Filed 11/20/07 In re Rachel L. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re RACHEL L., a Person Coming Under the Juvenile Court Law.	B192601 B195484 (Los Angeles County
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v.	Super. Ct. No. JD00773)

PHILIP L., et al., Defendants and Appellants.	

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Stephen Marpet, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Judgment and order are reversed and case is remanded with instructions.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant, Mary L.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant, Philip L.

Lori A. Fields, under appointment by the Court of Appeal, for Minors and Appellants, Jonathan L. & Mary Grace L.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Lisa Proft, for Plaintiff and Respondent.

In this dependency case (Welf. & Inst. Code, § 300),[1] two of the subject minor children have each filed an appeal from the judgment. Their trial court appointed attorney has also filed an appeal from the judgment, as have the parents of the minors. These several appeals have been consolidated under case number B192601. All appellants contend the dependency court erred in not holding a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118) when one of the minor children requested new appointed counsel. There are also challenges to the sufficiency of the evidence to support the jurisdiction and dependency findings, and mother contends the parents' due process rights were

violated in several ways during court hearings. Mother also asserts a failure to comply with the requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.).

Appeals have also been filed by the same two minor children, and by their parents, from the minute order issued at a six-month review hearing, and those appeals challenge the sufficiency of the evidence to support the trial court's decision to retain jurisdiction over the minor children. Those appeals have been consolidated under case number B195484.[2] We consider and decide both the B192601 appeals and the B195484 appeals in this single opinion.

We find that although there was *Marsden* error, it is harmless. Moreover, we do not find a denial of due process to the parents in the conduct of the matter below. Regarding the Indian Child Welfare Act (the ICWA), we find that noncompliance with that federal legislation requires us to reverse the judgment, and the order from the six-month review hearing, and remand the case so that the trial court can fulfill its ICWA duties. Because our review of the record convinces us there is sufficient evidence to support the trial court's jurisdiction and dependency findings and support the trial court's retention of jurisdiction over the minors at the six-month review hearing, if the trial court ultimately determines that the ICWA is not applicable to this case, the trial court must reinstate its judgment as well as its minute order from the six-month review hearing. If the court determines the ICWA is applicable, it must proceed accordingly under the provisions of that law.

BACKGROUND OF THE CASE

1. *The Parties to the Case*

The parties to this case are Mary L., mother of the subject minor children (mother), Philip L., father of the children (father), Rachel L., Jonathan L., and Mary Grace L., the three minors, and the Los Angeles County Department of Children and Family Services (the Department), the local child protection agency.[3]

2. *The First Four Dependency Petitions*

According to the Department's jurisdiction/disposition report in the instant case and Department records from 1987, the family's involvement with the Department dates back to early 1987 when sheriff's deputies were called to the

family house because of father's brutal physical treatment of his daughter Cam L., who is a half-sibling of the parents' eight children, including the three minor children who are the subject of the instant matter. Mother, who is Cam's stepmother, did not protect Cam from father. That particular physical abuse of Cam by father occurred when Cam returned home at 9 o'clock in the evening after being out with friends without permission. Father was waiting for her in the front yard and he began yelling at her. He pulled her from a car by her hair, dragged her into the house by her arm, and then proceeded to slap her face several times, slam her to the floor, and hit her head against the wall. She sustained injuries to various parts of her body. She was taken to the hospital for treatment of her injuries and then detained with her grandmother. Later she went to live with her mother in Idaho. Father was arrested because of his abuse. After Cam was living with her mother, the section 300 petition filed on her behalf was dismissed without prejudice.

In October 1989 a section 300 petition was filed on behalf of five of the parents' children. The sustained allegation in the petition charged sexual abuse of then-minor Charity, who had been examined by a physician who is an expert in the medical detection of child abuse. The doctor found Charity was suffering from a condition consistent with sexual abuse.[4] The dependency court found there was no preponderance of the evidence to indicate that father was the perpetrator of sexual abuse on Charity. Mother had testified that once or twice a week the children were left in the care of the paternal grandmother or a friend of father's, Leonard C., aka Lynn C., aka Len C., and such persons acted as babysitters. [5] Charity and two of her siblings were found to be persons coming within the provisions of section 300 and the petition was dismissed as to the other two children named in it.

Jurisdiction over the three minors was terminated in November 1990. However, this court, in an unpublished opinion filed in September 1991 (B051244), found that the jurisdiction finding of the dependency court as to the three children could not stand because the allegation in the Department's section 300 petition had been amended to delete charges of parental fault, whether willful or negligent. The statutory language of the portion of section 300 upon which the finding of jurisdiction was placed specifically stated that a minor is a person described by section 300 if he or she has suffered or there is a substantial risk that the minor will suffer serious physical harm or illness as a result of, among other things, "the willful or negligent failure of the minor's parent or guardian to adequately supervise or protect the minor from the conduct of the custodian with whom the minor has been left."

The family's third contact with the juvenile court came when a petition was filed in November 1993 for the same five children plus minor Rachel. According to a Department report in the instant case and a Department report in a 2001 matter involving this family, the six minors were found to be persons coming within the provisions of section 300 on the basis of the following sustained allegations: the parents' home was dangerous to the minors in that it included, but was not limited to, approximately 60 guns, rifles and/or assault weapons; black powder in an unsecured location; and live ammunition, shells, and magazines, all of which was within access of the minors, and the guns and ammunition were in close proximity to each other. Further, the minors' home was found to be in an endangering filthy, unsanitary and unsafe condition, and the minors were chronically filthy, and unsupervised late at night.

Additionally, the parents unlawfully concealed the whereabouts of the children from the Department and father willfully gave false information to the court concerning the whereabouts of the children. Eventually all of the minors were released to mother's care. Jurisdiction was terminated in September 1994.

Next, a petition was filed in February 2001 on behalf of the minor Elizabeth L., who was fifteen years old at that time. The sustained allegations are that father inappropriately physically disciplined Elizabeth on numerous occasions; Elizabeth demonstrated numerous behavior problems which the parents could not handle, including her not wanting to follow home rules and her constantly running away, and Elizabeth's physical and emotional health were at risk. Elizabeth was placed in long term foster care and jurisdiction was terminated in June 2003 when she became 18 years of age.

Thus, the family has had problems sufficient to involve the dependency system for 20 years.

3. *The Current Dependency Case*

The fifth and current involvement of the Department with this family came as the result of minor Rachel's contact with the Los Angeles Police Department, Wilshire Division, on January 26, 2006, when she asked to be picked up because she was tired, hungry and had no place to live. She was fourteen years old at the time.

She had run away from the family home on October 29, 2005. Rachel told the Department social worker that she was tired of living under father's house

rules. She stated father would hit her with a stick, hanger or shoe if she did not follow his rules. She said he will not let her wear pants at home and she had to wear skirts or dresses, not let her wear makeup, and not let her attend public school. Rachel also reported that Leonard C. repeatedly molested her when she was between the ages of four and nine. He repeatedly groped her and would come into her room when she was in bed and put his finger into her vagina.

She said she told the parents about it when she was 12 years old but they did not believe her. She stated the man still comes to the house occasionally and she worries that he might begin molesting her sister Mary Grace. She stated she engages in self-mutilation (cutting herself with a razor blade) and has problems with depression, but her parents will not send her to therapy because father tells her that speaking with him is all the therapy she needs. She stated she would never be all right with father now because she has been sexually active. She stated she would continue to run away if she is forced to live at home. The social worker reported that Rachel's situation was similar to her sister Elizabeth's, who also ran away, wanted to attend public school, objected to father's house rules, was removed from the home for physical and emotional abuse, and complained that father dominates everyone in the house, including mother.

Father came to the Wilshire Division of the police department when Rachel was there. The Department's detention report states he was sarcastic, contrary, belligerent, and bullying. He accused the Department of wanting to have children run the streets, dress any way they please, take drugs and drink alcohol, all so that they could be happy at home. Father asserted he was trying to protect Rachel from high-risk behavior, including talking to men on the internet, writing to a man in prison, and wearing clothes that he believes are provocative. He denied that he had ever hit Rachel. He also denied that Rachel had ever told him or mother that she was sexually abused by Leonard C.

Rachel was placed in foster care at that time. On January 31, 2006, a section 300 petition was filed on her behalf. It alleges father's physical and emotional abuse of Rachel, sexual abuse of her by Leonard C., the parents' failure to protect her from the physical, emotional and sexual abuse, the risk of harm to Rachel's siblings Jonathan and Mary Grace, the prior dependency cases, the parents' failure to provide regular schooling and peer relationships for Rachel, Rachel's severe anxiety, depression, and aggressive behavior towards her self, and her refusal to reside in the parents' home.

In the meantime, on January 27, 2006, a visit to the parents' two-bedroom home in Lynwood revealed it was very cramped with the family's belongings, the hallway had a dresser and plastic boxes piled almost to the ceiling and they partially blocked the door to the children's bedroom, which had no door on it. The yard was loaded with junk that presented a fire hazard and breeding ground for vermin.

The social worker interviewed two of the adult children (Charity and Elijah), mother, and the two youngest children (Mary Grace and Jonathan). Charity was 19 at that time. She reported that father had struck Rachel several times using a sandal as punishment. The sandal was applied to Rachel's buttocks and the punishments occurred close to the time Rachel left home. Charity added that the younger children are usually not spanked for punishment, and on rare occasion father would spank them on their buttocks with his hand. Normally he punishes the children by putting them on restriction, such as taking away visits to the library. Charity was living at home and she and mother shared the household chores. She stated that Lydia, who was 18, worked at father's motorcycle shop and also lived at home. Charity stated Rachel ran away because she could not get her own way.

Elijah, who was 23, stated he left home when he was 18 and had come by the house to visit the family the day the social worker was there. He believed Rachel was going through teen rebellion and was too young to dress a certain way, wear make up and have a boyfriend. He did not believe that father would hit her. Like the other children, he was not permitted to attend school. Whatever education he received was provided for him at home.

Jonathan stated that he mostly he plays outside with friends, and stated father has never hit Rachel. Instead, when Rachel does something bad she is told to not do it again. He also denied ever having been spanked by father. Seven-year-old Mary Grace stated she likes to play with her Barbie dolls and when she does something wrong nothing happens to her. She stated she does not know a man named Lynn (Lynn C.). There was an old bruise on her arm, which she stated was the result of her falling down.

Mother stated Rachel never told her about Leonard C. molesting her. Asked if father ever hit Rachel, mother stated he never hits the children. Rather, the children are punished by having something taken away from them that they like, or not being able to go outside. Mother stated she wanted Rachel to come home but Rachel is into the "punk" scene and wants to wear clothing

that is too revealing and will get her into trouble, and the family cannot accept that.

Father showed the social worker two police reports he filed. One was a missing person report he filed on October 29, 2005, the day Rachel ran away. The other he filed on January 28, 2006, two days after Rachel went to the Wilshire police station. In the latter, he reported Rachel's allegation that Leonard C. sexually abused her. He stated that on January 28, 2006 Leonard C. denied having sexually abused Rachel.

A detention hearing was held on January 31, 2006. The court ordered Rachel detained, counseling for her, family reunification services, monitored visits for mother and father with a Department approved monitor, and Rachel's enrollment in school. A pretrial resolution conference was set for March 1, 2006.

3. *The Section 300 Petition for Jonathan and Mary Grace*

A section 300 petition was filed for Mary Grace and Jonathan on February 2, 2006. It alleges the father's physical abuse of Rachel and mother's refusal to protect her, the sexual abuse of Rachel by father's friend Leonard C. and the parents' knowledge of the abuse and refusal to take action to prevent it, Rachel's refusal to live in the parents' home, the prior dependency history of the older five siblings, and the failure of the prior Department and court services to resolve the family problems. The petition alleges these matters endanger Mary Grace and Jonathan's physical and emotional health and safety.

A detention hearing was held on February 2, 2006, at which time the court ordered Jonathan and Mary Grace detained and family reunification services be provided. An arraignment hearing was set for February 3, 2006, and the court ordered that the minor children attend that hearing. However, neither mother nor the children appeared on February 3. Father was evasive when the court questioned him as to the whereabouts of mother and the children. The attorney appointed for father indicated that mother; having learned that the children were ordered detained, left with them and did not tell father where she was going. Father stated that was correct. An arrest warrant was issued for mother, and protective custody warrants were issued for Mary Grace and Jonathan. The court noted that the Department had gone to the family home to take the children and could not find them. For warrant purposes, the court questioned father concerning physical descriptions of mother, Jonathan and Mary Grace,

and concerning their birthdays, and father stated he did not know their birthdays because the family does not celebrate birthdays.

Father indicated that Rachel had told him, at that time she went to the Wilshire police station, that Leonard C. had molested her. Father stated that when he asked Rachel why she had not told him about the molestation, Rachel answered that she could not talk to father.

At the request of father's attorney, the matter was continued to February 6, 2006, and on that date the three subject minor children appeared at the hearing, as did mother and father. The warrants were recalled. Mother's Code of Civil Procedure section 170.6 motion, filed in propria persona, was denied as untimely. Counsel was appointed for her. The court released Mary Grace and Jonathan to the parents *conditioned on the parents' cooperation in the case, including allowing social workers and minors' counsel to visit the family home and to interview the children outside of the presence of the parents*. The Department was ordered to include updated interviews of the children in its pretrial resolution report and verify that the parents have appropriate documentation for home schooling the minors, and if the parents do not have such documentation the Department was ordered to assist in enrolling the children in school. There was to be no visitation by Leonard C.

4. *The Amended Petition*

A first amended petition was filed on March 1, 2006, the day of the scheduled pretrial resolution conference. It is the operative petition. It addresses all three subject minors and alleges father's physical abuse of Rachel, mother's failure to protect Rachel, the sexual abuse of Rachel by Leonard C. and the parent's failure to protect her from him in that they allowed him to frequent the family home, Rachel's refusal to live in the family home, the older siblings' having been dependents of the court due to father's physical and emotional abuse, the parents' failure to provide the children with regular medical and dental care and provide Rachel with therapy when they discovered she was practicing self mutilation by cutting herself, the threat to the minors' physical and emotional health that these matters pose, and the parents' failure to keep the children in regular attendance at school.

5. *Reports for the Pretrial Resolution Conference*

The subject three children were interviewed by the Department for the March 1, 2006 pretrial resolution conference hearing, as was their sister Elizabeth. Jonathan and Mary Grace responded in the negative when asked by father if they wanted to speak to the social worker. The social worker reminded father that the court made an order for the children to be interviewed again and that the worker be permitted into the house again. Mary Grace and Jonathan did not want to be interviewed separately. They appeared to be very bright and alert, and they told the social worker where their private parts were. They both stated they would not permit anyone to touch their private parts and they had not been touched by anyone. Mary Grace added that Leonard C. had not touched Rachel. Neither Mary Grace nor Jonathan had received childhood immunizations because the immunizations are contrary to the parents' beliefs.

Elizabeth, the older sister who had run away several times, stated she did not know anything about the molestation and had not been around the family in a long time. She stated Leonard C. never approached her sexually when she lived at home. She confirmed that the parents don't argue much and mother goes along with what father does, and she noted she was a dependent of the court because father physically abused her. Asked about the fact that the bedrooms in the family home do not have doors, she stated the doors were removed when she lived there.

Rachel told the social worker that when she told the parents about Leonard C. molesting her, they shrugged it off. Father told her not to think about the molestation and he told her he did not want to make a big deal about it because if he did then she would have to "see a shrink" when she was older. The parents watched Leonard C. to make sure he was not around Mary Grace and kept him away from the house for a few months. However, Leonard C. never touched Rachel again.

Rachel stated that when father found out Rachel was cutting her arms with a razor blade he told her he would "beat the shit out of her" if she did it again. She tried to stop the cutting but when she couldn't, she cut herself on her thighs so that father could not see the cuts. She thought about suicide but decided against it. Rachel stated that mother knew that father was hitting her as a form of punishment that mother goes along with everything father does, and the parents don't fight. She stated that mother takes the children to the doctor if they are sick but they do not have regular check ups. The parent's pay cash for medical care and do not have medical insurance. Rachel has had two teeth pulled.

Asked about schooling, Rachel stated mother is not a teacher. Mother has booklets that she gives to the minors and tells them to do the booklets. Rachel admitted she did not do well with the booklets but Jonathan does pretty well. Father told her she could not go to a private or church school.

The Department's report states that previous reports for prior dependency matters noted that father is a very guarded person who does not disclose much personal information, and mother usually did not speak unless father was with her, and he appeared sometimes to be very controlling of her and the children. The parents had not yet requested to have visits with Rachel even though she had been out of their care for over a month.

The social worker found Rachel to be a very sweet child who has internalized her pain. She doesn't speak much and when she does, "it is with intensive honesty and occasional sarcasm." She had begun therapy and was seeing her therapist each week at her foster home. She was having problems dealing with limits in her foster placement but the social worker opined that perhaps it was because she had been overwhelmed with limits. Rachel stated she did not want to return home, wanted no contact with father, and would like to visit with mother and her siblings. She was attending school in the ninth grade, felt she was behind academically, and was having problems with schoolwork. Her forensic medical exam produced findings that were nonspecific in that they could be due to sexual abuse or to consensual sexual intercourse.

Jonathan and Mary Grace were interviewed by a forensic evaluator/clinical social worker. Both of them were uncooperative to a certain extent and at times appeared irritated with being interviewed. Mother was also examined, however father did not appear for an examination. The evaluator felt that mother and Mary Grace gave answers that suggested they were not being completely candid. Also, the examiner was greatly concerned that the parents permitted Leonard C. back into their home given that he had been identified as perhaps a perpetrator of sexual abuse against Charity.

Mary Grace was able to demonstrate for the forensic evaluator that she knows the difference between the truth and a lie but she did not agree to tell the truth during the interview because it was "no fun." She stated she wanted to color and was not able to tell the truth and color at the same time. She said there was no other reason for not wanting to tell the truth. She repeatedly displayed a reluctance to talk about her family members in a general way. She

denied having sisters. She indicated it was not all right to talk to the evaluator because she (Mary Grace) was mad because she did not want to come to the interview. Asked why she did not want to come, she repeated she didn't want to. Asked directly about Lydia, the child replied Lydia is her sister as is Rachel. However, when asked something about Rachel, Mary Grace stated she did not want to talk and she walked out of the room. She returned when directed to do so by the evaluator.

Mary Grace gave the names of body parts on a drawing of a preschool-aged girl and was able to state what goes in and out of body parts and what parts were not all right for people to touch. She denied that anyone had touched her private parts. She stated, "We don't know anything about that" when asked about the possibility that something had happened to Rachel. She stated that people from the church take showers at her family's home. She denied knowing Lynn (apparently the forensic examiner used Leonard C.'s other name, "Lynn"), and stated that mother told her Lynn is a woman. She stated she needed no help with anyone or anything except that she wanted her bed moved. Asked what happens when she does something wrong, she stated nothing happens and added that the parents don't hurt her. She stated the parents do not hurt anyone, including Jonathan and Rachel. When told to stay in the interview room when the evaluator stepped out briefly, the child went to the lobby and refused to return to the room.

During his interview, Jonathan agreed to tell the truth. He stated Rachel lived away from the family home because she is a run away and does not like things at home. He stated he had been injured when he tripped and fell on his head and then on a box. That was his explanation for three evenly spaced nickel size yellow bruises on his chest. He identified the private parts of a drawing of a boy. He stated, his private parts had not been touched, except by a doctor. He described Lynn as an old man who comes to feed the cat and as a "cool guy" who talks too much. He gave a nonresponsive answer when asked what Lynn talks about, and stated that Lynn does not come to the family home when the parents are away. When told that people are concerned about his safety because something might have happened to Rachel, he asked why be concerned about something that has already happened. Asked what he meant, he stated he was talking about his getting a bruise when he crashed his bicycle into a fence. He stated that when he misbehaves, his parents tell him to not do it again.

Mother told the forensic evaluator that she could not say that Leonard C. did not sexually abuse Rachel but that if he did she was not aware of it and had she known about it she would not have sat by and done nothing. She stated that in the early 1990's Leonard C. was permitted to baby sit for Elijah, Lydia and Elizabeth "a couple of times" but he did not baby sit Rachel because at that time she did not need his assistance. She had not suspected that her children were unsafe around Leonard C. She described him as an old friend of father's who, when he came to visit at the family home, would "say 'hello,' feed a stray cat, and leave." Asked why the parents had permitted him to resume visiting them after he had been designated as an alleged sexual predator of their child Charity, mother stated it was because "we knew him for so long. I didn't put the kids in a position for him to do anything." She added that she thought it was safe for him to be at the home because a doctor had reported that he (the doctor) could not say for certain whether Charity had been sexually abused and "Charity said nothing happened." Asked whether father ever hit the children, mother stated she never saw him do that and she was not aware that he had done it.

At a conference held at a Department office between mother, father and the social worker, the parents both stated Rachel never told them about being sexually molested by Leonard C. and father stated Rachel never asked for counseling. Father implied that they rely on their religious beliefs—God takes care of them when they are sick and provides protection for the family. Father indicated the parents do not have birth certificates for the children. He stated he does not see a point to having birth certificates, and added he would not obtain them nor assist the Department in obtaining them.

A letter from Sunland Christian School asserted that the parents "consistently complied with all regulations concerning homeschooling their children. They maintain the appropriate interaction required, which includes accountability, record keeping, testing and attendance of required meetings." The letter does not state whether the "regulations" are state regulations or regulations of the school. There are no references to the Education Code in the letter. There is no definition or explanation of the terms "accountability," "record keeping," "testing," or "attendance of required meetings."

An April 6, 2006 Department report indicates the parents were given referrals to parenting, counseling and anger management programs, and that father continued to be uncooperative with the Department, such as indicating he would not cooperate with the Department unless ordered to do so by the court.

(We note: he had already been ordered by the court, on February 6, 2006, to cooperate in the case, and such cooperation was a condition of having Jonathan and Mary Grace released to the parents.)

6. *The Pretrial Resolution Conference Hearings*

At the pretrial resolution conference hearings held on March 1 and April 6, 2006, the initial petitions were dismissed and the parents denied the allegations in the first amended petition. Thereafter, father filed a challenge for cause to the hearing officer, asserting that the exchange between himself and the hearing officer on April 6, 2006 demonstrated the court's prejudice against him and inclination to rule against him on the petition. Additionally, he filed notice that he did not want to be represented by his court-appointed attorney and instead wished to represent himself. He also filed a request for a jury trial, and several other notices.

On May 11, 2006, the court struck father's statement of disqualification of the hearing officer, finding there were no stated grounds for disqualification. It held a *Marsden* hearing and determined that father could represent himself but directed father's court appointed attorney to remain on the case as an advisory counsel to father regarding dependency law.

7. *The Adjudication Reports and Hearing*

a. *Reports*

By the time of the May 18, 2006 adjudication hearing, Rachel was living with her sister Elizabeth. The Department was having difficulty securing a clothing allowance for Rachel because a birth certificate for her was needed but the parents continued to assert there was no birth certificate. Because the parents were not willing to sign an affidavit stating where and when Rachel was born, the Department indicated Rachel would be required to have a bone test done to determine her age, and for that, a medical or court order was necessary.

Rachel told the social worker that she did not think Jonathan and Mary Grace would be in danger living with the parents until such time as the minors begin thinking for themselves, and at that point they will have problems with father. During the monthly home visits for Mary Grace and Jonathan, father continued to be very intimidating to the social worker. Moreover, he asserted

he would not cooperate with the Department unless it was ordered by the court and put in a minute order. The parents were given referrals for parenting, counseling and anger management. Father stated the parents called counseling and parenting programs but was told they have waiting lists.

The attorney representing Jonathan and Mary Grace, who was also their guardian ad litem under the federal Child Abuse Prevention and Treatment Act (CAPTA), filed points and authorities addressing the need for the dependency court to order that the minor children be enrolled in a school and that the parents assure regular attendance at such school. The attorney asserted regular attendance was not only for the educational benefit of the minors but also because of the safety and welfare protection provided to them by school day interaction with mandated reporters.

The adjudication hearing was held over the course of three days, May 18 and 19, and June 5, 2006. On the first day, counsel for Jonathan and Mary Grace informed the court that Jonathan told her he wanted new counsel. The court stated the request would be denied unless the minor was willing and able to pay for his own attorney and the attorney was there ready to begin. No *Marsden* hearing was held.

b. *Testimony at the Hearing*

Father's Testimony

Called as a witness for the Department, father testified that none of his children have attended public school except for his eldest child who attended a public school for first grade. Instead, all of his children have been given lessons in his home. He stated that the children begin their lessons between 9 and 10 in the morning and end them between 3 and 5 in the afternoon, with "some breaks for them to go out and play a little bit." He stated the home schooling is under the supervision of Sunland Christian School. Father stated he completed the tenth grade and then attended a trade school and an electronics school. He stated neither he nor his wife, are accredited by an educational agency to teach their children at their home.

Contrary to representations made by himself, mother and Jonathan earlier in the instant matter, father acknowledged that he had used physical punishment on Rachel. He stated that in the prior year, she received two or three spankings from him. He said he has spanked Rachel on her buttocks and has used both

his open hand and a back scratcher to do that, but has never hit her on any other portion of her body. He identified a back scratcher produced in court as the one he used on Rachel. It appeared to be broken or cracked, and he denied that it broke when he hit her with it. He stated that usually he would discipline Rachel by putting her on restriction, such as denying her the use of a computer or telephone, or not allowing her to visit her friends. Restrictions would generally last a week. He stated that with the other children he would talk to them if they misbehaved and if he felt it was necessary he would either spank them and tell them not to repeat the bad behavior, or he would put them on restriction.

Father denied that Rachel ever told him that Leonard C. molested her. He stated the first he heard about Rachel's claim of molestation was when he went to the Wilshire police station after Rachel turned herself in there. When he learned that Rachel was accusing Leonard C. of molesting her he asked Leonard C. about it and Leonard C. denied the accusation. Father made a police report about the alleged molestation but he acknowledged that he never called the police to inquire about the status of the report. He stated, he is still friends with Leonard C. He stated that Leonard C. has no actual home and sometimes lives in a car. When asked about his daughter Cam. L., who was the focus of the family's first involvement with the Department because of father's brutal physical treatment of her, father only reluctantly acknowledged that she was his child.

Father acknowledged that when the section 300 petition was filed in 2001 on behalf of Elizabeth, he did not come to court. He stated he has "no idea" what was done with Elizabeth in that dependency matter because he "wasn't a party to any of that." Regarding the dependency matter in which Charity was alleged to have been sexually abused, father testified that although Leonard C.'s name was raised as a possible molester, that was only because Leonard C. went to the hospital when Charity was there and he identified himself as her babysitter. Father stated that until the section 300 petition was "dismissed" in that matter, he complied with an order to not allow Leonard C. come to the house.

Rachel's Testimony

Rachel testified she ran away from home in late October 2005 because she did not want to live with father. She described him as dominating, saying that things have to be his way. She stated that when she was younger father would hit her with his open hand but when she was older he hit her with shoes,

hangers, canes, and broom sticks. He also hit her with a back scratcher. He would hit her on her back, legs and buttocks. His hitting would leave marks on her body when he hit her both with his hand and with objects. Father's hitting her with objects happened more than ten times, and it happened more than once a month. She stated she has been hit more than 50 times by her father, since she was seven years old. It hurt each time he hit her and she cried each time. He would usually hit her "on the legs or on the back part." Mother was around most of the time when she was being hit by father but mother did not intervene to stop the hitting. Rachel stated that mother "wouldn't do that." Asked which of her siblings she has seen father hit, Rachel stated she has never seen him hit Jonathan, Mary Grace, Lydia, or "Tasha" (Charity), but she has seen him hit Elijah and Elizabeth. Later she stated she could not recall if she has seen him hit Charity. She said father did not hit Lydia because Lydia is father's favorite. When father attempted to examine Rachel (acting as his own attorney) he stated: "Your testimony is that your father spanked you, isn't that correct?" Rachel answered: "Spanking is spanking on the butt, Dad." She denied that father spanked her with his hand on her buttocks.

Rachel broke down when she was questioned about her accusation that she was molested by father's friend, Leonard C. She stated Leonard C. has touched her body in places that made her feel uncomfortable, including her vaginal area. He did that with his hand and he did it "a lot." He would remove her underclothing. He began touching her when she was four or five years old and stopped when she was between eight and nine. She stated that although it was true that the parents had told her to report instances of people touching her private parts, she stated she "didn't have that kind of . . . relationship with my parents." She said she felt she could not tell them, "and obviously, I couldn't because they reacted the way they did." She added that when Leonard C. first began abusing her she was scared, plus he had been buying her things and she did not want him to become angry with her and stop buying her things. He bought her toys and food.

When she was twelve she told her parents that Leonard C. molested her. She told them when they were in the living room and it was evening time. Father asked her where she was touched and she pointed to her vaginal area for him. She did not think her parents believed her. Rachel's sister Lydia was there and Lydia told the parents that Leonard C. used to touch her too and make her feel uncomfortable when she was little, and Leonard C. also bought her things. However, Lydia did not want to talk about those matters and she left the room. Rachel stated the parents' reaction to Rachel's disclosure of sexual abuse was that mother said Rachel should stay away from Leonard C. and she

did not want Leonard C. to be around Mary Grace, and "they did that for about three months." Rachel stated that was the end of the matter. Her parents "didn't do anything about it. They were just like, whatever." They did not take her to a doctor for a medical examination. Nor did they take her to a therapist or talk with anyone about what happened to her. After she told them about Leonard C., the parents would let him be alone in the house with Rachel. She "just ignored him." However, the parents did not leave Jonathan and Mary Grace alone with Leonard C.

Rachel stated she is attending public school and likes it. She stated she does not have the same knowledge that the other students in her class have and she is working to catch up to them. Asked how much time she spent each day on being schooled at the parents' home, she stated "sometimes two hours. Sometimes half an hour. It depended on what homework it was." Only mother taught her, not father. She was provided with books. The books had reviews in them but not tests. Mother helped her with assignments if she needed help. She could not recall mother being unable to help her. She would also ask Charity but Charity "doesn't know it so she wasn't much help." Her subjects were citizenship, math, English and science. Once a year she took a test to see if she could pass to another grade. The last test she took was at a church. The test was administered by Sunland Christian School and was a "test for that school." She passed the test but she did not remember her marks. During her schooling at home, her best subject was science and her worst was math. She was not taught geography or history. Asked if she can add, subtract, multiply and divide, Rachel stated she cannot. She remembered a time when a woman by the name of Marty helped Rachel's sister Lydia with math, and when Rachel asked mother if Marty could help Rachel with math lessons, mother replied that she did not want to ask Marty for help for Rachel because Marty's mother had broken her hip. Later, Marty told Rachel that she could help her with math. However, when Rachel told mother about the offer of help, mother "never did anything."

Rachel began cutting herself with a razor blade when she was around twelve years old. She was unsure whether she began the cutting before or after she told the parents about Leonard C. When the parents discovered the cuttings father told Rachel that he would "beat the shit out of you" if she cut herself again. Rachel stated she had never heard him say "shit" before and his use of that word at that time scared her sufficiently so that she did not cut herself for a long time. At some point she asked if she could see a doctor about the cutting and father asked her if she was depressed. She told him she was depressed and he told her that he would be her therapist. That ended the conversation about

seeking treatment for the cutting and she continued to cut herself. The last time she cut herself before she was detained was a few months before the detention. She cut herself when she was in the foster home before she went to live with her sister. Asked if she received advice on the internet about cutting she stated she did not. Asked by mother's attorney if she received information on the internet on how to file child abuse charges against father, Rachel answered: "Oh, yeah. I received handbooks on it. No. Of course not."

Lydia's Testimony

Rachel's sister Lydia testified she has never seen father use physical discipline on herself or any of her siblings. She stated she would be surprised to learn that father testified he has spanked some of his children with his open hand. She stated Leonard C. never touched her private parts, and she never told anyone that Leonard C. touched her in an inappropriate way. Moreover, none of her siblings, including Rachel and Charity, ever told her that Leonard C. touched their private parts. She denied that Rachel had disclosed, in her presence, that Leonard C. had touched her.

Lydia stated she gets along well with Rachel. However, she never saw Rachel's cutting marks until after Rachel was detained from the house by the Department. When she learned that Rachel was cutting herself, she may have asked Rachel why she was doing that but she and Rachel did not actually have a discussion about the cutting. She didn't think that Rachel's cutting herself was serious. She testified that cutting oneself is a popular thing for children Rachel's age to do. Lydia has known other children who cut themselves but she did not ask them why because it was not something that she was "real curious about."

Asked about her schooling, Lydia stated she graduated from the twelfth grade and she received a diploma from "the school." When she was being home schooled, she was schooled six or seven hours a day, and her siblings are also schooled that amount of time, five days a week and sometimes on Saturdays. History and social studies were part of her curriculum. She stated the children were schooled full time all year and not given holidays off like students in public schools are, but they were given their birthdays off. She stated that birthdays are celebrated in their family. (That contradicted father's representation to the court on February 3, 2006, that the family does not celebrate birthdays.)

Charity's Testimony

Twenty-year-old sibling Charity testified she lives in the parents' home and has always lived there. She stated that once she saw father hit Rachel with his open hand on Rachel's buttocks and she has never seen him hit Rachel with any other object. Charity stated she thinks that father's normal way of disciplining Rachel was to impose restrictions on her, such as Rachel would not be permitted to go places with her friends.

Asked who Leonard C. is, Charity stated he is someone who "would go on errands for [father]." She stated Leonard C. was never left alone with her or any of her siblings, and he never touched her in her private parts. She stated Rachel never told her that he touched her private parts. Asked about Rachel's cutting herself, Charity stated that she and Mother discussed with Rachel that she should not cut herself because "[i]t is not a very smart thing to do." Charity asked Rachel why she was cutting herself and Rachel answered that she did it because she felt sad and it made her feel better. When Charity twice asked Rachel why she felt sad, Rachel's answer both times was "because." Charity stated Rachel just did not feel like talking about it. She stated that she and Rachel got along "sometimes, and, if anything happened to her, I would—probably wouldn't feel that good about it." Since being removed from the family home, Rachel has visited there numerous times but never when father is there.

Charity stated that home schooling at the family home was Monday through Friday, every week. Contrary to Lydia's representation that the children were not excused from study on holidays, Charity stated there were days off from school on Thanksgiving, Christmas, and birthdays. She took English, math, science, history, social studies, bible, and sometimes physical education. She did not receive a high school diploma but she received a certificate of completion. She did not know the difference between the two. She was not able to define the subject "social studies." She stated there would be five or six children being home schooled at one time by mother. If they asked mother for help, mother would "read stuff to us." The home schooling consisted of reading and writing activities. Charity stated that part of her home schooling time was sometimes spent helping her siblings and her older siblings would sometimes help her. When he examined Charity at the jurisdiction hearing, Father showed her written education materials, which she identified as being like those she used. The materials had publication dates of 1978 and 1979. Charity stated the pages of the education materials would be copied on a copier and the copied pages would be used by the children. That way all of the minors could use the books.

Leonard C.'s Testimony

Leonard C. testified that he would come to the parents' home now and then when Rachel was between the ages of four and nine. He never "really" lived in the house. He "usually" stayed in his truck in the front. He stated there was a period of time when he did not go to the parents' home at all, but he could not remember "the instances." It was "lately" that father asked him to not come to the home. He stated he never was left alone with any of the children, including Rachel. He stated he never baby-sat the children. After he was informed that mother had said he baby-sat the children, he stated that there were times when mother would ask him to mind the children while she went to the store but he stayed there with them as an adult, not as a babysitter. He stated he never removed any of Rachel's clothing and never touched her vaginal area. He stated he was hospitalized in approximately 2000 because someone put rat poison in his food, he was shot in 1998, and he has spent time in jail.

Jonathan's Stipulated Testimony

The parties stipulated Jonathan would testify that father has never physically abused him or hit him with an object, he has never seen Rachel hit with any object, he has never been touched or molested by Leonard C., Rachel has never told him that Leonard C. molested her, he is home schooled regularly except for birthdays and certain occasions, he takes tests for school once or twice a year, and when he is ill he has been taken to a doctor or dentist.

Mother's Stipulated Testimony

Subject to cross-examination, the parties stipulated Mother would testify that Rachel was home schooled in history, social studies, science, math, bible, and "other subject matters other than those specific ones as a fill in." Mother would testify that she was the primary teacher for the home schooling, her own education was through the eleventh grade, and the Sunland Christian School "had approved her to have the qualification to home-school her children." Mother would also testify Rachel never disclosed to her that she had been touched by Leonard C., and the first time mother heard of the accusation was when Rachel went to the Wilshire police station. Mother would also testify she became aware of Rachel cutting herself approximately six months before Rachel ran away, the cuts were "essentially superficial cuts," when mother spoke with Rachel about the cuts Rachel was not able to give mother "any definitive answer," and mother monitored Rachel and did not notice any more fresh wounds after she spoke with Rachel.

Mother would also testify that the usual form of discipline was restrictions, although father would spank the children with an open hand or the back of the back scratcher, and she has no knowledge of the children suffering bruises from discipline, but Jonathan, Mary Grace, Lydia and Charity were never spanked, they were only given restrictions.

Additionally, the parties stipulated that if Lydia and Charity were recalled to testify, they would state that they lived in the parents' home full time with Rachel prior to her leaving the home and the normal attire was dresses and shorts and they never saw any marks or bruises on any part of Rachel's body.

c. *The Court's Directive for Points and Authorities on the Legality of the Parents' Home Schooling and for Evidence of the Accreditation of Sunland Christian School*

The court directed the attorneys to provide it with points and authorities on the legality of the parents' home schooling their children, and it indicated it wanted a declaration from Sunland Christian School regarding the school's accreditation. Having already filed points and authorities on the issue of home schooling, Jonathan and Mary Grace's attorney filed a second set. Points and authorities were also filed by mother's attorney.

8. *Adjudication of the Amended Petition, and Disposition*

a. *Adjudication*

On June 5, 2006, the dependency court issued its adjudication of the amended petition and made a disposition order. The court found that Rachel, Jonathan and Mary Grace are minors described by the following subdivisions of section 300: (1) *subdivision (a)*—Rachel was physically and emotionally abused by father on numerous occasions, including being excessively punished by being struck by father on her arms, back and legs with a stick, hanger and shoe, mother knew of the abuse but failed to protect Rachel, and such abuse endangers Rachel, Jonathan and Mary Grace; (2) *subdivision (b)-1*—Rachel was repeatedly sexually abused by Leonard C. (he was identified in allegation b-1 as Lynn W.) from the ages four to nine when he digitally penetrated her vagina and fondled her vagina and body, and although the parents knew that he had been a person of interest with regards to Charity's possibly being sexually

molested, the parents failed to take action to protect Rachel from him in that they allowed him to have unlimited access to Rachel in their home, and this endangers Rachel, Mary Grace and Jonathan; (3) *subdivision (b)-2*—the same as subdivision (a); (4) *subdivision (b)-3*—Rachel and several of her siblings were former dependents of the juvenile court due to father's physical and emotional abuse, and prior dependency involvement has failed to resolve family problems in that Rachel has been physically and emotionally abused by father and sexually abused by Leonard C., the parents took no action to protect her, and the parents' conduct endangers Rachel, Mary Grace and Jonathan; (5) *subdivision (d)*—the same as subdivision (b)-1; and (6) *subdivision (j)*—the same as subdivision (b)-3). The court also sustained a *subdivision (i)* count as to Rachel—the same as subdivision (b)-1.[6]

The court dismissed the section 300, subdivision (b) allegation that the parents neglected the minors' medical and dental needs. The court also dismissed a section 300 subdivision (c) allegation which charged that the parents failed to maintain *Rachel's* regular attendance in school and thereby deprived her of an education and peer relationships necessary to her normal growth and development and placed her at substantial risk of suffering serious emotional damage as evidenced by her severe anxiety, depression, withdrawal and aggressive behavior towards others and herself. When the court addressed that allegation, it did so as though the allegation were about all three children.[7]

b. *Disposition*

Regarding disposition, the court declared all three minors dependents of the court under the subdivisions adjudicated as applicable to them. Custody of Rachel was taken from the parents and placed with the Department for relative placement, and family reunification services were ordered. Mary Grace and Jonathan were placed under a home of parent order (mother), under Department supervision, and family maintenance services were ordered.

Father was granted monitored visitation with Rachel, to be with a Department approved monitor in a therapeutic setting. Mother was granted unmonitored visits with Rachel. The Department was granted discretion to liberalize the visitation.

Rachel was ordered to individual counseling at a Department approved facility, with conjoint counseling at the discretion of her therapist. The court ordered the parents to participate in counseling as directed by the Department

and ordered no cost/low cost referrals for such counseling. Such counseling was to be at a facility approved by the Department and to include individual counseling, with conjoint counseling with Rachel at the discretion of the therapists. The parents were also ordered to parenting classes.

With respect to the children's education, the court ordered the parents to ensure that Jonathan and Mary Grace are properly home schooled by ensuring the education materials are updated, and by having the Lynwood school district investigate their home schooling and give its approval. The court indicated it believed the parents have the legal right to home school their children assuming the home schooling education is appropriate. The court ordered that when Mary Grace and Jonathan are ready for high school, the parents interview the minors for their input as to whether the minors would rather attend home schooling or public school, and if the minors indicated a preference for public school, then the parents are to enroll them in public school.

A progress hearing on those orders was set for July 12, 2006, with the court indicating it could change its order regarding home schooling depending on the progress report. The progress report was to also address Rachel's progress in her placement and counseling.

A six-month review hearing was set for all three minors for November 21, 2006.

Mary Grace, Jonathan, mother, and father each individually, and each acting in propria persona, filed timely notices of appeal from the disposition order. Additionally, a timely appeal from the disposition order was filed on behalf of Mary Grace and Jonathan by their court appointed attorney. As noted above, all such appeals were consolidated under appellate case number B192601.

9. *The July 12, 2006 Progress Report and Hearing*

The Department's progress report shows that Rachel had brought her grades up in three subjects between April and June 2006 such that her final grades for the school year were four B's, one A, and one F. The F was in algebra and she was attending a summer school algebra class. Her therapist reported that she was responsive to therapy and was making gradual and steady improvement toward her treatment goals. Elizabeth L., Rachel's caregiver sibling, was

participating in the therapy, and Rachel was showing good insight and motivation. Continued therapy was recommended.

Regarding the progress of the parent's home schooling orders, the social worker was able to verify during a home visit on June 27, 2006 that the parents had obtained updated education materials for Jonathan and Mary Grace. When asked about their progress in having the Lynwood school district investigate their home schooling using standards of the district to obtain the district's approval, father informed the social worker that he was not answerable to the social worker; he was answerable to the court. When the social worker explained to father that the Department had been ordered by the court to give the court a progress report on the matter of school district approval, father replied that *he* would give the court a progress report and he ended the conversation.

Mother then told the social worker that she had contacted the school district and was waiting for a response from them, but she was not able to provide the contact person's name to the social worker. Despite this representation from mother on *June 27, 2006* that she was waiting for a response from the Lynwood School District, the record contains a report from the school district to the attorney for Mary Grace and Jonathan stating a visit was made by the district to the parents' home on *June 8, 2006*. The school district's report states that school district officials were not permitted to enter the parents' home (father contends the officials never asked to come into the home), but the "two adults" in the house that came to the front door did respond to the question whether they were home schooling children. The two adults said they were registered with Sunland Christian School and gave the district officials the name of the school's administrator and its telephone number.

One of the Lynwood School District officials obtained information from the internet regarding Sunland Christian School and in her report she stated the school "appeared to be [a] valid charter school." The Lynwood School District's report goes on to say that the Sunland Christian School's administrator, Terry Neven, reported that he made visits to the parents' home about four times a year. Neven faxed a letter to the school district in which he stated that Jonathan and Mary Grace were currently enrolled in the school. Neven further stated that Sunland Christian School is a "California private school," it complies with California's "Education codes," files an annual affidavit, and "has been evaluated by both Los Angeles Unified School District

and the Los Angeles County Office of Education to be in compliance with state laws."

At the July 12, 2006 progress hearing, the attorney representing Mary Grace and Jonathan stated she spoke with one of the Lynwood School District officials who went to the parents' home and wrote the report, and the official told her that the official "accepted this letter from Sunland Christian School, that this is the program, but she did advise that we should talk to Los Angeles County Office of Education." The attorney indicated her office left a message at the County Office of Education and the Los Angeles Unified School District, and was in contact with the state department of education. The attorney renewed her request for an order that Jonathan and Mary Grace attend private or public school to ensure their physical and emotional safety. Father and mother submitted a writing to the court in which they indicated they kept their children at home for education because of their "sincerely held Religious Beliefs."

The court denied the request for an order requiring the minors to attend public or private school, but indicated it would consider a motion to that effect, with a ten-day notice, if Jonathan and Mary Grace's attorney obtained information showing the children were not appropriately home schooled. The attorney filed a petition for extraordinary writ with this court, asking that we require the juvenile court to order the parents to enroll Jonathan and Mary Grace in a public school or a full time private school. We ordered that the writ petition be heard with the pending appeals from the disposition orders.

10. *The Six-Month Review*

By the time of the November 21, 2006 six-month review hearing, Rachel had run away from the home of her caregiver sister, Elizabeth. A protective custody warrant was issued by the court on September 28, 2006. The record shows that Rachel became upset when Elizabeth asked her what internet site she was on. Rachel told Elizabeth she did not want to live with her anymore went into the bathroom and began cutting her arm. When Elizabeth asked her to come and talk about the situation, Rachel left the home and did not return.

A second situation surfaced prior to the six-month review. Consistent with the court's minute order of February 6, 2006 that the release of Jonathan and Mary Grace to the parents' home was conditioned on the parents' cooperation in the case, including that the parents had to permit the Department and the

children's attorney to interview the minors outside of the parents' presence and permit the Department and the children's attorney to visit the family home "to verify that everything is doing well in the home," an investigator from the children's attorney's office attempted to make an appointment to visit the children in their home in early September 2006. The investigator spoke with mother and mother indicated that the investigator would need to speak with father and father would call the investigator. When the investigator had not received a call from father in five days, the investigator called the family home again and this time spoke with father. Father asserted that the investigator did not really want to speak with the minors but only wanted to find information for the attorney, and further asserted that only the Department social worker needed to see the children. The investigator explained that the attorney needs her own information and did not rely on the social worker's reports, but father replied that the children did not want to speak with the investigator and father would not permit him to interview the children.

In response to father's obstruction, on October 3, 2006, the children's attorney submitted to the court a written walk-on presentation of the situation, together with a request for an order directing father to allow the investigator to visit the children. On October 6, 2006, the court set a hearing for October 17, 2006, to allow the attorney to give notice to the parents and the Department, and cite the parents to come to court and bring the children. The parents were personally served with the citations. Father submitted a written statement in which he asserted that he did not refuse an interview of the children by the investigator but merely told the investigator that the investigator could come to the home but it was up to Mary Grace and Jonathan whether they would speak with the investigator and the children had already told father they did not want to speak with the investigator or their court appointed attorney.

At the October 17, 2006 hearing, the parents appeared with Jonathan and Mary Grace. Father admitted he had told the children that the children's attorney "does not represent their interest," and further admitted that he then asked the children whether they wanted to "talk to somebody that is not representing your interests, and they said no." The court informed father that telling the children their attorney was not representing their interests "is telling them not to talk to them, and that is inappropriate." Father continued to argue the point at length, stating in various ways that he has the right to "enlighten []" the minors." The court repeatedly told father he has no right to impose on the attorney-client relationship the minors have with their attorney and the attorney must advocate for what is in the children's best interests. The court also observed that father had imposed his will "on these children and the rest of

your family for a number of years," and later added that mother "is in the same position as the kids." The children's attorney indicated the children had initially seemed willing to talk with her privately that very day in court "but then, because of father's interference, I was not able to have a conversation with them." The court ordered that the children's attorney and/or her representatives are entitled to interview the children without the parents being present. The court added that the parents should not discuss the facts of the case or the litigation with the minors.[8]

The Department's report for the six-month review hearing for Rachel, Jonathan and Mary Grace shows Rachel's whereabouts remained unknown to the Department. The younger children appeared to be doing well in the parents' home. The report states the children and parents were communicating in a positive manner and the parents were providing for the children's "medical, educational and emotional needs." On numerous occasions the parents were given referrals for the programs in which they were ordered to participate but they refused to enroll in the programs (parenting classes and individual counseling, with therapeutic conjoint counseling with Rachel at the discretion of the therapist). They asserted they needed no parenting classes because they raised their "other kids just fine." Mother asserted she could not participate in counseling because Rachel was missing, and father asserted Rachel does not want to attend counseling with him and he does not understand why. The parents continued to refuse to allow Jonathan and Mary Grace to receive childhood vaccinations.

At the November 21, 2006 six-month review hearing, father spent time asserting that he should have counsel to help him represent himself and that it should not be the attorney appointed by the court to aid father in his inpropria person status because that attorney "works for the State of California. He doesn't work for me." On that basis, he asserted the hearing should not go forward. Father also asserted he would not engage in the counseling portion of the case plan because it would be "against my sincerely held religious beliefs to do so." He stated he had "raised eight children" and he "know[s] what is expected of him." The court informed the parents that dependency court jurisdiction (including frequent reviews of the family home and the children by the Department and the children's attorney) would continue over Mary Grace and Jonathan until the minors turned 18 unless both parents participated in and completed an appropriate, Department-approved parenting class and individual counseling class. The court indicated the parents had the option of participating in a counseling program through their church, however the parents would have to present the court with evidence of completion of such a

counseling program and the court would have to find the program appropriate. The court observed the family had repeatedly been in the juvenile court for nearly 20 years.

The case was continued to May 22, 2007 for another six-month review hearing. Mother, father, Jonathan and Mary Grace each filed an appeal, inpropria persona, from the November 21, 2006 six-month review order.[9] As already noted, those four appeals are consolidated under court number B195484.

Thus, we find ourselves presented with two sets of appeals in this dependency matter, and the petition for extraordinary writ that is the subject of our companion opinion. We note that according to a June 27, 2007 minute order, which we have received as additional evidence at the request of the Department, the trial court terminated jurisdiction over Jonathan and Mary Grace at a six-month review hearing held that same day. The minute order indicates termination of jurisdiction was made over the objection of the Department and the minors' counsel. According to the brief of the Department filed in connection with the second appeal before us now, the Department was informed that the children's trial attorney filed a petition for rehearing of that decision to terminate jurisdiction, and the attorney determined that an appeal might be in order depending on the outcome of the petition.

DISCUSSION

1. *The Marsden Issue*

The court in *People v. Marsden* held that when presented with a request by *a criminal defendant* for new appointed counsel on the asserted basis that the current counsel is not adequately representing the defendant, the trial court must conduct a hearing to determine the validity of the grounds that constitute that claim of ineffective assistance of counsel, and then must exercise its discretion as to whether new counsel will be appointed. (*People v. Marsden*, *supra*, 2 Cal.3d at pp. 123-124. If the trial court declines to conduct the hearing, it "abuses the exercise of [its] discretion to determine the competency of the attorney" (*id*. at p. 124) and reversal of a conviction is required unless the reviewing court can conclude beyond a reasonable doubt that such a denial of a hearing on the effectiveness of the defendant's attorney did not contribute to the defendant's conviction (*id*. at p. 126).

Mary Grace, Jonathan, mother and father all contend on appeal that the trial court erred in failing to conduct a *Marsden* hearing when Jonathan requested new appointed counsel on the first day of the adjudication hearing. As noted above, the trial court's response to the request for new counsel was that it would only be granted if Jonathan were able to afford to pay the new attorney and the attorney was already in court and was ready to begin the representation. The record shows Jonathan was in court that day and could have been questioned in a *Marsden* hearing.[10]

Section 317 provides for appointment of counsel for indigent parents in situations where out-of-home care of the minor children is an issue. Section 317 also provides for appointment of counsel for minor children unless the court finds the minors would not benefit from appointment of counsel. Section 317.5 provides that parties in a dependency proceeding who are represented by counsel, including the minors who are the subject of such proceeding, are entitled to "competent counsel," that is, to the effective assistance of counsel. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1659 et seq.)

Because a minor's right to counsel in dependency matters is not a constitutional right but rather a statutory right, and because the minor is not faced with personal deprivations such as those faced by criminal defendants, an error in connection with *appointment* of counsel is examined under a miscarriage of justice/harmless error standard. (*In re Richard E.* (1978) 21 Cal.3d 349 (proceeding to terminate parental rights in which the court held that a failure to appoint counsel for minor in absence of a showing that appointment was not necessary is an error, but it is not grounds for an automatic reversal; rather it is reviewable under a harmless error/miscarriage of justice standard.) In *In re Elizabeth M.*, *supra*, 232 Cal.App.3d 553, the court held that a failure to appoint individual attorneys for children with divergent interests is examined under the *Richard E.* standard of review. *Richard E.* and *Elizabeth M.* were cited with approval in *In re Celine R.* (2003) 31 Cal.4th 45, 58-59. In *In re Celine R.*, the Supreme Court gave the following definition for the harmless error test in such matters: reversal of an order is only necessary if the reviewing court "finds a reasonable probability the outcome would have been different but for the error." (*In re Celine R.*, at p. 60.)

Here, the error claimed by the appellants is not a failure to appoint counsel for Jonathan or a failure to appoint separate counsel for Jonathan and Mary Grace, but rather failure to conduct a *Marsden* hearing upon his request for substitute appointed counsel. Essentially, Jonathan claims a right to

reappointment of counsel and thus we will examine his *Marsden* error claim under the *Richard E*. standard of review, for the same reasons the *Richard E*. court found such standard to be appropriate. We will assume arguendo that the trial court committed error in not holding a *Marsden* hearing, but we will reverse the disposition order only if we find a reasonable probability that the outcome would have been different but for the error. It is true that the court in *In re Ann S*. (1982) 137 Cal.App.3d 148 automatically reversed an order that removed a child from the parents' physical custody because the trial court failed to conduct a *Marsden* hearing when the minor requested new appointed counsel. However, we observe that there was no analysis by the *Ann S*. court as to whether *Marsden's* holding, including its standard of review for reversal, applied wholesale in dependency cases. The *Ann S*. court did not attempt to explain why the *Marsden* standard of review was appropriate rather than the harmless error standard of review applied by the California Supreme Court in *In re Richard E*.

Because we apply the harmless error standard of review, we reject both (1) the parents' contention that all of the orders made after the trial court failed to conduct a *Marsden* hearing should be automatically reversed by this court and the case remanded for new hearings on the issues decided by the trial court after the *Marsden* issue was raised by Jonathan, and (2) the minors' contention that such orders should be conditionally reversed, to be reinstated after a *Marsden* hearing is held in the trial court if the court determines that Jonathan's attorney should have been relieved on May 18, 2006, the day the minor asked for new counsel. As for father's contention that Mary Grace was also entitled to a *Marsden* hearing, clearly she was not because she made no assertion to the trial court that she was being deprived of effective assistance of counsel.

Here, Jonathan's request for a new attorney came on the heels of his attorney's submission of points and authorities arguing that the court should sustain the amended section 300 petition because her clients (Mary Grace and Jonathan) have siblings who have been subjected to abuse in the family home and there is substantial risk that her clients would also be subjected to such abuse. The attorney also argued that the court should make an order directing the parents to enroll the children in school because that would put the children in compliance with California's compulsory education laws and would promote the children's safety since schools have mandated reporters.

It is clear that the education position asserted by the children's attorney conflicted with the wishes of her clients, who stated they wished to continue

their education at home with mother. However, the attorney's duty to her clients was not to merely act as their mouthpiece and advocate only for their wishes. (*In re Alexis W., supra,* 71 Cal.App.4th at p.36.) Section 317, subdivision (c) states that "[a] primary responsibility of any counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child." Subdivision (e) of section 317 adds that a child's counsel may "make recommendations to the court concerning the child's welfare." Thus, the attorney was carrying out her duties when she submitted the points and authorities.

With respect to the adjudication findings, we find that "[t]he record discloses, and [the minors and their parents] suggest[] nothing which [substitute] counsel for the minor[s] might have done to better protect [the children's] interests." (*In re Richard E., supra,* 21 Cal.3d at p. 355.) Indeed, as we discuss below, the record clearly supports the court's decision to sustain allegations in the amended petition, and therefore there is no showing of harmful error in that respect. Further, the record shows the trial court declined to order the parents to enroll Jonathan and Mary Grace in school, and thus the children received what they wanted. As discussed in our companion opinion, that was not a ruling that was in their best interests, but the record shows that the children's attorney did present the case for following the compulsory education laws in California, via points and authorities submitted to the court, and substitute counsel would have been amiss if he or she argued against enforcement of such laws.

2. *There Is Sufficient Evidence to Support Jurisdiction and Dependency Findings As to Rachel, Mary Grace and Jonathan*

a. *Jurisdiction*

The parents challenge the sufficiency of the evidence to support the findings of jurisdiction over the three minors. In determining whether it has section 300 jurisdiction over minor children, the dependency court applies a preponderance of the evidence standard of proof. In reviewing the trial court's determinations on jurisdiction, we apply a substantial evidence test. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 168.)

Before we begin with our analysis of this issue, it is helpful to note the following. First, in two prior dependency matters, father was found to have inappropriately physically disciplined two of his children, Cam and Elizabeth. Indeed, in at least Cam's case, father's treatment of her was brutal. Both Cam and Elizabeth were children who challenged father's rules at home. Thus, there was proof of his willingness to physically abuse his children when they did not tow the mark.

Second, in a prior dependency matter, two incidents of sexual abuse were addressed. Charity's physical condition was consistent with the possibility that she had been sexually abused and Leonard C. was a person of interest in connection with that possibility; especially since mother had testified he was permitted to baby-sit the children. Additionally in that same dependency matter, mother testified that sibling Christina had been sexually abused by another man allowed to be in the parents' home. Also noteworthy is the forensic evaluator's great concern that the parents had permitted Leonard C. back into their home after he had been a possible suspect of sexual abuse as to Charity.

Third, although the parents asserted Rachel had never told them, prior to when she sought help at the Wilshire police station, that Leonard C. sexually abused her, Rachel told the social worker at the police station, and told the court at the adjudication hearing, that she told her parents about the molestation when she was twelve years old.

Fourth, Rachel was specific about the molestation—specific as to the time period it occurred and as to what actions by Leonard C. it involved. Further, she indicated she did not report it when it was occurring because of the nature of her relationship with her parents, and because her molester bought her things and she feared that if she reported him he would not buy them any more. Rachel testified her sister Lydia told the parents Leonard C. used to touch her (Lydia) in ways that made her uncomfortable and buy her things too.

Fifth, there has been a change of position concerning whether Leonard C. was allowed to watch the children when the parents were not at home. Mother testified in an earlier case that once or twice a week the paternal grandmother or Leonard C. were babysitters for the children; but at her forensic evaluation she said he only watched her older children and only did that a couple of times, and he wasn't a babysitter for Rachel because she did not need him to watch Rachel.

Sixth, the evidence as to father's physical discipline of Rachel varied wildly. Rachel told the social worker and the court that father hit her with a stick, hanger, shoe, cane, broomstick and backscratcher for not following his rules. She stated he would hit her on her back, legs and buttocks and it would leave marks on her body. She said he has hit her more than 50 times since she was seven years old, and although mother was usually there at such times, mother would do nothing to intervene. She could not recall if she had seen father hit Charity but she has seen him hit Elizabeth and Elijah. (We note that Elizabeth and Elijah are two adult children who choose to not live at home). Initially in this matter father told the social worker he never hit Rachel, but at the adjudication hearing he testified he had hit Rachel on her buttocks but only with his open hand and a back scratcher. Twenty-year-old Charity, who lives at home, told the social worker father hit Rachel several times with a sandal, but at the adjudication hearing she testified she has only seen father hit Rachel with his open hand on Rachel's buttocks and she only saw that once. Lydia, who is a year younger than Charity and who also lives at home, stated she has never seen father use physical discipline on any of the children. Jonathan told the social worker father never hits Rachel. Mother told the social worker father never hits the children and she told the forensic evaluator she was not aware that father had ever hit the children, but her stipulated testimony at the adjudication hearing was that father would sometimes spank the children with an open hand or a backscratcher, although she would also testify that he never spanked Jonathan, Mary Grace, Lydia or Charity. Elizabeth told the social worker she was previously a dependent of the court because father physically abused her.

Seventh, the record contains substantial evidence, both from statements made by the children and from mother's own actions, that father dominates mother and dominates the children who live at home, two of whom have repeatedly run away from home because, in part, of the home rules father imposes. There is also substantial evidence that he has been difficult to work with in dependency matters—evasive, uncooperative, and belligerent. There is evidence that these character traits of father's have been consistent over the years that this family has been in dependency court. He will not permit the children to attend school. He will not permit them to receive childhood vaccinations. He will not permit the girls to wear pants at home. He will not permit birth certificates. There is evidence that mother does not interfere with his discipline of the children and his rules. There is evidence she does not make even tentative decisions in dependency matters but rather defers issues until father can make decisions on them. Several of the children gave answers to the social worker, forensic evaluator, and the court that have all the

appearance of reflecting what the children were told to say or believed father would want them to say or not say. Further, Mary Grace stated she would not agree to tell the truth during her forensic examination, she denied having sisters, and when asked about the propriety of people touching other people's private parts and the possibility that something had happened to Rachel, she stated "we don't know anything about that" even though she had earlier stated to a social worker that Leonard C. had not touched Rachel. Both Mary Grace and Jonathan were uncooperative to a certain extent during the forensic evaluation, and at times when the social worker visited the home.

Eighth, besides the evidence that father changed his statements regarding physical discipline of Rachel, there is evidence that father is not credible even with respect to small matters, such as his statement that the family does not celebrate birthdays. The children stated birthdays were celebrated. In contrast, the social worker found Rachel to be "intens[ely] honest."

Ninth, there was evidence of the parents' emotional abuse of Rachel. Besides the physical discipline father imposed on her, which was also a form of emotional abuse, Rachel testified that father's reaction to her cutting herself was to tell her if she did it again he would beat the shit out of her. Thus, there was no concern that such a drastic activity as self-mutilation might necessitate a need for psychological intervention. Indeed, when she asked for such therapeutic help, father told her that conferring with him was all the help she needed. She testified that when she told the parents when she was about twelve years of age that Leonard C. had molested her, father told her he did not want to make a big deal about it because if he did she would need to see a "shrink" when she was older. Thus, there was no therapeutic help sought for the molestation either. Further, although Leonard C. was kept away from the house for a few months, he was permitted to return with Rachel still living there, which could be reasonably seen by Rachel as a declaration by father that Leonard C. is more important to father than Rachel's well-being. Mother also emotionally abused Rachel by, for example, not interceding when father was physically abusive to Rachel, and not seeking help for Rachel's cutting and molestation.

With that evidence in mind, we find substantial evidence to support the trial court's finding that all three minors come within the jurisdiction of the juvenile court. Subdivision (a) of section 300 applies when a "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For

the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injury on the child or the child's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm. For purposes of this subdivision, 'serious physical harm' does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury." Subdivision (b) is often a companion jurisdiction basis to subdivision (a). Subdivision (b) applies when a "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . "

There is no doubt in this court's mind that subdivision (a) and (b) of section 300 apply to all three children. Father has a long history of physically abusing the children and mother has a long history of not protecting them from father, with Rachel being the most recent victim. Rachel comes within subdivisions (a) and (b) (the b-2 count). As for Mary Grace and Jonathan, it is true that "past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; '[t]here must be some reason to believe the acts may continue in the future.' [Citations.]" (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; accord *In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565.) Here, the history of the family provides that reason. It demonstrates that if Jonathan and Mary Grace began to assert themselves in ways that challenge father's dominance (and their interactions with the social worker and forensic evaluator shows their willingness to challenge authority figures), they will also be in danger of receiving physical abuse from father, and mother will not come to their protection. That has already happened with *three* of the children— Rachel, Elizabeth and Cam. Father has demonstrated throughout the years, including during the pendency of the instant matter, that he has no tolerance for children (and adults) who challenge his ideas, and mother has demonstrated she will not protect her children from father's abusive physical discipline. Thus, our finding of jurisdiction as to Mary Grace and Jonathan is not based on speculation. With their 20-year history in dependency court, it is no wonder the trial court ordered the parents to parenting classes and counseling.

We also find substantial evidence that subdivision (b) applies because of the sexual abuse of Rachel by Leonard C., which is the b-1 count. Although Leonard C. was a person of interest in the charge that Charity was possibly sexually molested (and indeed father acknowledged that the trial court in

Charity's case ordered that Leonard C. not be permitted to come to the family's home), father testified the parents continued to permit the man to be in their home after this court found that the record would not support the trial court's finding that Charity was a person coming within section 300. Yet, our decision in that prior appeal had nothing to do with determining whether Leonard C. molested Charity. We simply determined that because of the way the petition was amended, it would not support a jurisdiction finding because it eliminated allegations of parental fault. Leonard C. remained a person of interest in the doctor's finding that Charity's physical condition was consistent with sexual abuse and was not due to disease, a fall or anything Charity did to herself. The parents simply ignored the risk that he might have molested Charity, and the result was that he sexually molested Rachel over a period of years. The evidence further shows that after Rachel told the parents about the molestation, they again permitted the man to come to their home where Rachel, Mary Grace and Jonathan were living. Moreover, mother admitted in a prior dependency matter that another man who was permitted to be in the family home had molested sibling Christina. The parents have not learned the lesson of protecting their children from sexual abuse by men allowed to be in the home. Indeed, Mary Grace told the forensic evaluator that the parents permit people from the church to shower at their home. Rachel, Mary Grace *and Jonathan* are at risk because there is no guarantee that the parents will not permit to be in their home a person who has a sexual preference for boys Jonathan's age. Moreover, the court in *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 198 acknowledged that brothers of molested sisters can be harmed by the way that parents react to molestation of their sisters. Here, the parents' reaction to Rachel's disclosure of molestation was unfavorable to her.

Likewise, we find substantial evidence to support the subdivision b-3 allegation that Rachel and her older siblings are former dependent children of the juvenile court, prior dependency involvement failed to resolve the family's problems in that Rachel has been physically and emotionally abused by father and mother did not take steps to protect her, Rachel was sexually abused by Leonard C. and the parents did not protect her from him, and such conduct by the parents places the three minor children at risk of future serious harm. There is no need to repeat the supporting evidence here.

Subdivision (d) of section 300 pertains when a "child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian

knew or reasonably should have known that the child was in danger of sexual abuse." There is no evidence that mother or father or a member of the children's household has sexually abused the children. However, there is substantial evidence that the parents failed to protect all three children from sexual abuse when the parents knew or reasonably should have known that the children were in danger of sexual abuse. They permitted Leonard C. to be in their home after he was identified as a person of interest in connection with Charity's possibly being sexually molested, during which time he repeatedly molested Rachel, and they still permitted him to be in the home after Rachel told them he molested her. Thus, the subdivision (d) applies to all three children. We do not find that Jonathan and Mary Grace need to be sexually abused themselves by Leonard C. before they can come within the protection of subdivision (d). We also note that Jonathan and Mary Grace are in the age range during which Leonard C. molested Rachel, and given the cool reception Rachel received from the parents when she disclosed the molestation, the two younger children might believe it would be unwise or useless to report molestation to the parents if they were subjected to it or if they discovered their sibling was being subjected to it.

Lastly, we address subdivision (j), which applies when a "child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child." The subdivision (j) charge is the same as the b-3 count, which we have already considered, and we thus find that the record supports the subdivision (j) count.

b. *Finding of Dependency*

There is no merit to father's contention that the evidence is insufficient to support the juvenile court's declaration of dependency as to Jonathan and Mary Grace. To begin with, the trial court had *discretion* under sections 300 and 360 whether to declare Mary Grace and Jonathan dependents. Section 300 states that a child described by any of the subdivisions in section 300 "is within the jurisdiction of the juvenile court which *may* adjudge that person to be a dependent child of the court." (Italics added.) Section 360 provides that the court *may* declare children described by section 300 to be dependents of the

court; alternatively, the court *may* decline to declare them dependents but rather order services to keep the family together and place the children and the parents under the supervision of a social worker for a time period consistent with the provisions in section 301 (which provides for supervision of a family by a social worker rather than by filing a section 300 petition seeking jurisdiction of the juvenile court).[11]

It is clear to us there was no abuse of discretion in declaring Mary Grace and Jonathan dependents. These are children whose parents have been brought before the juvenile court five times, and the pattern of father dominating mother and the children, abusing the children who do not submit to his domination, caring little for the threats posed by Leonard C. to his children, and being uncooperative with social workers and the court has not changed. The decision to provide oversight of the family by the court itself rather than by a social worker was a wise exercise of the court's discretion since Father made it clear throughout the case that he has no regard for social workers and the dependency system. Oversight of the family was required because the parents had yet to enroll in their case plan programs, much less complete them, and there was no indication that their methods and philosophy of raising the minors had improved without help from the case programs.

3. *There Was No Relitigation of Charity's Sexual Abuse Matter and No Denial of Due Process to the Parents*

We reject mother's contention that in considering prior dependency matters involving this family, specifically the allegation that Charity was sexually abused, the trial court essentially relitigated that allegation and thus ignored principals of res judicata and collateral estoppel. There was no relitigation. There was an acknowledgement of something that necessarily impacts how the present dependency matter should be considered. The past is a prelude to the present. The trial court was not required to turn a blind eye to it. Moreover, as we discussed above, our decision in the parents' appeal in Charity's case had nothing to do with determining whether Leonard C. molested Charity. There was no finding by this court that he did not molest Charity. The significance of that earlier matter is that Leonard C. was a person of interest in the alleged molestation and the parents continued to permit him to be around their children.

Nor do we find merit in mother's contention that the parents' due process rights were violated. "Due process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.] The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations.]" (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.) Mother asserts father was deprived of due process because several times he was not permitted to examine Rachel's credibility. She cites instances when father himself was examining witnesses at the jurisdiction hearing and he attempted by various questions to illicit testimony from Rachel, Lydia and Elijah regarding the reasons *why* he used physical punishment on Rachel. The court repeatedly sustained relevance objections by the Department and the minors' attorneys because, as the court explained to father, it does not matter *why* Rachel was punished. The court was correct. What matters with respect to the allegations of father's physical abuse of Rachel and mother's failure to protect her is *how* she was punished. Section 300 does not permit unreasonable physical punishment for any reason.

We also find no merit in mother's assertion that it was a violation of due process "for the Department to present only the selections it chose from previous case files, without affording [the] parents the ability to see those files, and over the parents' objections." On the first day of the adjudication hearing, mother's attorney noted that the Department's attorney made a request for judicial notice of the prior cases, and mother's attorney stated that "[i[f there is going to be inquiry as to the old petitions and the old reports, I feel it is incumbent upon the court to provide [father] and myself with copies." The attorney also observed that a request for judicial notice calls for provision to the parties of the documents for which judicial notice is requested. The court replied that if the Department did not provide the court with the documents for which judicial notice is requested, then the request could not be granted. The court added that so far, the only documents it had were the case file for the instant matter and the case file for Elizabeth's dependency matter, and mother's counsel was invited to look at them. (There is no indication that the files for the other three times this family has been before the dependency court were ever presented to the trial court. The record in the instant appeal was augmented with the case file for Elizabeth's matter.)

Regarding Charity's sexual abuse case, the court stated that the reason it had questioned Lydia about Charity's sexual abuse case was "[b]ecause there is some indication in here about the information, so we can certainly ask questions about it," apparently referring to the two case files it had. Later,

mother's attorney argued that the court had no competent admissible evidence that the Department and the dependency court had ever investigated the claim that Leonard C. might have sexually abused Charity and determined "that there was some substance to" the claim. However, the court replied that father himself had testified that Leonard C. became a person of interest in Charity's case. And the Department's attorney pointed out that when the forensic evaluator interviewed mother, mother discussed Charity's case and stated that Charity had suffered a seizure and when she was examined in the hospital the issue of sexual abuse arose, and Leonard C.'s visit to Charity in the hospital, coupled with his identification of himself as the child's babysitter, was perhaps why he had been named as an alleged perpetrator.

Thus, mother's attorney's comment at that point that the Department had not "provided us with any of the paperwork," which we take to mean the case file from Charity's case, is without moment. The parents themselves acknowledged that Leonard C. was a person of interest in Charity's case. And indeed, mother told the forensic evaluator that for a period of time after Charity's case the parents did not let him come to the family home. Thus, the absence of Charity's case file from the documents presented by the Department to the court and the parents' attorneys, and the inability of the attorneys to cross-examine the social workers who prepared the reports in Charity's file is of no consequence.

Finally, there is no merit to mother's contention that the parents' due process rights were violated when the trial court ruled, under Evidence Code section 352, that sibling Elijah would not be permitted to testify. As noted above, a court has the right to require that evidence be relevant and of significant probative value to the issue before the court. In that respect, the trial court here asked for an offer of proof regarding Elijah because Elijah had not lived at home for several years. Father indicated Elijah would testify as to Rachel's behavior and "questions concerning abuse on my part, questions concerning abuse by [Leonard C.], questions concerning his schooling." Father also stated the essence of Elijah's testimony would be that he never saw any abuse by father or Leonard C. in the last five years nor in the time he (Elijah) lived in the family home. Attorneys for the Department and the three minor children *stipulated to that testimony* for Elijah but Father declined to have Elijah's testimony be by stipulation, and mother's counsel also declined to have the testimony be by stipulation. The court indicated it would not allow testimony from Elijah because it would not be relevant and it would be cumulative. We find no denial of due process.

4. *Sufficient Evidence Supports the Decision to Retain Jurisdiction Over Rachel, Mary Grace and Jonathan*

The six-month review hearing was held under section 364. Subdivision (c) of section 364 provides that after the juvenile court hears evidence at such hearing, "the court shall determine whether continued supervision is necessary. The court shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of the evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn. Failure of the parent or guardian to participate regularly in any court ordered treatment program shall constitute prima facie evidence that the conditions which justified initial assumption of jurisdiction still exist and that continued supervision is necessary."

We apply a sufficiency of the evidence test to review the trial court's decision to continue jurisdiction over the minors at the six-month review hearing, and we examine the entire record. (*In re N. S.* (2002) 97 Cal.App.4th 167, 172.) In doing so, we immediately observe that the court had prima facie evidence of the need for continued supervision, to wit, the parents had refused to participate in their case plans. That prima facie case is bolstered by the history of this family. Father's dictatorial way of "fathering" and mother's continued deference to his way of "fathering," has resulted in a method of "parenting," that has not kept the family from repeated juvenile court oversight. Now, with the opportunity to comply with a very simple case plan—parenting classes and counseling—the parents had dug their heels in and refused to comply despite the painfully clear need for such programs. Permitting such noncompliance by the parents and terminating jurisdiction would simply be an invitation for repeated failures of the parents' style of parenting, despite father's assertion that they raised their "other kids just fine."

Even though the social worker opined in the six-month review report that Jonathan and Mary Grace appeared to be doing well in the family home and appeared to have positive communication with the parents, there is no indication that a similar state of tranquility did not exist between Jonathan, Mary Grace and the parents when the petition in the instant matter was filed and sustained (or when any of the earlier petitions were sustained). Trouble between Jonathan and Mary Grace and the parents has never been what causes

this family to repeatedly be before the juvenile court. The repeated dependency jurisdiction has often been caused by the natural progression of the family's children growing older and finding their own ideas about the world that are different from father's. Thus, the case plan for the parents was designed to budge father from his dominance over the family and mother from her role of being dominated and passive about father's treatment of the children,. Mother herself impliedly agrees with this analysis when she states in her appellate brief that "[j]urisdiction over a child should continue only as long as necessary to resolve the problems which brought the case into the system."

Father's assertion at the six-month review hearing that he no longer uses corporal punishment on his children could reasonably be taken with a grain of salt by the trial court, considering that the two youngest children had not yet begun to spread their wings with new ideas and beliefs, and thus posed no threat to father's authority. And although the parents had reported that they no longer permitted Leonard C. to visit their home, Mary Grace told the forensic evaluator that father permits people to come to the family home to shower. We cannot say the trial court lacked substantial evidence to support its finding that when all of the evidence was considered, the prima facie case for continued jurisdiction, which arose from the parents' failing to participate regularly in their case plans, prevailed. We cannot say that the court retained jurisdiction as a bargaining chip to motivate the parents to begin and complete their case plans, as if completion of the case plans was a proper goal apart from the *necessity* of the parenting classes and counseling. Moreover, continued jurisdiction over Rachel, who was still missing, was also clearly warranted.

Further, we find no abuse of discretion when the court denied mother's request for a contested six-month review hearing. The trial court indicated there was no basis at that point in time for a contest but there could be a contest in the future if the parents complied with their case plans and their therapists were able to present evidence that the parents had become good parents. Mother's attorney indicated his assent to that analysis.

5. *The Home Schooling Issue Is Not Moot*

The parents assert that the home schooling issue raised in the petition for extraordinary writ is no longer viable because (1) the Department's report for the six-month review hearing stated the children's educational needs were being met by the parents and the report did not ask that the trial court change its approval of home schooling, and (2) neither the Department nor the children's

attorney raised the validity of home schooling at the six-month review hearing, and neither appealed from the six-month review minute order or filed a petition for extraordinary writ after the six-month review hearing for the purpose of raising a home schooling issue.

Father cites *In re Dani R.* (2001) 89 Cal.App.4th 402 and *In re Eric A.* (1999) 73 Cal.App.4th 1390 to support the claim of mootness. Neither case provides that support. Those cases address the impact, on issues raised by a party in an appeal, of that party's stipulations at later dependency hearings. For example, a parent who challenges a trial court's jurisdiction findings by way of an appeal from a disposition order, but then at a six-month review hearing stipulates to a finding that essentially admits the truth of the jurisdictional findings being challenged in the appeal, has effectively mooted the jurisdiction issue. In the instant case, although the Department's six-month review report states the children's educational needs were being met, that does not address the Department's contention that home schooling deprives the minors of the safety net provided by mandatory reporters in schools. Nor can the Department convey to the parents the right to not comply with California's compulsory public education law, and we have held in our companion opinion that home schooling by a non-credentialed teacher is not permitted under California's compulsory education law.

Likewise, the trial court's decision to terminate jurisdiction over Jonathan and Mary Grace at the second six-month review hearing does not moot the education issue. Under the Education Code, the parents have a continuing duty to enroll the minors in a public school or alternatively come within one of the exemptions to compulsory public education. As for the asserted forfeiture of the home schooling issue by the "failure" of the Department and the children's attorneys to raise the issue at the six-month review hearing, there was no need to raise the issue since it was already before this court for our consideration by means of the writ petition.

6. *The ICWA Issue*

At the February 6, 2006 pretrial resolution conference hearing, mother indicated to the court that she had "heard that [her] father had some Indian in him." She added that she thought it was the Blackfeet Tribe. The Department was ordered to notice the Blackfeet Tribe and the Bureau of Indian Affairs. The record contains copies of notice sent to the Bureau's offices in California and Washington, D.C. as well as to the Blackfeet Tribe in Montana, and the

certificate of mailing on the notice states the notices were sent on February 21, 2006. However, the notice forms had little information which could be used by the Bureau or the Tribe to determine the status of the three minors. Nor was there proof that the notices were sent by registered or certified mail, return receipt requested, as required by section 224.2, and by section 1912 (a) of the ICWA. Likewise, there was no proof that the return receipts were received back by the Department, and the Department did not submit to the court any responses by the Tribe or the Bureau of Indian Affairs. It is the responsibility of the trial court to determine whether ICWA notice is proper and whether the responses to the notice indicate that proceeding under the ICWA is required. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 852.) Here, the record does not show that the trial court made a determination regarding proper notice and application of the ICWA.

As acknowledged in California Rules of Court, rule 5.664, the ICWA provides that a foster care placement or termination of parental rights proceeding shall not be held until at least ten days after receipt of notice by those entitled to notice. (25 U.S.C. § 1912 (a).) An exception is made for the detention hearing. (§ 224.2, subd. (d).) Here however, all of the proceedings were held prior to proof that the proper parties received notice. Moreover, the test for removal of a child from the parents' physical custody, as happened with Rachel, is different for an Indian child. (25 U.S.C. § 1912 (e); § 361, subd. (c.)

Mother contends the judgment must be set aside in its entirety because of noncompliance with the ICWA. The Department contends only a limited remand of the case is necessary so that the Department can report on its ICWA notice efforts. It argues that the parents have been reluctant to divulge personal information and perhaps that is the reason none was given on the ICWA notices. We find that reversal and remand are required.

The trial court must hold a hearing on the ICWA issue by placing the parents under oath, and using the "Notice of Involuntary Child Custody Proceedings for an Indian Child" form as a format, questioning the parents regarding the information necessary to permit the Blackfeet Tribe/Bureau of Indian Affairs to determine whether the children are Indian children. Failure of the parents to appear at such hearing and fully cooperate with the trial court in gathering information relative to the ICWA may be enforced by contempt.

If the trial court ultimately determines that the ICWA is not applicable to this case, the trial court should reinstate its judgment and its minute order from

the six-month review hearing. If the court determines the ICWA is applicable, it must then proceed accordingly under the provisions of that law.

DISPOSITION

The judgment and the six-month review minute order are reversed and the cause is remanded for compliance with the notice requirements of the ICWA. If, after proper notice, a Tribe asserts its right under the ICWA to intervene in this matter in state court, or to obtain jurisdiction over the proceedings by transfer to the tribal court, the cause shall proceed in accordance with the Tribe's election. If there is no intervention or assertion of jurisdiction by any Tribe after proper notice, then the juvenile court's judgment and six-month review order shall be reinstated. The Department is to notify this court forthwith if a Tribe asserts its right to intervene or obtain jurisdiction over the proceedings or the juvenile court reinstates its judgment and order.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

We Concur:

KLEIN, P. J.

KITCHING, J.

[1] References herein to statutes are to the Welfare and Institutions Code unless otherwise indicated.

[2] The trial court attorney for two of the minor children has petitioned this court for extraordinary writ relief, asking us to direct the juvenile court to order the minors' parents to enroll the two children in a public school, or a private full-time day school, in compliance with California's compulsory public education law. That issue will be addressed in a separate opinion.

[3] Despite father's representation to the trial court that there are no birth certificates for the minors, according to the appellate record, Rachel was born on August 8, 1991, and was 14 years of age when the family's current dependency case was filed, Jonathan was born on May 16, 1997, and was eight years old, and Mary Grace was born on June 4, 1999, and was six years old.

[4] In that dependency matter, mother testified she had observed Charity touching or scratching her genital area. Charity's grandmother testified she had seen Charity touch her vaginal area. Father testified he had seen Charity place her fingers up her own vagina. Charity was four years old at the time of that case.

The expert physician testified that her examination of Charity showed the child had very little hymen tissue between six and ten o'clock. The doctor opined that the cause of that condition was a penetration of the hymenal opening by a "fairly firm" object, such as a penis, digit or an instrument, and it was not caused by a fall or disease and was not self-inflicted. In response to a question whether the condition could have occurred as a result of masturbation or inserting something into her own vagina, the expert stated that a child will normally stimulate the clitoris, not put things into her vagina. She stated the cases of self-insertion she has seen were with autistic children or children who were abused and were repeating the act that occurred to them.

[5] Mother had also testified that when Rachel's sibling Christina was four years old she was sexually abused by a man who stayed in the parents' home a few days, the parents reported the incident to the police, and father turned the man into the police. Thus, counting the sustained allegation of sexual abuse of Rachel in the instant matter, this one family has had (at least) three incidents of alleged sexual abuse of its female children.

[6] The b-3 count was amended by the court at the June 5, 2006 hearing to include not only Rachel but also Jonathan and Mary Grace in its allegation.

[7] Subdivision (c) of section 300 addresses emotional abuse of children. It applies when a "child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care."

[8] Section 317, subdivision (e) states in part: "The counsel for the child shall be charged in general with the representation of the child's interests. To that end, the counsel shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts, . . . He or she may also . . . make recommendations to the court concerning the child's welfare, . . . In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being, and shall advise the court of the child's wishes. Counsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child. . . . "

Thus, the children's attorney had both a right and a duty to investigate the status of the children for the six-month review. The attorney also had a duty to advocate a position that was in their interests, even if it was at odds with the minors' wishes. (*In re Alexis W*. (1999) 71 Cal.App.4th 28, 36.)

[9] The attorney appointed to represent Mary Grace and Jonathan in their appeal from the six-month review order filed a *Sade C*. advisement with this court. (*In re Sade C*. (1996) 13 Cal.4th 952.) We directed the attorney to send the appellate record to the minors, and we informed the minors of their right to submit a brief or letter to this court of their grounds, contentions or arguments. The minors have made no such submission.

[10] The parents have standing to contest the failure of the trial court to hold a *Marsden* hearing for Jonathan. (Cf. *In re Elizabeth M*. (1991) 232 Cal.App.3d 553, 565, where the court stated the father had standing to assert trial court err in not appointing independent counsel for each child.)

[11] Declaring dependency is a separate issue from a decision to remove a child from a parent's physical custody. To remove a child from the parents' physical custody and place custody with a nonparent due to circumstances set out in section 361, subdivision (c), the trial court applies a clear and convincing burden of proof, and the reviewing court determines whether there is

substantial evidence to support the trial court's decision to remove the child from the parents' custody. (*In re Basilio T.*, *supra*, 4 Cal.App.4th at pp. 169-170.