



Children's Law Center of California

“DEPENDENCY LEGAL NEWS”

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NEW DEPENDENCY CASELAW

Relative Placement—WIC 361.3

In re J.Y.—published 3/18/22; Second Dist., Div. Eight

Docket No. B313020; 76 Cal.App.5th 473

Link to Case: <https://www.courts.ca.gov/opinions/documents/B313020M.PDF>

THE JUVENILE COURT ERRED IN SETTING A SECTION 361.3 HEARING AFTER THE REUNIFICATION PERIOD ENDED, WHEN THE AGENCY FULFILLED ITS OBLIGATION TO ASSESS RELATIVES FOR PLACEMENT DURING REUNIFICATION AND A NEW PLACEMENT WAS NOT REQUIRED.

J.Y. was placed with his foster parents when he was two months old and remained there throughout the dependency case. After two years, the foster parents were granted de facto status. During the reunification period, the agency assessed several maternal and paternal relatives in California, but the efforts were unavailing. In January 2021, two months after the parents' reunification services were terminated and a 366.26 hearing was scheduled, father's half-brother from Arizona and his wife came forward seeking placement. The child had no prior relationship with these relatives, but virtual and in-person visits began once they came forward. In March 2021,

the juvenile court set a section 361.3 hearing to consider placement with the paternal relatives and ordered an ICPC. In May 2021, at the foster parents' request, they were designated de facto parents. After a contested section 361.3 hearing, the juvenile court placed the child with his relatives in Arizona, stating that the agency had failed to follow the law by assessing other relatives during reunification and promptly assessing the Arizona relatives when they stepped forward after the reunification period. The de facto parents and the agency timely appealed.

Reversed. The trial court abused its discretion by setting a section 361.3 hearing after the reunification period ended, where the agency had fulfilled its obligations to assess relatives for placement during reunification, and there was no need to change J.Y.'s placement. Furthermore, the court abused its discretion by deciding, without any evidence that removal from his de facto parents, the only parents J.Y. had ever known, was in J.Y.'s best interest. The court merely engaged in a perfunctory reference to the 361.3 factors and demonstrated a total disregard for the statutory limitations upon its authority in the exercise of its discretion. The overriding concern of dependency proceedings is the best interest of the child, whose bond with a foster parent may require that placement with a relative be rejected. The longer a successful placement continues, the more important the child's need for continuity and stability becomes in the evaluation of the child's best interest. (NS)

ICWA—WIC 224.2

In re J.C.—published 4/4/2022; Second Dist., Div. Seven
Docket No. B312685; 77 Cal.App.5th 70

Link to case: <https://www.courts.ca.gov/opinions/documents/B312685.PDF>

[1] THE AGENCY ERRED BY FAILING TO CONTACT EXTENDED FAMILY MEMBERS AND INQUIRE WHETHER THE CHILD HAD POSSIBLE INDIAN ANCESTRY IN VIOLATION OF SECTION 224.2. [2] THE JUVENILE COURT ERRED BY FAILING TO ENSURE THE AGENCY FULFILLED ITS DUTIES TO CONDUCT A PROPER ICWA INQUIRY, RESULTING IN INSUFFICIENT SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT ICWA DID NOT APPLY.

A petition was filed for J.C., who was then detained from his parents and placed with his paternal grandmother. After the petition was sustained, J.C. was removed from the custody of his parents. Reunification services were ordered for father, but not for mother, given her history of failing to reunify with prior children. After the six-month hearing, the juvenile court granted

mother's 388 petition for reunification services, but both mother and father's reunification services were later terminated at the 12-month hearing. Parental rights were terminated at the section 366.26 hearing. With respect to ICWA, both parents completed ICWA-020 forms indicating that they had no Indian ancestry as far as they knew and informed the juvenile court of such at the detention hearing. The agency was in contact with the paternal grandmother, paternal great-grandmother, and maternal stepfather, but failed to inquire about possible Indian ancestry. Mother and father appealed.

Conditionally affirmed and remanded with instructions. The agency did not fulfill its duty of inquiry by failing to inquire of any extended family members if J.C. had any possible Indian ancestry, in violation of section 224.2, subdivision (b). Many of the relatives were readily available to the agency. The juvenile court additionally failed to fulfill its duty to ensure the agency conducted an adequate investigation into J.C.'s Indian ancestry, as the record demonstrated that it did not consider ICWA beyond the detention hearing. A case must be remanded for a proper ICWA inquiry when it is impossible for a parent to show prejudice based on the agency's inadequate ICWA inquiry. Absent a proper ICWA inquiry, the appellate record will not be sufficient to show substantial evidence to support a finding that the ICWA does not apply. Even under the harmless error standard set out previously in *In re Benjamin M.* (2021) 70 Cal.App.5th 735 the agency's failure to inquire was not harmless because the extended relatives would have been able to shed meaningful light onto the inquiry of whether J.C. had Indian ancestry. The application of the harmless error test in the recent cases of *In re S.S.* (2022) 75 Cal.App.5th 575 and *In re Darian R.* (2022) 75 Cal.App.5th 502 is questionable and seems to shift the burden to that of the parents and relatives, but the burden of inquiring about Indian ancestry falls squarely on the agency. (KH)

Jurisdiction/Disposition Timing—PC 2625

In re A.J.—published 4/4/22; Third Dist.

Docket No. C093305; 77 Cal.App.5th 7

Link to case: <https://www.courts.ca.gov/opinions/documents/C093305.PDF>

THE PRACTICE OF SPLITTING THE JURISDICTION AND/OR DISPOSITION HEARINGS AND HOLDING THEM SEPARATE AS TO EACH PARENT IS UNAUTHORIZED AND ERRONEOUS.

A.J. was detained from his father at age 11 due to father's arrest for committing armed robbery while the child waited in the car. Father was

appointed counsel but did not appear at detention. The juvenile court signed multiple transportation orders for father to be brought to court, and at each scheduled Jurisdiction/Disposition hearing father was not transported. On January 8, 2020, the fourth scheduled Jurisdiction hearing, the juvenile court proceeded with a Jurisdiction hearing just for mother, striking and amending parts of the petition pertaining to mother, but leaving alone parts pertaining to father, and finding A.J. described by sections 300 (b) and (g). The matter was continued twice again for a combined Jurisdiction/Disposition hearing as to father and a Disposition hearing as to mother. The agency recommended bypass for father due to the expected length of his incarceration and his conviction for a violent felony. On June 1, 2020, father was not transported; the court held the Disposition hearing as to mother only, removed A.J. from mother's custody, and granted her family reunification services. The Jurisdiction/Disposition hearings for father were continued three times since June 1, 2020, and finally scheduled for November 3, 2020. Meanwhile, mother's six-month review hearing was in September 2020, and she was granted additional reunification time. Father again was not transported to court on November 3. Counsel for father requested a continuance which the juvenile court denied. The court found the allegations in the petition true and denied father reunification services. Father appealed.

Affirmed. Jurisdiction and Disposition hearings, or any review hearing, cannot be "split" by holding such hearings separately as to each parent. The juvenile court's error caused the court to purportedly hold the Jurisdiction and Disposition hearings "as to father" less than three months before "mother's" 12-month review hearing. The juvenile court takes jurisdiction over the *child*, it does not prosecute parents, as the purpose of dependency is to protect the child. The proper dates of the Jurisdiction and Disposition hearings are January 8, 2020, and June 1, 2020, respectively. The juvenile court's action confused the proceedings and resulted in father "being lulled into sitting on his rights." Father's contention, however, that the juvenile court erred by conducting the Jurisdiction/Disposition hearings in his absence is unavailing. While Penal Code section 2625 does require either the presence of the prisoner or their attorney, unless a proper waiver of that right is submitted, the proper date of the single Jurisdiction hearing was January 8, 2020, and the single Disposition hearing June 1, 2020—father waived this issue by failing to appeal the juvenile court's Disposition and Jurisdiction findings at that time. In addition, father was not entitled to a continuance of the November 3 hearing because even if it were the Jurisdiction/Disposition hearing, the child's interest in the resolution of his custody status, as well as dependency timelines for Disposition, outweighed father's interest in being physically present for that hearing. (SH)

Due Process – Appointment of Counsel

In re Christopher L.—published 4/25/22; California Supreme Court
Docket No. S265910; 12 Cal.5th 1063

Link to case: <https://www.courts.ca.gov/opinions/documents/S265910.PDF>

FAILURE TO APPOINT COUNSEL FOR AN INCARCERATED PARENT AT A JURISDICTION/DISPOSITION HEARING DOES NOT NECESSARILY CONSTITUTE STRUCTURAL ERROR REQUIRING AN AUTOMATIC REVERSAL AS A MATTER OF LAW.

The agency filed a petition for Christopher L. and his then 10-month-old sibling after Christopher was born positive with methamphetamine in his system. The agency’s petition alleged the children were at risk due to mother’s and father’s history of substance abuse as well as father’s criminal history and notified the parents the agency was seeking a bypass of reunification services against them pursuant to section 361.5, subdivisions (b)(10) and (b)(11). Father was convicted of robbery eight months prior to the petition being filed and remained incarcerated at a fire camp during the entire pendency of the case. The agency notified father of the jurisdiction and disposition hearing to which father responded in a letter, requesting to appear telephonically and for the court to order paternity testing. The court did not appoint counsel for father and father did not appear at the hearing. The agency argued father had “not made himself available” and requested the juvenile court sustain a petition against him in his absence. The juvenile court proceeded in his absence, sustaining a petition against both parents and denying them reunification services pursuant to the bypass provisions. Father was later appointed counsel at a permanency hearing and made his first appearance shortly before the court terminated his parental rights. Father appealed, arguing he was denied due process at the jurisdiction and disposition hearing because he did not appear, and the court did not appoint him counsel. The Court of Appeal for the Second District affirmed, holding that although father’s due process rights were violated, an automatic reversal of the case was not warranted. Father filed a petition for review which was granted with the following question presented: is it structural error, and thus reversible per se, for a juvenile court to proceed with a jurisdiction and disposition hearing without an incarcerated parent’s presence and without appointing the parent an attorney?

Affirmed. Structural error is defined as an error which is “not susceptible to the ‘ordinary’ or ‘generally applicable’ harmless-error analysis . . . and may require reversal of the judgment notwithstanding the strength of the evidence contained in the record in a particular case.” Although the juvenile

court's failure to appoint counsel for father was a serious error, it did not constitute structural error requiring an automatic reversal of the case. First, while parents have a right to counsel as well as a right to participate in dependency hearings, these rights protect the parent from an erroneous determination and a violation of these rights does not constitute structural error on its own. Second, structural error is not applicable in this context because it is possible for a reviewing court to ascertain whether harmless error occurred when an incarcerated parent is deprived of an attorney. Here, father was not prejudiced by the failure of the juvenile court to appoint counsel for him because: (1) both bypass provisions applied as father failed to reunify with two of his older children because of his ongoing substance abuse and criminal issues; (2) father was able to file an Ansley motion to reconsider the juvenile court's prior orders against him; and (3) any arguments father could have made at the jurisdiction and disposition hearing were not supported by the record, as father was only convicted of his felony robbery charges eight months prior to the agency's petition being filed, so he could not argue that he was a non-offending parent or that the allegations against him were stale. Third, structural error did not occur in this case because no issue of fundamental fairness arose which would require automatic reversal. Father was provided notice of the hearing and was appointed counsel at a later stage of the proceedings, where he had the ability to challenge the juvenile court's orders through an Ansley motion. Additionally, any prejudice experienced by a parent must be balanced against the rights of the child to avoid delay of the child's long-term permanency. (SW)

NEW NON-DEPENDENCY CASELAW

Restraining Orders

M.S. v. A.C.—published 3/30/2022; First Dist., Div. Three
Docket No. A161921; 76 Cal.App.5th 1139

Link to case: <https://www.courts.ca.gov/opinions/documents/A161921.PDF>

IT WAS NOT AN ABUSE OF DISCRETION TO INCLUDE THE CHILDREN AS PROTECTED PARTIES ON A DVRO GIVEN THE EVIDENCE THAT FATHER ENLISTED THEM TO STALK AND HARASS THE MOTHER AND ENGAGED IN ACTS OF PHYSICAL VIOLENCE TOWARDS THEM

After the mother and father separated, mother sought a Domestic Violence Restraining Order against the father. The restraining order was granted protecting mother and the children. It was concluded that the father had

engaged in a harassment campaign against the mother and enlisted the children to stalk her and obtain information about her for the father. It was also concluded that the father sometimes engaged in physical acts of violence toward the children, most commonly through overly rough play, which caused the children to tear up, freeze, and be fearful. Father appealed.

Affirmed. There was substantial evidence to include the children as protected parties on the restraining order. The Domestic Violence Prevention Act is intended to prevent domestic violence, abuse, and allow for a separation to allow the violence to be resolved. The definition of abuse included stalking, harassment, striking, and battering. To include children as protected parties, the totality of the circumstances must be considered, including whether the failure to make the requested orders may jeopardize the safety of the children. (KH)