

DEC 12 2019

IN THE SUPREME COURT

Jorge Navarrete Clerk

OF THE STATE OF CALIFORNIA

Deputy

|                             |   |                                |
|-----------------------------|---|--------------------------------|
| In re CADEN C.,             | ) | Supreme Court No. S255839      |
|                             | ) |                                |
| Person Coming Under         | ) | Court of Appeal, 1st District, |
| the Juvenile Court Law.     | ) | Division One                   |
| _____                       | ) | Case Nos. A153925 & A154042    |
|                             | ) |                                |
| SAN FRANCISCO HUMAN         | ) | San Francisco County           |
| SERVICES AGENCY,            | ) | Superior Court No. JD153034    |
|                             | ) |                                |
| Plaintiff and Respondent,   | ) |                                |
|                             | ) |                                |
| v.                          | ) |                                |
|                             | ) |                                |
| CHRISTINA C. et al.,        | ) |                                |
|                             | ) |                                |
| Defendants and Respondents. | ) |                                |
| _____                       | ) |                                |

After a Published Decision by the Court of Appeal of the State of California  
First Appellate District, Division One

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**BRIEF OF AMICUS CURIAE**  
**CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF**  
**SAN FRANCISCO HUMAN SERVICES AGENCY**

---

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## INTRODUCTION

This case presents two matters of statewide importance to children. (1) What standard governs appellate review of the beneficial parent-child relationship exception to adoption found in Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i)?<sup>1</sup> (2) Whether a showing that a parent has made progress in addressing the issues that led to dependency is necessary to meet the beneficial parent-child relationship exception? When a child has been removed from parental custody for abuse or neglect and the parent has failed to reunify with the child, should the juvenile court be allowed to consider the parent's progress towards the issues that led to dependency as one factor when determining if a beneficial parent-child relationship exists and whether such a relationship represents a compelling reason terminating parental rights would be detrimental to the child?

The California State Association of Counties (CSAC), Amicus Curiae,<sup>2</sup> contends a hybrid standard applies to appellate review of the beneficial parent-child relationship.

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise stated.

<sup>2</sup> The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. San Diego County has been designated to write this amicus curiae brief on behalf of CSAC.

The reviewing court should consider if there is substantial evidence to support a finding the parent regularly visited and contacted the child and whether there is a beneficial parent-child relationship. Assuming the parent proves the first two prongs of the exception, the reviewing court should review the juvenile court's exercise of discretion in determining whether the parent-child relationship represents a compelling reason to forgo terminating parental rights. In other words, did the juvenile court abuse its discretion in determining the child would suffer such great detriment if contact with the parent ended as to outweigh the benefit of permanence derived through adoption.

CSAC submits a parent is not required to show progress in addressing the issues that led to dependency to prove application of the beneficial parent-child relationship exception, but it can be relevant and is one factor the juvenile court may permissibly consider when evaluating whether a beneficial parent-child relationship exists and when determining whether the existence of a beneficial parent-child relationship is a compelling reason for not terminating parental rights.

Mother now concedes in her reply brief the juvenile court may consider whether the parent has made progress in addressing the issues that led to dependency when determining whether a beneficial parent-child relationship exists, but continues to assert it cannot be considered when balancing the potential harm of terminating parental rights against the benefits of permanence and stability derived from a new, adoptive caregiver.<sup>3</sup>

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<sup>3</sup> The father joined in the argument presented in the mother's opening brief and has not filed a reply.

CSAC contends prohibiting consideration of the parent's efforts and progress towards resolving protective issues while analyzing the beneficial parent-child relationship exception would not serve children or parents. A parent's progress towards the protective issues will not always be relevant. A parent's *effort* towards reunification often will be relevant to whether a parental bond was formed or maintained, as when a father who did not reunify but attended loving visits, complied with the case plan, and continued attempting to regain his physical and mental health nonetheless established application of the exception. (See *In re S.B.* (2008) 164 Cal.App.4th 289, 300.)

Similarly, the juvenile court should be able to consider when a parent's effort and progress are relevant to the balancing of the potential harm from severing all contact with the parent against the benefits of adoption. For example, when a mother recognizes her past behavior was traumatic for her children, places their needs before her own, and works to maintain her sobriety, it can provide a compelling reason to forgo termination of parental rights based on a beneficial parent-child relationship. (See *In re E.T.* (2018) 31 Cal.App.5th 68, 77 (*E.T.*))

CSAC submits the First District Court of Appeal, Division One's opinion in *In re Caden C.* (2019) 34 Cal.App.4th 87, did not create a new rule that the parent must show progress in addressing the issues that led to dependency to prove application of the exception. Courts have been authorized to consider it since *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575-576, interpreted the exception 25 years ago. No party suggests departing from *Autumn H.* and no California case

published since *Autumn H.* was decided disagrees with its interpretation of the exception.<sup>4</sup>

This Court should not now depart from this well-established approach. Doing so would hurt children and parents in dependency proceedings in counties throughout California. Arbitrarily limiting juvenile court discretion in this way would result in a lose-lose scenario. Rather than moving the needle one direction or the other on the continuum between preserving parental rights and permanence for children, it will instead result in more error: erroneous termination of parental rights in some cases and erroneous prevention of permanency in others.

Barring juvenile court consideration of a parent's progress towards the protective issues when evaluating whether the beneficial parent-child relationship exception applies will also hurt Caden, over whose case no reasonable juvenile court would have applied the beneficial parent-child relationship exception. Caden's mother had a 30-year-history of child welfare involvement and lost custody to six children based on substance abuse, domestic violence, and mental illness. She had a long pattern of brief periods of sobriety followed by relapse which was not surprising considering her assertion that her methamphetamine addiction did not render her an unfit parent. She so poorly regulated her behavior that she caused Caden to lose placements, which further traumatized him. She needed frequent redirection during the controlled setting of supervised visitation. She

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<sup>4</sup> A Lexis Shepard's report of *Autumn H.* revealed 4,212 citing decisions and 75 published decisions by California Courts of Appeal. No case has disapproved of *Autumn H.* as of November 18, 2019.

discussed adult topics, the dependency case, and promised Caden he would return home. Ultimately visits were so harmful to Caden that they had to be reduced in frequency. All the information before the juvenile court suggested the mother would continue to parentify Caden and jeopardize his placements. Despite Caden's love for the mother, no reasonable court would have decided to allow Caden to languish in extended foster care given what the mother's progress towards resolving the protective issues predicted for his future.

CSAC respectfully submits the decision of the Court of Appeal, First Appellate District, Division One, reversing the juvenile court's application of the beneficial parent-child relationship exception should be affirmed.

#### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

CSAC has not had access to the record on appeal in this case. As such, references to facts or procedural history set forth in this brief will be with citation to the decision as published by the First District Court of Appeal, Division One, at 34 Cal.App.4th 87.<sup>5</sup> CSAC also joins the presentation of facts and procedural history as set forth by the San Francisco Human Services Agency (San Francisco HSA).

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<sup>5</sup> Although review has been granted and the appellate court's decision is no longer published, for ease of reference, CSAC will cite to the appellate court's decision as set forth in the official reports prior to the grant of review. (*In re Caden C.* (2019) 34 Cal.App.4th 87.)

## ARGUMENT

### I

#### THE HYBRID STANDARD OF APPELLATE REVIEW APPLIES TO THE BENEFICIAL PARENT-CHILD RELATIONSHIP TO ADOPTION

CSAC agrees with the parties that a hybrid standard is the most appropriate standard to be used for appellate review of the beneficial parent-child-relationship exception to the termination of parental rights. (See Mother's Opening Brief [MOB] pp. 30-38; Father's Opening Brief [FOB] p. 6.; Child's Brief [CB] pp. 26-31; SF HSA's Answering Brief [SFAB] pp. 50-51.)

Under section 366.26, subdivision (c)(1), if the juvenile court determines the child is adoptable by clear and convincing evidence it shall terminate parental rights unless an exception applies. (§ 366.26, subd. (c)(1).) An exception applies if the court finds a "compelling reason" for determining terminating parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent must therefore prove three prongs to establish application of the exception: 1) regular and consistent visitation, 2) a beneficial parent-child relationship, and 3) the parent-child relationship represents a compelling reason for determining that terminating parental rights would be detrimental to the child. (*In re Logan B.* (2016) 3 Cal.App.5th 1000, 1010-1013.)

Although in the past some Courts of Appeal reviewed the juvenile court's consideration of the beneficial parent-child relationship exception under the abuse of discretion standard and others reviewed it

under the substantial evidence standard, California courts in four of the six appellate districts now employ a hybrid standard incorporating both. (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300 (*Noah G.*); *E.T.*, 31 Cal.App.4th 68, 76; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 647 (*Breanna S.*); *In re Collin E.* (2018) 25 Cal.App.5th 647, 663 (*Collin E.*); *In re J.C.* (2014) 226 Cal.App.4th 503, 530-531 (*J.C.*); *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315-1316. (*Bailey J.*.) These include the First Appellate District, Division Three (*E.T.*), the Second Appellate District, Division Seven (*Breanna S.*), the Fourth Appellate District, Division One (*Collin E.*), the Fourth Appellate District Division Three (*J.C.*), and the Sixth Appellate District (*Bailey J.*). CSAC could not locate a published case originating from the Third or Fifth Appellate Districts reviewing application of the beneficial parent-child relationship exception.<sup>6</sup>

Under the hybrid standard of review, appellate courts review the first two prongs of the exception under the substantial evidence standard. (*Breanna S.*, *supra*, 8 Cal.App.5th 636, 647.) When an appellant challenges an order on the grounds of insufficient evidence, the appellate court must review the evidence in the light most favorable to the trial court's order, drawing every reasonable inference and resolving all conflicts in the evidence in favor of the prevailing party. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The appellant

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<sup>6</sup> Review of unpublished cases decided by the Third Appellate District suggests it might employ the hybrid standard of review. See for example *El Dorado Cty. HHS v. A.D. (In re N.B.)* (June 21, 2019, No. C088551) \_\_\_ Cal.App.5th \_\_\_ [2019 Cal. App. Unpub. LEXIS 4196, at p. \*11].)

has the burden to show the evidence was not sufficient to support the findings and orders. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.) The substantial evidence standard logically applies to the factual question of whether there was regular and consistent visitation. It also applies to the factual question of whether a parent-child relationship exists from which the child derives some measure of benefit. (*Bailey J., supra*, 189 Cal.App.4th 1308, 1314.)

The third prong of the exception requires the juvenile court to determine the importance of the parent-child relationship by balancing the detriment the child will suffer from severing contact with the parent against the benefits of permanence and stability derived through adoption. Determining whether the parent-child relationship represents a compelling reason to forgo terminating parental rights is a "quintessentially' discretionary decision." (*Baily J., supra*, 189 Cal.App.4th 1308, 1315.) Because the juvenile court's weighing analysis is an exercise of discretion, it should be reviewed under the abuse of discretion standard. "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) In exercising its discretion, the trial court is required to make a "' 'reasoned judgment' "' and comply with legal principles and policies appropriate to a particular matter. (*In re Lee G.* (1991) 1 Cal.App.4th 17, 26-27.) If no reasonable court would have made the same finding, the trial court has abused its discretion and is subject to reversal.



CSAC contends this Court should hold that the hybrid standard applies to appellate review of the beneficial parent-child relationship exception to adoption and affirm the decision of the First District Court of Appeal, Division One.

## II

### **WHETHER A PARENT HAS MADE PROGRESS IN ADDRESSING THE ISSUES THAT LED TO DEPENDENCY MAY BE CONSIDERED AS A FACTOR IN EVALUATING THE SECOND AND THIRD PRONGS OF THE BENEFICIAL PARENT-CHILD RELATIONSHIP EXCEPTION**

CSAC joins in the arguments presented by San Francisco HSA and Caden's counsel. CSAC agrees with San Francisco HSA and Caden's counsel that a parent's progress in addressing the issues that led to dependency is one factor that may be permissibly considered by the court under prongs two and three of the beneficial parent-child relationship exception: it is relevant in determining whether a parent-child relationship exists and in the weighing analysis of whether that relationship represents a compelling reason to forgo termination of parental rights. (SFAB pp. 59-67.) The mother now concedes that the parent's progress in addressing the protective issues can be considered when the juvenile court determines whether there is a parent-child relationship from which the child derives benefit, but asserts the juvenile court is not permitted to consider it under the third prong when deciding whether the existence of that relationship represents a compelling reason to forgo termination of parental rights. (Mother's Reply Brief [MRB] pp. 5-7, 10-19.) She is mistaken.

**A. *The Beneficial-Parent Child Relationship Exception Must Be Understood in the Context of the Entire Dependency Statutory Scheme.***

Dependency cases represent the apex of a large investigative pyramid. The Child Abuse and Neglect Reporting Act (CANRA) provides that if so designated by the individual county, the child welfare agency investigates reports of suspected abuse or neglect as defined by the Penal Code. (Pen. Code, § 11165.9; § 11164, subd. (b); see also Welf. & Inst. Code § 328.) After the child welfare agency social worker investigates the allegations, the worker determines whether the report of suspected abuse or neglect is unfounded, inconclusive, or substantiated.<sup>7</sup> (Pen. Code § 11165.12.) If the social worker determines based on the investigation that abuse or neglect as defined by the Penal Code more likely than not occurred, the social worker substantiates the allegation. (Pen. Code § 11165.12, subd. (b).)

If the allegation of abuse or neglect is substantiated, there are four escalating interventions the child welfare services agency can take to protect the child. First, the social worker can connect the parent to community resources and take no further action. (*In re Ethan C.* (2012) 54 Cal.4th 610, 637 (*Ethan C.*)) Second, if referring the parent to

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<sup>7</sup> An allegation is "[u]nfounded" when determined by the investigating social worker to be false, inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect. (Pen. Code § 11165.12, subd. (a).) An allegation is deemed "[i]nconclusive" when determined by the investigating social worker not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect as defined in Penal Code section 11165.6 occurred. (Pen. Code § 11165.12, subd. (c).)

community resources is not sufficient to protect the child, the child welfare services agency can take the greater step of offering the parent services on a voluntary basis. (§ 301, subd. (a); Cal. Rules of Court, Rule 5.516(b)<sup>8</sup>.) Third, if voluntary services are not sufficient to protect the child, the social worker can petition the juvenile court to supervise the family while the child remains living with the parent through a dependency case in juvenile court. (§ 325.) This requires the social worker to allege the child has suffered or is at risk of suffering, abuse or neglect as defined by Welfare and Institutions Code section 300. (§ 300.) Fourth, if an in-home dependency case is not adequate to protect the child, the social services agency can initiate a dependency case while also seeking removal of the child from the parent's custody.<sup>9</sup> (§§ 311, subd.(a), 340, subd. (b).)

Thus, of all the reports of suspected child abuse and neglect generated in California, only a fraction is substantiated. A much smaller number of substantiated reports result in dependency cases,

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<sup>8</sup> All references to rules are to the California Rules of Court unless otherwise indicated.

<sup>9</sup> This includes detention under exigent circumstances pending the detention hearing, temporary detention via a protective custody warrant under section 340 pending the detention hearing, and later removal at the disposition hearing. (*Wallis v. Spencer* (9th Cir. 1999) 202 F.3d 1126, 1138; §§ 340, 361, subd.(c); Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2019 ed.), Summary of Initiation of Dependency Proceedings [Seiser], § 2.13[1], p. 2-38.)

and an even smaller number of dependency cases involve a child who is removed from the parent's custody.<sup>10</sup>

Dependency proceedings are special proceedings, civil in nature, that are generally governed by their own rules and statutes. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 328; Rules 5.500, 5.501; Seiser, *supra*, Dependency Proceedings, § 2.10[1] & [2], pp. 2-24 to 2-26.) The purpose of the dependency statutory scheme is to provide maximum protection for children "who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited," and "to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2.)

Unlike a criminal proceeding, in which a defendant's rights are balanced against those of the state, dependency proceedings balance the parent's interest in care, custody and control of the child with the

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<sup>10</sup> The California Child Welfare Indicators Project (CCWIP) is a collaborative venture between the University of California at Berkeley and the California Department of Social Services (CDSS). Its site allows the user to pull customizable information from the data regarding California's entire child welfare system. (See <[http://cssr.berkeley.edu/ucb\\_childwelfare](http://cssr.berkeley.edu/ucb_childwelfare)> [as of Nov. 26, 2019].)

Information obtained from the CCWIP showed in 2018, allegations of abuse or neglect were generated on 486,683 California children of which only 69,092 were substantiated. Dependency cases were opened for approximately 43,000 California children. The tables are attached as Exhibits 1 and 2. (Webster, D., Lee, S., Dawson, W., Magruder, J., Exel, M., Cuccaro-Alamin, S., Putnam-Hornstein, E., Wiegmann, W., Saika, G., Chambers, J., Hammond, I., Sandoval, A., Benton, C., Hoerl, C., Yee, H., Flamson, T., Hunt, J., Carpenter, W., Casillas, E., & Gonzalez, A. (2019). *CCWIP reports*. <[http://cssr.berkeley.edu/ucb\\_childwelfare](http://cssr.berkeley.edu/ucb_childwelfare)> [as of Nov. 26, 2019].)

child's right to safety and stability. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.)

The current dependency statutory scheme stems in large part from two waves of legislation designed to bring California in line with the federal Adoption Assistance and Child Welfare Act of 1980, Public Law No. 96-272. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 246 (*Cynthia D.*)) Senate Bill (SB) 14, passed in 1982, established a structured framework to protect abused, neglected, and abandoned children. It implemented a clear and convincing evidence standard of proof before children could be removed from their parents, reunification services for parents, hearings to review progress towards reunification, and permanency planning hearings if children could not be returned home. (*Ibid.*)

Former section 366.25 was enacted in 1982 by SB 14. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 302 (*Marilyn H.*)) It provided if the juvenile court found the minor was adoptable, and no exceptions applied, the court was directed to order the county counsel to initiate proceedings to terminate parental rights in a separate proceeding under former Civil Code section 232. Under former section 366.25, subdivision (d)(1)(A), an exception applied if "[t]he parents or guardians have maintained regular visitation and contact with the minor and the minor would benefit from continuing this relationship." (Former § 366.25, Stats. 1982, ch. 978, § 27, pp. 3540-3541, effective September 13, 1982 and repealed by Stats. 1998 ch. 1054 § 35.)

Unfortunately, the Legislature found that children unable to be returned to their parents lingered for extended periods in foster care, often as much as five years from the initial removal before the case was

ultimately resolved. (*Cynthia D.*, *supra*, 5 Cal.4th 242 at p. 246.) After convening and hearing from a task force which reviewed and coordinated child abuse reporting statutes, child welfare services, and dependency court proceedings, the Legislature passed Senate Bill 243. (*Ibid.*)

One way SB 243 sought to reduce the large numbers of children lingering in foster care was by narrowing the definition of abuse, limiting the situations in which the juvenile court intervened in family life. The bill's goal was to bring only the children who could not be protected any other way into the dependency system. (*Ethan C.*, *supra*, 54 Cal.4th 610 at p. 630; *Marilyn H.*, *supra*, 5 Cal.4th 295, at p. 303.) Senate Bill 243 also substantially changed the procedure for terminating parental rights by making the termination action part of the dependency proceedings instead of a separate civil procedure. (*Cynthia D.*, *supra*, 5 Cal.4th 242 at p. 246.) The new procedure was designed to expedite permanency for children who were adoptable and could not be returned to a parent. (*Ibid.*; *In re Marilyn H.*, *supra*, 5 Cal.4th 295 at p. 303.)

Section 366.26 was enacted in 1987 by SB 243. Subdivision (c)(1) echoed the prior language in section 366.25, subdivision (d)(1) mandating that the juvenile court terminate parental rights if it found the child was adoptable, but added the requirement the adoptability finding be made by clear and convincing evidence. (§ 366.26, subd. (c)(1), added by Stats. 1987 ch. 1485 § 47.) Former section 366.26, subdivision (c)(1)(A), stated that an exception to terminating parental rights occurred when "The parents or guardians have maintained regular visitation and contact with the minor and the minor would

benefit from continuing the relationship." In other words, the beneficial parent-child relationship exception language was moved unchanged from section 366.25, subdivision (d)(1)(A) to section 366.26, subdivision (c)(1)(A). In 1998, the Legislature revised section 366.26, subdivision (c)(1) to require the juvenile court not only to find that an exception to adoption exists, but also that it represents a "compelling reason" for determining that terminating parental rights would be detrimental to the child. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349 (*Jasmine D.*))

By the time the juvenile court considers whether to terminate parental rights at section 366.26 selection and implementation hearing, the parent has received numerous protections designed to safeguard the parent's interest retaining custody and control of the child. These include, but are not limited to, notice (§§ 291, subd. (a), 293, subd. (a)), the right to appointed counsel for both trial and appellate proceedings (§§ 317, subd. (b), 395), and court advisals on dependency timelines, trial, and appellate rights. (See, e.g. §§ 316.1, subd. (a) [advisal regarding use of the parent's designated mailing address for notice], 317.5, subd. (a). [advisal of the right to counsel], 316 [advisal of the nature and possible consequences of dependency hearings], 363 [advisal of trial rights at the jurisdiction hearing]; Rule 5.590 [advisal of appellate and writ rights].)

Parents may cross-examine the social worker, call witnesses, and present evidence at dependency hearings. (See, e.g. §§ 319, subd. (a), 341, 355, subd. (a), 366.26, subd. (b).) Parents receive a detention hearing on temporary out-of-home placement of the child pending adjudication of the petition allegations (§ 319,) a jurisdiction hearing

regarding whether the petition allegations are true by a preponderance of the evidence (§ 355, subd. (a),) and a disposition hearing at which the child may only be removed from the parent's custody if there is clear and convincing evidence of detriment (§§ 358, subd. (a), 361, subd. (c)(1).) Parents' rights are protected by the requirement that reunification services are provided upon removal of custody unless an exception applies (§ 361.5, subd. (a),) and the requirement that reunification services be reasonably tailored to accomplish reunification (§§ 366.21, subd. (e)(8), 366.22, subd. (f)(1)(A).) The parent's opportunity to resume custody is further protected by hearings to evaluate progress towards reunification and the requirement the juvenile court order the child returned to the parent unless the child welfare services agency shows return would be detrimental by a preponderance of the evidence. (§§ 366.21, subds. (e), (f), 366.22, 366.25, subd. (a)(1).)

At any point following the disposition hearing and before parental rights are terminated, a parent may petition under section 388 to modify a prior court order provided the parent establishes a change of circumstances or new evidence and that it would be in the best interests of the child to modify the order. (§ 388, subd. (a).) Section 388 is often considered an "escape mechanism" to allow the parent to petition for return of the child after reunification services have been terminated if there is a legitimate change in the parent's circumstances. (*In re Alayah J.* (2017) 5 Cal.App.5th 469, 478, citing *Marilyn H.*, *supra*, 5 Cal.4th 295, 309.)

The need to promptly resolve the child's custodial status is emphasized throughout the dependency statutory scheme. (Seiser,



*supra*, Goals of Dependency Proceedings, § 2.11[3] pp. 2-28 to 2-29.)

Whether permanency means return home to a parent and the cessation of juvenile court involvement in family life or the selection and finalization of an alternate permanent plan, the juvenile court is directed not to make children wait any longer than is absolutely necessary. This sometimes requires balancing the interests of the parent in resumption of custody against the child's need to expedite the proceedings.

Accelerated timelines apply to dependency cases. A petition filed under section 300 must be set for hearing within 30 days, unless the child is detained, and then the hearing shall be set within 15 judicial days from the date of the order directing detention. (§ 334.)

Dispositional hearings are to be conducted within 60 days of the child being removed, unless exceptional circumstances can be demonstrated with the outside maximum time limit being six months. (§ 352, subd. (b).) Reunification services are time-limited based on the age the child entered the dependency system and the extent of the parent's progress, but are capped at 18 months except for rare, limited, circumstances in which they are capped at 24 months. (§§ 361.5, subd. (a), 366.21, 366.22, 366.24.) During the dependency case, a continuance of a hearing should be granted only upon a showing of good cause and should not be granted if it is contrary to the child's best interests. (§ 352, subd. (a); Rule 5.550(a).)

Numerous courts have recognized the importance of resolving a child's dependency case without delay. "[A]n important element that a trial court must consider, when making a decision about children, is the impact of the passage of time. Childhood is short; many basic attitudes

and capacities are developed in the very early years." (*In re Rose G.* (1976) 57 Cal.App.3d 406, 425.) Continuances "should be difficult to obtain." (*Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238, 1242.) And because the swift resolution of dependency matters is essential to promoting permanency for children, dependency cases take priority over all others pending before the Court of Appeal. (§ 395, subd. (a)(1); *In re Phoenix H.* (2009) 47 Cal.4th 835, 843-844.)

From the initial phases of a dependency proceeding until the end of the reunification period, the parent's interest in resuming custody of the child is balanced against the child's need for safety and stability. Once reunification services have been terminated, the focus shifts from reunification to providing a permanent, stable placement for the child. (*In re Marilyn H., supra*, 5 Cal.4th 295, at p. 304.) "The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.)

By the time of the section 366.26 hearing, the child's needs for permanence and stability are paramount. (*Marilyn H., supra*, 5 Cal.4th 295 at p. 307.)

At the section 366.26 hearing, the juvenile court must select a permanent plan for a child unable to reunify with a parent. The court first determines whether the child is adoptable by clear and convincing evidence, and shall terminate parental rights unless an exception applies. (§ 366.26, subd. (c)(1).) The court selects a permanent plan from a descending series of options, from most permanent, adoption, to least permanent, extended foster care. (§ 366.26, subd. (b)(1)-(7).) A

party seeking to apply an exception to prevent termination of parental rights has the burden to prove application of the exception. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

Adoption is the permanent plan preferred by the Legislature. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.) Children are afforded the best possible opportunity to get on with the task of growing up when they are placed in the most permanent and secure alternative available. (*Ibid.*) A plan of adoption is stable, permanent, and allows the caregiver to make a full emotional commitment to the child. (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53.)

As explained above, under section 366.26, subdivision (c)(1), if the juvenile court determines the child is adoptable, it shall terminate parental rights unless an exception applies. (§ 366.26, subd. (c)(1).) An exception applies if the court finds a "compelling reason" for determining terminating parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent must therefore prove three prongs to establish application of the exception: 1) regular and consistent visitation, 2) a beneficial parent-child relationship, and 3) the parent-child relationship represents a compelling reason for determining that terminating parental rights would be detrimental to the child. (*In re Logan B., supra*, 3 Cal.App.5th 1000, 1010-1013.)

Focusing on the child's needs at the permanency planning stage of the proceedings does not mean that the parent's current circumstances, including parental inadequacies, are not considered.

(Seiser, *supra*, Selecting and Implementing an Alternative Permanent Plan, § 2.171[3][c] p. 2-625.) As stated in a well-known treatise on dependency law, the parent's current circumstances at the time of the section 366.26 hearing can be considered in the limited context of whether the beneficial parent-child relationship exception applies. (*Ibid.*, citing *In re Edward R.* (1993) 12 Cal.App.4th 116, 127 (*Edward R.*); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575-576 (*Autumn H.*); *In re Zeth S.* (2003) 31 Cal.4th 396, 412, fn 9.)

It is the rare, exceptional, case in which the beneficial parent-child relationship exception applies to prevent termination of parental rights. (*Breanna S.*, *supra*, 8 Cal.App.5th 636 at p. 646, quoting *Jasmine D.*, *supra*, 78 Cal.App.4th 1339 at p. 1350.) As it should be. An incredibly small number of children with substantiated child abuse and neglect reports ever reach the juvenile court. Of those, a much smaller number ever reach the end of the dependency process at which termination of parental rights can be considered. Parents who arrive at this procedural destination have received numerous protections designed to ensure that parental rights are not unfairly terminated. (*In re Zeth S.*, *supra*, 31 Cal.4th 396, 410-411.) It will be the extraordinary case in which guaranteeing ongoing visits with a parent is worth allowing a child to languish in an insecure placement like extended foster care.

To determine whether a child's circumstances represent the exceptionally rare situation in which application of the beneficial parent-child relationship exception is warranted, juvenile courts have relied on the analysis of the Fourth District Court of Appeal, Division One, in the case of *In re Autumn H.*, for the last 25 years.

***B. The Beneficial-Parent Child Relationship Exception Always Allowed the Juvenile Court to Consider Whether a Parent Made Progress in Addressing the Issues That Led To Dependency.***

Juvenile courts have long been able to consider whether the parent has made progress in addressing the issues that led to the dependency when considering whether the parent has proved application of the beneficial parent-child relationship exception. (*Autumn H., supra*, 27 Cal.App.4th 567, 575-576.) The Fourth Appellate District, Division One, explained in *Autumn H.* that prong one, regular visitation and contact, is a prerequisite for finding the exception applies. Regarding prongs two and three, it interpreted "benefit from continuing the [parent/child] relationship exception" to mean "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) In determining whether the exception applies,

"...[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive, emotional attachment such that the child would be **greatly** harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H., supra*, 27 Cal.App.4th at p. 575 (emphasis added).)

The Fourth Appellate District, Division One, explained that interaction between parent and child will always confer some "incidental benefit" to the child. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) The exception applies, however, when a "significant

attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation." (*Ibid.*) A parent-child relationship "arises from day-to-day interaction, companionship, and shared experiences." (*Ibid.*)

Addressing the second and third prongs together, the *Autumn H.* court explained, "The exception must be examined on a case-by-case basis, taking into account the *many variables* which affect a parent/child bond." (*Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576, emphasis added.) It continued, "The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are *some* of the variables which logically affect a parent/child bond." (*Id.* at p. 576, emphasis added.)

CSAC submits that as explained in *Autumn H.*, the juvenile court has always been able to consider whether the parent has addressed the issues leading to dependency. (*Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) The parent's current circumstances at the time of the section 366.26 hearing, including whether the parent has made any progress addressing the protective issues, are relevant to the "positive or negative interactions" between parent and child. (*Id.* at p. 576.) Additionally, *Autumn H.* detailed a nonexhaustive list of factors that juvenile courts may consider both in determining whether a parent-child relationship exists from which the child derives benefit and during the balancing analysis in which the court considers whether the detriment from severing the connection outweighs the benefits of adoption. (*Ibid.*) A parent is therefore not required to prove resolution of the protective issues to prove application of the exception, but a

parent's progress in addressing the protective issues is a permissible and logical additional factor juvenile courts may consider when deciding whether the exception applies.

A review of the amendments to section 366.26 supports this position. When enacting or amending legislation, the Legislature is presumed to know of existing case law. (*In re W.B.* (2012) 55 Cal.4th 30, 57 (*W.B.*)) Since *Autumn H.* was decided, section 366.26 has been amended numerous times. (See e.g. former § 366.26, similar to the current version, added Stats. 1987 ch. 1485 § 47, amended Stats. 1988 ch. 1075 § 7, Stats. 1989 ch. 913 § 17, Stats. 1990 ch. 1363 § 16, ch. 1530 § 7, operative until July 1, 1991, § 7.5, operative July 1, 1991, Stats. 1991 ch. 820 § 5, Stats 1992 ch. 163 § 140, operative January 1, 1994, Stats. 1993 ch. 892 § 7, Stats. 1994 ch 324 § 1, ch 1007 § 2, Stats. 1995 ch. 540 § 6, Stats. 1996 ch. 1082 § 5, ch. 1083 § 5.5, operative until January 1, 1999, Stats. 1997 ch. 510 § 3, ch. 793 § 25, and repealed January 1, 1999, by its own terms.) Throughout that time, the language of what is now section 366.26, subdivision (c)(1)(B)(i) was left

undisturbed.<sup>11</sup> In 1998, the Legislature amended section 366.26, subdivision (c)(1) to require the juvenile court not only find that one of the listed circumstances exists, but also that the circumstance provides "a compelling reason for determining that termination would be detrimental to the child," before applying an exception to prevent termination of parental rights. (*Jasmine D.*, *supra*, 78 Cal.App.4th 1339, 1349.) Taken together, this shows the Legislature approved of the *Autumn H.* interpretation of the beneficial relationship exception, and wished to emphasize that it will be an extraordinarily rare case in

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<sup>11</sup> Section 366.26 was amended many other times including the current version of the statute that was added Stats. 1995 ch. 540 § 7 (AB 1523), operative January 1, 1999. It was amended Stats. 1996 ch. 1082 § 6 (AB 2679), operative January 1, 1999, ch. 1083 § 6.5 (AB 1524), operative January 1, 1999; Stats. 1997 ch. 510 § 4 (AB 329), operative January 1, 1999, ch. 793 § 26 (AB 1544), operative January 1, 1999; Stats. 1998 ch. 572 § 1 (AB 2310), ch. 1054 § 36 (AB 1091), operative January 1, 1999, ch. 1056 § 17.1 (AB 2773); Stats. 1999 ch. 83 § 193 (SB 966), ch. 997 § 3 (AB 575); Stats. 2000 ch. 910 § 13 (AB 2921); Stats. 2001 ch. 747 § 3 (AB 705); Stats. 2003 ch. 813 § 7 (AB 408); Stats. 2004 ch. 810 § 5 (AB 2807); Stats. 2005 ch. 626 § 1 (SB 218), effective January 1, 2006, ch. 634 § 2 (AB 519), effective January 1, 2006, ch. 640 § 6.5 (AB 1412), effective January 1, 2006; Stats. 2006 ch. 838 § 52 (SB 678), effective January 1, 2007; Stats. 2007 ch. 565 § 4 (AB 298), ch. 583 § 28.5 (SB 703), effective January 1, 2008; Stats 2008 ch. 482 § 5 (AB 2070), effective January 1, 2009; Stats. 2009 ch. 287 § 15 (AB 1325), effective January 1, 2010, operative July 1, 2010, repealed January 1, 2014; Stats. 2012 ch. 35 § 57 (SB 1013), effective June 27, 2012, ch. 846 § 23 (AB 1712), effective January 1, 2013; Stats. 2015 ch. 425 § 13 (SB 794), effective January 1, 2016; Stats 2016 ch 612 § 75 (AB 1997), effective January 1, 2017; Stats. 2017 ch. 307 § 1 (SB 438), effective January 1, 2018, ch. 319 § 134.5 (AB 976), effective January 1, 2018 (ch 319 prevails), and Stats. 2018 ch. 833 § 32 (AB 3176), effective January 1, 2019.



which it applies to prevent the termination of parental rights. (*W.B.*, *supra*, 55 Cal.4th 30, 57; *Jasmine D.*, *supra*, 78 Cal.App.4th 1339, 1349.)

The Legislature knows how to give guidance on weighing evidence in dependency proceedings. It also knows how to tell the juvenile court which evidence it should and should not consider at various stages. When a dependency action commences, section 319, subdivision (a), states that at a detention hearing the court "shall" receive all relevant evidence the child, the parents or Indian custodian, the petitioner, or their counsel desires to present. (§ 319, subd. (a); see also Rule 5.674(b)(1).)

If the petition allegations are found true, custody is removed from the parent, and reunification services are ordered, the parent's progress towards reunification is evaluated at a six-month review hearing. Section 366.21, subdivision (e)(1), directs the court to consider certain types of evidence at a six-month review hearing. The juvenile court "shall" receive and consider the social worker's report and the report of the child's Court Appointed Special Advocate (CASA). (§ 366.21, subd. (e)(1).) The juvenile court "shall" consider a parent's criminal history, provided the parent agreed to fingerprint as part of the case plan and the criminal history is substantially related to the parent's ability to reunify with the child. (§ 366.21, subd. (e)(1).)

Section 366.21, subdivision (e)(1) also gives guidance on how to weigh the evidence received at a six-month review hearing. If the child welfare services agency's recommendation is for the child to remain out of the parent's care and for the parent to receive additional reunification services, the agency must establish it is detrimental to the

child to return home by a preponderance of the evidence. (§ 366.21, subd. (e)(1).) Section 366.21, subdivision (e)(1) states when determining whether the Agency has met its burden to prove detriment, the "failure of the parent... to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental." (§ 366.21, subd. (e)(1).) But the "fact that the parent is enrolled in a certified substance abuse treatment facility shall not be, for that reason alone, prima facie evidence of detriment." (§ 366.21, sub. (e)(1).)

If a parent fails to reunify and the juvenile court schedules a selection and implementation hearing under section 366.26, that statute provides guidance on evidence the juvenile court shall and shall not consider when selecting a permanent plan for the child. (§ 366.26, subd. (b).) Section 366.26, subdivision (b), states the juvenile court "shall" review the Agency's assessment report and indicate it has read and considered it. (§ 366.26, subd. (b).) Subdivision (b) provides the juvenile court "shall receive other evidence the parties may present..." (§ 366.26, subd. (b).) The court also "shall" consider the wishes of the child and act in the child's best interests. (§ 366.26, subd. (h)(1).)

Section 366.26, subdivision (c)(1), directs the juvenile court to terminate parental rights if it finds the child is adoptable by clear and convincing evidence unless an exception applies. (§ 366.26, subd. (c)(1).) In doing so, the statute directs the court not to consider certain evidence when determining whether a child is adoptable: "The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be

adopted." (§ 366.26, subd. (c)(1).) These are just a few examples of the guidance provided throughout the dependency statutory scheme.

"When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful." (*Ethan C.*, *supra*, 54 Cal.4th 610 at p. 638.) Section 366.26, subdivision (c)(1)(B)(i) in relevant part directs the juvenile court to determine whether the child would "benefit" from continuing the relationship with the parent. (§ 366.26, subd. (c)(1)(B)(i).) The Legislature could have directed the juvenile court not to consider the parent's progress in addressing the issues that led to the dependency as a factor when deciding whether the beneficial parent-child relationship exception applies, just as it limited the type of evidence that can be considered when determining whether the child is adoptable. It chose not to do so.

Further, the Legislature has had ample time in the 25 years since *Autumn H.* was decided to expressly prohibit consideration of a parent's progress regarding the protective issues. The only legislative change affecting the beneficial parent child relationship exception in section 366.26, subdivision (c)(1)(B)(i) supports *Autumn H.*'s interpretation because requiring courts to find not only that the circumstances of subdivision (c)(1)(B)(i) exist but also they represent a compelling reason to forgo terminating parental rights requires the balancing test described in *Autumn H.*

In the Mother's Opening Brief, the mother contended the Legislature did not intend the juvenile court to consider a parent's progress towards the issues that led to dependency because section 366.26, subdivision (c)(1)(B)(i) does not expressly state that it is

permitted. (MOB p. 54.) In her Reply Brief, the mother now concedes that this evidence can be considered under the second prong of the exception. (MRB pp. 6, 12.) But to the extent this Court considers her earlier argument, CSAC responds that the succinct language of the exception does not direct the juvenile court on the types of evidence it should consider when determining whether a parent-child relationship exists, is beneficial, and whether the child would be so greatly harmed by the loss of that relationship as to outweigh the benefits of adoption. The juvenile court has interpretive case law to assist with that decision. Additionally, section 366.26, subdivision (b) states the juvenile court "shall" receive the agency's assessment report and "shall" receive "other evidence" the parties (such as the agency) wish to present. (§ 366.26, subd. (b).) Consideration of a parent's progress in resolving the issues that led to dependency therefore need not be expressly stated as admissible in section 366.26, subdivision (c)(1)(B)(i), for the juvenile court to permissibly consider it when determining whether the beneficial parent-child relationship exception applies.

In an amicus curiae brief submitted by the Children's Law Center of California et al. (CLC), Amici quote the task force established to recommend changes in the law that resulted in SB 243 regarding the beneficial parent-child relationship exception:

"There is substantial clinical evidence that some children in foster care retain very strong ties to their biological parents. Since termination in such situations is likely to be harmful to the child, courts should retain parental ties if desired by both the parents and the child." (Sen. Select Committee on Children & Youth SB 1195 Task Force Rpt. On Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (January 1988) p. 11 (Task Force Report).)

Amici reference this language to assert that the juvenile court is completely prohibited from considering a parent's progress on the protective issues. (CLC, p. 30.) Nowhere in the Task Force's statement of intent is a prohibition on considering a parent's progress towards the protective issues to the extent it affects whether a strong tie to a biological parent was formed or maintained. (Task Force Report, p. 11.) Further, the Task Force's statement contains no prohibition on considering a parent's progress on the protective issues if relevant to the level of harm the child will suffer if the relationship with the parent is severed. (Task Force Report, p. 11.)

Although the Task Force language contained a reference to preserving parental rights if "desired" by the child, this language was obviously a summary of a more complex analysis. All children love their parents, even those who abused or neglected them. (See *In re Teneka W.* (1995) 37 Cal.App.4th 721, 726 [child testified she loved and missed her father, who physically abused her and killed her mother].) Many children long to return to parents who cannot care for them. The Legislature clearly did not intend all children to be able to veto termination of parental rights based on preference. Senate Bill 243 introduced the language now found in section 366.26, subdivision (c)(1)(B)(ii), which states an exception to adoption applies if, "A child 12 years of age or older objects to termination of parental rights." Thus it only intended a child aged 12 or older to be able to decide their own permanent plan.

Amici CLC et al. also rely on *Edward R.*, a case decided one year before *Autumn H.*, in support of their position the juvenile court is barred from any consideration of a parent's progress towards the issues

that led to dependency when determining application of the beneficial parent-child relationship exception. (Compare *In re Edward R.*, *supra*, 12 Cal.App.4th 116, 127 with *In re Autumn H.*, *supra*, 27 Cal.App.4th 567, 575-576.)

In *Edward R.*, the Fifth Appellate District Court of Appeal considered a parental challenge to the then recently established section 366.26 parental rights termination procedure. (*Edward R.*, *supra*, 12 Cal.App.4th 116 at p. 118.) The parents asserted that their rights had been unjustly terminated because, they claimed, former Civil Code section 232 allowed the court to consider a parent's circumstances at the time of the termination hearing, but section 366.26 did not. (*Id.* at p. 124.) The *Edward R.* court rejected this argument, explaining that Civil Code 232 and section 366.26 provided the same protections for parents. (*Ibid.*) The juvenile court's consideration of the parents' current circumstances was limited at a section 366.26 hearing in that parents were not permitted to relitigate the basis for termination of reunification services and continued out-of-home placement. (*Id.* pp. 125-127.) The Fifth Appellate District Court of Appeal stated, "This is not to say, however, that the juvenile court should refuse to consider the circumstances as they exist by the time of [the] section 366.26 hearing," explaining a parent's current circumstances were relevant to application of the beneficial parent-child relationship. (*Id.* at p. 127.)

While the Court of Appeal in *Edward R.* focused on visitation facts as being the current circumstances, it noted the trial court had considered the mother's progress on the protective issues to a certain degree. The mother argued the juvenile court erred in sustaining a relevance objection to a question designed to elicit evidence she had

attended a parenting class. (*Edward R.*, *supra*, 12 Cal.App.4th 116 at p. 127.) After observing the mother waived the issue because she did not challenge the objection or the juvenile court's relevance ruling during the contested hearing, the Fifth Appellate District in dicta observed that the juvenile court properly excluded the evidence because it was relevant to reunification, and reunification was not permitted by section 366.26. (*Ibid.*) Still, the Court of Appeal noted the trial court recognized the mother's sobriety at the time of the section 366.26 hearing and that she was successfully caring for other children at the time, but noted as to Edward, there was "no more time to build a relationship." (*Id.* at p. 128.)

The Fifth Appellate District did not consider whether a parent's progress towards resolving the protective issues was relevant to the formation or maintenance of a parental bond, or the balancing of the harm in terminating parental rights against the benefits of adoption. (*Edward R.*, *supra*, 12 Cal.App.4th 116 at pp. 121-129.) And no wonder. The parents in that case had visited the child, who was detained shortly after birth, just seven times in two years. (*Id.* at pp. 118, 121.) No parental bond formed, so the court did not analyze whether the mother's sobriety by the time of the section 366.26 hearing affected the strength of a hypothetical parent-child relationship. CLC's reliance on *Edward R.* is misguided; a decision does not stand for a proposition not considered by the court. (*People v. Harris* (1989) 47 Cal.3d 1047, 1071.)

Eight published cases have cited *Edward R.* since it was decided. (*In re Vanessa W.* (1993) 17 Cal.App.4th 800, 807; *In re Brittany M.* (1993) 19 Cal.App.4th 1396, 1404; *In re Cody W.* (1994) 31 Cal.App.4th

221, 227, 230; *In re Keyonie R.* (1996) 42 Cal.App.4th 1569, 1573; *In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; *In re Lorenzo C., supra*, 54 Cal.App.4th 1330, 1344; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153; *Christopher D. v. Superior Court* (2012) 210 Cal.App.4th 60, 75.) None of them have referenced *Edward R.* to assert that the parent's progress towards the protective issues cannot be considered by the court a factor when analyzing prongs two and three of the beneficial parent-child relationship exception. None of them have disagreed with the *Autumn H.* interpretation of the beneficial parent-child relationship exception. (*Ibid.*)

**C. *Prohibiting Juvenile Courts from Considering a Parent's Progress on the Protective Issues under Both Prongs Two and Three of the Beneficial Parent-Child Relationship Exception Would Be Absurd.***

Both San Francisco HSA and Caden's counsel have discussed the beneficial parent-child relationship case law at length and CSAC joins in their arguments. (SFAB pp. 59-67; CB pp. 37-41.) Since they filed their briefs, the mother now concedes that the juvenile court may consider a parent's progress on the protective issues under prong two of the exception. No party now disputes the juvenile court can consider it when determining whether a beneficial parent-child relationship has been formed or maintained. (MRB pp. 6, 12-15; SFAB pp. 59-67; CB pp. 39-41.) The mother's concession is reasonable, because it would be absurd to ask the juvenile court to ignore evidence relevant to whether a parental bond was formed and maintained up to the section 366.26 hearing. (See *People v. Pieters* (1991) 52 Cal.3d 894, 898-899 [a fundamental principle of statutory construction is that a court should not interpret a statute in a way that leads to an absurd result].)



However, the mother asserts that the juvenile court is precluded from considering the parent's progress at all when conducting the weighing analysis of whether the child would be so greatly harmed if all contact with the parent ended as to outweigh the benefits of security and permanence adoption provides. (MRB pp. 12, 16-17.)

The mother cites no authority in support of her assertion that a parent's progress may not be considered in the balancing of detriment from severing the parental relationship against the benefits of adoption. She simply asserts that if parental progress, or lack thereof, is considered on the second prong of the exception, it cannot be considered on the third. (MRB pp. 16-17.) The mother's argument is perplexing: while acknowledging when discussing the standard of review that the court's balancing analysis on the third prong is a quintessentially discretionary call, the mother now seeks to remove the court's discretion by preventing it from considering all relevant evidence.

Further, mother provides no justification and no authority for why this one factor cannot be considered in the balancing analysis while all others can. Courts have long considered the totality of the circumstances in balancing tests. (See, e.g., *People v. Schmitz* (2012) 55 Cal.4th 909, 921 [evaluating totality of the circumstances when balancing legitimate government interests against privacy to determine whether searches are reasonable under the Fourth Amendment]; *Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 550 [courts balancing equitable concerns consider totality of circumstances when deciding whether to apply disentitlement doctrine]; *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th

869, 874-875 [considering totality of circumstances when balancing employee's right to prompt payment of worker's compensation benefits against employer's right to be free of unreasonable penalties].) This Court should decline mother's invitation to depart from this well-established approach.

The mother also appears to incorrectly equate parental progress with "parental inadequacy." (MRB p. 17.) CSAC reiterates, as have San Francisco HSA and Caden's counsel, that it does not assert a parent's failure to reunify should automatically result in termination of parental rights. There will be times when a parent fails to reunify but still qualifies for the exceptionally rare beneficial parent-child relationship exception without showing progress on the protective issues. A prime example of this is *S.B.*, in which the father who did not reunify but attended loving visits, complied with the case plan, and continued attempting to regain his physical and mental health established application of the exception. (*In re S.B.*, *supra*, 164 Cal.App.4th 289, 300.)

Interpreting the exception to prohibit a juvenile court from considering evidence like the mother's progress in the issues that led to dependency in Caden's case would be absurd. It must be presumed that every word, phrase, and provision employed in a statute is intended to have meaning. (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1206-1207 citing *Johnson v. Santos* (1983) 148 Cal.App.3d 566, 573.) The mother appears to argue that since the Court of Appeal in Caden's case found substantial evidence supported a beneficial parent-child relationship, it was required to consider the relationship a compelling reason termination of parental rights was detrimental without

considering the factors relevant to whether the benefits of adoption would outweigh the harm if contact ended. Her approach would render the "compelling reason" language of section 366.26, subdivision (c)(1)(B) meaningless, a result not permitted under principles of statutory interpretation.

CSAC submits Caden's mother's progress on the protective issues is a relevant and permissible factor for the juvenile court to consider when analyzing whether a beneficial parent-child relationship was formed and maintained, as well as whether there was a compelling reason to forgo terminating the mother's rights.

Caden's mother had a 30-year history of substance abuse and lost custody of five children before Caden was born. She demonstrated a pattern of temporary sobriety followed by relapse. (*Caden C., supra*, 34 Cal.App.5th 87, 92.) When Caden was detained at age four years, he had already been the subject of 11 child welfare service referrals. Marin Child Protective Services (CPS) discovered that the mother smoked methamphetamine around him a closed room. The mother would scream at Caden and get physical with him, including an incident when she was seen taking her anger out on Caden by throwing him in his crib. She was offered a voluntary services case, but declined. (*Id.* at p. 92.) She used phencyclidine (PCP), screamed at Caden, and stated she wanted to get rid of him so she could get high. (*Caden C., supra*, 34 Cal.App.5th 87, 92-93.) The mother was diagnosed with depression and posttraumatic stress disorder (PTSD) but did not seek treatment, instead using Caden for emotional support. (*Id.* at p. 93.)

When Caden entered the dependency system, he was diagnosed with disruptive behavior disorder, PTSD, with symptoms of aggression,

impairment of social relationships, tantrums, regression, and emotional dysregulation. (*Caden C.*, *supra*, 34 Cal.App.5th 87, 94.) He made remarkable progress on these issues after stabilizing in his second foster home of Ms. H. (*Id.* at p. 94.)

The mother followed her pattern and achieved a brief period of sobriety in Caden's case, resuming custody before she relapsed again and Caden had to be removed. Caden was demonstrating similar behaviors he had before removal when mother was using: throwing objects, threatening others, threatening self-harm, and having outbursts in his classroom. (*Caden C.*, *supra*, 34 Cal.App.5th 87, 95.)

Caden's social worker described the relationship between the mother and child as "toxic." (*Caden C.*, *supra*, 34 Cal.App.5th 87, at p. 95.) The mother discussed adult topics including the dependency case with him, placing responsibility on him for his removal. She created an environment in which he was unable to separate from the mother because he was extremely concerned about her well-being. She repeatedly promised Caden he was returning to live with her, becoming aggressive when advised not to do so. (*Id.* at pp. 95, 97-98.)

The mother caused Caden to lose placements due to her poor boundaries and impulsive behaviors. (*Caden C.*, *supra*, 34 Cal.App.5th 87, 96.) She threatened to find Caden's confidential placement. (*Id.* at p. 98.) Caregivers cited concern about the ongoing involvement with the mother as a reason they gave notice for his removal. (*Id.* at p. 97.)

Although Caden knows who his biological mother is and loves her, the record casts substantial doubt on whether the parent-child relationship that exists between them is beneficial. (See *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 955 [a child's sadness about possibly not

having contact with the parent in the future does not on its own establish a beneficial parent-child relationship].) There is a nexus between the mother's 30-year history of methamphetamine and other substance abuse, her untreated mental illness, and the trauma Caden has endured affecting whether a beneficial parent-child relationship was formed before he was detained at age four. (*Caden C.*, *supra*, 34 Cal.App.5th 87, 92-93.) There is a link between the mother's resistance to treatment and the parentification of Caden, the retraumatizing of Caden as he lost foster care placements due to her behavior, and the emotionally harmful behavior she demonstrated at visits, such that they had to be limited for Caden's protection and whether a parent-child relationship was maintained during the time he spent in out-of-home placement until the section 366.26 hearing. (*Id.* at pp. 92-98.)

Putting aside the second prong of the beneficial parent-child relationship exception, however, adopting a rule that bars consideration of a parent's progress under the third prong of the exception would do a disservice to Caden. Again, CSAC does not argue that the mother had to resolve the issues that led to dependency. CSAC does not contend the mother should be precluded from proving application of the exception simply because she did not reunify. But the mother's progress towards the protective issues was a relevant factor that should be considered when the juvenile court analyzed whether Caden would be so greatly harmed by the termination of parental rights that it would outweigh the benefits of adoption.

Caden loves the mother and preserving the mother's right to visit him would provide some incidental benefit, but the record provided overwhelming evidence that he would be harmed long term. (*Caden C.*,

*supra*, 34 Cal.App.5th at pp. 92-98.) The mother caused Caden to be parentified -- extremely anxious to return to her because he worried about her well-being. (*Id.* at pp. 95, 97-98.) She was so disruptive at visits that they had to be steadily reduced. She sabotaged his placements, causing him to lose at least two. (*Id.* pp. 97-98.) The juvenile court also had a 30-year track record from which to evaluate her behavior, and her behavior towards older half-sibling, N.C.- G., in which she sent text messages so disturbing the child suffered anxiety that put the sibling at risk of being psychiatrically hospitalized. (*Id.* at p. 99.) As this Court has recognized, "a measure of a parent's future potential is undoubtedly revealed in the parent's past behavior with the child." [citation]" (*In re Jasmon O.*, *supra*, 8 Cal.4th 398, 424.) Every indication before the juvenile court in Caden's case suggested her behavior would continue in this vein. (*Id.* at p. 98 ["I don't get the fact that anyone can show me to be unfit because I use meth."].) Preventing Caden from moving forward in the most secure permanent plan preferred by the Legislature to preserve a relationship that was marked by instability, would jeopardize future placements, and was often harmful was absurd. No reasonable court would have made the call that the trial court did in Caden's case. Preventing juvenile courts across California from considering evidence like this to avoid the error made by the juvenile court in Caden's case would be a travesty.

It is possible that the Legislature did not originally contemplate the juvenile court considering a parent's progress towards the protective issues, but it did not prohibit it. Indeed, the Task Force's reference to "substantial clinical evidence" showed a Legislature willing to rely on child welfare experts and peer-reviewed medical and social

science research in establishing evidence-based practices to ensure the best outcomes for children. (Task Force Report, p. 11.) Case law, research and our understanding of how to help children mature into healthy, well-adjusted adults has evolved. Over time, the Adverse Childhood Experiences (ACEs) study and related literature has provided new understanding about how individuals who experience traumatic events and toxic stress during childhood are at greater risk for disease and early death. The literature also addresses how to help children develop the resilience to overcome these traumatic experiences. (See <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/index.html> [as of Nov. 25, 2019]; Szilagyi, A., et al., Heath Care issues for Children and Adolescents in Foster Care and Kinship Care, 136 (4) Pediatrics (October 2015) p. e1142, e1145 <https://pediatrics.aappublications.org/content/pediatrics/early/2015/09/22/peds.2015-2656.full.pdf> [as of Nov. 26, 2019]; See also <https://kpjrfilms.co/paper-tigers/> [as of Nov. 25, 2019] [film describing one effort to incorporate the ACEs study data into a high school discipline program].) One of the ways children develop resilience to overcome traumatic experiences is through the presence in their lives of a stable, caring adult. Caden has that adult in Ms. H., the foster mother who resumed placement of him after his third foster home gave notice and wishes to adopt him. (*Caden C.*, *supra*, 34 Cal.App.5th at pp. 98, 102-103.)

CSAC submits that allowing the juvenile courts to consider a parent's progress towards the issues that led to dependency as a relevant factor on the second and third prongs of the exception is true

to the Legislature's intent that it will be the exceptional case in which the exception applies, accounts for the exception as interpreted by the *Autumn H.* line of case law, and is fair to both children and parents. There are a myriad of things that can be relevant when the juvenile court considers whether the beneficial parent-child relationship exception applies. This Court should not tie the juvenile court's hands by restricting the juvenile court's ability to consider a parent's progress towards the issues that led to dependency.

### CONCLUSION

CSAC respectfully asks this court to hold that a hybrid standard applies to appellate review of the beneficial parent-child relationship, with the substantial evidence standard applying to the first and second prongs of the exception and an abuse of discretion standard applying to the third prong.

CSAC contends a parent is not required to show progress in addressing the issues that led to dependency to prove application of the beneficial parent-child relationship exception, but it is one factor the juvenile court may consider when evaluating whether a beneficial parent-child relationship exists and when determining if the child would be so greatly harmed if contact with the parent ended as to outweigh the benefits of permanence and stability derived from adoption.

Childhood is brief and children deserve the best chance to grow up to be healthy, well-adjusted adults. CSAC acknowledges the incredibly difficult decisions juvenile courts must make regarding children and families every day. It seems clear from the record that the trial court in Caden's case was greatly affected by Caden's statements



about his love for his mother. All kids love their parents, even profoundly flawed parents who abuse or neglect them. We do not ask children under age 12 to decide their own permanent plan. Does Caden love his mother? Yes. Is allowing him to languish in extended foster care to preserve contact that is sometimes loving but also damaging fair or just? Absolutely not. No reasonable court would have decided that it was. The abuse of discretion standard is a high bar, but it permits reversal in the appropriate case, as is found here. CSAC asks this court to affirm the decision of the First District Court of Appeal, Division One.

DATE: November 27, 2019

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of Counties

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**WORD COUNT CERTIFICATION**  
(Cal. Rules of Court, rule 8.360(b)(1))

The text of this brief consists of 12,795 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

DATE: November 27, 2019      JENNIFER HENNING,  
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**PROOF OF SERVICE BY MAIL**

(CRC 8.212 & 8.817; Civ. Code Proc., § 1013(a).)

(Supreme Court No.: S255839; 1st Civil Nos. A153925 & A154042; In re: Caden C.)

I, **Arlene Martinez**, declare that: I am over the age of 18 years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California, where the mailing occurs; and my business address is 5530 Overland Ave., Ste. 170, San Diego, California 92123. I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business. I caused to be served the following document(s): **BRIEF OF AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF SAN FRANCISCO HUMAN SERVICES AGENCY** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

|  |  |
|--|--|
| COURT OF APPEAL, STATE OF CALIFORNIA<br>FIRST APPELLATE DISTRICT, DIVISION ONE<br>350 MCALLISTER STREET<br>SAN FRANCISCO, CA 94102 | HONORABLE MONICA WILEY<br>JUVENILE COURT APPEALS DESK<br>400 MCALLISTER ST.<br>SAN FRANCISCO, CA 94102 |
|--|--|

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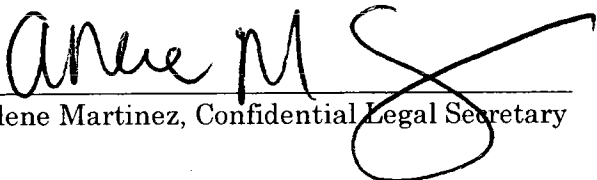
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Furthermore, I, **Arlene Martinez**, declare my business address is 5530 Overland Avenue, Suite 170, San Diego CA 92123. I have electronically served the **same referenced document** from the electronic notification address of [SDCCJD.Appeals@sdcounty.ca.gov](mailto:SDCCJD.Appeals@sdcounty.ca.gov), on 11/27/19 at approximately 12:56pm, to the following:

| Party  | Electronic Service Address   |
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 27, 2019

  
Arlene Martinez, Confidential Legal Secretary

## EXHIBITS TABLE OF CONTENTS

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| Exhibit 2-<br>CWS/CMS Dynamic Report<br>System Case Openings | Page: 55 |

# Exhibit 1

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California Child Welfare Indicators Project (CCWIP)  
 University of California at Berkeley  
 Children with one or more Allegations for Jan 1, 2018 to Dec 31, 2018  
 Agency Type: Child Welfare  
 California

| Allegation Type                     | Disposition Type |              |           |                               |                    | Total   |
|-------------------------------------|------------------|--------------|-----------|-------------------------------|--------------------|---------|
|                                     | Substantiated    | Inconclusive | Unfounded | Assessment Only/Evaluated Out | Not Yet Determined |         |
|                                     | n                | n            | n         | n                             | n                  |         |
| <b>Sexual Abuse</b>                 | 3,439            | 8,892        | 12,458    | 20,544                        | 187                | 45,520  |
| <b>Physical Abuse</b>               | 4,810            | 25,313       | 37,460    | 24,516                        | 440                | 92,539  |
| <b>Severe Neglect</b>               | 2,823            | 1,917        | 1,574     | 851                           | 32                 | 7,197   |
| <b>General Neglect</b>              | 49,161           | 54,157       | 62,647    | 57,586                        | 1,174              | 224,725 |
| <b>Exploitation</b>                 | 160              | 137          | 76        | 104                           |                    | 477     |
| <b>Emotional Abuse</b>              | 2,535            | 27,905       | 12,445    | 10,438                        | 284                | 53,607  |
| <b>Caretaker Absence/Incapacity</b> | 2,493            | 769          | 1,417     | 482                           | 21                 | 5,182   |
| <b>At Risk, Sibling Abused</b>      | 3,671            | 13,883       | 29,913    | 9,693                         | 276                | 57,436  |
| <b>Substantial Risk</b>             |                  |              |           |                               |                    |         |
| <b>Missing</b>                      |                  |              |           |                               |                    |         |
| <b>Total</b>                        | 69,092           | 132,973      | 157,990   | 124,214                       | 2,414              | 486,683 |

A child is counted only once, in category of highest severity.  
 Data Source: CWS/CMS 2018 Quarter 2 Extract.  
 Program version: 2013.12.05 Database version: 70265CAE

# Exhibit 2

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Table Only | Table + Graph | Graph Only

California Child Welfare Indicators Project (CCWIP)  
University of California at Berkeley

**Case Openings**

Agency Type = Child Welfare

Jan 1, 2018 to Dec 31, 2018

Selected Subset: Case Count: All Openings

Selected Subset: Days Case Open: 8 days or more, 7 days or less

California

| Age Group       | First Service Component |                    |                      |                     |                       |         | Total<br>n |
|-----------------|-------------------------|--------------------|----------------------|---------------------|-----------------------|---------|------------|
|                 | Emergency Response      | Family Maintenance | Family Reunification | Permanent Placement | Supportive Transition | Missing |            |
|                 | n                       | n                  | n                    | n                   | n                     | n       |            |
| <b>&lt;1 mo</b> | 56                      | 1,300              | 3,206                | 173                 |                       |         | 4,735      |
| <b>1-11 mo</b>  | 64                      | 1,427              | 1,696                | 66                  |                       |         | 3,253      |
| <b>1-2 yr</b>   | 124                     | 2,541              | 2,842                | 112                 |                       |         | 5,619      |
| <b>3-5 yr</b>   | 190                     | 3,491              | 3,509                | 125                 |                       |         | 7,315      |
| <b>6-10 yr</b>  | 335                     | 5,569              | 4,650                | 331                 |                       |         | 10,885     |
| <b>11-15 yr</b> | 326                     | 4,471              | 3,804                | 463                 |                       |         | 9,064      |
| <b>16-17 yr</b> | 138                     | 1,108              | 1,192                | 283                 | 8                     |         | 2,729      |
| <b>18-20 yr</b> | 13                      | 1                  | 1                    | 90                  | 58                    |         | 163        |
| <b>Total</b>    | 1,246                   | 19,908             | 20,900               | 1,643               | 66                    |         | 43,763     |

Data Source: CWS/CMS 2019 Quarter 2 Extract.  
Program version: 2013.12.09 Database version: 702D06F7