.PDF>

(I) A PARENT IS ENTITLED TO AN EVIDENTIARY HEARING AT A WIC 364 JUDICIAL REVIEW. (II) REQUIRING AN OFFER OF PROOF BEFORE GRANTING A CONTESTED WIC 364 HEARING DOES NOT VIOLATE DUE PROCESS.

The children were detained when the police found a loaded handgun and cocaine in the family home during an investigation of their stepfather who was a major figure in a drug cartel. The juvenile court sustained a WIC 300 petition, finding true that Mother placed the children in a dangerous home environment by allowing a loaded handgun and narcotics to be within reach. DCFs reported concern over returning the children to Mother due to her pattern of associating with men with serious criminal histories and her failure to address case issues. At disposition, the boys were returned to their mother with family maintenance services, enhancement

services for father, and unmonitored visits. At the judicial review hearing, the agency recommended continued services as Mother had not completed all her court-ordered programs and expressed concern over her lack of awareness to how she failed to protect the children. Father submitted a declaration to the court asking for custody of the children in Russia during their summer vacation or to be allowed weekend overnight visits while he was in Los Angeles. Father also alleged Mother was involved in criminal activity, citing the fact she lived in an expensive rental property and drove a new sports car but had no apparent significant income. The juvenile court continued services for both parents and ordered visitation for Father every other week for one week at a time when he is in Los Angeles in addition to video conferences. At the 12-month judicial review hearing, the agency recommended the court terminate jurisdiction, grant sole physical custody to Mother and legal custody to the parents with unmonitored weekend visits to Father when he was in California. Father's counsel requested the matter be set for contest, stating he sought to call witnesses in support of Father's request for custody. The court asked Father if he had filed a WIC 388 petition requesting removal of the children from Mother, to which Father indicated he had not. The court indicated that Father's request was essentially to remove custody from mother which required a WIC 388 petition and findings of substantial risk of harm to the children and lack of available services to prevent removal from Mother's custody. Father then provided an offer of proof that he would (1) call a private investigator who would testify to his observations of activity outside the family home consistent with drug use and that Mother resided with a convicted felon and associated with drug dealers, and (2) call Mother to testify regarding these observations. The court denied the request to set the matter for contest, finding the evidence proffered was not relevant to the issues. The court granted physical and legal custody solely to Mother and terminated jurisdiction. Father was awarded unmonitored visits in California two weekends a month, plus weekly video calls. Father appealed.

Reversed. (I) The juvenile court was incorrect that a WIC 388 petition is required in order to request a change in physical custody as part of the exit order. This is because a WIC 364 hearing is a periodic review where the court must consider the totality of the circumstances and the child's best interest in determining whether jurisdiction should be terminated and in fashioning exit orders. A finding of substantial risk of harm to the children and a lack of available services to prevent removal from Mother was also *not* required to consider Father's request. Those findings are required at disposition pursuant to WIC 361(c), but there is no statutory language suggesting this standard applies when the court issues a custody order upon terminating jurisdiction pursuant to WIC 364. Instead, at this stage of the proceedings, the court must consider the child's best interest. (II) The court did not err in requesting an offer of proof for a contested WIC 364 hearing.

Because this hearing considers whether court supervision would continue or, if terminated, with which parent the children would live and the nature of visitation for the noncustodial parent, it does not offend due process to condition the right to a contested evidentiary hearing on an offer of proof as it would if this were instead a parent's final opportunity to avert termination of parental rights. (III) Father's offer of proof was enough to warrant an evidentiary hearing. A proper offer of proof gives the court an opportunity to determine if, in fact, there really is a contested issue of fact. The offer of proof must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued. Here, the proffered evidence was relevant to whether jurisdiction should be terminated or whether further supervision was needed to ensure there was no substantial risk to the boys' safety. It was not harmless error to preclude the testimony. If the court had heard the investigator's testimony and found it to be credible and Mother could not adequately explain his observations, it would reasonably be probable that the result be more favorable to Father, either in the continuation of jurisdiction to give him further opportunity to pursue custody or in a different custody and visitation exit order. (ML)

Visitation—WIC 362.1; Reasonable Services

Serena M. v. Superior Court—filed 6/30/20, cert. for publ. 7/24/20; Fifth District Docket No.: F080612

Link to Case: <https://www.courts.ca.gov/opinions/documents/F080612.PDF>

IT IS THE JUVENILE COURT'S RESPONSIBILITY TO CRAFT A FLEXIBLE VISITATION PLAN THAT FITS THE NEEDS OF A FAMILY'S UNIQUE CIRCUMSTANCES, FAILURE TO DO SO RISKS A PARENT BEING DENIED REASONABLE SERVICES.

The child, C.C., was detained from her mother due to physical abuse. At the detention hearing, the juvenile court found detriment and suspended visitation. The court later sustained the petition and offered mother reunification services. The agency was given discretion to begin therapeutic visits when appropriate. Mother later filed a 388 motion to begin visitation within a therapeutic setting. The 388 motion was denied, the juvenile court declared there was no evidence to warrant vacating the previous detriment finding. At the six-month review hearing, the agency recommended therapeutic visits to begin. Minor's counsel objected to this recommendation; C.C. disclosed she did not want to visit her mother in any setting. However, C.C. was communicating with her mother regularly through letters, text messages and monitored phone calls. At the combined six-,12- and 18- month review

hearings, the agency recommended termination of reunification services. The mother had engaged in services but was unable to complete her case plan due to work obligations. She testified that she loved her daughter and wanted to establish a strong relationship. C.C. testified that she never wanted to visit her mother and when she saw mother it did not make her happy. She admitted that she loved her mother but did not miss her. C.C. further stated that she would not go back home. Mother's attorney argued she was denied reasonable services because she was denied visitation. The court found it would be detrimental to return C.C. to her mother's care, terminated reunification services, and set a section 366.26 hearing. Reasonable services were found by clear and convincing evidence and mother's progress was found to be "moderate." Mother filed a petition for extraordinary writ in propia persona.

Writ Granted. Visitation is a critical component, probably the most critical component, of a reunification plan. Without visitation of some sort, it is virtually impossible for a parent to achieve reunification. It is the juvenile court's responsibility to ensure regular parent-child visitation occurs while at the same time providing for flexibility in response to the changing needs of the child and the dynamic family circumstances. The juvenile court failed to craft an appropriate visitation plan, and this led to a lack of reasonable services. The mother's only hope for repairing her damaged relationship with C.C. and reunifying with her was to work through their issues in a therapeutic setting. However, the juvenile court made that impossible by forbidding in-person contact. While evidence supported the initial detriment finding, evidence was insufficient to support such a finding throughout an 18-month period. A parent's failure to make sufficient progress in her court-ordered services is an important consideration in evaluating a child's safety and prospect of return, but it cannot be the deciding factor in preventing any parent/child contact. The lack of reasonable services warranted an extension of services beyond the 18-month date. "[W]here a timely challenge to the adequacy of services for the statutorily required minimum period ... is sustained, that failure to provide services will justify the extension of services beyond 18 months...." (*T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1256.) (MO)

Appellate Review—Clear and Convincing Evidence Standard

Conservatorship of O.B.—filed July 27, 2020; Supreme Court
Docket No.: S254938

Link to Case: <https://www.courts.ca.gov/opinions/documents/S254938.PDF>

IF THE CLEAR AND CONVINCING EVIDENCE STANDARD WAS REQUIRED AT TRIAL, APPELLATE COURTS MUST CONSIDER THE HEIGHTENED STANDARD WHEN REVIEWING WHETHER SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE LOWER COURT'S FINDINGS

The probate court appointed co-conservators for O.B. O.B. appealed, arguing that the evidence before the probate court was insufficient to justify the appointment of limited conservatorship because the clear and convincing standard of proof applies. The Court of Appeal rejected the argument and affirmed the trial court, finding that the clear and convincing evidence standard “is for the edification and guidance of the trial court and not a standard for appellate review;” therefore, on appeal “the clear and convincing test disappears.” The California Supreme Court granted review.

Reversed and remanded. An appellate court must account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard. The clear and convincing standard applies to various determinations, including termination of parental rights. There is a significant split of authority among Courts of Appeal regarding how the application of the clear and convincing standard of proof before the trial court affects appellate review. The recent trend in case law has been to recognize that when a heightened standard of proof applied before the trial court, an appropriate adjustment must be made to appellate review for sufficiency of the evidence. The Court confirms that this modern trend is correct. Thus, when reviewing a finding that demands clear and convincing evidence, an appellate court must determine whether the evidence, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding with the specific degree of confidence required by clear and convincing evidence. (NS)

Notice—Due Diligence

In re S.P.—filed 07/31/2020; Second Dist., Div. Five

Docket No. B302804

Link to case: <https://www.courts.ca.gov/opinions/documents/B302804.PDF>

WHERE A PARENT CANNOT SHOW THERE WAS A REASONABLE PROBABILITY THAT ABSENT A NOTICE ERROR HE WOULD HAVE A MORE FAVORABLE OUTCOME, THE ERROR IS HARMLESS.

Five days after father was arrested on drug related charges, the agency began investigating the neglect of S.P. by parents. After mother tested positive for

methamphetamine, the juvenile court issued a removal order for S.P. Mother and father previously lost custody of a child who was adopted during the course of S.P.'s case. Written notice was sent by certified mail to father's last known address informing father about the investigation. A petition was filed and S.P. was detained. Father was not present at the detention hearing, and the court ordered the agency to conduct a due diligence for father. Mother named father as S.P.'s father, said she did not know his whereabouts, and provided the names of paternal relatives. The court found father to be the alleged father. The agency recommended no reunification services for both parents due to their long history of substance abuse, failure to reunify with prior children, and father's whereabouts being unknown. The jurisdictional hearing for father was continued after the court found the due diligence was not complete since the agency made no effort to contact the identified paternal relatives. At the continued hearing, the court found notice proper even though the agency submitted the previous due diligence without a supplemental report. The allegations were sustained, and S.P. was removed from the care of both parents. The court denied reunification services pursuant to section 361.5(b)(10) and (11) and set the matter for a section 26 hearing. Father was personally served for the section 26 hearing after being located in custody. Father later filed a section 388 petition challenging the court's jurisdictional and dispositional orders for lack of proper notice. Father wanted S.P. placed with his relatives. -Father's section 388 petition was denied because the juvenile court found there was not a sufficient bond and it was not in S.P.'s best interest, and parental rights were terminated. Father appealed.

Affirmed. The juvenile court's order terminating parental rights was affirmed, even though there was a defect in notice for father. A section 388 petition can be used to challenge constitutional errors such as lack of notice of prior proceedings. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 490.) Due process affords a parent notice that is reasonably calculated to apprise them of the dependency proceedings and an opportunity to object. The agency must act with diligence to locate a missing parent and conduct the inquiry in good faith. In a dependency matter, when confronted with an error of a constitutional dimension, harmless error analysis applies. Applying the *Watson* standard, reversal is only permitted if it is "reasonably probable the result would have been more favorable to the appealing party but for the error." (*People v. Watson* (1956) 46 Cal.2d 818.) Here, the agency did not conduct a sufficient due diligence—as such, the efforts to locate and notice father were deficient. However, the father has failed to show there was a reasonable probability of a more favorable outcome absent the error. The juvenile court's order denying reunification services was supported by the record. Father had not demonstrated that he had made a reasonable effort to treat his substance abuse, and he had previously failed to reunify with a child who was eventually adopted. There was no

evidence that father and S.P. had a bond. Further, father was never found to be a presumed father, nor did he ask to be found presumed. Even if he had been found presumed, his relatives were not in a position to accept placement of S.P. Based on the facts of the case, under the *Watson* standard, it was not reasonably probable that father would have been either granted reunification services or kept his parental rights intact. (KH)

WIC 352; Cal. Rules of Court, emergency rule 6

In re M.P.—filed 8/3/20; Second Dist., Div. Five

Docket No. B306181

Link to case: <https://www.courts.ca.gov/opinions/documents/B306181.PDF>

THE JUVENILE COURT ERRED WHEN IT CONTINUED A SECTION 364 HEARING 8 MONTHS PAST THE STATUTORY TIME LIMIT, CONTRARY TO STATE LAW AND THE INTEREST OF THE MINORS.

The minors M.P. and Am.P. were declared dependents, initially removed from their parents, but released to home of mother on October 9, 2019, with father having monitored visits. On November 14, 2019, the juvenile court set a section 364 review hearing for May 14, 2020 in accordance with statutory time frames. On April 28, the agency filed a report with the recommendation of closing the case with a juvenile custody order granting mother sole physical custody with father continuing to have only monitored visits. On April 29, 2020, the juvenile court continued the section 364 hearing, off the record, without notice, and via minute order, to January 28, 2021 (220 days later). The continuance was based on the State of Emergency designation by the Governor of California, and Emergency Orders of both the Chief Justice of the Supreme Court and the Presiding Judge of the Los Angeles Superior Court (Judge Brazile). Judge Brazile's order closed the juvenile court to all but essential functions, such as health and safety emergencies involving foster youth and detentions, from March 17, 2020 to June 22, 2020. In response to the State of Emergency and Executive Orders by the Governor, the Judicial Council issued emergency rules on April 6, 2020 governing juvenile court procedures, including a rule allowing a continuance of any hearing up to 60 days due to the COVID-19 pandemic. (Cal. Rules of Court, emergency rule 6.) A few days later, the Presiding Judge of the Juvenile Court of Los Angeles County (Judge Greenberg) issued a memorandum to all juvenile court bench officers directing continuances according to a prioritization schedule, and requiring any juvenile court bench officer who wishes to deviate from the schedule to get approval from one of three supervising judges. Judge Greenberg revised his memorandum again on April 14, 2020, issuing a new

prioritization schedule with even longer timelines for continuances. Section 364 hearings were directed to be continued between 220 and 270 days. Father, D.P., filed a petition for writ of mandate challenging the continuance and the prioritization schedule, joined by both minors and the agency.

Writ Granted. The continuance was outside the bounds of the Welfare and Institutions Code and emergency rules, and the Judge Greenberg lacked the authority to issue an order for such lengthy continuances. Continuances in dependency proceedings can only be made after a showing of good cause and if they are not contrary to the interest of the minor. (WIC 352(a).) Further, any continuance shall only be for the time period necessary by the evidence presented. (Cal. Rules of Court, rule 5.550(a)(1).) Emergency rule 6 only authorizes a juvenile court to continue any dependency matter up to 60 days, and there was no order by Presiding Judge Brazile under the authority of the Chief Justice to grant a continuance of over 8 months. Judge Greenberg's memoranda directing the continuance was contrary to statutory time limits and emergency rule 6 and is thus contrary to state law. The memorandum is further contrary to the Chief Justice's order authorizing expedient adoption of local rules. Although health quarantines due to infectious diseases do generally constitute good cause for a continuance, there is no evidence that the juvenile court relied on section 352 or conducted an individualized assessment of the interest of the minors prior to continuing the matter 220 days. (SH)

WIC 362(a); Vaccination exemptions—Health & Safety Code 120372(d)(3)(C)

In re S.P.—filed 8/6/20; Second Dist., Div. Six
Docket No. B302636

Link to case: <https://www.courts.ca.gov/opinions/documents/B302636.PDF>

**THE JUVENILE COURT HAS THE AUTHORITY TO DECIDE WHETHER
DEPENDENT CHILDREN SHOULD BE VACCINATED**

At disposition, the agency requested the juvenile court to authorize the dependent children to be vaccinated as recommended by their current treating pediatrician. Father objected, stating his children were exempted from vaccinations by Dr. Ham over a year ago. At a hearing to determine whether the children should be vaccinated, Dr. Ham testified that he had seen the children only once for about an hour, was not a pediatrician, and had issued the exemption without having the children's medical records but only the parents' reports of their medical history. Dr. Ham conceded the children had no medical conditions. He said vaccinations were

patently unsafe and dangerous. The juvenile court declared Dr. Ham's vaccination exemptions to be null and void and authorized the vaccinations. Father appealed.

Affirmed. (I) Does a juvenile court have the authority to order vaccinations for dependent children under its jurisdiction? Yes. When a child is adjudged a dependent child pursuant to WIC 300, the juvenile court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child, including medical treatment. (II) Does recently enacted Health & Safety Code § 120372(d)(3)(C) deprive the juvenile court of the authority to order vaccinations? No. Because the court has inherent authority to decide whether dependent children should be vaccinated, it necessarily has the authority to decide all objections to vaccinations, including exemptions issued under § 120372. Nothing in this statute prevents a court from taking appropriate action where the evidence shows the vaccination exemption was fraudulent or without foundation. Here, Dr. Ham's letters failed to comply with the statutory requirement there must be a medical condition to support the exemption. Moreover, Dr. Ham expressed the view that vaccinations are dangerous and unsafe, but this view has been rejected by the courts. Vaccinations prevent the spread of disease and ensure the health and safety of children. (ML)

WIC 388; Domestic Violence

In re I.B.—filed 8/7/20; Fourth Dist.

Docket No.: G058814

Link to Case: <https://www.courts.ca.gov/opinions/documents/G058814.PDF>

UNDER SECTION 388, A CHANGE IN CIRCUMSTANCES ANALYSIS IN DOMESTIC VIOLENCE CASES MUST RECOGNIZE THE UNIQUE FACTS AND CIRCUMSTANCES PRESENTED IN EVERY CASE AND A BEST INTEREST ANALYSIS MAY CONSIDER THE RELATIONSHIP BETWEEN SIBLINGS.

The children, I.B. and A.B., were detained from their parents due to ongoing domestic violence. At the combined jurisdiction/disposition hearing the petition was sustained and the children were removed. The parents were offered reunification services. During the reunification period, A.B. exhibited aggressive behaviors towards his brother, I.B., and was diagnosed with an adjustment disorder with disturbance of conduct. During visitations between mother and A.B., mother was unable to control his behavior or properly redirect his negative behavior. Due to A.B.'s behavioral issues, the children were unable to be placed in a foster home for a prolonged period of time. In three years, the boys experienced four different group

home placements due to A.B.'s behaviors. The boys were eventually placed with one of the staff in a previous group home. The juvenile court terminated family reunification services at the 18-month date. Although mother was making progress, she continued to minimize her dependence on father and did not acknowledge the gravity of the domestic violence that occurred between them. 11 months later, mother later filed a section 388 petition requesting return of the children and family maintenance services. She continued to actively participate in her programs even after the termination of services. Mother's therapist noted she was doing well and acknowledged the toxic relationship with father. She also acknowledged she was a victim of father's abuse. Later, mother modified her 388 petition and requested only I.B. be returned to her care. Due to A.B.'s behavioral issues, mother did not feel equipped to care for both children. During this period, A.B.'s physical aggression towards I.B. increased and the Department noted a growing concern for I.B.'s safety. A.B.'s aggressive behavior also occurred at school. I.B. was noted as doing well, the foster mother described him as being "genuinely nice" and shares well. The juvenile court granted mother's 388 request and found it in I.B.'s best interest to return to the care of his mother. I.B. appealed.

Affirmed. Section 388 provides an escape mechanism that allows the court to consider new information even after the focus has shifted from reunification. (I) Substantial evidence supported the juvenile court's finding of changed circumstances. Mother continued to engage in programs after reunification services were terminated and enrolled in additional programs to strengthen her independence. The Court rejects counsel's argument that mother failed to consistently acknowledge the severity of the domestic violence between the parents and historically allowed father to return to home, which continued to pose a risk to the children. Although it took mother some time to recognize her role as a victim within a domestic violence relationship, "[t]here are five distinct stages domestic violence survivors follow when seeking an end to the relationship. The path is not linear but cyclical. Studies have found that many survivors attempt to leave a violent relationship five to seven times before they are able to fully do so. Domestic violence survivors, like all people, want their relationships to be successful and want both to be safe, free, and unafraid, and to live with the partner they love or the partner they feel is needed to provide financial security for themselves and their children." (II) Although the presumption of out-of-home placement being in the best interest of the child applied due to the termination of mother's reunification services, mother's continued bond with I.B. and the abusive behavior by A.B. rebutted this presumption. Mother continued to be a positive presence in I.B.'s life every week. She never missed or was late for a visit. The mistreatment of I.B. by his brother A.B., was a significant factor in upholding the juvenile court's decision. The abusive relationship between the siblings was unhealthy: "not all sibling

relationships are strong or healthy” and “[l]iving in an abusive environment can provide permanency but not necessarily a healthy and stable situation.” Mother rebutted the presumption and return to her was in the best interest of I.B. (MO)