S267429

IN THE SUPREME COURT OF CALIFORNIA

In re D.P.,
A Person Coming Under the Juvenile Court Law.

THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

T.P.,

Defendant and Appellant.

From an Unpublished Decision by the Court of Appeal
Second Appellate District, Division Five, Case No. B301135
Los Angeles Superior Court Case No. 19CCJP00973
On Appeal from the Superior Court of Los Angeles County
Honorable Craig S. Barnes, Judge Presiding

ANSWER BRIEF ON THE MERITS

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Issue Presented

(1) Is an appeal of a juvenile court's jurisdictional finding moot when a parent asserts that he or she has been or will be stigmatized by the finding?

(2) Is an appeal of a juvenile court's jurisdictional finding moot when a parent asserts that he or she may be barred from challenging a current or future placement on the Child Abuse Central Index as a result of the finding?

Introduction

Appellant, T.P. (Father), seeks reversal of the decision of the Second District Court of Appeal entitled *In re D.P.* (Feb. 10, 2021, B301135) [nonpub. opn.] (Opinion).

Father contends that dismissal of the appeal as moot will prevent him from having his name removed from the Child Abuse Central Index (CACI). This contention lacks merit because the record shows that the Department of Children and Family Services (DCFS or Department) did not file any report with the Department of Justice (DOJ) related to the underlying juvenile dependency case to trigger a CACI listing.

Father also contends that if the challenged jurisdictional finding is not reversed, he will be stigmatized and that he only needs to assert the existence of a unspecified stigma to avoid dismissal for mootness even though the stigma is speculative. This contention lacks merit because well-established rules of appellate procedure require an appellant to identify a specific legal or practical consequence from the challenged jurisdictional finding, either within or outside the dependency proceedings that injuriously affects his or her rights or interest in an immediate

and substantial way to avoid dismissal for mootness. This contention also lacks merit because Father did not contend there was no substantial evidence supporting the factual allegations of the jurisdictional count, which he admits are undisputed. Rather, Father's challenge is that the risk posed by the undisputed allegations was eliminated by the time of the jurisdictional hearing. Therefore, even if Father's challenge to the jurisdictional finding is successful, the alleged stigma will remain based on the undisputed facts and the evidence supporting those facts.

Therefore, the Opinion should be affirmed.

Combined Statement Of The Case And Facts

This matter concerns the welfare of D.P., the subject of the appeal. Y.G. (Mother) is the child's mother.[1] T.P. (Father) is the child's father and Appellant/Petitioner herein.

DCFS adopts the "Background" set forth in the Opinion: "On February 5, 2019, the parents took [D.P.], then two months old, to the hospital because he was having trouble breathing. A chest x-ray revealed possible viral bronchitis or pneumonia and a healing rib fracture. The parents were surprised to learn of the fractured rib and could not explain how it occurred. Hospital staff notified the Department and the police.

"On February 13, 2019, the Department filed a petition that alleged the child and his then five-year-old sister, B.P., were

[1] Mother did not file a Petition for Review.

described by [Welfare and Institutions Code][2] section 300, subdivisions (a), (b), and (j).[3] As to the child, the petition alleged that he had suffered a rib fracture; the parents' explanation for the fracture was inconsistent with the injury; and such an injury would not occur but for the parents' deliberate, unreasonable, and neglectful acts. At the detention hearing the following day, the juvenile court denied the Department's request that the children be detained and released them to the parents under the Department's supervision.

"Dr. Karen Imagawa, the Director of the CARES team at Children's Hospital Los Angeles and an expert in forensics and suspected child abuse, reviewed the child's medical records and prepared a report.[4] According to Dr. Imagawa, rib fractures are uncommon injuries in healthy infants with normal bone density. Such injuries have a high degree of specificity for non-accidental trauma and are generally due to a significant compression of the chest from front to back on an unsupported back. Due to the pliability of an infant's rib cage, significant force is necessary to fracture a healthy infant's rib. A non-offending caregiver would not necessarily know that an infant's crying or irritability was

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[2] All statutory references shall be to this code unless otherwise indicated.

[3] Because the juvenile court ultimately dismissed the petition as to B.P. and she is not a subject of the parents' appeals, we do not recite the allegations as to her.

[4] Dr. Imagawa also testified at the jurisdiction and disposition hearing. We limit our recitation of the evidence Dr. Imagawa provided to her report.

related to a rib fracture and might attribute such crying or irritability to causes like fatigue or colic.

"Dr. Thomas Grogan, a pediatric orthopedic surgeon and an expert in child abuse forensics, also reviewed the child's medical records and prepared a report.[5] Dr. Grogan explained that rib fractures such as the child's typically result from a compressive-type force. That force could be from someone picking up a child incorrectly and applying too much pressure to the chest. Even a child as young as two years old could supply the force necessary to fracture a rib. Absent an x-ray, a caregiver who did not cause such an injury would never realize a child had a fractured rib. Because there was no evidence of trauma in this case, the child's rib fracture could have been sustained accidentally, but Dr. Grogan could not rule out that the injury resulted from intentional conduct.

"At the jurisdiction hearing, on September 20, 2019, the juvenile court sustained the section 300, subdivision (b)(1) count as amended—it struck the language that the child's rib fracture resulted from "deliberate" or "unreasonable" conduct by the parents.[6] The court stated, among other things, "I think this is—

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[5] Like Dr. Imagawa, Dr. Grogan also testified at the jurisdiction and disposition hearing. We limit our recitation of the evidence Dr. Grogan provided to his report.

[6] As amended by the juvenile court, the sustained petition alleged, "On or about 02/06/2019, the two-month old child . . . was medically examined and found to be suffering from a detrimental condition consisting of a healing right posterior 7th rib fracture. [M]other['s] explanation of the manner in which the child sustained the child's injury is inconsistent with the child's injury.

at its most—a possible neglectful act in the way this compression fractured occurred." It dismissed the remaining counts. As for disposition, the juvenile court ordered the child to remain released to the parents under the Department's informal supervision pursuant to section 360, subdivision (b) for a period consistent with section 301, namely, six months. (§§ 301; 16506.)

"On September 30, 2019, father timely filed his notice of appeal. On October 18, 2019, mother timely filed her notice of appeal. The Department did not file a petition pursuant to section 360, subdivision (c) or otherwise bring the case back before the juvenile court. Accordingly, the parties do not dispute that the court's jurisdiction has since terminated." (Opinion, at pp. 2-5.)

Additional Relevant Facts not Contained in the Opinion.

Duke Nguyen was the DCFS social worker who investigated the September 2019 referral, and reported his results as follows:

> As to the original allegation of Physical Abuse of the child [D.P.] by the unknown perpetrator, DCFS determined the allegation to be inconclusive. Per §11165.4, "unlawful corporal punishment or injury"

(…continued)

[F]ather . . . has not provided an explanation of the manner in which the child sustained the child's injury. Such injury would ordinarily not occur except as the result[] of neglectful acts by the child's mother and father, who had care, custody and control of the child. Such neglectful acts on the part of the child's mother and father endanger the child's physical health, safety and well-being, create a detrimental home environment and place the child . . . at risk of serious physical harm, damage, danger and physical abuse."

> means a situation where any person willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition. On 2/6/2019, DCFS found the child [D.P.] had a fractured rib, lateral right 7th rib.
>
> During the investigation, an allegation of General Neglect was added of the child [D.P.] by the parents [. . .] DCFS determined the allegation to be substantiated. Per §11165.2(b), "General Neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred. On 2/6/2019, DCFS found the child [D.P.] had a fractured rib, lateral right 7th rib. On 2/6/2019, [the] parents provided no appropriate explanation as to the fracture.

(Clerk's Transcript [CT] 19-20.)

Actions in the Court of Appeal

Father's Appellant's Opening Brief

In his Appellant's Opening Brief (AOB), Father contended "the juvenile court lacked substantial evidence to sustain jurisdiction under section 300, subdivision (b), where the parents could not reasonably know [D.P.] had a fractured rib, there was no evidence of a deliberate act or lack of sufficient parenting skills and no evidence that the harm could recur as the parents had already completed all recommended services." (AOB 21.) Father articulated the issue before the Court of Appeal as, "[W]hether there was sufficient evidence that the circumstances at the time of the adjudication hearing, subjected [D.P.] to the defined risk of harm." (AOB 24.)

Father did not contend the factual allegations sustained as true were not supported by substantial evidence. (AOB 25-26.) He argued that by finding D.P.'s injuries would not have occurred but for the neglectful act of the parents, the juvenile applied the presumption provided by section 355.1, subdivision (a).[7] (AOB 26.) Father argued this finding was erroneous because, at the time of the jurisdictional hearing, he had eliminated the risk by completing all services the juvenile court would have had him complete. Therefore, his claim was that the section 355.1, subdivision (a) presumption was rebutted. (AOB 25-26, 30.)

DCFS's Letter Brief In Lieu of Respondent's Brief

On April 9, 2020, DCFS filed a Letter Brief in Lieu of Respondent's Brief (DCFS Letter Brief), which stated that, in light of the parents' successful completion of the section 360, subdivision (b)[8] disposition, without conceding error, DCFS did

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[7] Section 355.1, subdivision (a) provides: "Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that finding shall be prima facie evidence that the minor is a person described by subdivision (a), (b), or (d) of Section 300."

[8] Section 360, subdivision (b) provides: "If the court finds that the child is a person described by Section 300, it may, without adjudicating the child a dependent child of the court, order that services be provided to keep the family together and place the child and the child's parent or guardian under the supervision of the social worker for a time period consistent with Section 301."

not oppose reversal of the jurisdictional finding. (DCFS Letter Brief.)

Request for Briefing on Issue of Mootness

On October 30, 2020, the Court of Appeal invited the parties to submit supplemental letter briefs on whether the appeal was moot and should be dismissed for that reason.

DCFS's Supplemental Letter Brief on the Issue of Mootness

On November 9, 2020, DCFS filed its Supplemental Letter Brief on the Issue of Mootness (DSLB), in which DCFS contended the appeal was moot and should be dismissed. DCFS argued this was true because there were no remaining juvenile court orders that adversely affected the parents' rights and, therefore, reversal of the jurisdictional finding would provide the parents with no practical or effective relief. (DSLB 3-5.)

Mother's Supplemental Letter Brief on the Issue of Mootness

On November 9, 2020, Mother filed her Supplemental Letter Brief (MSLB). Citing *In re N.S.* (2016) 245 Cal.App.4th 53, 59, Mother argued that even though the appeal was moot, "an appellate court may exercise its inherent discretion to resolve an issue when there remains a material question for the court's determination, where a pending case possesses an issue of broad public interest that is likely to recur, or where there is a likelihood of recurrence of the controversy between the same parties or other." (MSLB 3.) Mother argued that the "sustained findings of the juvenile court will have ongoing consequences for the mother that will call into question her good moral character in future dependency proceedings, in matters involving her ability to be employed in a profession involving children, or in

aspects of her family life as a mother who would like to participate in school activities or athletics involving her children and other students." (MSLB 4.)

Mother also argued the appeal was not moot because, "The results of the juvenile court's findings will *undoubtedly* cause a written report to the Department of Justice concerning a substantiated investigation of child abuse and neglect. (Pen. Code § 11169, subd. (a).)" (MSLB 4, italics added.) Mother explained that as long as the sustained allegations remained, she would not be able to have her name removed from the CACI. (MSLB 4.) Mother concluded that the juvenile court's findings and orders would "create a stain on [her] good moral character" that could affect her ability to maintain employment as a teacher, obtain other employment involving children, and prevent her from volunteering or participating in school activities related to her children and their classmates. (MSLB 4-5.)

Father's Supplemental Letter Brief on the Issue of Mootness

On November 3, 2020, Father filed his Supplemental Letter Brief (FSLB). In his FSLB, father articulated the issues as follows: "Father's appeal raised three issues: (1) Whether substantial evidence supported the jurisdictional findings for a single "perhaps" neglectful act; (2) whether substantial evidence supported denial of Father's request to dismiss the petition after the jurisdictional findings since the parents had completed services; and (3) whether sufficient evidence supported a period of informal supervision" (FSLB 2.) Father conceded that the third issue was rendered moot by the passage of time. (*Ibid.*)

Regarding issue number one before this Court, Father argued as follows:

> For the same reasons that applied in [*In re Justin O.* (2020) 45 Cal.App.5th 1006], sustained findings of child abuse could affect [Father's] ability to parent the minor children in his care. Other than these proceedings, Father's family had no prior child welfare history, no criminal history, and no prior issues with mental health, substance use or domestic violence. [. . .] Thus, the sustained findings against Appellant impact his good moral character and establish a history of being responsible for acts of child abuse or neglect. (§ 361.3, subd. (a)(5).) This would impact his ability to ever be a resource family for family members. Dismissing his appeal for mootness deprives appellate of a chance to challenge this stigma on his character.

(FSLB 4.) Regarding the second issue before this Court, Father argued the following: "It must be assumed that the Department will follow its obligatory administrative reporting obligations. (Penal Code §§ 11165.9, 11169 (a).) [¶] Once this appeal is dismissed, Father has no opportunity to challenge a CACI report. Once there is a true finding that the child abuse occurred by a dependency court, as in this case, the person who is listed on CACI is barred from requesting a grievance hearing to remove a CACI listing. (Penal Code § 11169, subd. (e).)" (FSLB 5.)

DCFS's Response Letter Brief

On November 19, 2020, DCFS filed another letter brief in response to the parents' letter briefs (DRLB). DCFS argued that neither parent identified any material question for the Court to resolve, or an issue of broad public interest that may recur, or

show how any controversy will likely recur, but merely the specter of a future impact. (DRLB 1-4; see MSLB 3-5; FSLB 4.)

Regarding the CACI argument, DCFS pointed out that it was not a finding under section 300 that prompts notification to the CACI, rather, it is any substantiated allegation of known or suspected child abuse or severe neglect. (DRLB 4-5; see Penal Code § 11169, subd. (a).) DCFS argued that the parents presented nothing on appeal indicating they indeed were listed on the CACI and if so, whether they had sought to challenge a CACI referral. (DRLB 5.)

Father's Supplemental Response Brief

On November 19, 2020, Father filed a Supplemental Response Brief (FSRB). In regard to DCFS's claim that the parents had presented nothing on appeal indicating they are listed on the CACI, Father countered that it was not his responsibility to ensure DCFS complied with the mandatory requirements of Penal Code sections 11165.9 and 11169(a). (FSRB 1-2.) Father further argued DCFS was required to report to the DOJ "every incident of suspected child abuse or severe neglect for which it conducts an investigation and for which it determines that the allegations of child abuse or severe neglect are not unfounded." (FSRB 2.)

Regarding DCFS's claim that Father had failed to show he had sought administrative review, Father stated that Penal Code section 11169, subdivision (e) provides that a grievance hearing shall be denied when a court of competent jurisdiction has determined the child abuse occurred, and because the juvenile

court sustained count b-1, there was no administrative relief available to Father. (FSRB 2.)

Regarding DCFS's argument that if a parent need only assert the jurisdictional count would sully his good moral character and stigmatize him to avoid dismissal for mootness, then no juvenile dependency case could ever be rendered moot, Father countered that the sustained, "child abuse findings could prevent him from ever volunteering for his children in organized youth activities. He would be without any chance to ever seek review of those findings due to Penal Code Section 11169." (FSRB 3.)

Opinion

Regarding father's first argument, the Court of Appeal found it lacked merit because, "The parents do not assert that they have relatives that might be subject to a placement under section 361.3, and thus have failed to identify a specific legal or practical negative consequence resulting from the jurisdictional finding." (Opinion 7.)

Regarding Father's second argument, the Court of Appeal found it lacked merit because, "The parents have not demonstrated that the Department here made a CACI referral even though under Penal Code, section 11169, subdivision (c), the Department would have been required to provide written notice to the parents had it made such a referral." (Opinion 8, fn. 9.)

The Court of Appeal dismissed the appeal as moot. (Opinion 9.)

Actions in the Supreme Court

Father's Petition for Review

On March 3, 2021, Father filed a Petition for Review (Petition). Father raised three issues: (1) Can jurisdictional findings under Section 300, subdivision (b) be supported by a juvenile court's finding there was at most a possible neglectful act by the parents? (2) Is a parent's effort to avoid being labeled a child abuser sufficient to preserve appellate jurisdiction and decide an appeal on its merits? (3) Does the parent's exemplary cooperation with authorities causing county counsel's letter of non-opposition to reversal compel consideration of the appeal on its merits? (Petition 20-25.)

On May 5, 2021, the Supreme Court instructed DCFS to file an Answer to the Petition.

DCFS's Answer to Petition for Review

On May 17, 2021, DCFS filed its Answer to Petition for Review (Answer). DCFS argued the Petition should be denied for the following reasons: (1) The Petition asked the Supreme Court to address the merits of the appeal, which the Court of Appeal had not addressed. (2) Arguments in the Petition derived from the dissent were not raised by Father below. (3) Appellant's successful completion of a section 360, subdivision (b) disposition is not a legal ground for review. (4) Respondent's letter of non-opposition is not a legal ground for review under California Rules of Court,[9] rule 8.500 (b). (5) The appeal was rendered moot.

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[9] All references to rules shall be to the California Rules of Court unless otherwise indicated.

Petition Granted

On May 26, 2021, the Supreme Court granted the Petition.

Argument

I. Standard of Review.

Questions of law that do not involve resolution of disputed facts are subject to de novo review. (*Jose O. v. Superior Court* (2008) 169 Cal.App.4th 703, 706.) Father acknowledges that the factual bases for the challenged jurisdictional count are undisputed. (Appellant's Opening Brief on the Merits (BOM), 29-30.)

II. The Mootness Doctrine.

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

(*Mills v. Green* (1895) 159 U.S. 651, 653.) This language was adopted by California's Supreme Court in *Consolidated Vultee Aircraft Corp. v. United Auto. etc. Workers* (1946) 27 Cal.2d 859, 863. Therefore, "an action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal would be without practical effect, and the appeal will

therefore be dismissed." (13 Witkin, Cal. Proc. (5th ed. 2019) Appeal, § 749.)

III. The Function of Courts is to Decide Actual Controversies Between Parties, Not Issue Opinions as to Moot Questions or Abstract Propositions.

Courts of Appeal have routinely held they have discretion to consider the merits of appeals that fail to raise a justiciable controversy and appeals that are originally based on a justiciable controversy but have become moot by subsequent acts or events. (*In re Nathan E.* (2021) 61 Cal.App.5th 114, 121; *In re N.S.* (2016) 245 Cal.App.4th 53, 59; *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763; *In re I.A.* (2011) 201 Cal.App.4th 1484, 1491-1492; *In re D.C.* (2011) 195 Cal.App.4th 1010, 1015; *In re C.C.* (2009) 172 Cal.App.4th 1481.) However, the doctrines of mootness and justiciable controversy leave no room for discretion to review moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it just because it may disagree with the lower court's decision. (*Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175, 1205-1206.)

There are three situations that have been characterized as "exceptions" to the general rule that a moot appeal must be dismissed: "when there remain 'material questions for the court's determination,' where a 'pending case poses an issue of broad public interest that is likely to recur, or where 'there is a likelihood of recurrence of the controversy between the same parties or others.'" (*In re N.S.*, *supra*, 245 Cal.App.4th at p. 59, internal citations omitted; see also *Grier v. Alameda-Contra*

Costa Transit Dist. (1976) 55 Cal.App.3d 325, 330.) In the dependency context it has been held that a Court of Appeal has discretion to reach the merits of an appeal not presenting a justiciable controversy when, (1) the jurisdictional finding serves as the basis for dispositional orders that are also challenged on appeal; (2) the findings could be prejudicial to the appellant or could impact the current or any future dependency proceedings; and (3) the finding could have consequences for the appellant beyond jurisdiction. (*In re Drake M., supra,* 211 Cal.App.4th at pp. 762-763.)

However, by definition, a "moot appeal" is one that does not involve an "actual controversy" for which practical and effective relief that will impact the appellant's rights or interests, can be granted. (*Mills v. Green*, *supra* 159 U.S. at p. 653.) Therefore, it appears that all but one of the so called "exceptions" are actually situations where there remain material issues affecting the rights of the parties that need to be resolved. (See, *e.g.*, *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541 ["[T]he general rule governing mootness becomes subject to the case-recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination."]; 13 Witkin, Cal. Proc. (5th ed. 2019) Appeal, § 757 ["If any material question remains to be determined, the case is not entirely moot, and the appeal will not be dismissed."].)

The only "exception" that allows a Court of Appeal to reach the merits of the appeal when no effective or practical relief can

be granted the appellant directly, is where the appeal involves an issue of broad public interest that will escape review. (13 Witkin, Cal. Proc. (5th ed. 2019) Appeal, § 759.) As this Court explained, questions of general public interest do not become moot because subsequent events prevent the Court from granting effective and practical relief for the appellant. (*In re William M.* (1970) 3 Cal.3d 16, 23.)

In his Introduction, Father states that, "Both the stigma of being labeled a child abuser and an erroneous listing in a child abuse index are issues of broad public interest likely to recur." (BOM 14.)[10] However, he does not thereafter advance that contention in his Argument section or otherwise explain how his being stigmatized by a juvenile court's jurisdictional finding affects the general public. (BOM 27-57; see 13 Witkin, Cal. Proc. (5th ed. 2019) Appeal, § 759.) He has therefore forfeited the contention. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [holding that, when an appellant makes a general assertion, unsupported by specific argument he forfeits the issue].)

Indeed, citing *In re I.A.*, *supra,* 201 Cal.App.4th at p. 1484, in his Argument section, Father acknowledges that to avoid dismissal for mootness, he must identify a specific legal or practical consequence from the challenged jurisdictional finding, either within or outside the dependency proceedings. (*Id.* at p. 1493; see BOM 28.) He then restates the rule that "Courts also have discretion to resolve appeals that are technically moot if

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[10] As shown below, there was no CACI report.

they present important questions affecting the public interest that are capable of repetition yet evade review." (BOM 28.) But he then follows that with the statement: "The pivotal question in determining if a case is moot is whether the court can grant the plaintiff any effectual relief." (*Ibid*.) Father, therefore, acknowledges that his appeal should be dismissed as moot if he cannot be granted any effectual relief. He does not, thereafter, revisit the issue or claim the stigma he allegedly suffers affects the general public or will escape review. (BOM 28-57.)[11]

The basis for the rule that to avoid dismissal for mootness, an appellant must identify a specific legal or practical consequence to himself from the challenged jurisdictional finding, is the requirement that to maintain an appeal, an appellant must be an "aggrieved party." (Code Civ. Proc. § 902.) "An aggrieved person . . . is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as

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[11] Neither this Court nor Father has identified as an issue to be resolved here; whether the termination of juvenile court jurisdiction resulting from a parent's successful completion of a section 360, subdivision (b) disposition should prevent the parent from challenging the predicate jurisdictional finding? The answer to such question should be in the negative. However, the appropriate procedure for such challenge would be a Petition for Extraordinary Writ. (*Varney v. Superior Court* (1992) 10 Cal.App.4th 1092, 1098.) Furthermore, within that process, the parent still would be required to show a specific legal or practical consequence from the challenged jurisdictional finding, either within or outside the dependency proceedings. (*In re K.C.* (2011) 52 Cal.4th 231, 236; *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740-741; *In re I.A., supra*, 201 Cal.App.4th at p. 1484.)

a nominal or remote consequence of the decision." (*In re K.C.*, *supra,* 52 Cal.4th at p. 236.) Therefore, to avoid dismissal for mootness, Father was required to show the challenged jurisdictional count injuriously affected his rights or interest in an immediate and substantial way. The mere assertion of a speculative future harm is insufficient. (*In re I.A., supra*, 201 Cal.App.4th at pp. 1494-1495; compare with *In re Nathan E.* (2021) 61 Cal.App.5th 114 (*Nathan E.*); *In re M.W.* (2015) 238 Cal.App.4th 1444; *In re C.C.*, *supra,* 172 Cal.App.4th at p. 1481.)

In *Nathan E.* the Court of Appeal allowed the mother to escape dismissal for mootness based merely on the mother's assertion that the jurisdictional findings "may impact any possible future dependency proceeding involving these or any children mother may have in the future." (*Nathan E., supra,* 61 Cal.App.5th at p. 121.) The Court acknowledged that the mother's argument assumed there would be future dependency proceedings and found she offered no specific harm that the sustained jurisdictional and dispositional findings may bring her. (*Ibid.*)

In *In re M.W.*, the mother did not challenge all of the jurisdictional findings and acknowledged that juvenile court jurisdiction would continue even if her appeal were successful. (*In re M.W., supra.* 238 Cal.App.4th at p. 1452.) In response to an argument that mother failed to raise a justiciable controversy, the Court of Appeal found it had discretion to review the merits of the appeal, in part, because the challenged finding, "that mother knowingly or negligently exposed her children to a

substantial risk of physical and sexual abuse are *pernicious*. The finding in count d-2 (that mother failed to protect the children from a substantial risk of sexual abuse) carries a *particular stigma*." (*Ibid,* italics added.) Merriam Webster defines "pernicious" as, "causing great harm or damage often in a way that is not easily seen or noticed[.]" (https://www.merriam-webster.com/dictionary/pernicious#learn-more.) The very definition of the word raises no more than the mere specter of a possible future harm, which should be deemed insufficient to allow merit review. (*In re I.A., supra*, 201 Cal.App.4th at pp. 1494-1495.)

In *In re C.C.,* the mother appealed the juvenile court's finding that continued visitation would be detrimental to C.C. (*In re C.C.*, *supra*, 172 Cal.App.4th at p. 1488.) While the appeal was pending, the juvenile court terminated its jurisdiction with a family law order that reinstated the mother's monitored visitation. (*Ibid.*) The Court of Appeal invited briefing on the issue of mootness. DCFS argued the appeal had been rendered moot. The mother agreed the issues raised on appeal were moot, but asked the Court to reach the merits of the appeal because of a possibility she might be prejudiced by the court's finding of detriment and order terminating visitation in some collateral proceeding. (*Ibid.*)

The *In re C.C.* Court of Appeal found that the juvenile court granted appellant the relief she sought on appeal thereby rendering her appeal "doubly moot[,]" and that her concerns of prejudice in a future family law proceedings were "highly

speculative." (*Id.* at p. 1489.) However, the Court, "in an abundance of caution, and because dismissal of the appeal operates as an affirmance of the underlying judgment or order" exercised its "discretion" to reach the merits of the moot appeal for which it could provide the mother no effective or practical relief. (*Id.* at pp. 1491-1492.) The Court ultimately found the juvenile court had used an improper standard when it found visitation would be harmful to C.C., and reversed a visitation order that no longer existed. (*Id.* at p. 1493; see *Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175, 1205-1206 [holding that when the judgment the appellant seeks to have vacated is no longer effective, the appeal must be dismissed].)

The problem with these cases is that they allow a parent to maintain a moot appeal even though the appellant is no longer an aggrieved party, which is what Father is doing here. (Code of Civ. Proc. § 902; *In re K.C., supra,* 52 Cal.4th at p. 236.) Citing to *Nathan E., supra,* 61 Cal.App.5th at p. 114, Father argues that his mere assertion of a future unspecified stigma is sufficient to avoid dismissal even though the existence of the stigma is speculative. (BOM 31.)

DCFS does not contend that a lingering jurisdictional finding can never be detrimental to a parent in the future nor that a jurisdictional finding could never result in a stigma that could injure a parent's rights or interests "in an immediate and substantial way, and not as a nominal or remote consequence of the decision." (*In re K.C.*, *supra,* 52 Cal.4th at p. 236.) However,

the detriment, whether in the form of a stigma or otherwise, must be a realistic and concrete detriment that can be articulated and would result in the parent being sufficiently aggrieved to have standing to maintain the appeal. To hold otherwise would be to disembowel the doctrines of mootness and justiciable controversy, because anyone can assert that something may happen in the future. Indeed, the *Nathan E.* Court of Appeal reached the merits of a moot appeal merely on the parent's assertion that the jurisdictional findings *may* impact a nonexistent dependency proceeding involving children yet to be born. (*Nathan E., supra*, 61 Cal.App.5th at p. 121.)

Therefore, based on longstanding case law regarding mootness and justiciable controversy, the answer to the presented issues is that a parent must do more than assert a speculative and nebulous potential harm or stigma to avoid dismissal of a moot appeal. Father has not done so here. Accordingly, the Opinion should be affirmed.

IV. Father's Claim That The Dismissal Of His Appeal Bars Him From Challenging A Current Or Future Placement On The CACI Lacks Merit Because The Record Shows The Initial Referral Was Not Substantiated And DCFS Policy Prohibited Reporting Referrals Alleging Only General Neglect.

A. DCFS's CACI Reporting Requirements.

California's Child Abuse and Neglect Reporting Act (CANRA) was enacted "to protect children from abuse and

neglect." (Penal Code[12] § 11164, subd. (b).) The CANRA requires DCFS to forward to the Department of Justice (DOJ) "a report in writing of every case it investigates of known or suspected child abuse or severe neglect that is determined to be substantiated, other than cases coming within subdivision (b) of Section 11165.2." (§ 11169, subd. (a).)

The CANRA defines "child abuse or neglect" to include "physical injury or death inflicted by other than accidental means upon a child by another person, sexual abuse as defined in Section 11165.1, neglect as defined in Section 11165.2, the willful harming or injuring of a child or the endangering of the person or health of a child, as defined in Section 11165.3, and unlawful corporal punishment or injury as defined in Section 11165.4." (§ 11165.6, subd. (a).)

"Severe neglect," "means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive. 'Severe neglect' also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by Section 11165.3, including the intentional failure to provide adequate food, clothing, shelter, or medical care." (§ 11165.2, subd. (a).)

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[12] Now, all future statutory references shall be to this code unless otherwise indicated.

The CANRA provides for three levels of reports; unfounded, substantiated, and inconclusive;

> "Unfounded report" means a report that is determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect, as defined in Section 11165.6.
>
> "Substantiated report" means a report that is determined by the investigator who conducted the investigation to constitute child abuse or neglect, as defined in Section 11165.6, based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred. A substantiated report shall not include a report where the investigator who conducted the investigation found the report to be false, inherently improbable, to involve an accidental injury, or to not constitute child abuse or neglect as defined in Section 11165.6.
>
> "Inconclusive report" means a report that is determined by the investigator who conducted the investigation not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect, as defined in Section 11165.6, has occurred.

(§ 11165.12, subds. (a), (b), and (c).)

Section 11169, subdivision (c) provides:

> At the time an agency specified in Section 11165.9 forwards a report in writing to the Department of Justice pursuant to subdivision (a), the agency shall also notify in writing the known or suspected child abuser that he or she has been reported to the Child Abuse Central Index (CACI). The notice required by this section shall be in a form approved by the Department of Justice. The requirements of this subdivision shall apply with respect to reports forwarded to the department on or after the date on which this subdivision becomes operative.

"If a report has previously been filed which subsequently proves to be not substantiated, the Department of Justice shall be notified in writing of that fact and shall not retain the report." (§ 11169, subd. (a).) Section 11170, subdivision (a)(3), provides that, "Only information from reports that are reported as substantiated shall be filed pursuant to paragraph (1), and all other determinations shall be removed from the central list."

DCFS Policy # 0070-548.17, Completion and Submission of the BCIA 8583 Child Abuse or Severe Neglect Indexing Form provides as follows:

> When a child abuse/neglect investigation concludes with a substantiated finding in the categories of sexual abuse, physical abuse, severe neglect, emotional/mental abuse or exploitation, the investigating CSW is responsible for forwarding the BCIA 8583, Child Abuse or Severe Neglect Form to the Department of Justice (DOJ). In turn, the DOJ records this information in the Child Abuse Central Index (CACI).
>
> The Department of Justice does not require notice of allegations of general neglect, or when the allegations are concluded as unfounded or inconclusive. If a report has previously been filed which subsequently proves to be unfounded, the DOJ shall be notified in writing of that fact and shall not retain the report.
>
> DCFS is required to notify the known or suspected child abuser when his or her name is reported to the DOJ and the CACI. The (alleged) perpetrator must be sent a SOC 832, SOC 833, and SOC 834 whenever their name is submitted to the DOJ on the SS 8583. This letter must be sent within 5 business days of the submission of the SS 8583 to DOJ.
>
> DCFS cannot forward a report to the DOJ unless it has conducted an active investigation and

determined that the report is substantiated. If a CSW has not been able to locate the family, the CSW has not completed an active investigation, and therefore cannot submit the BCIA 8583, Child Abuse or Severe Neglect Indexing Form to DOJ.

The ERCP CSW is responsible for completing and submitting the BCIA 8583 when he or she investigates a referral and closes it at ERCP. If an ERCP CSW conducts the initial investigation of the allegation and sends the referral to the regional office as a follow-up or placement/replacement, the regional ER CSW will complete and submit the BCIA 8583. Only substantiated dispositions are to be reported to the DOJ.

B. A Parent's Challenge To A CACI Report.

Section 11169, subdivision (d) provides:

Subject to subdivision (e), any person who is listed on the CACI has the right to a hearing before the agency that requested his or her inclusion in the CACI to challenge his or her listing on the CACI. The hearing shall satisfy due process requirements. It is the intent of the Legislature that the hearing provided for by this subdivision shall not be construed to be inconsistent with hearing proceedings available to persons who have been listed on the CACI prior to the enactment of the act that added this subdivision.

Section 11169, subdivision (e), provides:

A hearing requested pursuant to subdivision (d) shall be denied when a court of competent jurisdiction has determined that suspected child abuse or neglect has occurred, or when the allegation of child abuse or neglect resulting in the referral to the CACI is pending before the court. A person who is listed on the CACI and has been denied a hearing pursuant to this subdivision has a right to a hearing pursuant to subdivision (d) only if the court's jurisdiction has terminated, the court has not made a finding

> concerning whether the suspected child abuse or neglect was substantiated, and a hearing has not previously been provided to the listed person pursuant to subdivision (d).

"The procedure by which an aggrieved party may challenge an agency's child abuse report under the CANRA is twofold. First, the aggrieved party must exhaust administrative remedies by completing the grievance process established by the State Department of Social Services. The California Health and Human Services Agency—State Department of Social Services has promulgated 'Grievance Procedures for Challenging Reference to the Child Abuse Central Index'[13] which require the party challenging a child abuse report to file a request for a grievance hearing. At the hearing, counsel may be present, evidence is presented, and witnesses may be called to testify. The grievance officer determines, based on the evidence presented at the hearing, whether the allegation of abuse or neglect is unfounded, inconclusive, or unsubstantiated." (*In re C.F.* (2011) 198 Cal.App.4th 454, 464.)

"Second, if the grievance process does not provide the desired relief, the aggrieved party may file a petition for writ of mandamus pursuant to Code of Civil Procedure section 1094.5 (administrative mandamus). (Citation.)" (*In re C.F., supra,* 198

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[13] Motion, Exh. 3: California Health and Human Services Agency—State Department of Social Services' Grievance Procedures for Challenging Reference to the Child Abuse Central Index, which was accessed at (https://cdss.ca.gov/cdssweb/entres/forms/English/SOC833_Updated2012.pdf.)

Cal.App.4th at p. 465.) Exhaustion of an aggrieved party's administrative remedies is required before the party may judicially challenge an agency's decision. (*Ibid.*)

The CANRA also provides that reports may be removed from the CACI in two situations: (1) when a reporting agency notifies the DOJ a previously filed report "subsequently proves to be unfounded" (§ 11169, subd. (a)) or (2) when a person listed in the CACI only as a victim of child abuse or neglect is at least 18 years of age and files a written request to have his or her name removed (§ 11170, subd. (g)).

C. *Humphries v. County of Los Angeles.*

In *Humphries v. County of Los Angeles* (9th Cir. 2009) 554 F.3d 1170 (*Humphries*), the Ninth Circuit Court of Appeal (Ninth Circuit) found that a person's inclusion in CACI implicated a constitutional liberty interest due to the resulting "stigma of being listed in the CACI as substantiated child abusers, plus the various statutory consequences" involved, such as "the loss of significant state benefits, such as child-care licenses or employment." (*Id.* at pp. 1185, 1200.)

D. DCFS Did Not Report The Unsubstantiated February 2019 Referral Or The Substantiated General Neglect Referral To The DOJ.

Attached to DCFS's Motion[14] as Exhibit 1, is the declaration of Duke Nguyen, the emergency response social

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[14] Concurrent herewith, DCFS has filed a Motion to Take Additional Evidence and For Judicial Notice (Motion). Attached to the Motion as Exhibit 1 is a copy of Duke Nguyen's Declaration. Attached to the Motion as Exhibit 2 is a copy of

worker who investigated the referral that initiated DCFS's initial contact with the family. (CT 11, 24.) Attached to the Motion as Exhibit 2 is a copy of DCFS Policy # 0070-548.17, Completion and Submission of the BCIA 8583 Child Abuse or Severe Neglect Indexing Form, which states that substantiated referrals based on general neglect are not to be reported to the DOJ and the DOJ does not require reports of such referrals. As indicated by his declaration, Mr. Nguyen followed DCFS policy and did not report the substantiated general neglect referral to the DOJ. (Motion, Exhs. 1 and 2; CT 19-20.) Therefore, Father's name could not appear on the CACI based upon the substantiated general neglect referral. (CT 19-20.)

Apparently in recognition of the fact that DCFS did not make a CACI referral, Father argues that there is nothing to prevent DCFS from making a referral in the future. (BOM 40-41.) This is not true. The same reason DCFS was prohibited from initially filing a report with the DOJ when the dependency case began, prohibits DCFS from doing so in the future. (§ 11169, subd. (a); § 11170, subd. (a)(3); DCFS's Policy # 0070-548.17,

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(…continued)
DCFS Policy # 0070-548.17, Completion and Submission of the BCIA 8583 Child Abuse or Severe Neglect Indexing Form. (http://m.policy.dcfs.lacounty.gov/Search?link=making%20a%20caci%20report.) Attached to the Motion as Exhibit 3 is California Health and Human Services Agency—State Department of Social Services' Grievance Procedures for Challenging Reference to the Child Abuse Central Index. (https://cdss.ca.gov/cdssweb/entres/forms/English/SOC833_Updated2012.pdf.)

Completion and Submission of the BCIA 8583 Child Abuse or Severe Neglect Indexing Form; Motion Exhs. 1 and 2.)

Therefore, Father's arguments and contentions regarding any adverse consequence or stigma flowing from a CACI report have no merit and should not be entertained by this Court.

E. The Record Supports The Conclusion That DCFS Did Not Make A CACI Referral In This Case.

If DCFS's Motion is not granted, the record, without Duke Nguyen's Declaration, supports the conclusion that a CACI referral was not made.

As argued above, in order to avoid dismissal of an appeal on mootness grounds, a parent must identify a specific legal or practical consequence from the challenged jurisdictional finding, either within or outside the dependency proceedings that injuriously affects the parent's rights or interests in an immediate and substantial way. (*In re K.C., supra,* 52 Cal.4th at p. 236; *In re I.A., supra,* 201 Cal.App.4th at p. 1493.) Applying this rule to Father's claims regarding the CACI, would require him to do more than assert that he *may* be barred from challenging a current or future placement on the CACI. Rather, it would require him to show that DCFS received a referral that alleged child abuse or severe neglect (§ 11169, subd. (a); that the investigator substantiated the referral pursuant to section 11165.15, subdivision (b); that a CACI referral was made pursuant to section 11169, subdivision (a); that he requested an administrative hearing pursuant to section 11169, subdivision (d); that his request for a hearing was denied pursuant to section

11169, subdivision (e), because a court of competent jurisdiction determined that suspected child abuse or neglect had occurred; and that he had no other means of redress (§ 11169, subd. (a); see *In re C.F., supra,* 198 Cal.App.4th at p. 454).

The order of the lower court is "presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) It is the appellant's burden to affirmatively demonstrate error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) To meet that burden, an appellant's brief must contain legal arguments supported by citations to authorities and the record on the points made. (Rule 8.204(1)(C); *Kim v. Sumitomo Bank of California* (1993) 17 Cal.App.4th 974, 979.) The failure to meet that burden forfeits the issue. (*People v. Stanley, supra,* 10 Cal.4th at p. 793.)

Presumably in recognition of these fundamental rules of appellate procedure, the Court of Appeal found that by failing to demonstrate DCFS made a CACI referral, even though DCFS would have been required to provide written notice to the parents had it made such a referral, Father had not met his appellate burden. (Opinion at p. 8, fn. 9.)

Doubtless, Father has known from the beginning that he did not receive written notice that DCFS made a CACI referral. However, not until his BOM does he admit not receiving such notice. (Opinion at p. 8, fn. 9; BOM at p. 40.)

Father attempts to sidestep this insurmountable obstacle to his argument by claiming "there is nothing to prevent, or ensure

the prevention, of such reporting from taking place in the future." (BOM 40-41.) Father argues that it must be assumed that DCFS will comply with its duties under the CANRA, and in the face of a silent record, the established applicable principle is that the official duty has been regularly performed and a report has been or will be provided the DOJ. (Evid. Code § 664; BOM 41.) Therefore, Father knows he did not receive notice of a CACI referral, and presumably he has not contacted the DOJ to determine if his name is in fact on the CACI.[15] Again, Father has failed to meet his appellate burden. (*State Farm Fire & Casualty Co. v. Pietak*, *supra,* 90 Cal.App.4th at p. 610.)

Furthermore, Father's argument has no merit and it flips the law on its head. As explained above, the "thing" preventing DCFS from reporting Father in the future based on the referral received in February 2019, is the fact that no perpetrator was named and the referral was closed as inconclusive. (CT 19-20; see § 11169, subd. (a); § 11170, subd. (a)(3).) The "thing" preventing DCFS from reporting the substantiated general neglect referral in the future (CT 19-20), is the fact that DCFS's

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[15] Section 11170, subdivision (f)(1) provides: "Any person may determine if he or she is listed in the CACI by making a request in writing to the Department of Justice. The request shall be notarized and include the person's name, address, date of birth, and either a social security number or a California identification number. Upon receipt of a notarized request, the Department of Justice shall make available to the requesting person information identifying the date of the report and the submitting agency."

policy prohibits and the DOJ does not require reporting referrals based only on general neglect. (Motion, Exhs. 1 and 2.)

Father argues that a referral based on general neglect where the child sustained an injury is an exception to the exception and therefore must be reported. (AOB 40.) However, that is not what the statute says. Section 11169, subdivision (a) requires a "report in writing of every case it investigates of known or suspected child abuse or severe neglect that is determined to be substantiated, *other than cases coming within subdivision (b) of Section 11165.2*." (Italics added.) Section 11165.2, subdivision (b) defines "General Neglect" as "the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred."

For our purposes, "'Severe neglect' . . . means those situations of neglect where any person having the care or custody of a child *willfully* causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by Section 11165.3, including the intentional failure to provide adequate food, clothing, shelter, or medical care." (Italics added.) "'The *willful* harming or injuring of a child or the endangering of the person or health of a child,' means a situation in which any person *willfully* causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, *willfully* causes or permits the person or health of the

child to be placed in a situation in which his or her person or health is endangered." (§ 11165.3, italics added.)

Therefore, the CANRA does not specifically require reporting or except from reporting referrals based on general neglect where the child sustained a physical injury. Accordingly, the referral at issue here does not fit the definition of "severe neglect" or "general neglect." (§ 11165.2, subds. (a) and (b).)

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

(*Chevron, U.S.A., Inc. v. NRDC, Inc.* (1984) 467 U.S. 837, 844-845 [internal citations, quotations, and footnotes omitted].) Here,

the gap in the CANRA's definitions of "severe neglect" and "general neglect" is filled by DCFS's policies. Based on DCFS's policy, substantiated referrals based on general neglect are not reported to the DOJ. That policy does not distinguish between general neglect referrals that involve an injury and those that do not involve an injury. (Motion, Exhs. 1 and 2.)

Therefore, if the presumption that a governmental duty is duly performed is applied here, it does not benefit Father. (Evid. Code § 644.) The presumption is that DCFS did not make a CACI referral and Father's name does not appear on the CACI because, otherwise, Father would have received notice of the CACI report. He did not. (AOB 40.) Father could resolve this issue by making a written request to the DOJ pursuant to section 11170, subdivision (f)(1). He has not done so. Similar conduct has been characterized as trifling with the Court and should not be condoned. (See, e.g., *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431.

Because the record supports the conclusion that DCFS did not make a CACI referral, Father's arguments and contentions regarding any adverse consequence or stigma flowing from a CACI report have no merit and should not be entertained by this Court.

F. Any CACI Report Based On The Substantiated General Neglect Referral Would Have Been Removed From The CACI After The Juvenile Court's Jurisdictional Findings.

If the Court proceeds with its review based on a presumption that a CACI report was made, the further

presumption would be that the report has been removed from the CACI.

"If a report has previously been filed which subsequently proves to be not substantiated, the Department of Justice shall be notified in writing of that fact and shall not retain the report." (§ 11169, subd. (a).) "Only information from reports that are reported as substantiated shall be filed pursuant to paragraph (1), and all other determinations shall be removed from the central list." (§ 11170, subd. (a)(3).) DCFS Policy # 0070-548.17, Completion and Submission of the BCIA 8583 Child Abuse or Severe Neglect Indexing Form provides that, "If a report has previously been filed which subsequently proves to be unfounded, the DOJ shall be notified in writing of that fact and shall not retain the report." (Motion, Exh. 2.)

As sustained, count b-1 did not allege "child abuse or neglect" as defined by section 11165.6, which requires "physical injuries or death *inflicted* by other than accidental means . . . sexual abuse as defined in Section 11165.1, neglect as defined in Section 11165.2, the *willful* harming or injuring of a child or the endangering of the person or health of a child, as defined in Section 11165.3, and unlawful corporal punishment or injury as defined in Section 11165.4." (§ 11165.6, italics added; CT 5.) The juvenile court found the parents had rebutted the Welfare and Institutions Code section 355.1, subdivision (a) presumption that D.P.'s injuries would not have occurred but for deliberate acts of the parents. (CT 5; RT 120-121.) The sustained count stated only that D.P.'s injuries would not have occurred but for the

neglectful acts of the parents. (CT 5; RT 120-121.) Therefore, the juvenile court's jurisdictional findings meant that any presumptive report of child abuse or severe neglect to the DOJ was subsequently proven to be unfounded. Accordingly, it can be further presumed that had DCFS indeed made a CACI referral, it performed its governmental duty and notified the DOJ of the juvenile court's findings, and the DOJ performed its governmental duty and removed the presumptively filed report from the CACI. (Evid. Code § 664.)

Based on the foregoing, DCFS requests that this Court not entertain further, Father's contentions and arguments regarding a CACI report he has failed to prove exists now or may exist in the future.

V. The Mere Assertion By A Parent That A Jurisdictional Finding Will Create a Stigma Does Not Establish A Material Issue That Remains To Be Resolved.

A. Because There Was No CACI Report, There Is No *Humphries* Issue.

Because, as shown above, Father's name does not appear on the CACI, his claim that his appearance on the CACI stigmatizes him is wholly without merit.

B. Father Has Failed To Show There Was A Material Issue Remaining To Be Resolved.

1. *Father has failed to identify any specific stigma that impacts his rights or interests.*

Apparently in recognition of the requirement that he identify a specific legal or practical consequence from the challenged jurisdictional finding, either within or outside the dependency proceedings, Father rephrased the issue by stating

that an "acknowledged stigma" justifies review of a moot appeal. (AOB 31; see *In re K.C., supra,* 52 Cal.4th at p. 236; *In re I.A., supra,* 201 Cal.App.4th at p. 1493.) Father does not, thereafter, explain what he means by an "acknowledged stigma." (AOB 31-57.) Nor does he identify any specific stigma flowing from the jurisdictional finding or show how the alleged stigma will affect his rights or interests. (*Ibid.*) Rather, he simply asserts that an unspecified, speculative stigma flows from the challenged jurisdictional count and that such stigma warrants merit review. (AOB 31-37.)

Father has cited dependency and non-dependency cases where the reviewing court recognized the trial court's challenged order stigmatized the appellant. (BOM 31-34.) However, "It is axiomatic that cases are not authority for propositions not considered." (*Paul v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) The cases relied on by Father are distinguishable. Three of the cases did not involve the issues of mootness or lack of justiciable controversy. (*Application of Gault* (1967) 387 U.S. 1; *Conservatorship of Roulet* (1979) 23 Cal.3d 219; *In re Kevin S.* (2003) 113 Cal.App.4th 97.)

Stigma was not the reason for merit review in two of the cases, as Father claims. (BOM 31-34.) In *People v. Hurtado* (2002) 28 Cal.4th 1179, the exception to dismissal for mootness was that the issue raised was "recurrent--indeed, it is raised in virtually every SVPA trial and appeal--and the two-year limit on each commitment makes it likely that any appeal raising the issue would become moot before we could decide it." (*Id.* at p.

1186.) Likewise, the exception to dismissal recognized in *People v. Englebrecht* (2001) 88 Cal.App.4th 1236 (*Englebrecht*), was that the issues were of broad public interest likely to recur and escape review. (*Id.* at p. 1242, fn. 1.)

Two cases are factually distinguishable. (*People v. Succop* (1967) 67 Cal.2d 785, 787-790[16] [trial court's finding a criminal defendant was a probable mentally disordered sex offender]; *In re Michael D.* (1977) 70 Cal.App.3d 522, 524, fn. 1 [commitment to a mental institution].)

Only one case Father cites can be considered relevant here, *In re M.W.* (2015) 238 Cal.App.4th 1444. (BOM 33.) However, as argued above, *In re M.W.*, holds that the mere assertion of a possible but speculative future harm is sufficient to allow merit review of an appeal that fails to raise a justiciable controversy, which should be deemed insufficient to allow merit review. (*In re M.W., supra*, 238 Cal.App.4th at p. 1452; see *In re K.C.*, *supra*, 52 Cal.4th at p. 236 and *In re I.A., supra*, 201 Cal.App.4th at pp. 1494-1495.)

As the Court of Appeal explained in *Englebrecht* (2001) 88 Cal.App.4th 1236, "while some social stigma might arise from the finding that Englebrecht is a gang member, it is not the same order of stigma arising from a criminal verdict or a finding that one is a [mentally disordered sexual offender] or a narcotics

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[16] *People v. Succop* (1967) 67 Cal.2d 785, 787-790, also recognized that the challenged finding would remain relevant to the question whether probation should be granted and to the matter of parole if a prison sentence were imposed.

addict, or an LPS Act conservatee. The rights involved in this case, while important, are not as significant as the interest in physical liberty or parental rights." (*Id.* at p. 1253.)

Father notes the reference to "parental rights" in *Englebrecht.* (BOM 34.) However, he fails to explain how Father's parental rights are impacted by the challenged count not being reversed. As noted in *In re I.A., supra,* 201 Cal.App.4th at p. 1484, "A past jurisdictional finding . . . would be entitled to no weight in establishing jurisdiction [in the future]. . . . Instead, the agency will be required to demonstrate jurisdiction by presenting evidence of then current circumstances placing the minor at risk. (*Id.* at p. 1495.)

Again, DCFS does not contend that a jurisdictional count could never result in a stigma that would be a tangible and concrete harm to a parent's rights or interest. However, the finding here based upon the section 355.1, subdivision (a) presumption, that D.P.'s fractured rib would not have occurred but for the parents' neglectful acts, does not rise to that level. (CT 5.) It does not label Father a "child abuser" as he has claimed numerous times. (BOM 12-14, 28, 30-31, 34-37, 43-44, 46-47, 50, 56.)

In *Paul v. Davis* (1976) 424 U.S. 693, the plaintiff's photograph was included by local police chiefs in a "flyer" of "active shoplifters," after petitioner had been arrested for shoplifting. (*Id.* at pp. 694-696.) The shoplifting charge was eventually dismissed, and the plaintiff filed suit under Title 42 United States Code section 1983 against the police chiefs,

alleging that the officials' actions inflicted a stigma to his reputation that would seriously impair his future employment opportunities, and thus deprived him under color of state law of liberty interests protected by the Fourteenth Amendment. (*Paul v. Davis, supra,* 424 U.S. at p. 696.) The District Court dismissed the action finding that "'[t]he facts alleged in this case do not establish that plaintiff has been deprived of any right secured to him by the Constitution of the United States.'" (*Ibid.*) The Court of Appeal concluded that respondent had set forth a section 1983 claim "'in that he has alleged facts that constitute a denial of due process of law.'" (*Id.* at p. 697.) The United States Supreme Court granted review "to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment." (*Paul v. Davis, supra,* 424 U.S. at p. 694.) The United States Supreme Court reversed the Court of Appeal holding:

> The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

(*Id.* at p. 702.)

In *Endy v. City of Los A*ngeles (9th Cir. 2020) 975 F.3d 757 (*Endy*), the Ninth Circuit noted that in *Humphries, supra,* 554 F.3d 1170, it held that, under the Due Process Clause, an individual's inclusion in the CACI requires that he receive notice and some kind of hearing to challenge his inclusion. (*Id.* at p. 1201.) The issue in *Endy* was whether similar procedural protections are required for an individual's inclusion in the Child Welfare Services Case Management System (CWS/CMS). (*Endy, supra,* 975 F.3d at p. 760.) Endy asserted that the County of Los Angeles (the County) and DCFS violated his due process and privacy rights by maintaining "unfounded" child abuse allegations against him in CWS/CMS without providing him notice or a hearing to challenge them. (*Ibid.*) According to Endy, his continued inclusion in CWS/CMS stigmatized him as an alleged child abuser, caused him not to be promoted with his employer, prevented him from being able to adopt or work with or around children, violated his privacy, and caused him immense emotional distress. (*Id.* at p. 763.) The District Court granted the County's motion for summary judgment. Quoting from *Paul v. Davis, supra,* 424 U.S. at p. 711, the Ninth Circuit affirmed the finding Endy had not shown that the "maintenance of his 'unfounded' reports in CWS/CMS—an internal government database—caused him to suffer 'stigma . . . plus' alteration or extinguishment of 'a right or status previously recognized by state law.' (Citation.)" (*Endy, supra,* 975 F.3d at p. 760.)

The Ninth Circuit explained the difference between the CACI and the CWS/CMS: CWS/CMS "is an internal government database used primarily by county child welfare agencies to enter and manage information related to reports of suspected child abuse. In contrast, CACI is a statewide index of substantiated child abuse reports maintained by the [DOJ] and 'available to a broad range of third parties for a variety of purposes.' (Citation.)" (*Id.* at p. 760.)

The Ninth Circuit held that "[a] liberty interest may be implicated where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. However, procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of 'a right or status previously recognized by state law.' We have described this standard as the 'stigma-plus test.'" (*Id.* at p. 764.)

Endy alleged that he met the "stigma-plus" standard because he suffered harm similar to the deprivation of rights . . . recognized in *Humphries*. (*Ibid.*) In *Humphries,* the Ninth Circuit found "that a person's inclusion in CACI implicated a constitutional liberty interest due to the resulting 'stigma of being listed in the CACI as substantiated child abusers, plus the various statutory consequences' involved, such as 'the loss of significant state benefits, such as child-care licenses or employment.'" (*Ibid.*, citing *Humphries*, *supra,* 554 F.3d at pp. 1185, 1200, internal citations and quotation marks omitted.)

The Ninth Circuit found that because of the fundamental differences between the CACI and the CSW/CMS, a listing on the CSW/CMS was not stigmatizing. (*Endy, supra,* 975 F.3d at pp. 764, 766.)

"First, the child abuse allegations against Endy are listed as "unfounded" in CWS/CMS, unlike the "substantiated" allegations that are required to be included in CACI. In that regard, Endy has not been labeled a child abuser by the fact of his inclusion in CWS/CMS. Rather, he is listed as an individual who had been accused of child abuse and whose allegations were determined to be 'unfounded'" (*Id.* at p. 765.)

"Second, the 'unfounded' child abuse allegations against Endy are maintained in CWS/CMS, an internal database generally accessible only to government agencies, in contrast to the more publicly accessible CACI. As a result, Endy does not face the same exposure to reputational harm experienced by the *Humphries* plaintiffs—whose listings in CACI allowed potential employers, educational institutions, and 'a broad range of third parties' with access to CACI to identify them as 'substantiated child abusers.'" (*Ibid.*)

Third, although "there may be some stigma attached to the mere fact of being listed in any database used to maintain reports of suspected child abuse—even if the final disposition of a report is that the allegation was determined to be 'unfounded[,]'" "Endy's information in CWS/CMS is accessed and maintained by child welfare agencies and shared only with other governmental entities responsible for the safety and welfare of children. In

effect, the entities who are able to view Endy's listing in CWS/CMS are those who should be familiar with the meaning of an 'unfounded' allegation and the high burden that attaches to such a finding. Endy offers no evidence that those with access to CWS/CMS might misconstrue his 'unfounded' listing as equivalent to a 'substantiated' or 'inconclusive' one. Nor does Endy present evidence that his information in CWS/CMS—which is confidential and generally prohibited from public disclosure absent court order—might be disseminated in such a manner that would result in his public branding him as a child abuser. Although the statute has various disclosure exceptions, see, e.g., Cal. Welf. & Inst. Code § 827, there is no indication in the record that these exceptions allow for such a level of access that would make Endy's inclusion in CWS/CMS stigmatizing." (*Endy, supra,* 975 F.3d at p. 765.)

Fourth, even if it were assumed that the continued inclusion of Endy's unfounded allegations in CWS/CMS is stigmatizing, "Endy must also show that it altered or extinguished one of his known rights under the 'stigma-plus' test." (*Id.* at p. 766.) Thereafter, the Ninth Circuit dismissed each of Endy's attempts to prove the "plus," which included claims that continued listing in the CWS/CMS impacted his rights with respect to his employment, his right to visit his daughter's school, or his ability to adopt, become a legal guardian, or foster a child. (*Id.* at pp. 766-768.)

Regarding interference with Endy's employment, the Ninth Circuit noted that Endy had not pointed out any provisions in the

CANRA or other statutes or regulations that would permit his employer to obtain access to CWS/CMS information. (*Id.* at p. 766.) Regarding his ability to visit or volunteer at his daughter's school, Endy had pointed to no law that allows a school to deny an individual visitation rights based on "unfounded" reports in CWS/CMS. Furthermore, Endy admitted that he had not inquired whether he could visit the school since the allegations were deemed "unfounded." (*Ibid.*)

Regarding Endy's ability to adopt, become a legal guardian, or foster a child, the Ninth Circuit found that, although CWS/CMS may be accessed for purposes of assessing someone as a potential resource family, there was no provision in either California law or County policy that suggested that an individual might be denied his right to adopt, foster, or become a legal guardian purely on the basis of "unfounded" allegations against him in CWS/CMS. (*Id.* at p. 767.) In fact, "according to the DCFS Policy Manual, 'at-risk' indicators include only 'substantiated or inconclusive allegations of child abuse to a child protective agency' but 'not . . . unfounded reports.'" (*Ibid.*)

The Ninth Circuit concluded that "Endy's arguments as to the 'plus' prong of the 'stigma-plus' test rely upon mere allegations in his complaint, which are insufficient to overcome the County's evidence supporting its motion for summary judgment. Because Endy fails to raise a triable issue as to whether his inclusion in CWS/CMS deprived him of a constitutional liberty interest, his procedural due process claim

fails and we need not reach the issue of whether the attendant procedures were sufficient." (*Id.* at p. 768.)

The take-away from *Paul v. Davis, supra,* 424 U.S. at p. 694, *Humphries, supra*, 554 F.3d at 1170, *Endy, supra,* 975 F.3d at p. 757, and *Englebrecht, supra,* 88 Cal.App.4th at p. 1236, is that an appellant must do more than assert an unspecified and speculative "stigma" to avoid dismissal for mootness. The appellant must also show that the "stigma" impacts the appellant's rights or interest in a tangible and concrete way and, thereby, provides the reviewing court with a material issue to resolve. Father has failed to meet that burden. (BOM 37-57.)

As the Ninth Circuit did in *Endy, supra,* 975 F.3d at pp, 766-768, the Court of Appeal here found Father's assertion that unless vacated, the jurisdictional account would impair his ability to serve as a placement option for other family members under Welfare and Institutions Code section 361.3, subdivision (a)(5), was insufficient because Father did not also assert he had relatives that might be subject to a placement under section 361.3, "and thus [has] failed to identify a specific legal or practical negative consequence resulting from the jurisdictional finding." (Opinion 7.)

Endy also tells us that, by definition, for governmental conduct to stigmatize an individual, the conduct must be accessible to the public. (*Endy, supra,* 975 F.3d at p. 765.) Merriam Webster defines "stigma" as "a mark of shame or discredit." (https://www.merriam-webster.com/dictionary/stigma.) "Shame" is defined as, "a

condition of humiliating disgrace or disrepute." (https://www.merriam-webster.com/dictionary/shame.) One of the reasons the Ninth Circuit treated a CACI listing differently from a CWS/CMS listing is that a CWS/CMS listing is an internal database generally accessible only to government agencies, while a CACI listing is more publicly accessible. (*Endy, supra,* 975 F.3rd at p. 765.) "As a result, Endy does not face the same exposure to reputational harm experienced by the *Humphries* plaintiffs—whose listings in CACI allowed potential employers, educational institutions, and 'a broad range of third parties' with access to CACI to identify them as 'substantiated child abusers.'" (*Ibid*.)

A juvenile court's jurisdictional finding enjoys the same confidentiality as a listing on the CWS/CMS. Welfare and Institutions Code section 300.2 provides that, "the provisions of this chapter ensuring the confidentiality of proceedings and records are intended to protect the privacy rights of the child." Welfare and Institutions Code section 827 greatly limits access to juvenile court files. Subdivision (e) of Welfare and Institutions Code section 827 provides, "For purposes of this section, a 'juvenile case file' means a petition filed in a juvenile court proceeding, reports of the probation officer, and all other documents filed in that case or made available to the probation officer in making the probation officer's report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer."

Therefore, as recognized by the Ninth Circuit, the confidentiality of juvenile court records protects the parent from reputational harm (*Endy, supra,* 975 Fd.3d at p. 765), something not considered in *Nathan E.*, *supra,* 61 Cal.App.5th at p. 114, *In re M.W.*, *supra,* 238 Cal.App.4th at p. 1444, or *In re C.C.*, *supra,* 172 Cal.App.4th at p. 1481.

Another similarity with *Endy* is the fact that here, neither the initial referral, the substantiated general neglect referral, nor the allegations sustained by the juvenile court were reportable to the DOJ. (*Endy, supra,* 975 F.3d at p. 765; CT 5, 19-20.) One might argue that this is a reasonable and practical threshold where a juvenile court's jurisdictional finding becomes sufficiently accessible to the public to cause a stigma, *i.e.*, when the sustained allegations involve child abuse and/or neglect that are reportable to the DOJ. (§ 11169, subd. (a).) However, even this should not be a hard and fast rule. As discussed below, the determination of whether a jurisdictional finding causes a sufficient future harm to allow merit review of a moot appeal, must be made on a case-by-case basis and consider whether a successful merit review would actually eliminate the harm or stigma. For example, even in cases where there was a CACI referral, a successful challenge to the jurisdictional count would not eliminate the stigma if the parent's conduct also resulted in a criminal conviction, or if there had been previous dependency cases involving the same substantiated parental conduct.

Furthermore, because, as noted above, there was no CACI referral here, the issue of whether a CACI referral is sufficient, in

and of itself, to allow merit review is not before this Court for review.

Because Father still has not identified a specific legal or practical negative consequence resulting from the jurisdictional finding, the Opinion should be affirmed.

2. *Father's challenge to the jurisdictional finding, if successful, would not eliminate any alleged stigma.*

This case is also distinguishable from the stigma-cases relied on by Father because Father's appellate challenge, if successful, would not eliminate the factual basis for the jurisdictional findings, which Father agrees are undisputed: "Both medical experts agreed the child sustained a single rib fracture caused by compression which left alone would go on to uneventful healing." (BOM 29-30.) This is consistent with Father's position before the Court of Appeal. Father did not contend the factual allegations sustained as true were not supported by substantial evidence. (AOB 25-26.) He argued that by finding D.P.'s injuries would not have occurred but for the neglectful act of the parents, the juvenile applied the presumption provided by section 355.1, subdivision (a). (AOB 26.) Father argued this finding was erroneous because, at the time of the jurisdictional hearing, he had eliminated the risk by completing all services the juvenile court would have had him complete thereby rebutting the Welfare and Institutions Code section 355.1 presumption. (AOB 25-26, 30.) Therefore, a successful appeal on the merits here would merely mean reversal of the juvenile court's finding that the risk of substantial harm

continued to exist as of the date of the jurisdictional hearing, despite Father's efforts in the interim. Although such a reversal would result in the dismissal of the sustained count, it would not eliminate from existence the undisputed factual allegations of the count nor the evidence supporting those allegations, *i.e.*, D.P. sustained a rib fracture while in the care of his parents; Father failed to provide an explanation for the injury; and such an injury would not have occurred but for the neglectful acts of the parents. (CT 5; BOM 29-30.) Accordingly, any alleged stigma would remain.

Therefore, to avoid dismissal of a moot appeal by asserting the allegations of the challenged jurisdictional count are stigmatizing, the parent must challenge the underlying factual findings. Any other indirect attack, such as the one Father mounted here, should be insufficient to avoid dismissal because it would not eliminate the alleged stigma.

For this reason as well, the Opinion should be affirmed.

Conclusion

Because the record shows that DCFS did not report to the DOJ the February 2019 unsubstantiated referral or the substantiated general-neglect referral and is prohibited from doing so in the future, there is no CACI issue for this Court to review. Therefore, Father's contentions and arguments regarding the CACI have no merit and should not be entertained.

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Father's assertion of an unspecified and speculative "stigma," without more, failed to show there remained material issue to be resolved. Therefore, the Opinion should be affirmed.

DATED: August 25, 2021

Respectfully submitted,

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DATED: August 25, 2021

Respectfully submitted,

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Declaration Of Service

STATE OF CALIFORNIA, County of Los Angeles:

ARLENE MEZA states: I am employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action. My business address is 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012.

On August 25, 2021, I served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF D.P., SUPREME COURT CASE NO. S267429, 2d JUVENILE NO. B301135, LASC NO. 19CCJP00973,** to the persons and/or representative of the court as addressed below.

BY TRUEFILING. I served via TrueFiling, and no error was reported, a copy of the document(s) identified above:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25, 2021, at Los Angeles, California.

/s/ Arlene Meza
ARLENE MEZA

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S267429**
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8/25/2021

Date

/s/Arlene Meza

Signature

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