

CASE NO. S255839

IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA

In re CADEN C.,
A Person Coming Under Juvenile Law.

SAN FRANCISCO HUMAN SERVICES AGENCY,

Plaintiff and Appellant,

v.

CHRISTINA C., et al.,

Defendants and Respondents.

SUPREME COURT
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APPELLANT'S ANSWERING BRIEF ON THE MERITS

After the Published Decision by the Court of Appeal

First District, Division One

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ISSUES PRESENTED

1. What standard governs appellate review of the beneficial parental relationship exception to adoption?
2. Whether a showing that a parent has made progress in addressing the issues that led to dependency is necessary to meet the beneficial parental relationship exception.

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Mother contends a showing that a parent has made progress in addressing the issues that led to the dependency is not statutorily required to meet the beneficial parental relationship exception. As a general proposition, The San Francisco Human Services Agency (“Agency”) does not disagree. Further, the appellate decision below did not hold otherwise.¹

Application of the exception involves many variables, and there will be times when the parent’s progress in addressing the issues, whether before or after reunification services are bypassed or terminated, will not be relevant to the court’s determination. But any parent seeking to overcome the statutory preference for adoption must show that the benefit

¹ Appellants also agree with parents’ assessment regarding the appropriate standard of review, although, as will be discussed below, the parties disagree as to the appropriate application of that standard in this case.

to the child from continuing the parent-child relationship outweighs the permanency and stability of adoption. No juvenile court considering the issue should be prohibited from considering a parent's harmful conduct, untreated mental illness, untreated substance abuse, or any other issue affecting a determination of whether the relationship is "beneficial," or whether that beneficial relationship presents a compelling reason to deprive a child of the permanency and stability of adoption. This is true whether or not the conduct, mental illness, substance abuse, or other issue was one of the issues leading to dependency.

Ever since *In re Autumn H.* was decided twenty-five years ago, courts have considered the statutory question of whether "the child would benefit from continuing the relationship" (§ 366.26, subd. (c)(1)(B)(i))² by asking whether "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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)) *Autumn H.* explained that the exception "must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond." (*Id.* at 575-576.) Among the variable are the child's age, how long the child lived in the parent's custody, "the 'positive' or 'negative' effect of interaction between

² All statutory references are to the Welfare and Institutions Code.

parent and child, and the child’s particular needs.” (*Ibid.*) The legislature amended subdivision (c)(1)(B) of section 366.26 four years after *Autumn H.* was decided, to now require that the existence of the beneficial relationship also constitute a “compelling” reason to forego adoption. The legislature did not change the language construed by *Autumn H.* (Stats.1998, ch. 1054, § 36.6.)

A parent’s failure to reunify will not, *per se*, prevent that parent from obtaining the benefit of the exception. (*See, e.g., In re E.T.* (2018) 31 Cal.App.5th 68, reh'g denied (Jan. 31, 2019), review denied (Apr. 10, 2019) [First District Court of Appeal reversed the trial court’s refusal to apply the exception, finding that a mother with history of mental health issues and drug addiction who had not reunified nonetheless demonstrated that her children would benefit from continuing the relationship]; *see also In re Amber M.* (2002) 103 Cal.App.4th 681 [Fourth District reversed the trial court’s refusal to apply the exception, finding that a mother who had abused drugs, engaged in a violent relationship with her partner, neglected her three children, and had relapsed into drug use multiple times during the dependency nonetheless demonstrated her children would benefit from continuing the relationship].)

There will also be many situations in which the parents’ progress in addressing the issues will have little to no bearing on whether the juvenile

court should apply the exception. If, for example, the issues giving rise to the dependency first developed later in the minor's childhood, or after the child had lived with the parent for many years, the parental relationship may be so developed that it presents a compelling reason to forego adoption despite the persistence of the issues, and an older child may simply not need the level of emotional support that a younger child might require.

On the other hand, if a parent's harmful conduct, untreated mental illness, untreated substance abuse, or any other issue has affected the parent-child relationship either because it prevented it from developing or because it damaged a developed relationship, the juvenile court must be able to consider the issue when determining whether the relationship is 'beneficial.' Similarly, if an issue affecting the benefit to the child of continuing the parent-child relationship continues at the time of the section 366.26 hearing (or is likely to be an issue in the future), the court must be able to consider the issue when balancing the value of the relationship against the benefit of, and statutory preference for, adoption. Progress in addressing the issues, or lack thereof, will therefore be relevant when determining whether the parent-child relationship is *beneficial* to the child and, if it is, then whether the existence of a beneficial relationship is so *compelling* it outweighs the statutory preference for adoption.

Even if it were possible, however, to craft a set of bright line rules for when a juvenile court can and cannot consider the parent's progress in addressing the issues leading to the dependency, the instant case is a poor vehicle for doing so. The juvenile court's order below was not reversed simply because mother failed to make progress in addressing the issues that led to Caden's dependency. It was reversed because mother's continuing substance abuse, untreated mental illness, lack of insight as to how her conduct harmed her son, and sabotage of Caden's placements all compelled the conclusion that any other placement than adoption would pose an unacceptable risk to the boy's well-being.

In addition, this is simply an extreme case. Caden is mother's sixth child, and mother's substance abuse and mental health issues have caused her to be involved in dependency proceedings with every one of her children, beginning in 1986 and continuing for over 37 years. She was offered supportive services before then three-year-old Caden was removed; reunification services after Caden was first removed; and family maintenance services when Caden was placed with mother in her residential treatment program. Mother stopped engaging in services as soon as she completed that program and almost immediately relapsed on methamphetamines and alcohol while this dependency was still active. After Caden was removed for the second time and re-entered foster care,

mother's conduct continuing up to the .26 hearing made clear that Caden needs the permanency and security of adoption. Caden had been in four foster placements and there was evidence that mother had interfered with the stability in at least three of them. Caden's best hope for permanency, his latest foster parent, had refused to become his legal guardian due to mother's continuing interference. Without adoption, he would be relegated to continuing foster care and constant turmoil as mother continued to sabotage his placements.

In addition, the trial court plainly erred in both law and fact when it applied the beneficial relationship exception in this case. When the trial court found that mother had "substantially complied with her case plan" and "has continued her efforts to maintain her sobriety and address her mental health issues," it displayed an unfortunate misunderstanding of the record. When the court balanced the opinion of mother's bonding expert Dr. Hugh Molesworth, who testified that mother and Caden shared a parental bond, against the opinion of Dr. Alicia Lieberman, who acknowledged the existence of the bond but opined that "adoption is the least detrimental and most desirable alternative for Caden," the court evidenced a misunderstanding of the balancing test to be applied, as well as a misunderstanding of the various experts' roles at trial. In deciding that severing Caden's relationship with his natural mother would deprive

him “of a positive emotional attachment” and this was a sufficient reason to forego adoption, the trial court neglected to consider the ‘third prong’ of the beneficial relationship exception, the statutory mandate that existence of a beneficial relationship must be so compelling that it outweighs the statutory preference for adoption.

In sum, the beneficial relationship exception does not require *every* parent seeking to assert the exception to show that they have made progress in treating the issues giving rise to the dependency, but the exception is to be examined on a case by case basis and some parents seeking to prove a compelling reason to forego adoption will need to show that certain issues (whether the parent’s or the child’s), including those giving rise to the dependency, do not prevent the court from finding that a beneficial relationship exists or that continuing the relationship outweighs the benefits offered by an adoptive home. In this case, where mother’s conduct caused so much disruption, turmoil, and anxiety throughout Caden’s childhood and continuing to the .26 hearing, no reasonable court could have found that the benefit of continuing the parent-child relationship outweighed the benefits of adoption.

II. STATEMENT OF THE CASE

A. Joinder.

The Agency joins in the minor’s summary of the case and facts and

adopts that portion of the minor's Answering Brief.

B. Original petition and detention.

This case began in Marin County, where Marin County Health and Human Services ("Department") had received 47 previous referrals involving mother, Caden, and mother's five older children dating back many years. (1CT 377.)³ Each of mother's other children had been removed due to her chronic substance abuse and untreated mental health issues. (*Ibid.*) The Department had been working with mother and Caden since late 2012, when Caden was just three years old, in a noncourt family maintenance case, offering housing, services, and referrals. (*Ibid.*) Mother was offered a voluntary case plan but refused it, saying "I'm afraid to do a voluntary case because I self medicate when things get too overwhelming." (1CT 378.)

On September 16, 2013, the Department filed a petition, and a first amended petition on the same day, pursuant to section 300, subdivisions (b) and (j). (1CT 429.) The amended petition alleged: (1) mother had a long history of chronic substance abuse, with numerous arrests and extensive involvement with CPS; (2) mother's substance abuse prevented her four-year-old son Caden from addressing his special needs; (3) mother

³ We refer to the clerk's transcript as "CT." The initial volume, containing the file transferred to San Francisco from Marin County, is for the most part in reverse chronological order.

reported to police that she thought about dropping Caden off with a friend and overdosing on Oxycodone; (4) mother failed to provide adequate food, clothing, shelter or medical treatment for Caden, they were sleeping in her car, and mother reported the car was filthy and she was concerned about the safety of the locations where they parked at night; (5) mother did not obtain the necessary treatment to help Caden with problem behaviors and his mental health diagnosis; (6) Caden had witnessed domestic violence between mother and father; and (7) mother's older children had been abused or neglected. (1CT 431-433.)

C. Jurisdiction and disposition.

The Jurisdiction Report described 12 previous referrals in Marin County on Caden alone, from age one through four, involving neglect and physical and emotional abuse. When Caden was 16 months old mother was using methamphetamines, drinking excessively, and was seen angrily pushing and throwing Caden in his crib. (1CT 315.) In 2010, mother signed a contract agreeing to engage in substance abuse treatment. (1CT 316.) A year and a half later, however, when Caden was 35 months old, mother reported she had been smoking 1.5 grams of methamphetamines on a daily basis for the past two years and was depressed. (1CT 316-317.) Six months later mother admitted she had been using on a regular basis with Caden in her care. Mother and Caden were sleeping outside Macy's

on the ground; she declined the Department's arrangements for shelter and a treatment program. (ICT 317.)

Mother's first interaction with the Department had occurred in 1986, when mother and her newborn eldest child tested positive for marijuana and cocaine. (ICT 318.) In the intervening years, mother had lost custody of each of Caden's older five half-siblings, including one for whom parental rights were terminated. (*Ibid.*) Mother's criminal history, generally related to her drug use, includes felony drug convictions. (ICT 319-320.)

Mother told the social workers that people did not understand she did better on methamphetamines than off. (ICT 324.) She said several times that she did not know why her son was taken away and that she did much better when she was on methamphetamines. (*Ibid.*) A few days later, she called the social worker, stating "it's not that I think its ok to use drugs and parent but I think I am a better parent when I am on drugs and speed, yes I do." (ICT 326.) Mother said she had been diagnosed with PTSD and depression but was not on medication and was not receiving mental health treatment. She sometimes drank to help her deal with life stressors. She said she "self-medicated" with methamphetamines. (ICT 325, 327.)

Caden suffered from Disruptive Behavior Disorder and PTSD. His

symptoms included aggression, regression, and emotional dysregulation. (1CT 329.) Mother and Caden had been offered 26 sessions of Parent and Child Interactive Therapy in 2012 but attended only eight before mother was terminated for too many no-shows. (1CT 328-329.)

In the three months after Caden was detained, mother was unable to stay clean, failed to drug test, missed visits with Caden, dropped out of a treatment program, and refused a psychological evaluation. She eventually entered residential substance abuse treatment. (1CT 182-183.) At disposition, the court ordered reunification services for mother, including a psychiatric/psychological evaluation, parenting education, inpatient substance abuse services and random drug testing. (1CT 166-179, 221-222.)

C. Seven months after disposition, Caden is placed with mother in a residential treatment program.

Mother told the social worker she had difficulty remaining sober outside of residential treatment, even after three detoxification programs and six inpatient treatment programs in her past. (1CT 139.) A psychological assessment concluded that mother would need consistent supervision, guidance, and supports to avoid a relapse, particularly after leaving residential treatment. The Department assessed mother would need to engage in intensive therapeutic support in the chemical dependency area for at least a year, with less intensive support thereafter.

(1CT 76-77.) Mother would also need to continue receiving parenting education. (1CT 77.)

By the Six-Month Status Review report Caden had made significant behavioral strides. (1CT 91.) He had moved to a foster home with Ms. H. in February 2014 and had adjusted well; he consistently told the social worker and his mother that he enjoyed living there. (1CT 92.)

According to a report filed by Caden's Court Appointed Special Advocate (CASA) in July of 2014, now five-year-old Caden had transitioned to overnight visits in June at mother's inpatient drug treatment program, with a plan to place Caden with mother in the coming weeks. (1CT 123, 126.) When the overnight visits began Caden showed increasing anger with his foster family. (1CT 121.) Caden's therapist had noted that Caden had difficulty with transitions and needed consistency, and the CASA believed that Caden was struggling with the impending change. (1CT 121, 122.)

On July 14, 2014, the court ordered Caden placed with mother. (1CT 58-63.)

E. Mother completes residential treatment and then relapses; Caden is removed a second time.

Caden continued to reside with mother at the residential substance abuse program as mother celebrated a year of sobriety. (1CT 27, 30.) He

was reported to have developed greater independence, self-control, and creativity. (1CT 28.) He was attending therapy with a child trauma psychologist and learning to cope with the trauma of being removed from his mother. (1CT 29.)

The case was transferred to San Francisco. (1CT 1-12.) A June 2015 status report filed by newly assigned Protective Service Worker Chabrika Bowers reported mother had successfully completed the residential program after 14 months and had obtained supportive housing. (2CT 473, 480.) Mother's therapist reported, however, that it was difficult to devise a treatment plan for mother because she "always presents with a crisis." (2CT 474.)

Caden had finished kindergarten and continued to struggle with class instruction. He was easily overwhelmed and was struggling with building relationships with his peers. (2CT 476.) At a review hearing in July, the court ordered that Caden remain placed with mother and that services continue. (2CT 507-510.)

Mother had tested positive for methamphetamine on June 9, 2015 but denied the dirty test. (2CT 526.) Her providers recommended continued treatment, referred her to NA meetings, and asked her to get a sponsor. Her testing requirements were reinstated. (2CT 526.) After the June test mother had seven normal tests, three dilute tests, and 13 missed

tests (including three missed in July and three in August). (*Ibid.*) Mother herself reported that she relapsed in August. (2CT 522.) Mother had stopped being responsive to Caden's providers once told they would need to disclose her relapse to the Agency. (2CT 528.)

Mother also continued to need help parenting. She became overwhelmed when confronted with a crisis at Caden's school. She threatened a teacher, threatened to spank Caden, and kept him from school. She was overwhelmed by the demands of parenting and was unable to control her emotions, aggressively responding to conflict with threats. (2CT 522.) At a review hearing in January 2016, the court ordered additional services for mother, including an intensive outpatient drug treatment program. (2CT 529, 545-552.)

On June 14, 2016, the Agency filed a supplemental petition pursuant to section 387, alleging that the previous disposition had been ineffective in protecting Caden due to mother's substance abuse and mental health issues. (2CT 565, 567.)⁴ In a Status Review/387 Report filed the same day, PSW Bowers wrote that mother disclosed on January 5, 2016 that she had relapsed using methamphetamine, disclosed another relapse in March, and tested positive for methamphetamines six times between February and May. She missed 18 drug tests between January

⁴ A supplemental petition in an open dependency case seeks to remove the minor from parental custody. (§ 387.)

and May, and also disclosed alcohol abuse. (2CT 372, 638-644.) She enrolled in Family Treatment Court (FTC), but was unable to comply with the conditions of treatment and testing and was discharged. (2CT 575.) She then failed to comply with the conditions of intensive outpatient treatment. (2CT 575-576.) She was considering entering residential treatment again, saying “I just need 30 days to get this stuff out of me and then I will be fine.” (2CT 576.)

Mother frequently cancelled weekly appointments with her therapist, and when she went, she continued to present as being in crisis, requiring de-escalation throughout the sessions. (2CT 574-575.) The therapist reported mother frequently stated she would kill herself if Caden was removed from her, which coincided with an increase in Caden’s own self-harming behaviors. (2CT 574-575.) The Agency requested a mental health assessment for Caden but had to obtain a court order after mother refused to consent. Mother failed to take Caden to his therapy appointments three blocks from her home, repeatedly stating she was too overwhelmed. (2CT 573-574.)

About to enter second grade, Caden was academically behind his peers and had an IEP for Specific Learning Disability. Mother neglected to undertake the work necessary to get Caden to summer school, and then failed to take him to summer school once it was arranged. (2CT 576-577.)

Mother said she wanted Caden, who had just turned seven years old, to understand her substance abuse. (2CT 573.) She said she stayed up late when she was actively using and reported storing drug paraphernalia in the apartment where she lived with Caden. Caden told the social worker that mother kept him awake at night by acting weird and walking up and down. (*Ibid.*)

Caden appeared exhausted, worried, and anxious. (2CT 577.) He was not engaging in class and was aggressive at school. (*Ibid.*) His therapist reported that Caden did not do well when his mother is not stable, and that mother had not been able to maintain stability. There were concerns about his increasing suicidal ideation. (*Ibid.*) Caden was fearful of adults and struggled with trusting others, and mother's inappropriate discussion about the dependency case contributed to his fear of trusting others. (*Ibid.*)

Caden was removed for the second time. He said, "my mommy said CPS just wants to terrify me." He said he wanted to kill himself because he was being removed from his mother and his mother was his spirit. The social worker was concerned that mother lacked boundaries, placing too much responsibility on the boy. (2CT 572-573.) Caden was placed with Ms. H. again and adjusted well to the new placement. (2CT 578, 1CT 132.)

F. Mother's services are terminated.

By July of 2016, mother had disengaged with all of her service providers and had called Caden's providers to discontinue his services. (2CT 634.) She had entered a residential drug treatment program on June 30 but was unwilling to provide the Agency with the necessary releases to speak with her care coordinator or individual therapist. (2CT 635.) Two weeks later, mother called the social worker to say she was thinking of leaving the program in favor of an intensive outpatient program, because she had been clean and sober for three weeks, which she felt was long enough to prove herself. (*Ibid.*)

Bowers reported that Caden had experienced a moment of stability for the school year 2014-2015 while placed with Ms. H., but this changed once he was placed with mother in the summer of 2015. (2CT 635.) Caden's school case manager reported that Caden struggled with classroom work but could not engage with the providers assigned to help him, as he appeared anxious and unable to focus on a task. (*Ibid.*)

In July of 2016, Caden's counsel sought a court order admonishing mother's counsel from contacting Ms. H., suspending mother's telephone and text contact with Ms. H.'s home, and ordering the service providers to refrain from contacting Ms. H. (2CT 660-661, 664.) Ms. H. had given a seven-day notice to remove Caden; his attorney was attempting to avoid

another placement change. (2CT 660, 662.) Caden's counsel wrote Ms. H. was receiving "incessant contact" from mother, well in excess of the court-ordered twice weekly phone call, in an attempt to pressure her into providing long-term care for Caden. (2CT 664.) Ms. H. refused to withdraw the seven-day notice. (3CT 711.)

At the disposition hearing, the parties stipulated that mother would submit on the Agency's reports, and that the Agency would modify its recommendation to state that Caden should remain in foster care. (3CT 684.) The court then sustained the supplemental petition, terminated reunification services, and set the matter for a six-month review hearing. (3CT 684-689, 692-697.)

G. Events leading up to the six-month review hearing.

In a Progress Report in September of 2016, PSW Bowers wrote that Ms. H. had complained about, among other things, mother impulsively calling and failing to abide by the court-ordered schedule, something mother denied. (3CT 711.) Caden was placed in another foster home, in Modesto, where he at first struggled to adapt to the new home's rules and routines but eventually settled in. (*Id.*)

Mother completed her latest residential program on August 30, 2016. The first drug test, three days later, was positive for methamphetamines. (3CT 712.) Mother denied using, but the sample was

retested and confirmed positive. (3CT 810-811.)

Mother and Caden had three hours of supervised visits twice a week, but the Agency asked to have the time reduced. (*Id.*) The visits had deteriorated. Mother struggled to stay focused on Caden's needs and required constant redirection to remain in the room and avoid conversations about the case. (2CT 713.) She also told Caden he would return home by Christmas, despite being told to avoid making promises. (She said that no one could tell her not to tell her son he is coming home.) (2CT 713-714.) The Agency filed a section 388 petition, requesting reduced visitation to three supervised hours per week, and that mother have no calls or texts with Caden or the caregiver unless authorized by the social worker. (3CT 717-718.)

In January of 2017, mother filed a section 388 petition requesting that Caden be returned to her care or further reunification services. (3CT 724.) She declared that she had been consistently engaged in substance abuse treatment, completed a residential treatment program, consistently attended NA/AA meetings, participated in FTC, attended outpatient treatment at the Women's Resource Center, met regularly with her doctor to monitor her ADHD medication, and visited Caden regularly. (3CT 739-741.)

Caden appeared to be struggling with the transition to a new school.

(3CT 792.) His therapist reported he was struggling with accepting his second removal from mother. (*Id.*) Mother continued to discuss the case in front of Caden. (3CT 794.)

The Agency was having difficulty identifying a long-term placement for Caden. His current foster home mentioned an interest in permanency, but, Bowers wrote, “issues had arisen about the child’s relationship with the caregiver being sabotaged by the mother.” (3CT 794.) Caden’s maternal and paternal family members declined long-term placement due to their relationship with mother and father. (*Id.*) Ms. H. also declined. (3CT 794.)

In a report submitted in response to mother’s pending section 388 petition, PSW Bowers reported mother missed drug tests on June 7, 14, 23, July 6 and 14, October 10, 11, 19, November 23, and December 5, 2016. (3CT 810.) She tested positive for methamphetamines on July 5 and 8, and on September 2, 2016. She tested positive for alcohol on November 15. (*Id.*)

Bowers reported that mother continued to make inappropriate comments about the case and about the foster parent during visits, interfering with Caden’s connection to the foster parent and the stability of the placement. (3CT 814.) Mother complained about the foster parent in front of Caden. (*Id.*) She also told Caden “you want to play games all day

and not spend time with mom. Remember I'm the one that takes care of you," to which Caden replied, "you can't take care of me if you can't take care of yourself." (*Id.*) Mother also took time away from the visits to call her providers and attorney. (*Id.*)

A progress report in March of 2017 reported that mother tested positive for methamphetamines on February 24, 2017 but denied using. (3CT 874, 877-878.) She missed six drug tests in January, February, and March. She tested negative eight times in the same months. (3CT 874.)⁵ The court denied mother's section 388 petition. (3CT 895.)

Caden had been moved to a new foster home in February. (3CT 875.) His transition to the new home went well; he asked the foster mother to adopt him if he did not return to his mother. (3CT 875.) The foster parent indicated she was interested. (3CT 875.)

In a progress report filed in April of 2017, PSW Bowers reported that Caden's move to the new foster home was related both to the first home's strict structure and to mother interfering and sabotaging Caden's feelings for the foster parent. (3CT 900.) This was the second report since Caden's most recent removal that "involved mother tampering with the home's stability and causing a placement change." (*Id.*) But Caden liked

⁵ Two reports for the period received later showed that mother had tested positive for methamphetamine on two additional occasions in February and March. (3CT 906, 909.)

his new placement. He met friends in the community and next door. (*Id.*) The foster parent had said they would like to adopt Caden. (3CT 901.)

Mother continued to receive six hours of supervised visits in Modesto through the Foster Family Agency (“FFA”), but she continued to require regular redirection about inappropriate conversations in Caden’s presence and was not interacting with Caden at the visits. (3CT 901, 912-914.) The FFA social worker reported that mother began to appear dysregulated during the trial on her request to reinstate services, and that she threatened to harm Bowers, who she blamed for having Caden removed. (3CT 901, 911.) The FFA expressed concerns about their ability to continue facilitating visitation and for the safety of the visitation supervisor. (3CT 901, 911.)

For the three weeks leading up to the progress report, mother had been inconsistent in her visitation, attending three of the last six visits. (3CT 902.) Caden did not decompensate in placement and his school behavior did not escalate. (*Id.*) Bowers had been meeting with Dr. Alicia Lieberman, the Agency’s attachment-bonding consultant. Dr. Lieberman opined that six hours a week of visitation was interfering with Caden’s time to be with his foster family and establish a healthy relationship. (*Id.*) The Agency believed that a reduction in visitation would allow Caden to better connect with the foster family, who might become Caden’s adoptive

family. (*Id.*)

The report recommended the court set a .26 hearing. (3CT 898, 904.)

H. The court sets the .26 hearing.

The Agency filed an Addendum Report in May of 2017, in advance of the section 366.3 review hearing. (4CT 960.)

Bowers reported on an administrative review held in early May to discuss concerns regarding Caden's contact with his mother and the instability of his placements over the ten months since the latest removal. (4CT 963.) Five Agency representatives, two Foster Care Mental Health clinicians, Dr. Lieberman, Caden's individual therapist Marion Silverman, and the FFA social worker and her supervisor all attended the meeting. The participants agreed that Caden had a connection with his mother but also recognized that the relationship was not healthy and had been sabotaging his stability in placement. (*Id.*) Caden's constant state of arousal leading up to visits with his mother made it difficult for him to settle in a permanent home. (4CT 963.) The review team concluded that Caden is "experiencing the mother's emotional roller coaster." (*Id.*) The team weighed the importance of Caden's continuity of placement and chance for permanency against the continuity of visits and concluded that visits should be reduced. (*Id.*)

Caden had once again received a notice from his placement to have him removed. (4CT 964.) The foster parents “expressed a concern about the involvement of the mother and on-going visitation contact with Caden as being the primary reasons for the child not being able to connect and settle into a permanent home.” (4CT 962.) At Caden’s therapist’s suggestion, the Agency reached out to prior foster homes. Ms. H. was the first contacted and immediately agreed to accept him back. (4CT 964.)

Trying to avoid yet another change in placement, the Agency sought to limit mother’s education rights and keep Caden’s placement and school confidential. Mother had said that she would find Caden wherever he was placed. (4CT 962, 964.)

Mother had been discharged from FTC after she failed to maintain contact with her case manager and disengaged from treatment. (4CT 964.) The Agency had no current drug test results on file, and mother had not attended a treatment group in two months. (*Id.*)

At the contested section 366.3 review hearing, mother testified she had always been a good parent and there was no substance to the reasons she lost custody. She testified: “I get the purpose that I can’t use meth. I don’t get the fact that anyone can show me to be unfit because I use meth.” (4CT 1093.) The juvenile court set a section 366.26 hearing. (4CT 982-983.) The court also reduced visits to once a month and limited mother’s

educational rights. (4CT 984-985.) Mother filed a petition for an extraordinary writ seeking to reverse the court's setting order, the order limiting educational rights, and the order reducing visitation. On August 28, 2017, the writ petition was denied on the merits. (First Dist. Ct. App. case no. A151400, 4CT 1079-1100.)

I. Events leading up to the .26 hearing.

The Agency filed a .26 report on September 5, 2017. Caden was entering third grade. (4CT 1046.) He was placed in special day classes and was also receiving occupational therapy. He received positive reports from his school. (*Id.*)

Caden's visits with mother had been gradually reduced, and since July they had two-hour, monthly visits. (4CT 1050.) Mother had refused to visit Caden for two weeks after receiving the court's order reducing her visitation. (*Id.*) At her August visits, mother said she did not understand why he was not being returned to her care, and attempted to involve Caden in the discussion. (*Id.*) Mother told the visitation supervisor that she spent her days in bed drinking "creamsicles," a mixture of vodka, orange juice and cream. (*Id.*)

Ms. H. reported that Caden randomly would mention missing mother but did not act out and did not linger on the topic when asked about it. (*Id.*) Caden told his therapist he was upset when visits were reduced,

but he did not mention it when he met with PSW Bowers and there were no behavioral indications. (*Id.*) Caden also told his therapist that he wanted to continue to live with his foster family. (4CT 1055.) Bowers wrote that Caden was extremely connected to Ms. H., who had demonstrated her ability to understand and meet his emotional, social and educational needs; and he also had a solid relationship with her partner and two children. (4CT 1050, 1054.) The Agency recommended a 180-day continuance to locate an adoptive home for Caden. Ms. H. was considering adopting him, and a family located through an adoption agency had also stated a strong interest in meeting him. (4CT 1055.)

On November 21, 2017, the Agency filed an Addendum Report recommending that the court terminate parental rights and approve adoption as Caden's permanent plan. (4CT 1127.) Ms. H. wanted to adopt Caden. (*Id.*)

Bowers reported that she had met with Caden at his school and told him that Ms. H would like for her home to be his "forever home" and that she would like to adopt him into her family. Bowers explained that Ms. H. would become his parent and continue to care for him as she did now. Caden responded that would be good and he will stay with Ms. H. until he was big, able to get his own job, and buy his own house. He also asked whether he would be able to see mother. Later that day Caden came home

and told Ms. H. that her home was going to be his “forever home” and she would adopt him. Caden was smiling. Ms. H. stated he was very excited and happy. (4CT 1130-1131.)

When Bowers met with Ms. H. and Caden in their home the next day, she asked how he felt about a “forever home” with Ms. H. He responded, “sort of and it will be good,” but then started to cry and stated that he wanted to live with mother. Bowers explained to him he was not able to return to his mother as she needed to work on herself. Caden became flustered and tearful, and Ms. H. sat on the floor with him and comforted him. He suddenly stopped crying and started talking about Thanksgiving and Christmas with Ms. H. (4CT 1131.)

During the monthly visits, mother continued to struggle with staying focused on Caden. (4CT 1133.) He played alone while mother talked to the visitation supervisor, she questioned Caden about conversations he had with Bowers, and she had aggressive and emotional outbursts in his presence. (*Id.*)

An Addendum Report filed in December reported that the Agency lacked information about mother’s engagement in services, if any. Marin County Child Welfare Services, who was handling Caden’s half-sister Naomi’s case, reported that mother had failed to drug test. (4CT 1142.)

Mother had sent Naomi a disturbing text message that caused the teenager to experience massive anxiety attacks and risk being 5150'd. (*Id.*)

Caden continued to have a strong connection with Ms. H. and her family. (4CT 1143.) Bowers described Caden's relationship with Ms. H. over the past four years, including both placements and the times she visited with him while he was placed with mother. Ms. H. had also met Caden's older sister Naomi and two of his older brothers. (*Id.*) Caden's CASA filed a report describing Caden as very bonded with Ms. H. and the other children in her home. (4CT 1148.)

J. Bonding study.

On September 21, 2017, Dr. Hugh Molesworth authored a bonding study based on his observation of Caden and mother over a five-and-a-half-hour period (spread over two sessions in July and August); his interviews of mother, Caden, Caden's therapist, and a manager at mother's former apartment; and his review of the case file. (Aug. CT 79-81.)

During Dr. Molesworth's observation, Caden and mother were excited to see each other, were physically affectionate with one another, enjoyed each other's company, and told each other they missed each other and loved each other. (Aug. CT 92-93.) Dr. Molesworth asked Caden "how much he missed [mother]," to which Caden responded "is there a number more than a trillion ... that's how much." (Aug. CT 90.) Dr.

Molesworth did not ask Caden about his wishes with respect to adoption, nor did he ask him about his bond with Ms. H. (*Id.*)

Dr. Molesworth opined that Caden is “vulnerable” with a learning disability and PTSD. (Aug. CT 95.) He opined that Caden and mother had a positive bond; that Caden derived substantial emotional sustenance and benefit from it; that mother was at the center of his emotional life; and that if Caden were to lose contact with mother he “would not just have a broken heart, but it is likely the loss would be traumatic, and have a harmful effect on him. While it may not be catastrophic, there is a risk this loss will result in distress and possible regression in his emotional functioning and behavior. It is also likely this distress would be enduring and lead to a life-long psychological wound.” (Aug. CT 95.)

K. Dr. Lieberman’s clinical consultation report.

On January 6, 2018, Dr. Alicia Lieberman authored a clinical consultation report based on her participation in Caden’s case since August. She opined that adoption was the “least detrimental” plan for Caden. (Aug. CT 78.) Dr. Lieberman considered the “strong love” Caden had for mother in the context of the entire history of the case, including mother’s current refusal to drug test and her past interference with Caden’s placements, and concluded that his relationship with mother was a “psychological burden” that “colors the quality of Caden’s attachment.”

(Aug. CT 76-78.) Dr. Lieberman concluded that Caden's worry about mother's welfare, and his feeling of responsibility for his own placement, interfered with his development. (Aug. CT 78.)

Dr. Lieberman acknowledged a permanent separation from mother would be a major emotional challenge, but opined that Caden's bond with Ms. H. and acceptance of her support, as well as the lack of any deterioration in his behavior after the reduction of visits in the summer of 2017, was evidence of his ability to manage this challenge. (Aug. CT 77.) She also opined that Caden's response when he learned Ms. H. wanted to adopt him demonstrated that he feels safest with Ms. H. while continuing to love mother. Ms. H. has a supportive and committed relationship with Caden and reliably meets his physical and emotional needs. (Aug. CT 76.) Caden sees her as an attachment figure and considers her as a "secure base." (*Id.*)

Dr. Lieberman wrote that Caden is a vulnerable child who needs consistent support to manage his cognitive and emotional challenges; a stable placement with a caring and reliable caregiver is imperative to protect his physical and mental health. (Aug. CT 77.) Dr. Lieberman referenced research showing an association between exposure to four or more types childhood adversities (living with a parent with mental health and substance abuse issues; repeated and prolonged separation from a parent; witnessing domestic violence; and homelessness) and an "exponentially higher" risk for

psychiatric and medical problems. (Aug. CT 77.) For children exposed to such risks, safe and predictable caregiving is recommended. (*Id.*)

L. The Section 366.26 hearing.

The .26 hearing began on January 22, 2018 and continued over five non-consecutive sessions. Mother subpoenaed Caden, who was eight years old at the time, to testify; Caden's counsel moved to quash the subpoena and the motion was granted. (1/22/18 RT 209-213.)⁶

1. Testimony of PSW Chabrika Bowers.

PSW Bowers testified that Caden is significantly behind academically and remains in special day classes. (1/22/18 220.) Mother continued to have monthly supervised visits. (1/22/18 231.) When mother refused to visit Caden after her visitation was reduced, she later said she did it to get Caden to act out. (1/22/18 232-233.) Though Caden missed mother after visits were reduced, there were no behavioral changes. (1/22/18 RT 245 290-291.)

Bowers described the meaningful relationship shared by Caden and Ms. H. (1/22/18 RT 248-249.) She testified that the Agency was concerned that a legal guardianship would not protect Caden's security and stability over the next ten years. (1/22/18 330-331.)

⁶ We refer to the reporter's transcripts as "RT" preceded by the hearing date.

2. Testimony of Dr. Alicia Lieberman

Dr. Lieberman testified that she has a Ph.D. in psychology and has been a licensed psychologist since 1977. (1/29/18 RT 425.) She is a professor of psychology at the UCSF Department of Psychiatry, where she directs the Child Trauma Research Program – a program she founded in 1996 specializing in assessment and treatment of children exposed to trauma in the first years of life. (1/29/18 RT 428.) She provides clinical supervision at UCSF, which includes supervision of bonding studies, and provides psychological services for juvenile dependency for both parents and children. (1/29/18 RT 429, 447.) She has been published 70 times, and she has been designated an expert in court in the areas of attachment, bonding, trauma, and treatment of trauma-related disorders in parents and children. (1/29/18 RT 423, 424.) Dr. Lieberman's January 6, 2018 report was admitted into evidence. (1/29/18 RT 425, 432.)

Dr. Lieberman testified that her work on Caden's case began in August of 2016. Since then she had attended weekly case meetings; attended about five administrative review meetings; met individually with the child welfare worker and her supervisor; and reviewed the file. (1/29/18 RT 430, 438.) She also had an hour-long conversation with Caden's therapist in April of 2017. (1/29/18 RT 431, 436.) She did not meet Caden or mother but received information about them from the ten to

twelve service providers who worked directly with Caden or mother and who attended the administrative reviews. (1/29/18 RT 435, 447.)

Dr. Lieberman elaborated on her January report. It was her clinical judgment that Caden's worry about mother negatively affected his development. (1/29/18 RT 431, 433.) While Dr. Lieberman agreed with Dr. Molesworth's opinion that Caden and mother have a very strong emotional bond, and Caden clearly loves mother, she recommended adoption as the least detrimental and most desirable option for him. (1/29/18 RT 431, 433.)

Dr. Lieberman testified that the loss of parent can be detrimental, but one of protective factors against that loss is the availability of a parent who is able to provide safety, continuity and predictability. (1/29/18 RT 446.) She also testified that it is possible to be distressed and sad and grieve for loss, without becoming depressed or without developing a psychiatric condition. What makes the difference is the child's ability to acknowledge his or her grief and sadness with a person who supports, empathizes and acknowledges the legitimacy of his sadness. (1/29/18 RT 448.) Dr. Lieberman testified that permanent loss is a very complex issue, but Caden is at risk of constant exposure to an attachment figure who models disorganization, emotional dysregulation, and behavior that is emotionally overwhelming. (1/29/18 RT 448.)

3. Testimony of Dr. Hugh Molesworth

Dr. Molesworth testified that his bonding study was the third one he had ever performed. (1/29/18 RT 454, 455.) His training on bonding studies was based on family law issues, where out-of-home removals were not an issue. (1/29/18 RT 457.) Dr. Molesworth has been a clinical psychologist for 17 years, specializing in child development assessment and forensic psychology. (1/29/18 RT 451.) He has been the clinical director of Children's Psychotherapy Project for two years, specializing in providing psychotherapeutic services to children in foster care, and he has been a preschool consultant for 15 years. (1/29/18 RT 452.) He has been designated as an expert in court in the areas of juvenile delinquency, child development, assessment, and clinical psychology and bonding studies. (1/29/18 RT 454.) Dr. Molesworth's bonding study was admitted into evidence. (1/29/18 RT 460, 462, 470.)

Dr. Molesworth testified that his observations of Caden and mother in July and August of 2017 led him to opine that mother and Caden had a positive and substantial bond. (1/29/18 RT 462-465.) Caden expressed very loving feelings towards mother, expressed missing mother, was physically affectionate with her, enjoyed being with her, turned to her for physical comfort when he hurt himself, and was sad when saying good-bye. (1/29/18 RT 462-463.) Dr. Molesworth also opined that because

mother was very important to Caden, loss of contact with her would be harmful to him. (1/29/18 RT 478.) He would have anxiety and a harder time at school; he “might seek her out” when he turned 18 years old; he could be confused about his identity; and possibly have the feelings of abandonment that go with losing a parent. (1/29/18 RT 475-476, 482.)

4. Mother’s testimony.

When asked whether she has been high while her daughter Naomi was in her care, mother testified, “Have I been high? I guess if, if you want to call it high. I don’t for me I don’t feel like I get high from using. Because I never feel any different really.” (1/31/18 RT 648.) When she and Caden were living in a car, she used drugs to make sure Caden was safe. (1/31/18 RT 653.) Mother testified she loves her son more than anything and she has not been a bad parent. (1/31/18 RT 654.) She admitted that she “made lots of unfounded threats” about Caden’s foster homes. (1/31/18 RT 657.) She admitted she agreed not to contact Ms. H. but then texted her anyway, “Because that’s my child.” (1/31/18 RT 662.) She also admitted that she threatened the social worker with physical harm during visits (1/31/18 RT 718-719) and that she threatened Caden’s teacher and vice principal (1/31/18 RT 664). Mother also agreed that Caden loves Ms. H., Ms. H. loves Caden, and Caden feels safe with Ms. H. (1/31/18 RT 624-625.)

5. The juvenile court's findings.

On February 8, 2018, after the close of evidence and argument, the court found Caden to be adoptable. (2/8/18 RT 24.) The court then made specific findings. Among them, that mother “does stand in a parental role to her son” and that her visits have “continued the significant emotional attachment that Caden and his Mother did create prior to his removals.” (2/8/18 RT 25.) The court found that mother “has substantially complied with her case plan and although unsuccessful at times she has continued her efforts to maintain her sobriety and address her mental health issues.”

(*Id.*) The court further found that

Caden loves his Mother. And he does derive benefits from his visits with her. The record does show that while he has a strong developing relationship with Ms. [H.] that relationship in and of itself does not negate the harm that Caden would experience from the loss of his most significant emotional relationship. And that is with his Mother.

(*Id.*)

...

The Court's review of the clinical consultation report and bonding studies submitted by Doctors Lieberman and Mulsworth [sic] respectively, also demonstrates that [mother] and Caden have a consistent and positive relationship. The Court finds it noteworthy that Dr. Lieberman did not interview or meet Caden before offering opinions with respect to the nature of that bond.

...

The Court finds that severing Caden's relationship with his Mother would deprive Caden of a positive emotional attachment and greatly harm Caden.

Accordingly the Court does find based upon the foregoing that mother has established the continuing beneficial relationship exception determination of parental rights and that that does apply in this case and that that relationship does outweigh at this time any prospective adoption.

(2/8/18 RT 25-26; 4CT 1199-1200.)

The court continued the .26 hearing to determine Caden's permanent plan. The Agency was asked to meet with Ms. H. to ascertain whether she would accept legal guardianship. (4CT 1198-1200; 2/8/18 RT 26:20-27:5).

L. Ms. H. declines legal guardianship.

On March 12, 2018, the Agency filed an addendum report stating that Ms. H. was not willing to agree to a legal guardianship for Caden, because it lacked the protections of adoption. Ms. H. told the Agency her family could not handle mother's demands for visiting Caden, and she was concerned that mother was going to continue to try to disturb Caden's placement. Due to mother's erratic and impulsive threats over phone calls in 2015 and 2016, Ms. H. was also fearful for her family's safety. (4CT 1214-1215.) The court then ordered Caden to remain in foster care. (4CT 1220.)

M. The 366.26 order is reversed.

Caden and the Agency each appealed. On April 9, 2019, the Court of Appeal unanimously reversed the order declining to terminate parental rights. (*In re Caden C.* (2019) 34 Cal.App.5th 87, 116 (*Caden C.*))

III. ARGUMENT

A. The Beneficial Relationship Exception Applies Only in The Most Extraordinary of Cases.

“ ‘The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful.’ ” (*In re Celine R.* (2003) 31 Cal.4th 45, 53, quoting *In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

The .26 hearing, held after the juvenile court has either terminated or bypassed reunification services, “is designed to protect children’s ‘compelling rights . . . to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.’ ” (*In re Celine R.*, *supra*, 31 Cal.4th at 52–53, quoting *In re Marilyn H.*, *supra*, 5 Cal.4th at 306.)

At a .26 hearing “the court may order one of three alternative plans: (1) adoption (necessitating the termination of parental rights); (2) guardianship; or (3) long-term foster care.” (*In re J.C.* (2014) 226

Cal.App.4th 503, 528, citing § 366.26, subd. (c)(1), (c)(4)(A).) “ ‘Adoption is the Legislature’s first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.’ ” (*In re Celine R.*, *supra*, 31 Cal.4th 45, 53, quoting *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*)) Once a court has terminated reunification services, and once it has determined that the child is adoptable, the decision to terminate parental rights is “relatively automatic.” (*Cynthia D. v. Super. Ct.* (1993) 5 Cal.4th 242, 250.)⁷

A parent seeking a plan that is less stable and impermanent – guardianship or foster care – must show the termination of parental rights would be detrimental under one of the exceptions listed in section 366.26. (*In re J.C.*, *supra*, 226 Cal.App.4th at 528.) Among these is the beneficial relationship exception, under which “[t]he court finds a compelling reason for determining that termination would be detrimental to the child”

⁷ “The Legislature has decreed . . . that guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them. In decreeing adoption to be the preferred permanent plan, the Legislature recognized that, “Although guardianship may be a more stable solution than foster care, it is not irrevocable and thus falls short of the secure and permanent placement intended by the Legislature.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419, citation omitted.)

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 exception has been judicially construed to be a three-prong test, in which the court must determine: 1) whether the parent maintained regular visitation; 2) whether a beneficial parental relationship exists; and 3) whether there is a compelling reason to forego adoption because the benefit the child would gain from continuing the parent-child relationship outweighs the benefits the child would receive from adoption. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646-647 (*Breanna S.*); *In re Logan B.* (2016) 3 Cal.App.5th 1000, 1009-1013.) The parent has the burden of proving that the exception applies. (*Breanna S.* at 646; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

“The plain language of section 366.26, the purpose and the history of the statute, and prior case law” all demonstrate that the benefit from continuing a parental relationship must be weighed against the child's interest in adoption. (*In re Logan B., supra*, 3 Cal.App.5th at 845-846.) “Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*Breanna S.*,

supra, 8 Cal.App.5th at 646, quoting *Jasmine D.*, *supra*, 78 Cal.App.4th at 1350.)

B. The Beneficial Relationship Exception Has Three Prongs.

(1) The first prong – visitation.

As explained by the court below, the first prong is relatively straightforward. “[F]or purposes of the beneficial relationship exception, ‘[r]egular visitation exists where the parents visit consistently and to the extent permitted by court orders.’ ” (*Caden C.*, *supra*, 34 Cal.App.5th at 104, quoting *In re I.R.* (2014) 226 Cal.App.4th 201, 212.)

(2) The second prong – the beneficial relationship.

The second prong, asking whether the parent-child relationship is sufficiently “beneficial” to qualify for the exception, is more complicated. In *Autumn H.*, the court construed the “benefit” specified by subdivision (c)(1)(B)(i) 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. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the 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 575.)

The parent-child relationship must be ‘parental.’ “No matter how loving and frequent the contact, and notwithstanding the existence of an ‘emotional bond’ with the child, ‘the parents must show that they occupy “a parental role” in the child’s life.’ ” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621, citations omitted.)

Interaction between natural parent and child will always confer some incidental benefit to the child. The 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. [Citation omitted.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.

... The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. 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.

(*Autumn H.*, *supra*, 27 Cal.App.4th at 575–576.)

In *In re Casey D.* (1999) 70 Cal.App.4th 38, (like *Autumn H.*, decided by the Fourth District, Division One), the court wrote: “The

Autumn H. standard reflects the legislative intent that adoption should be ordered unless exceptional circumstances exist, one of those exceptional circumstances being the existence of such a strong and beneficial parent-child relationship that terminating parental rights would be detrimental to the child and outweighs the child's need for a stable and permanent home that would come with adoption.” (*Id.* at 51.) In *Jasmine D.*, the First District wrote, “a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at 1350.)

(3) The third prong – a compelling reason.

Assuming a sufficiently parental and beneficial relationship exists, the third prong of the exception requires the parent to prove that there is a “compelling reason to forego adoption” due the existence of that relationship. As explained by *Jasmine D.*, the Legislature emphasized the *exceptional* nature of the subdivision (c)(1) circumstances “by revising the statute in 1998 to require the court to find not only that one of the listed circumstances exists, but also that it provide ‘a compelling reason for determining that termination would be detrimental to the child.’ [Citation.]

This amendment . . . makes it plain that a parent may not claim entitlement to the exception [] simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at 1349; see also *In re Logan B.*, *supra*, 3 Cal.App.5th at 845 [same].)

C. The Hybrid Standard of Review Governs Appellate Review of The Beneficial Parental Relationship Exception to Adoption.

The Agency agrees with mother that the hybrid standard of review first announced in *Bailey J.* is the appropriate standard of review. (Mother’s Opening Brief (“MOB”) at 35.) The Court of Appeal applies the substantial evidence standard to review of the first and second prongs (regular visitation and the existence of a beneficial parental relationship, respectively), and the abuse of discretion standard to the third prong (determination of whether the existence of a beneficial parental relationship presents a compelling reason for overriding the statutory preference for adoption). (*In re Bailey J.*, (2010) 189 Cal.App.4th 1308, 1315 (*Bailey J.*); *In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.) As explained by the court below:

...a juvenile court’s determination whether such a relationship provides a compelling justification for forgoing adoption “is based on the facts but is not primarily a factual issue.” (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.) Rather, it is “a ‘quintessentially’ discretionary decision, which

calls for the juvenile court to determine the importance of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption.” (*Ibid.*; see *Jasmine D.*, at p. 1351.) Intrinsic to a balancing of these interests is the exercise of the court’s discretion, properly reviewable for abuse. (*In re E.T.* [(2018) 31 Cal.App.5th 68], at p. 76; *Bailey J.*, at p. 1315.)

(*Caden C.*, *supra*, 34 Cal.App.5th at 106.) As mentioned above, however, the Agency disagrees with mother’s argument regarding the Court of Appeal’s application of the abuse of discretion standard to the facts of this case.

D. The Court of Appeal Applied the Correct Standard and Arrived at the Correct Result.

It has often been said, as mother did, that “[t]he 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.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319, citations omitted.) But trial court discretion “is not ‘unfettered’ ” (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275, citation omitted), and it “is not unlimited” (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355). The court’s discretion is “but a legal discretion, which is subject to the

limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.’ ” (*Id.* at 355, quoting 6 Witkin (2d ed. 1971) Appeal, § 244, p. 4235.) “A discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order.” (*Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124–1125.) A trial court “would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. (*Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 405.) In this case, the trial court based its decision on a both a clearly erroneous assessment of the evidence and an erroneous view of the law. As the Court of Appeal correctly assessed, the trial court not only misapprehended the facts, it also failed to ask the right question.

The trial court’s findings indicate that it misunderstood the test to be applied, skipping over the third prong entirely. The court concluded its recitation of its findings by stating:

The Court finds that severing Caden’s relationship with his Mother would deprive Caden of a positive emotional attachment and greatly harm Caden.

Accordingly the Court does find based upon the foregoing that Ms. Coggins has established the continuing beneficial relationship exception determination of parental rights and that that does apply

in this case and that that relationship does outweigh at this time any prospective adoption.

(2/8/19 RT 26; 4CT 1209-1210.)

By jumping from a finding that terminating parental rights would “would deprive Caden of a positive emotional attachment” (that is, a beneficial relationship)⁸ to a determination that mother had established the beneficial relationship exception, the court skipped over the third prong, omitting consideration of whether there was a “compelling reason” to ignore the statutory preference for adoption. As the Court of Appeal noted below, “The juvenile court’s bare assertion that the ‘relationship [between Caden and mother] outweighed any prospective adoption’ sheds no light on how the court balanced these competing detriments.” (*Caden C.*, *supra*, 34 Cal.App.5th at 113.)

The Court of Appeal also wrote that “[i]n the absence of any explanation, we look to the evidence as a whole to ascertain if it supports the juvenile court’s determination.” (*Caden C.*, *supra*, 34 Cal.App.5th at 113.) Where the trial court has not made a finding on a necessary element required for it to make its “quintessentially discretionary decision” (determining “the importance of the relationship in terms of the

⁸ As explained in Appellant’s Opening Brief in the Court of Appeal, the Agency disputes whether the finding on the second prong was supported by substantial evidence here. (AOB 71-80.)

detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption” (*Bailey J., supra*, 189 Cal.App.4th at 1315)), an appellate court reviewing for abuse of discretion will need to review the record to determine whether the trial court’s exercise of its discretion was premised on “an erroneous view of the law or on a clearly erroneous assessment of the evidence.” (*Cooter & Gell v. Hartmarx Corp., supra*, 496 U.S. at 405.) The Court of Appeal performed that review and properly determined that the trial court erred.

Among other things, the juvenile court improperly balanced the “strong developing relationship” Caden shared with Ms. H. against the bond he shared with mother, concluding that the strength of his relationship with his foster parent would “not negate” the harm he would experience from the loss of his natural parent.⁹ (2/8/18 RT 25.) But comparing Caden’s relationships with his natural and foster mothers ignored the need to balance “the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.” (*Autumn H., supra*, 27 Cal.App.4th at 575.) It is not the *specific* new family that is to be judged, but the security and sense of belonging that *a* new family – his adoptive

⁹ The court stated: “The record does show that while he has a strong developing relationship with Ms. [H.] that relationship in and of itself does not negate the harm that Caden would experience from the loss of his most significant emotional relationship. And that is with his Mother.”

family – will confer if parental rights are terminated. As the Court of Appeal explained, “The question is not, as the court’s findings seem to imply, whether mother’s parental bond trumped the bond Caden shared with his current caregiver. It is instead an inquiry into whether mother’s bond with Caden was such a positive influence on his young life that an uncertain future is an acceptable price to pay for maintaining it.” (*Caden C.*, *supra*, 34 Cal.App.5th at 113, citing *In re Anthony B.* (2015) 239 Cal.App.4th 389, 396 [“The question is whether that relationship remained so significant and compelling in [the child’s] life that the benefit of preserving it outweighed the stability and benefits of adoption.”].)

In addition to misapprehending the legal task before it, the trial court found that mother had “substantially complied with her case plan” and “has continued her efforts to maintain her sobriety and address her mental health issues.” (2/8/18 RT 25.) Neither of these statements could have been further from the truth. Mother did not, of course, “substantially comply with her case plan.” Having denied mother’s petition for an extraordinary writ on the order setting the .26 hearing, the Court of Appeal was aware of the facts of this case and understood that the trial court was simply wrong on this point. (4CT 1079-1100.)

More importantly, the record of mother’s conduct between Caden’s second removal in June of 2016 and the .26 hearing in February of 2018

show anything but 'continued efforts' to maintain her sobriety. Instead, the record shows that her engagement in a new round of substance abuse treatment was slow to start (3CT 809) and extremely short-lived (2CT 712). There is no indication that mother attended any treatment after March of 2017. She had numerous positive and missed drug tests during this period. (3CT 810-811,874, 877-878, 900, 906, 909.) At the .26 hearing itself, mother made clear that she used drugs while she was with her children and would continue to do so. (1/31/18 RT 648.) And, mother continued to exhibit behaviors indicating her mental health was not stable (e.g. refusing to visit Caden after her visits were limited to get him to act out). The Court of Appeal addressed the trial court's factual error:

There is thus *no* evidence in the record that mother attempted to maintain her sobriety or seek treatment to address her addiction and mental health issues in the 10 months prior to the permanency planning hearing and, indeed, the clear implication is that mother was, again, actively using. Equally concerning, mother's recent statements reflected the same lack of awareness about the consequences of her substance abuse that she had demonstrated at the beginning of this case. At the six-month postpermanency review in May 2017, she testified: " 'I get the purpose that I can't use meth. I don't get the fact that anyone can show me to be unfit because I use meth.' " (*C.C. v. Superior Court, supra*, A151400.) More recently, she testified repeatedly at the permanency planning hearing that, while she was an addict, her drug usage did not negatively impact her ability to parent Caden.

(*Caden C.*, *supra*, 34 Cal.App.5th at 111, emphasis in original.) Notably, the Court of Appeal was focused on mother's conduct "in the 10 months prior to the permanency planning hearing," the period between Caden's second removal and the .26 hearing, after reunification services had terminated. For a juvenile court charged with determining whether there is a compelling reason to find that an uncertain future with a natural parent outweighs the benefit of an adoptive home, such a clear error of fact bearing on a key point – the uncertainty of that future – demonstrates an abuse of the court's discretion.

Further, the trial court also mistook the facts when it misunderstood or misconstrued the nature and purpose of Dr. Lieberman's report. The court mistakenly balanced Dr. Molesworth's report against Dr. Lieberman's report, as if they were competing opinions on the same issue. They were not. Dr. Molesworth testified that mother and Caden shared a parental bond, and that Caden would suffer if it were severed. (1/29/18 RT 463-465.) Dr. Molesworth's sole task was to examine the nature of the bond. He was not asked to opine on the risk of harm from severing the bond when weighed in comparison to the loss of the permanent adoptive placement. (1/29/18 RT 502-503.)

In contrast, Dr. Lieberman did not perform a bonding study, and was not asked to do so, but testified on the issue of whether the nature of

Caden's relationship with mother outweighed the benefit of adoption. (1/29/18 RT 431-434.) She testified the benefit of adoption, particularly by a prospective parent with whom Caden shared a nurturing bond, outweighed the detriment he would suffer if his relationship with mother was severed. (1/29/18 RT 431-434, 446-448.) Dr. Lieberman acknowledged the existence of the bond but concluded that "adoption is the least detrimental and most desirable alternative for Caden." (1/29/18 RT 431.) The trial court did not acknowledge Dr. Lieberman's uncontested opinion, because the court did not properly consider the third prong of the exception. Again, a juvenile court is charged with determining the importance of the beneficial relationship in terms of the detrimental impact that its severance can be expected to have on the child *and to weigh that against the benefit to the child of adoption.* Such a clear error of fact bearing on a key point – weighing the detrimental impact of severance against the benefit of adoption – again demonstrates an abuse of the court's discretion.

The Court of Appeal did not engage in an improper weighing of the evidence. It performed its duty to review the record to determine whether the trial court had exercised its discretion appropriately. The clear result, based on the trial court's erroneous view of the law *and* clearly erroneous assessment of the evidence, is that the trial court erred.

E. Application of The Exception Requires A Case by Case Examination; While Progress in Addressing The Issues That Led To Dependency is Not Necessary to Prove the Exception in Every Case, A Court Must Not Be Precluded From Considering All Relevant Evidence When Determining Whether a Relationship is “Beneficial” and, if it is Beneficial, Whether There is a Compelling Reason to Forego Adoption.

Contrary to mother’s argument, there is no “recent trend” by appellate courts to consider a parent’s efforts in addressing the problems leading to the dependency when assessing the applicability of the beneficial relationship exception. (MOB 46.) Mother’s argument is a contrived attempt to require courts to ignore crucial evidence that might prevent application of the exception.

As set out above, *Autumn H.* construed the statutory language “benefit from continuing the relationship” (§ 366.26, subd. (c)(1)(B)(i)) to mean that the “the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.” (*Autumn H.*, *supra*, 27 Cal.App.4th at 575.) The “exception must be examined on a case-by-case basis,” considering the many variables affecting the bond, including “the ‘positive’ or ‘negative’ effect of interaction between parent and child” and “the child’s particular needs.” (*Id.* at 575-576.)¹⁰ One can easily

¹⁰ A Westlaw “Citing References” search for *Autumn H.* returned 4,208 appellate cases (published and unpublished) as of its 25th anniversary in

imagine a case in which a mother whose untreated substance abuse has resulted in her child's removal on recurring occasions, so that the child, already suffering from PTSD, lives in a constant state of worry that he will lose his mother again. How can a court examine the positive *and negative* effect of their interaction *without* acknowledging mother's inability to overcome the issues giving rise to the dependency? Should the court be precluded from considering whether the mother's neglect affected the nature of her relationship with her son? If the mother's substance abuse continues after reunification services are terminated, or if the mother is unwilling or unable to acknowledge the harm inflicted on her child by the roller coaster of removal, residential treatment, recovery, and relapse, should the court be precluded from considering the likely effect on her son? What if the child is likely to re-experience the trauma of loss each time his mother relapses, or will be unable to develop healthy relationships due to constant fear of losing his mother? In any of these situations, and

August of 2019, of which 3,720 cases cited to the balancing test referenced above. (The search returned 80 published cases in the same period, of which approximately 74 cited to some portion of the balancing test and statutory construction cited above.) No case, published or unpublished, disagreed with the *Autumn H.* court's construction of the statutory language.

A Westlaw legislative history search for section 366.26 returned 29 statutory amendments in the 25 years since *Autumn H.* was decided, with no change to the "benefit from continuing the relationship" language (now codified at subdivision (c)(1)(B)(i)).

many more, the juvenile court needs to consider the parent's progress in addressing the issues.

Mother points out:

By the time the permanency planning phase arises, there have been "multiple specific findings" regarding the parent's fitness to regain custody and their efforts at rehabilitating and achieving fitness. (*Cynthia D. v. Superior Court, supra*, 5 Cal.4th at p. 253.) For this reason, during permanency planning, the juvenile court no longer concerns itself with parental inadequacies, and the questions of whether further efforts at reunification and/or return of the child to parental custody are not even considered at a section 366.26 selection and implementation hearing. ([Citations]; *Cynthia D. v. Superior Court, supra*, 5 Cal.4th at p. 254.)

(MOB 49-50.) This is entirely correct, *except*, as this Court stated in *In re Zeth S.* (2003) 31 Cal.4th 396, "[t]he one exception is when a colorable claim that the so-called benefit exception should be applied is raised at the termination hearing, because under the second prong of the benefit exception, the trial court at such a hearing must inquire into whether the minor would benefit from a continuing relationship with the parent or parents whose parental rights stand to be terminated." (*In re Zeth S.*, 31 Cal.4th at 412, fn. 9.) While the Court's statement may be dicta, it represents a longstanding recognition that the juvenile *does* concern itself with "parental inadequacies" when considering the exception.

Review of the published cases applying the exception demonstrates that it is not always possible or necessary to separate the issues leading to the dependency from consideration of the nature of the parent/child relationship, and it has been this way since *Autumn H.* For example, *In re Beatrice M.*, decided just months after *Autumn H.*, affirmed an order terminating parental rights where father had been incarcerated and mother in the depths of addiction for most of the young children's lives. Issues leading to the dependency bore directly on the nature and quality of the parent-child relationship, and the court found that the children did not know their parents as 'parents.' (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at 1418-1419.)

Similarly, *In re Teneka W.* reversed application of the exception in a case where "[t]he relationship was permanently marred by [father's] decision to kill the minors' mother." (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 729.) The murder and a family history of violence was the basis for the dependency (*id.* at 724), and "the father's history of family violence and the expert testimony regarding its probable effect on these minors" was the basis for reversal (*ibid.*).

In re Brittany C. found that mother had failed to demonstrate her child would benefit from continuing the relationship; mother had a substance abuse problem and "waited far too long to take the necessary

steps towards recovery.” (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.) As a result, and also because mother was incarcerated during part of the reunification process, the child “did not see her needs being met by [mother] in a parental role.” (*Ibid.*) Mother’s failure to engage in services affected the nature and quality of the parental relationship.

Jasmine D., decided in 2000, affirmed an order terminating parental rights where services had been terminated after mother failed to participate in drug treatment, failed to obtain housing, had no employment or other resources to meet her daughter’s needs, and appeared to be still using drugs. (*Jasmine D., supra*, 78 Cal.App.4th at 1338.) The Court of Appeal wrote “It requires little discussion to conclude the court did not abuse its discretion in this case. The benefit of a stable, permanent adoptive home for Jasmine clearly outweighed the benefit of a continued relationship with [mother], who despite her successful visitation record had made no steps toward overcoming the problems leading to Jasmine's dependency on the juvenile court.” (*Id.* at 1351-1352.)

In re Clifton B. declined to reverse an order terminating parental rights where father was able to show seven months of sobriety, which, “while commendable, was nothing new.” (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 423.) Father had a long history of “periods of sobriety alternated with recurring drug use.” (*Ibid.*) He did not begin to stay clean

until six months after his children were detained, and then relapsed after eight months. The trial court had acknowledged the risk of harm to the minor from severing the parental relationship, but balanced the potential benefit of an adoptive home “against the risk that returning him to [father] would result in another disruption in his life, further eroding his ability to develop trust and to bond with others.” (*Id.* at 425.)

These are but a few of the many cases in which appellate courts have held that the trial court appropriately acknowledged, or inappropriately failed to acknowledge, the parent’s progress in addressing the issues giving rise to the dependency. These are not recent cases, but recent cases are no different. (See, e.g., *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1304 [among other things, mother’s “drug abuse is evidence continuing the parent-child relationship would not be *beneficial*” (emphasis in original)]; and *Breanna S.*, *supra*, 8 Cal.App.5th 636, 648 [“...in balancing the benefit to [the children] of adoption and the possible detriment from terminating their relationship with their mother, the juvenile court properly expressed concern over the continuing violence that characterized [mother]’s relationship with [father], the very reason that dependency jurisdiction was exercised in the first place.”].)

In *Breanna S.*, like *In re Clifton B.*, the court’s focus was not so much on how the parent’s past issues affected the nature of the parental

relationship, as on how the present and likely future issues would affect the minor. Whether it is continuing substance abuse, continuing domestic violence, untreated mental illness, or any other issue likely to affect the child's well-being, a court would be derelict in its duties to the dependent child if it failed to take the parent's progress into account when considering whether an uncertain future with the parent in the child's life outweighs the security of adoption.

Mother also contends that requiring the parent to show progress renders the exception "meaningless," because a parent who has failed to reunify cannot prove the exception. (MOB 57.) This is simply wrong. First, there will be cases in which the parent can assert the exception without showing progress in addressing the issue leading to the dependency, simply because such a showing is not relevant to determination of the exception. For example, where the issues giving rise to the dependency first developed later in the minor's childhood, or after the child had lived with the parent for many years, the relationship may be so developed that it presents a compelling reason to forego adoption despite the persistence of the issues. The "effect" of an older child's interaction with the natural parent may not be as "negative," because the older child may not have suffered trauma from being removed in the way

that a younger child might have, or may simply not need the level of emotional support that a younger child might require.

In addition, there will be cases, such as *In re E.T.* (decided by the First District just four months before *Caden C.*), in which a parent fails to reunify but is nonetheless able to assert the exception. (*In re E.T.*, *supra*, 31 Cal.App.5th at 77.) Despite being bypassed for reunification services, a mother with a history of mental health issues and drug addiction participated in treatment programs on her own and consistently tested negative for drugs. She also “took classes in life skills, parenting, cognitive behavior, criminal thinking, anger management and children of alcoholics and addicts,” again on her own. (*Ibid.*) The court also noted the evidence of “the insight she has into her own development and the love and care she has for her children.” (*Ibid.*) The Court of Appeal found that mother had demonstrated that her children would benefit from continuing the relationship. (*Ibid.*)

Contrary to mother’s argument, the purpose of the statute is not frustrated by acknowledging that there will be times in which the issues giving rise to the dependency have either prevented a parent’s relationship with their child from rising to the level of a “beneficial relationship,” or have so damaged the relationship so that it no longer rises to such level. Nor would the purpose of the statute be frustrated by acknowledging that

some ongoing issues prevent a court from finding the existence of the relationship so compelling as to override the safety and security of adoption.

In sum, demonstration of a beneficial relationship and a compelling reason to deprive a child of the security and stability of an adoptive family will of necessity require a comprehensive view of the circumstances. Evidence of progress in addressing the issues that led to the dependency is not necessarily a prerequisite to assert the exception, but neither should a court ignore issues that affect the nature and quality of the parental relationship, or issues that would prevent the court from determining that the beneficial relationship is compelling enough to deprive the child of the opportunity offered by an adoptive family.

IV. CONCLUSION

Any parent seeking to overcome the statutory preference for adoption must show that the benefit to the child from continuing the parent-child relationship outweighs the permanency and stability of adoption. No juvenile court considering the issue should be prohibited from considering a parent's harmful conduct, untreated mental illness, untreated substance abuse, or any other issue affecting a determination of whether the relationship is "beneficial," or, if it is beneficial, whether the relationship presents a compelling reason to deprive a child of the permanency and

stability of adoption. Application of the exception involves consideration of many variables, and there will be times when the parent's progress in addressing the issues, whether before or after reunification services are bypassed or terminated, will not be relevant to the court's determination. But there are times, as in this case, where they cannot be ignored.

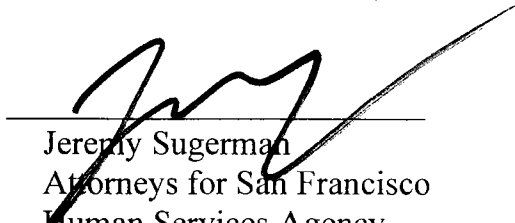
Dated: October 7, 2019

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE
(California Rules of Court, rule 8.204(c)(1).)**

I certify that this brief complies with Rule 8.204, because it uses proportionately spaced font with a typeface of 13 point and contains 13,970 words, other than those words excepted by California Rules of Court rule 8.204(c)(3).

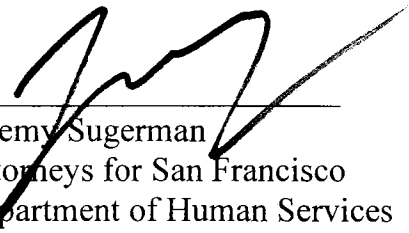
To assess the number of words, I utilized the word count function of Microsoft Word program with which this brief was drafted.

Dated: October 7, 2019

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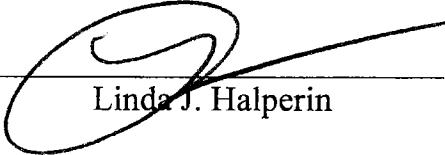

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SERVICE LIST
In re Caden C. S255839

I am over the age of 18 years and not a party to this action. My business address is 1901 Harrison Street, 14th Floor, Oakland, California, 94612. On October 7, 2019, I served the attached **APPELLANT'S ANSWERING BRIEF ON THE MERITS**, addressed as follows:

<u>Via Email:</u>	<u>Via U.S. Mail</u>
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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 and that this Declaration was executed on October 7, 2019, at San Francisco, California.



Linda J. Halperin