

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re CADEN C.,)	No. S255839
)	
A Person Coming Under the)	Court of Appeal Nos.
Juvenile Court Law.)	A153925
_____)	consolidated with
)	A154042
SAN FRANCISCO HUMAN)	
SERVICES AGENCY,)	San Francisco No.
)	JD153034
Plaintiff and Appellant,)	
)	
v.)	
)	
CHRISTINE C. et al.,)	
)	
Defendants and Respondents;)	
)	
CADEN C., a Minor,)	
)	
Appellant)	
_____)	

CRC
8.25(b)

SUPREME COURT
FILED

SEP 04 2019

Jorge Navarrete Clerk

Deputy

CHRISTINE C.'S OPENING BRIEF ON THE MERITS

After the Published Decision by the Court of Appeal
First District, Division One
Filed April 9, 2019 and Modified April 10, 2019

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Under Appointment By the Supreme
Court of California Under the First
District Appellate Project's Independent
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Defendants and Respondents;)	
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CADEN C., a Minor,)	
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Appellant.)	
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OPENING BRIEF ON THE MERITS
FOR RESPONDENT MOTHER CHRISTINE C.

QUESTIONS PRESENTED

(1) What standard of review governs appellate review of the
beneficial parental relationship exception to adoption?

(2) Is a showing that a parent has made progress in addressing the
issues that led to dependency necessary to meet the beneficial parental
relationship exception?

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INTRODUCTION

The “relationship of a natural parent and a child is a vital human relationship which has far-reaching implications for the growth and development of the child.” (*In re Andrew L.* (2004) 122 Cal.App.4th 178, 195.) By creating the Welfare and Institutions Code¹ section 366.26, subdivision (c)(1)(B)(i), beneficial parent-child relationship exception to adoption, the Legislature recognized that these relationships are sometimes worth preserving even when a parent has not been able to reunify with the child. Despite the creation of this exception by the Legislature, the Courts of Appeal have, at times, imposed a requirement that the parent establish he or she had made progress in addressing the issues leading to the child’s dependency before applying the beneficial parent-child relationship exception to adoption. This is contrary to the clear language of the statute and public policy and effectively renders the beneficial parent-child relationship exception meaningless. Thus, for the reasons set forth herein, this Court should find it not necessary that there be a showing that a parent has made progress in addressing the issues that led to dependency to meet the beneficial parent-child relationship exception to adoption.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

STATEMENT OF FACTS / PROCEDURAL HISTORY

Original and Amended Petitions and Detention:

On September 16, 2013, Marin County Health and Human Services filed a petition that alleged then four-year-old Caden was subject to juvenile court jurisdiction pursuant to section 300, subdivisions (b), due to Mother's substance abuse, mental illness, and unstable housing. (1CT² 435-440.)

That same day, Marin County Health and Human Services filed a first amended petition that added an allegation that Caden was also subject to juvenile court jurisdiction pursuant to section 300, subdivision (b), because Mother had a history of engaging in domestic violence with Caden's father as well as an allegation that Caden was subject to juvenile court jurisdiction pursuant to section 300 subdivision (j), because his half-siblings had previously been dependents. (1CT 429-434.) At the initial hearing held on September 16 and 23, 2013, the Marin County juvenile court found a prima facie showing had been made, ordered Caden temporarily detained, and set a contested jurisdiction hearing. (1CT 362-365, 417-419.)

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² "CT" refers to the Clerk's Transcript, which will be identified by Volume; "ACT" refers to the Augmented Clerk's Transcript; "RT" refers to the Reporter's Transcript, which will be identified by date.

Jurisdiction:

After a settlement conference, on November 8, 2013, Marin County Health and Human Services filed a second amended petition that alleged Caden was subject to juvenile court jurisdiction pursuant to section 300, subdivision (b), due to Mother's substance abuse, mental illness, and unstable housing. (1CT 246-250, 311.) At the jurisdiction hearing held that day, all parties submitted, the Marin County juvenile court sustained the second amended petition and set a disposition hearing. (1CT 237-244.)

Disposition:

At the disposition hearing on January 14, 2014, the juvenile court declared Caden a dependent, ordered him removed from Mother's custody pending the provision of family reunification services to her, and set a six-month review for July 14, 2014. (1CT 166-179.)

Reunification Period:

During the reunification period, Mother completed residential substance abuse treatment at healthRIGHT360 and then transitioned to another treatment program at Women's Hope, where she remained. (1CT 89, 93-94.) Mother demonstrated the ability to remain clean and sober, to manage her anger, and to keep Caden safe. (1CT 89, 94.) She progressed to unmonitored visits in May 2015. (1CT 89, 94.) Caden missed Mother and

wanted to return to her custody. (1CT 89, 91.) As a result of the progress made by Mother, Caden was placed with her at Women's Hope on July 10, 2014. (1CT 58.) Subsequently, at the six-month review hearing on July 14, 2014, the Marin County juvenile court ordered Caden returned to Mother's custody under a family maintenance plan and set a six-month in-home review. (1CT 58-66.)

Family Maintenance:

From July 2014 to January 2015, Mother and Caden continued to reside at Women's Hope in San Francisco. (1CT 22, 27.) Mother actively sought other housing options and continued to demonstrate her ability to keep Caden safe. (1CT 22, 27.) At the six-month review hearing on January 12, 2015, the juvenile court continued Caden as a dependent and ordered the case transferred to San Francisco. (1CT 1-12.) On February 13, 2015, the San Francisco Juvenile Court (hereinafter juvenile court) accepted transfer and set a six-month in-home review. (2CT 449.)

Between January and July 2015, Caden remained in Mother's custody and they moved to a new apartment. (2CT 471, 473.) Despite turmoil regarding her move away from Women's Hope to private housing, Mother maintained her sobriety and demonstrated her ability to keep Caden safe. (2CT 473-475.) At the six-month review hearing on July 7, 2015, the

juvenile court continued Caden as a dependent and set another six-month in-home review. (2CT 507-510.)

From July 2015 to January 2016, Caden remained in Mother's custody. (2CT 519.) Mother struggled with her sobriety and continued to require support from the agency to parent Caden. (2CT 521-523, 529.) At the six-month review on January 5, 2016, the juvenile court continued Caden as a dependent, ordered Mother to participate in additional services, and set a further six-month in-home review. (2CT 545-552.)

Supplemental Petition and Re-detention:

Mother relapsed in January and March 2016, presented several positive tests, missed other tests, and failed to consistently participate in treatment to address substance abuse. (2CT 572, 575-576.) She did not regularly attend individual counseling. (2CT 574-575.) Mother had difficulty meeting Caden's needs in that she failed to assure he participated in therapy and attended summer school. (2CT 572.) As a result, Caden was taken back into protective custody on June 9, 2016. (2CT 565.)

On June 14, 2016, the agency filed a section 387 supplemental petition alleging that Caden's placement with Mother was no longer appropriate because Mother's unaddressed substance abuse and mental health concerns prevented her from adequately caring for Caden. (2CT 565-

568.) At the initial hearing held on June 15 and 16, 2016, the juvenile court found a prima facie showing had been made, ordered Caden temporarily detained, and set a contested jurisdiction and disposition hearing. (2CT 583-586, 589.)

Adjudication of Supplemental Petition:

Pending adjudication of the supplemental petition, Caden was placed with his former foster mother and non-related extended family member (NREFM), Christina H. (2CT 629.) Caden remained there until August 9, 2016, when he was removed at Christina's request and placed in a licensed foster home in Modesto. (3CT 711.) Mother immediately re-enrolled in residential substance abuse treatment at healthRIGHT360. (2CT 635.)

Mother visited Caden regularly, supervised by the agency. (2CT 636.) She was prepared for visits and provided structure for Caden during visits. (2CT 636.) She brought toys, games and snacks to visits, played with Caden, and read books with him. (2CT 636.) Caden consistently stated that he wanted to go home with Mother and he also cried and said that he missed Mother. (2CT 636.) However, he was able to accept that he could not go home with Mother and could be soothed when upset. (2CT 636.) The agency observed that Mother and Caden had "a close bond and attachment." (2CT 636.)

Prior to the contested jurisdiction and disposition hearing, the parties reached an agreement under which Mother agreed to submit on the supplemental petition and the agency agreed to recommend a permanent plan of long-term foster care for Caden to give Mother an opportunity to file a petition for modification so as to regain custody of Caden. (3CT 683-685.) Hence, on August 15, 2016, the juvenile court sustained the supplemental petition, ordered Caden removed from Mother's custody, terminated Mother's reunification services, selected a permanent plan of long-term foster care for Caden with twice weekly visits for Mother and Caden, and set a six-month post-permanent plan review as well as a hearing on Mother's anticipated petition for modification. (3CT 692-697.)

Post-Permanency Planning:

Pending the first post-permanent plan review, Caden initially remained placed in the same licensed foster home in Modesto where he was placed on August 9, 2016. (3CT 709, 711, 789.) Although he struggled to adjust, by late September he settled into the placement. (3CT 711.) Then, on February 13, 2017, Caden was placed in a new foster home in the Modesto area, where he reportedly adjusted well and was happy. (3CT 900-901.) Nevertheless, Caden struggled to emotionally deal with his removal from Mother's custody. (3CT 792-793.)

Mother completed residential substance abuse treatment at healthRIGHT360 on August 31, 2016, and also consistently participated in services offered through Family Treatment Court, including outpatient substance abuse treatment, a twelve-step program with a sponsor, and drug testing. (3CT 712, 714, 809-811, 874.) However, she continued to display issues with her mental health, failed to participate in therapy, had difficulty understanding the impact of her substance abuse on Caden, missed some drug tests, presented two positive tests (one for alcohol), and was ultimately discharged from Family Treatment Court on April 19, 2017. (3CT 712, 714, 810-811, 874; 4CT 964.)

Mother consistently visited Caden six hours per week, supervised at Seneca's First Stop, then at Environmental Alternatives, then in the community, and finally at the foster family agency. (3CT 712-713, 794, 813, 901-902.) Caden "value[d] his time" with Mother and looked forward to visits. (3CT 713, 902.) Mother was nurturing and affectionate with Caden and Caden was affectionate with Mother. (3CT 713.) However, Mother struggled with not discussing the case with Caden and the social workers and not making promises to Caden. (3CT 713-714, 794, 813-814, 875, 901.) Mother provided snacks and participated in structured activities

with Caden. (3CT 713, 794, 813-814.) She was able to set limits and redirect Caden and he responded to her. (3CT 713, 875.)

On January 5, 2017, Mother filed a petition for modification seeking either additional reunification services or Caden's return to her custody. (3CT 724-785.) After a contested hearing on April 4, 2017, the juvenile court denied Mother's petition for modification finding that there were no changed circumstances. (3CT 895.)

After Mother's petition for modification was denied, the agency immediately sought to reduce Mother's visitation with Caden. (3CT 901-902.) The social worker consulted with Dr. Alicia Lieberman, the agency's "attachment-bonding" consultant, who recommended a reduction in visits because Caden's "frequent contact with the parent who is unstable left [him] in a state of heightened anxiety." (3CT 902.) On the other hand, Caden's therapist, Miriam Silverman, expressed concern about reducing visits because Caden looked forward to seeing Mother. (3CT 902.)

After an administrative review on May 9, 2017, in which Dr. Alicia Lieberman participated, the agency once again sought to reduce Mother's visitation with Caden "to allow him the chance to process his separation and adjust to a permanent home." (4CT 962-964.) The agency acknowledged that Caden had "a connection with [Mother]," but opined that the

relationship was not healthy and that the relationship was “sabotaging his stability in placement.” (4CT 963.) Specifically, the agency reported that Caden had three placements in the eleven months since his last removal from Mother, with each placement failing due to the multitude of services Caden required, including visitation with Mother. (4CT 962.) The agency further reported that visitation with Mother seemingly prevented Caden from being able to connect to his caregivers and settle into a permanent home. (4CT 962.) Finally, the agency opined that visitation with Mother “cause[d] [Caden] to be in a constant state of being re-triggered and not being able to relax” because he was in a constant state of excitement when visitation days approached. (4CT 963.) The agency recognized that the reduction in visitation might impact Caden, but opined that therapeutic support would assist him in his adjustment. (4CT 963.)

After a contested six-month post-permanent plan review on May 24, 2017, the juvenile court continued Caden as a dependent, reduced Mother’s visits with Caden to once per month, and set a section 366.26 selection and implementation hearing for September 19, 2017. (4CT 981-985.) Subsequently, on June 1, 2017, the juvenile court formally appointed minor’s counsel as Caden’s educational rights holder. (4CT 993-994.)

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Permanency Planning:

On May 19, 2017, Caden was re-placed in the home of Christina H., where he remained throughout the permanency planning stage.³ (4CT 964, 1046, 1050, 1054, 1127; 1/22/18 RT 218.) Caden adjusted well to the placement as he had continuously maintained a relationship with Christina H. since being placed in her home from March to July 2014 and in the summer of 2016. (4CT 1049; 1/22/18 RT 218-219.) In September 2017, Christina H. indicated that she was committed to adopting Caden. (4CT 1053-1054, 1129.)

Caden was physically healthy and had no mental health, emotional, or behavioral concerns. (4CT 1048-1049.) However, due to his learning disability, he was performing two grade levels behind in school, i.e., he had completed second grade, but was performing at a kindergarten level. (4CT 1049; 1/22/18 RT 220.) Caden was attending weekly therapy with Miriam Silverman and was scheduled to end services on August 31, 2017. (4CT 1049.) However, it was planned for him to continue therapy with a new provider “to process the separation from [Mother] and adapt to his identified adoptive home.” (4CT 1049.)

³ On August 15, 2017, Christina H. was designated as Caden’s educational rights holder. (4CT 1035-1036.)

Between May 24, 2017 and July 2017, Mother's visits with Caden were reduced from twice per week, to once per week, then to biweekly, and finally to monthly. (4CT 1050.) Mother continued to bring snacks and to engage in appropriate interaction with Caden. (4CT 1050, 1133.) However, she again had difficulty refraining from discussing the case.⁴ (4CT 1050-1051, 1133.)

Caden was upset that the visits were reduced to once per month and told his therapist that he wanted to continue visiting Mother. (4CT 1049, 1050.) Caden also regularly stated that he missed Mother. (4CT 1050.) However, he did not display any "concerning behaviors that indicated he was in crisis due to the reduced contact." (4CT 1050.)

When adoption was first discussed with Caden, he said he would be willing to live with Christina H. until he "was big," but asked if he would still be able to visit Mother. (4CT 1130; 1/22/18 RT 315.) Caden was reassured that he would have some type of visits with Mother that would resemble his current visits. (4CT 1130; 1/22/19 RT 315-316.) However, when asked the next day about being adopted by Christina H., Caden "started to cry and state that he wanted to live with [Mother]." (4CT 1130.)

⁴ At one point, Mother told the visitation supervisor that she spent her days in bed, drinking a mixture of vodka, orange juice, and cream, which she referred to as "creamsicles." (4CT 1050.)

The agency acknowledged that Caden had a “bond and attachment” to Mother and that he would have “some emotional responses to separation from [her].” (4CT 1051-1052, 1131.) However, the agency opined that maintaining the relationship with Mother was detrimental to Caden⁵ because their relationship was “infused with moments of trauma and stability” and because Mother was not allowing him to be happy in his placement, which undermined Caden’s “stability in foster care.” (4CT 1051-1052, 1131-1132.)

The Section 366.26 Hearing:

The section 366.26 hearing took place on January 22, 29 and 31 and February 8, 2018. (4CT 1064, 1067, 1116-1119, 1164, 1171, 1175-1179, 1194-1200.) During the hearing, the juvenile court accepted into evidence the September 5, 2017 WIC 366.26 Report, the November 21, 2017 Addendum Report, the December 29, 2017 Addendum Report, the Curriculum Vitae of Dr. Alicia Lieberman [Exhibit 4] and her three-page Clinical Consultation Report [Exhibit 5], the Curriculum Vitae of Dr. Hugh Molesworth and his Bonding Study [Exhibit B], a letter from Caden, a drawing made by Caden, and a January 13, 2018 letter from David Simonini

⁵ Nevertheless, Mother and Christina H. were referred for mediation to arrange post-adoption visitation. (4CT 1143-1144.)

to Mother [Exhibit H], as well as copies of reports related to Mother's daughter. (4CT 1178-1179; ACT 7-97.) The juvenile court also heard testimony from social worker Chabrika Bowers, Mother's adult children Aris and Brian, Danielle Williams, Mother's daughter Naomi G., Dr. Alicia Lieberman, Dr. Hugh Molesworth, David Simonini, Sherrie Taylor, and Nhyema Barnes. (4CT 1176-1177.)

Testimony of Social Worker Chabrika Bowers:

Bowers had been the social worker on Caden's case since February 2015 when Caden was living with Mother. (1/22/18 RT 217.) Bowers described Caden as a "really awesome engaging social kid." (1/22/18RT 221-222.) Bowers was recommending termination of parental rights and a permanent plan of adoption for Caden. (1/22/18 RT 231.) Her recommendation was based on the longevity of Caden's relationship with his foster mother, Christina H., her dedication to him and his comfort with her, the stability and security that placement with Christina H. offered to Caden as well as Christina H.'s willingness to support ongoing contact between Caden and Mother. (1/22/18 RT 231, 247-249, 327.) However, Bowers also indicated that she would have supported a permanent plan of legal guardianship if that was the permanent plan that Christina H. had desired because ongoing contact with Mother was part pf what was best for

Caden. (1/22/18 RT 301.) Nevertheless, Bowers believed adoption was the best permanent plan for Caden because it would offer him stability and put an end to litigation. (1/22/18 RT 330-331.)

According to Bowers, Caden's visits with Mother were originally twice a week for three hours, supervised.⁶ (1/22/18 RT 234.) Mother and Caden were affectionate with each other and Mother interacted appropriately with Caden, but Mother had difficulty focusing on Caden and not discussing the case. (1/22/18 RT 234-238.) Since visits were reduced in May 2017, Caden was currently visiting with Mother once per month for two-and-one-half hours. (1/22/18 RT 231, 288-289.) Caden was "not happy" about the reduction in visits and said that he missed Mother, but he did not display any concerning behaviors as a result of the reduction in visits. (1/22/18 RT 244-245, 290, 291.)

Bowers believed that Mother's actions directly led to the failure of three placements for Caden, including the 2016 failure of his placement with Christina H. (1/22/18 RT 239-242.) Bowers did not have any concerns about Caden's current placement with Christina H. failing and recognized that Mother supported that placement. (1/22/18 RT 242-244, 311.)

⁶ Bowers never observed a visit between Mother and Caden. (1/22/18 RT 236.)

Bowers acknowledged that Caden had a connection and a bond with Mother, that he looked forward to visits with Mother, and that maintaining visitation with Mother was important to Caden. (1/22/18 RT 249, 288, 289-290.) She also acknowledged that, when she was discussing adoption with Caden, he cried and said he wanted to be with Mother. (1/22/18 RT 248.)

Testimony of Dr. Alicia Lieberman:

Dr. Alicia Lieberman, the agency's attachment and bonding consultant, was qualified as an expert in "parent-child bonding and attachment, with specific focus on childhood trauma and its impact on children." (1/29/18 RT 422-430.) She began consulting on Caden's case in August 2015; she attended meetings at the agency, reviewed the case file, spoke to Caden's therapist, and ultimately recommended a reduction in Mother's visits with Caden. (1/29/18 RT 430-431.) However, she never met Caden or Mother and never observed them together. (1/29/18 RT 435-436.) As she did in her Clinical Consultation Report, Lieberman opined that adoption was "the least detrimental and most desirable alternative for Caden." (1/29/18 RT 431; ACT 76-78.) Lieberman acknowledged that Caden had "a very strong emotional bond with [Mother] and loved her very much." (1/29/18 RT 433; ACT 76-78.) Nevertheless, Lieberman believed that the narrowness of the bond and Caden's preoccupied attachment to

Mother posed risks to Caden's development. (1/29/18 RT 433; ACT 76-78.)

Finally, Leiberman acknowledged that Caden missed Mother, wanted to visit Mother and/or live with her, and was upset about adoption. (1/29/18 RT 444, 446, 447; ACT 76-78.) However, she opined that the availability of a protective parent, like Christina H., would allow him to overcome any detriment he suffered from losing Mother. (1/29/18 RT 444, 446, 447; ACT 76-78.)

Testimony of Dr. Hugh Molesworth:

Dr. Hugh Molesworth conducted a bonding study as to Mother and Caden and was qualified as an expert "in child psychology, bonding studies, and the parent-child attachment[.]" (1/29/18 RT 451-461.) Molesworth observed Mother and Caden together on July 13 and August 15, 2017 for a total of five-and-a-half hours, met with Caden for an additional 45 minutes, reviewed portions of the file, and consulted with collaterals such as Caden's therapist. (1/29/18 RT 464-465, 467, 470-473; ACT 79-81.) Molesworth opined that Caden viewed Mother as a source of emotional support, enjoyed being with her, sought out her affection, looked to her to have his needs met, and benefitted from his relationship with her. (1/29/18 RT 462, 498; ACT 92-95.) Molesworth declared that there was a positive bond between Caden and Mother, that Caden had a substantial maternal attachment to

Mother, and that his relationship with Mother was very important to Caden. (1/29/18 RT 462, 463,478; ACT 92.) Although Molesworth noted concern that Caden's bond with Mother was a narrow bond, he did not believe that was the case because Caden was able to form relationships with other people, including Christina H. (11/29/18 RT 480-481; ACT 95.)

Molesworth acknowledged that Mother had ongoing substance abuse and mental health issues that periodically interfered with her ability to parent, but explained that Mother's shortcomings had not lessened the bond between Mother and Caden. (1/29/18 RT 492, 493, 495.) Molesworth opined that Caden would suffer significant feelings of loss if he did not have contact with Mother and could suffer emotional disorganization, developmental regressions, problems sleeping, anxiety, depression, identity issues that would last his entire life, and he could be at risk of abusing substances. (1/29/18 RT 473-478, 482; ACT 95-96.) On the other hand, Molesworth further opined that Caden would benefit from continued contact with Mother because it would give him a sense that people do not disappear. (1/29/18 RT 475.)

Testimony of Mother:

According to Mother, Caden was removed in October 2013, returned in July 2014, and removed again in June 2016. (1/31/18 RT 606.)

She was Caden's only caregiver when he lived with her. (1/31/18 RT 614.)

When Caden was not living with her, Mother was very consistent with her visits, missing only a few visits between 2013 and 2018. (1/31/18 RT 605-606, 617-618.) According to Mother, Caden loved his visits, loved being with her, and needed her to be a part of his life. (1/31/18 RT 618, 627.)

Mother believed that if she was taken out of Caden's life, he would believe that he did something wrong and he would become angry and defiant.

(1/31/18 RT 626.)

Mother acknowledged that her addiction was problematic, took full accountability for it, and claimed she battled it daily. (1/31/18 RT 721-723.)

She even acknowledged using both while Caden was in her custody and when she was trying to regain custody. (1/31/18 RT 721-723.) However, she noted that, despite her addiction, she was never told that she was not properly parenting Caden. (1/31/18 RT 721-722.)

Caden's Letter:

In his letter to the court, Caden stated that he loved Mother, missed Mother, was sad that he was not with her, and very much wanted to go back and live with her. (ACT 91.) If he could not return to Mother, then he wanted to have visits with her, including visits where he could spend the night with her. (ACT 91.)

Testimony of Caden's Half-Siblings:

Caden's adult brother, Aris, said he believed that Caden was very attached to Mother. (1/22/18 RT 255.) Caden's other adult brother, Brian, similarly opined that Caden had a strong bond with Mother. (1/22/18 RT 264, 266.) Caden's 16-year-old sister, Naomi, stated that Caden and Mother had a "really loving relationship" and that he would be torn apart if he was adopted. (1/29/18 RT 413, 416.)

Other Testimony:

Mother's neighbor, Danielle Williams, said she observed that Mother and Caden had a good relationship, believed Caden loved Mother very much and was very attached to her, and thought that taking Mother away from Caden would do more harm to him than good. (1/22/18 RT 303-306.) Mother's friend, David Simonini similarly stated that Caden appeared to be very bonded to Mother. (1/31/18 RT 669.) Mother's former counselor from healthRight360 opined that Caden had a very good relationship and a strong bond with Mother and loved her very much. (1/31/18 RT 679-680, 682.) Mother's former Marin County social worker, Nhyema Barnes, declared that Caden loved Mother, missed her when he was not with her, and was very bonded to her, and that it would be difficult for Caden to have no contact with Mother. (1/31/19 RT 689, 695, 696.)

The Juvenile Court's Decision:

After hearing all of the testimony and argument from all parties and considering the evidence, on February 8, 2018, the juvenile court announced its decision. (1/31/19 RT 746-756; 2/8/18 RT 3-26.) The juvenile court stated:

“With respect to the matter of Ms. C[.], this has been an extremely difficult case for the court. Ms. C[.], I do believe that Caden does deserve some permanency. That is the preference of the legislature. That is the case law. [¶] The Court finds that the Agency has met its burden that Caden is adoptable. That therefore shifts the burden to you to essentially determine what the nature of your bond is with Caden. [¶] Caden has pursuant to the evidence that the Court has heard during this proceeding been in out of placements and lived with various homes with various caretakers. [¶] However, the Court does find that throughout the various placements that he has had that Ms. C[.], his Mother, has been a constant and that is the relationship that the Court does need to focus on. [¶] Ms. C[.], you have acknowledged your addiction and that your addiction impedes your ability to care for Caden full time. [¶] I certainly commend you for your honesty and I find you credible in all of your testimony with respect to your love for your son. [¶] The Court does make the following specific findings with respect to this case. [¶] . . . In consideration of the exhibits that have been admitted into court, and considered by the Court, the Court does find that Ms. C[.] has been Caden’s primary caregiver for six, approximately six out of his eight and a half years of life. [¶] The record does show Ms. C[.]’ devotion to Caden and that she has maintained consistent and regular visitation and

contact with Caden in the context of these Dependency proceedings. [¶] The Court does find that Ms. C[.] does stand in a parental role to her son. [¶] The Court does find that the visits themselves have continued the significant emotional attachment that Caden and his Mother did create prior to his removals. [¶] The Court further finds that Ms. C[.] 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. [¶] I think there can be no doubt that Caden -- well, strike that. Let me rephrase 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. [¶] Ms. C[.] has maintained her deep commitment and emotional relationship with Caden throughout this process both when he was in and out of her care. That is very significant to the Court. [¶] The Court finds that Caden is a mature 8 year old and he's probably seen a lot more in his brief 8 years of life than he should have. He has directly communicated his desire with this court in a February 6th, 2017, letter and through Minor's counsel both his love of his Mother and his request to be returned to her. [¶] The Court's review of the clinical consultation report and bonding studies submitted by Doctors Lieberman and Mulsworth [sic] respectively, also demonstrates that Ms. C[.] 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 also notes that Dr. Lieberman acknowledges that Dr. Mulsworth's [sic] bonding study

provides a, quote, ‘compelling description of Caden's love for his Mother.’ End quote. [¶] 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. C[.] has established the continuing beneficial relationship exception determination [sic] 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 23-26; 4CT 1199-1200 [written findings].)

Ultimately, on March 12, 2018, the juvenile court selected a permanent plan of long-term foster care for Caden and authorized continuing once per month visits for Caden and Mother. (4CT 1218-1222.)

The Appeal:

On March 21, 2018, Caden’s attorney and CAPTA Guardian ad Litem filed a notice of appeal on his behalf. (4CT 1225-1226.) On April 6, 2018, the agency filed a notice of appeal. (4CT 1234-1235.)

In a published opinion, the Court of Appeal, First District, Division One, reversed the juvenile court’s finding that the beneficial parent-child relationship exception to adoption applied. (*In re Caden C.* (2019) 34 Cal.App.5th 87, as modified April 10, 2019, rehearing denied (May 1, 2019), review granted July 24, 2019 (S255839) (*Caden C.*)

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ARGUMENT

I.

THE HYBRID STANDARD OF REVIEW IS THE MOST APPROPRIATE STANDARD.

Welfare and Institutions Code section 366.26, subdivision

(c)(1)(B)(i), commonly referred to as the beneficial parent-child relationship exception to adoption, states, in relevant part:

“If the court determines . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . Under these circumstances, the court shall terminate parental rights unless . . . [t]he court finds a compelling reason for determining that termination [of parental rights] would be detrimental to the child [because] [t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

(§ 366.26, subd. (c)(1)(B)(i).) Since its inception, the beneficial parent-child relationship exception to adoption has been judicially interpreted to be, in essence, a three-prong test, wherein the court must determine:

1) whether the parent maintained regular visitation and contact with the child; 2) whether the parent-child relationship is sufficiently beneficial to the child such that the child would benefit from continuing the relationship and/or suffer detriment from the loss of the relationship; 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 Logan B.* (2016) 3 Cal.App.5th 1000, 1009-1013; *In re S.B.* (2008) 164 Cal.App.4th 289, 300-301; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575-576.)

The first appellate review of the new beneficial parent-child relationship exception to adoption employed what appeared to be a hybrid substantial evidence and abuse of discretion standard of review. (*In re Jesse B.* (1992) 8 Cal.App.4th 845, 851 [Fifth District].) Starting in 1994 with *Autumn H.*, the Courts of Appeal routinely applied a substantial evidence standard of review to challenges regarding the applicability of the beneficial parent-child relationship exception to adoption. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809 [Fourth District, Division One]; *In re Brittany C.* (1999) 76 Cal.App.4th 847, 854 [Sixth District]; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827 [Second District]; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1533-1534, 1538 [Second District, Division Four]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 53 [Fourth District, Division One]; *In re Teneka W.* (1995) 37 Cal.App.4th 721, 729 [Second District, Division Two]; *In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576 [Fourth District, Division One].) Then, in 2000, explaining that “[t]he juvenile

court is determining which kind of custody is appropriate for the child[.]”
the First District Court of Appeal applied the abuse of discretion standard of
review to a challenge regarding the applicability of the beneficial parent-
child relationship exception to adoption. (*In re Jasmine D.* (2000) 78
Cal.App.4th 1339, 1351.)

For the next ten years, some of the Courts of Appeal applied the
substantial evidence standard of review while other Courts of Appeal
applied the abuse of discretion standard. (*In re S.B.*, *supra*, 164 Cal.App.4th
at pp. 297-298 [Fourth District, Division One; substantial evidence]; *In re*
B.D. (2008) 159 Cal.App.4th 1218, 1235 [Fourth District, Division One;
substantial evidence]; *In re Mary G.* (2007) 151 Cal.App.4th 184, 206
[Fourth District, Division One; substantial evidence]; *In re Helen W.* (2007)
150 Cal.App.4th 71, 81 [Fourth District, Division Three; substantial
evidence]; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449 [Second
District, Division Eight; abuse of discretion]; *In re Dakota H.* (2005) 132
Cal.App.4th 212, 229 [Fourth District, Division One; substantial evidence];
Ire Amber M. (2002) 103 Cal.App.4th 681, 689 [Fourth District, Division
One; substantial evidence]; *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947
[Fourth District, Division One; substantial evidence]; *In re Jerome D.*
(2000) 84 Cal.App.4th 1200, 1207 [Fourth District, Division One;

substantial evidence]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 424 [Fourth District, Division Three; substantial evidence]; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153 [Second District, Division Four; substantial evidence].)

Subsequently, in late 2009, the Sixth District Court of Appeal, expanding on its previous decision in *In re I.W.* (2009) 180 Cal.App.4th 1517, issued a decision explaining that the proper standard of review when addressing a challenge to the applicability of the beneficial parent-child relationship exception to adoption is a hybrid of the substantial evidence standard and the abuse of discretion standard. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) In *Bailey J.*, the Sixth District held that the first two prongs of the exception, the frequency and consistency of visitation and the nature of the parent-child relationship, are factual issues appropriately reviewed under the substantial evidence standard of review. (*Id.* at p. 1314.) The Sixth District further held that the question of whether or not the parent's regular visitation and contact and the existence of a beneficial parent-child relationship constitutes a "*compelling reason*" for determining that termination of parental rights would be detrimental to the child was "'quintessentially' a discretionary decision," which was better suited to the abuse of discretion standard of review. (*Id.* at p. 1315.)

Notwithstanding the *Bailey J.* decision, some of the Courts of Appeal continued to apply the substantial evidence standard of review. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166 [First District, Division Four]; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643 [Second District, Division Six]; *In re C.F.* (2011) 193 Cal.App.4th 549, 557 [Fourth District, Division One; substantial evidence]; *In re C.B.* (2010) 190 Cal.App.4th 102, 127 [Fourth District, Division One; substantial evidence].) However, since 2014, the Courts of Appeal have, for the most part, consistently been following *I.W.* and *Bailey J.* and applying the hybrid standard of review while, at the same time, noting that there is a split in authority regarding the correct standard of review. (*In re E.T.* (2018) 31 Cal.App.5th 68, 76 [First District, Division Three]; *In re Collin E.* (2018) 25 Cal.App.5th 647, 663 [Fourth District, Division One]; *In re J.S.* (2017) 10 Cal.App.5th 1071, 1080 [Fourth District, Division Two]; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 647 [Second District, Division Seven]; *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300 [Second District, Division Five]; *In re Anthony B.* (2015) 239 Cal.App.4th 389, 395 [First District, Division One]; *In re J.C.* (2014) 226 Cal.App.4th 503, 530-531 [Fourth District, Division Three]; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622 [Second District, Division Seven].) Indeed, in the case now before this Court, Division One

of the First District recognized that there was a conflict as to the standard of review and joined the other Courts of Appeal following *I.W.* and *Bailey J.* in applying the hybrid standard of review. (*In re Caden C.*, *supra*, 34 Cal.App.5th at p. 106.)

Mother submits that the hybrid standard of review first developed in *In re Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1314-1315 and recently followed by nearly every Court of Appeal that has published on the issue, is the appropriate standard of review. As the *Bailey J.* Court noted, the questions of whether or not the parent maintained regular visitation and contact with the child and whether a beneficial parent-child relationship exists are factual issues. (*Id.* at p. 1314.) Thus, as with any factual issue, the appropriate standard of review of those questions is the substantial evidence standard of review. (*Ibid*; *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 889.) Moreover, as the *Bailey J.* Court also noted, the question of whether or not a “compelling reason” exists to find that termination of parental rights and adoption would be detrimental to the child is based on the facts, but is not primarily a factual issue because it requires a balancing of interests. (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315; *In re Logan B.*, *supra*, 3 Cal.App.5th 1000, 1009-1013.) Certainly, a balancing of interests to reach a decision is

“a ‘quintessentially’ discretionary decision[.]” (*In re Bailey J, supra*, 189 Cal.App.4th at p. 1315.) Therefore, as with any other discretionary determination, application of the abuse of discretion standard of review is appropriate. (*Ibid.*; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

However, although Division One of the First District Court of Appeal aptly identified the hybrid standard as the appropriate standard of review, it did not correctly apply the abuse of discretion portion of that hybrid standard. As this Court has made clear: “‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ [Citations.]” (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319.) In the present case, rather than draw inferences supporting the juvenile court’s decision, the Court of Appeal drew its own inferences from the facts to reverse. (*In re Caden C., supra*, 34 Cal.App.5th at pp. 113-115.) Indeed, the Court of Appeal elevated the opinions of Dr. Alicia Lieberman, which the juvenile court discounted because she had never even met Caden and Mother, over the opinions of Dr. Hugh Molesworth, upon which the juvenile court relied and who had conducted a very thorough bonding study. (*Ibid.*) Additionally, in reaching its decision, the *Caden C.* Court even went

so far as to conduct its own balancing of the benefits resulting from continuing the parent-child relationship against the benefits of adoption in order to reverse the juvenile court's finding that the beneficial parent-child relationship exception to adoption applied. (*Ibid.*) This was error because the Court of Appeal effectively "substitute[d] its own judgment as to what [wa]s in the child's best interests for the trial court's determination in that regard, reached pursuant to the statutory scheme's comprehensive and controlling provisions." (*In re Zeth S.* (2003) 31 Cal.4th 396, 410.)

In sum, based on the nature of the inquiry into whether or not the beneficial parent-child exception to adoption applies, the appropriate standard of review is the hybrid substantial evidence and abuse of discretion standard set forth in *In re Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1314-1315 and adopted by the Court of Appeal in this case. (*In re Caden C.*, *supra*, 34 Cal.App.5th 87, 106.) However, because the abuse of discretion portion of that standard was not correctly applied, this Court must reverse the decision of the Court of Appeal, First District, Division One and either reinstate the finding that the beneficial parent-child relationship exception to adoption applied or, at the very least, remand to the Court of Appeal with directions to properly apply the abuse of discretion standard of review to the

juvenile court's finding that the benefits of maintaining the parent-child relationship outweighed the benefits of adoption.

II.

A DETERMINATION OF WHETHER THE PARENT HAS MADE PROGRESS IN ADDRESSING THE ISSUES THAT LED TO DEPENDENCY IS NOT STATUTORILY REQUIRED FOR ASSESSING WHETHER THAT PARENT HAS ESTABLISHED THAT THE BENEFICIAL PARENT-CHILD RELATIONSHIP EXCEPTION TO ADOPTION APPLIES, IS INCONSISTENT WITH PUBLIC POLICY, AND RENDERS THE BENEFICIAL PARENT-CHILD EXCEPTION TO ADOPTION MEANINGLESS.

As set forth *ante* in Argument I, the section 366.26, subdivision (c)(1)(B)(i), beneficial parent-child relationship exception to adoption, provides, in relevant part:

“If the court determines . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . Under these circumstances, the court shall terminate parental rights unless . . . [t]he court finds a compelling reason for determining that termination [of parental rights] would be detrimental to the child [because] [t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

(§ 366.26, subd. (c)(1)(B)(i). The beneficial parent-child relationship exception to adoption has been judicially interpreted to be, in essence, a

three-prong test, wherein the juvenile court must determine: 1) whether the parent maintained regular visitation and contact with the child; 2) whether the parent-child relationship is sufficiently beneficial to the child such that the child would benefit from continuing the relationship and/or suffer detriment from the loss of the relationship; 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 Logan B.*, *supra*, 3 Cal.App.5th at pp. 1009-1013; *In re S.B.*, *supra*, 164 Cal.App.4th at pp. 300-301; *In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.)

In what is often referred to as the seminal case on the beneficial parent-child relationship exception to adoption, *In re Autumn H.*, Division One of the Fourth District Court of Appeal recognized that, because the parent had already been found unfit and failed to reunify, the focus of the application of the beneficial parent-child relationship exception to adoption was on the child, not the parent. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576 [“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. . . . 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."].) Over the next two decades, the Courts of Appeal sometimes mentioned the parent's unresolved issues, but the focus of the analysis on the applicability of the beneficial parent-child relationship exception to adoption remained on the child. (E.g., *In re Jerome D.*, *supra*, 84 Cal.App.4th at p. 1206 [mentions the mother's short comings as a parent but focuses on child's view of relationship]; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1352 [relationship with parent who had made no efforts to address her issues did not outweigh benefits of adoption]; *In re Brittany C.*, *supra*, 76 Cal.App.4th at pp. 852-855 [makes reference to the mother's substance abuse, but focuses on the child]; *In re Amanda D.* (1997) 55 Cal.App.4th 813, 821-822 [despite the father's rehabilitation, the exception did not apply because the children did not view the father as a parent]; *In re Teneka W.*, *supra*, 37 Cal.App.4th at pp. 727-729 [makes reference to the father having killed the mother, but focuses on the children's relationships with the father]; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416-1420 [makes reference to

parent's failure to reunify, but focuses on the nature of the children's relationships with the parents].) None of the other cases published during this period of time, however, make any mention of the parent's issues leading to the dependency or the parents' efforts to address those issues when assessing the applicability of the beneficial parent-child relationship exception to adoption. (E.g. *In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-955; *In re Angel B.* (2002) 97 Cal.App.4th 454, 466-469; *In re Jamie R.* (2001) 90 Cal.App.4th 766, 773; *In re Clifton B.*, *supra*, 81 Cal.App.4th at pp. 424-425; *In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1154; *In re Zachary G.*, *supra*, 77 Cal.App.4th at pp. 810-812; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109; *In re Derek W.*, *supra*, 73 Cal.App.4th at pp. 826-827; *In re Brandon C.*, *supra*, 71 Cal.App.4th at p. 1538 ["[t]he court's attention was first focused, properly, on the existence of a relationship between parent and children, and the benefit to the children from continuing that relationship."]; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 52; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1341-1343; *In re Jason E.* (1997) 53 Cal.App.4th 1540, 1548-1549; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

In 2002, the Division One of the Fourth District Court of Appeal revisited the beneficial relationship exception to adoption in the case *In re*

Amber M. (2002) 103 Cal.App.4th 681, 689-691 and specifically held that the parent's failure to rehabilitate and be ready for the child's return to her custody could not be the basis for an order terminating parental rights or a finding that the beneficial parent-child relationship exception did not apply. Over the next 14 years, when assessing the applicability of the beneficial parent-child relationship exception to adoption, some of the published cases followed *Amber M.* and made no mention of the parent's issues leading to the dependency or their efforts to address those issues. (*In re J.C.*, *supra*, 226 Cal.App.4th at pp. 528-534; *In re C.B.*, *supra*, 190 Cal.App.4th at pp. 123-129; *In re Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1315-1317; *In re Jason J.* (2009) 175 Cal.App.4th 922, 935; *In re Mary G.*, *supra*, 151 Cal.App.4th at pp. 206-208; *In re Helen W.*, *supra*, 150 Cal.App.4th at pp. 80-81; *In re Aaliyah R.*, *supra*, 136 Cal.App.4th at p. 449.) However, other published cases did make mention of the parent's issues and rehabilitative efforts, but these cases nonetheless generally placed proper focus on the child, not the parent. (*In re Anthony B.*, *supra*, 239 Cal.App.4th at p. 396 [noting the father was not in a position to take custody, but focusing on the lack of consistent visitation]; *In re L.S.* (2014) 230 Cal.App.4th 1183, 1199 [mentioning the parents' issues, but focusing on the effect on the children]; *In re G.B.*, *supra*, 227 Cal.App.4th at pp. 1165-1166 [noting the mother was

just beginning to make progress addressing her issues, but focusing on the child]; *In re Marcelo B.*, *supra*, 209 Cal.App.4th at pp. 642-644 [mentioning parents' continued alcohol abuse, but nevertheless focusing on the child]; *In re C.F.*, *supra*, 193 Cal.App.4th at pp. 553-559 [noting the mother's resumption of drug use and resultant loss of custody distinguished that case from *In re S.B.*, but nevertheless focusing on the requirements of the statute and the child's interests]; *In re Scott B.* (2010) 188 Cal.App.4th 452, 470-473 [noting the child might never be able to be returned to the parent's custody, but nevertheless reversing the finding that the exception did not apply based on the child's needs]; *In re S.B.*, *supra*, 164 Cal.App.4th at pp. 396-301 [opining the father's "devotion to S.B. was constant, as evinced by his full compliance with his case plan and continued efforts to regain his physical and psychological health" when reversing the finding the exception did not apply, but still maintaining primary focus on the child]; *In re B.D.*, *supra*, 159 Cal.App.4th at p. 1234 [no mention of issues outside the mother's inability to understand the impact of her lack of consistent parenting on the children and her inability to meet the children's special needs]; *In re Dakota H.*, *supra*, 132 Cal.App.4th at pp. 228-231 [no mention of issues outside the mother's limited cognitive abilities, but focusing on child].) Indeed, only one case went so far as to

opine that the mother's issues, including her refusal to participate in services, established that the exception did not apply. (*In re Michael G.* (2012) 203 Cal.App.4th 580, 594-595.)

In 2014, in the case *In re Noah G.* (2014) 247 Cal.App.4th 1292, 1299-1304, relying on the comments regarding the mother's relapse into drug use set forth in *In re C.F., supra*, Division Five of the Second District Court of Appeal held that the mother's failure to complete her case plan, her missed drug tests, and her continued substance abuse constituted "evidence continuing the parent-child relationship would not be *beneficial*" to her children when affirming the juvenile court's finding that the beneficial parent-child relationship exception to adoption did not apply. In 2017, in the case *In re Breanna S., supra*, 8 Cal.App.5th at pp. 647-648, when affirming the juvenile court's finding that the beneficial parent-child relationship exception to adoption did not apply, Division Seven of the Second District Court of Appeal followed suit and found that "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 [the mother's] relationship with [the father], the very reason that dependency jurisdiction was exercised in the first place." Finally, in 2018, in the case *In*

re E.T., supra, 31 Cal.App.5th at pp. 75-78, Division Three of the First District Court of Appeal relied, in part, on the mother's efforts to rehabilitate in finding the juvenile court erred when it found the beneficial parent-child relationship exception to adoption did not apply.

In the case at bar, Division One of the First District Court of Appeal took this new philosophy that parental efforts at rehabilitation bear relevance to the applicability of the beneficial parent-child relationship exception to adoption one step further. (*In re Caden C., supra*, 34 Cal.App.5th at pp. 103-115.) The *Caden C.* court found that substantial evidence supported the juvenile court's findings that Mother maintained regular visitation and contact with Mother and that Caden and Mother had a parent-child relationship that was beneficial to Caden. (*Id.* at pp. 107-109.) The *Caden C.* court went on to find that there was no substantial evidence to support the juvenile court's findings that Mother " 'substantially complied with her case plan' " and " 'continues her efforts to maintain her sobriety and address her mental health issues' [.] " (*Id.* at pp. 110-111.) Then, relying on *In re Noah G., supra*, 247 Cal.App.4th at pp. 1302, 1304, *In re Breanna S., supra*, 8 Cal.App.5th at p. 648, *In re Marcelo B., supra*, 209 Cal.App.4th at p. 643-645 as well as *In re S.B., supra*, 164 Cal.App.4th at p. 293-294, 300-301, *In re Amber M., supra*, 103 Cal.App.4th at pp. 686-

687, 690-691, *In re Brandon C.*, *supra*, 71 Cal.App.4th at p. 1535 and *In re E.T.*, *supra*, 31 Cal.App.5th at p. 78, the *Caden C.* court opined that “no reasonable judge could have concluded that a compelling justification was made to forego adoption and order a permanent plan of long-term foster care for Caden” and reversed the juvenile court’s finding that the beneficial parent-child relationship exception to adoption applied. (*Id.* at pp. 110-113.)

This Court has granted review to determine whether this recent trend toward considering a parent’s efforts in addressing the problems leading to the dependency is a proper consideration when assessing the applicability of the beneficial parent-child relationship exception to adoption applies, i.e. 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?” As fully set forth below, the answer is an unqualified no.

A. A Parent Has A Fundamental Liberty Interest In The Care, Custody And Management Of His Or Her Child.

The “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” (*Griswold v. Connecticut* (1965) 381 U.S. 479, 484 [85 S.Ct. 1678, 1681, 14 L.Ed.2d 510].) One of the penumbral rights emanating from the Bill of Rights is the right of privacy. (*Id.* at p. 485.) That right of

privacy includes the freedom of personal choice in family matters. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753 [102 S.Ct. 1388, 71 L.Ed.2d 599]; *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 24-32 [101 S.Ct. 2153, 68 L.Ed.2d 640]; *Quilloin v. Walcott* (1978) 434 U.S. 246, 255 [98 S.Ct. 549, 54 L.Ed.2d 511]; *Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 845 [97 S.Ct. 2094, 53 L.Ed.2d 14]; *Moore v. East Cleveland* (1977) 431 U.S. 494, 499 [97 S.Ct. 1932, 52 L.Ed.2d 531]; *Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 639-640 [94 S.Ct. 791, 39 L.Ed.2d 52]; *Stanley v. Illinois* (1972) 405 U.S. 645, 651-652 [92 S.Ct. 1208, 31 L.Ed.2d 551]; *Prince v. Massachusetts* (1944) 321 U.S. 158, 166 [64 S.Ct. 438, 88 L.Ed. 645]; *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535 [45 S.Ct. 571, 69 L.Ed. 1070]; *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 [43 S.Ct. 625, 67 L.Ed. 1042].) Thus, through the penumbras and emanations of the Bill of Rights, a parent has a fundamental liberty interest in the care, custody and management of his or her child. (*Santosky v. Kramer, supra*, 455 U.S. at p. 753.)

Child welfare proceedings, which in California are known as dependency proceedings, impact the parent's fundamental liberty interest in the care, custody and management of his or her child. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.) Indeed, there can be no greater

impact on a parent's liberty interest in his or her child than an order terminating parental rights and permanently severing the natural parent-child relationship.

B. California Dependency Proceedings.

A brief review of dependency proceedings is necessary to fully understand the beneficial parent-child relationship exception to adoption.

Dependency proceedings are divided into three distinct phases.

(*Cynthia D. v. Superior Court, supra*, 5 Cal.4th at p. 253.) First, there is the adjudicatory phase, where the grounds for jurisdiction over the child and removal from parental custody (the equivalent to parental unfitness) are established. (*Cynthia D. v. Superior Court, supra*, 5 Cal.4th at p. 253; § 300 [bases for jurisdiction]; § 361 [grounds for removal].) Next, there is the reunification phase, where all efforts are focused on rehabilitating the parent's fitness and returning the child to the parent's custody. (*Cynthia D. v. Superior Court, supra*, 5 Cal.4th at p. 253; § 366.21 [six-month review and 12-month review]; § 366.22 [18-month review]; § 366.25 [24-month review].) Finally, there is the permanency planning phase, where efforts are focused on finding the child the most stable, permanent home possible. (*Cynthia D. v. Superior Court, supra*, 5 Cal.4th at p. 253; § 366.26 [selection and implementation of permanent plan].)

During the first two phases, adjudicatory and reunification, both the parent's interest in his or her fundamental right to care, custody and control of the child and the child's interest in maintaining his or her existing family unit weigh equally and heavily, while the child's interest in stability and permanency is, by law, of lesser importance. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419-420; *In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

However, during the third phase, permanency planning, the child's interest in stability, permanency and finding a safe and secure home strongly takes priority over the parent's interest in the care, custody and companionship of the child. (*In re Jasmon O., supra*, 8 Cal.4th at pp. 419-420; *In re Marilyn H., supra*, 5 Cal.4th at p. 309.)

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. (*In re*

Jasmon O., *supra*, 8 Cal.4th at pp. 419-420; *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309; *Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 254.)

Permanency planning is governed by section 366.26. At the section 366.26 hearing, the court must select and implement a permanent plan for the dependent child. The court has six statutory alternatives to choose from, but adoption, which requires the termination of parental rights, is the preferred permanent plan. (§ 366.26, subd. (b); *In re Celine R.* (2003) 31 Cal.4th 45, 53.)

At the section 366.26 hearing, “in order to terminate parental rights, the court need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated.” (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at pp. 249-250.) Once it has been determined that a child is adoptable, the court will terminate parental rights unless the parent is able to prove by a preponderance of the evidence one of the exceptions to adoption set forth in section 322.26, subdivisions (c)(1)(A) and (c)(1)(B). (*In re Brian R.* (1991) 2 Cal.App.4th 904, 924.) The provisions of section 366.26, subdivisions (c)(1)(A) and (c)(1)(B) recognize an effort by the Legislature under certain exceptions to provide an alternative to adoption.

At issue in the present case is the beneficial parental relationship which provides that a permanent plan other than adoption should be selected where “[t]he court finds a compelling reason for determining that termination would be detrimental to the child [because] [t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

C. Principals Of Statutory Construction Establish That Application Of The Beneficial Parent-Child Relationship Exception To Adoption Does Not Require The Parent To Establish That He Or She Has Made Progress In Addressing The Issues That Led To The Dependency.

Whether a showing that a parent has made progress in addressing the issues that led to dependency is necessary to satisfy the beneficial parent-child relationship exception is a matter of statutory interpretation. (See *Mardardo F. v. Superior Court* (2008) 164 Cal.App.4th 481, 483-492.) Questions of statutory interpretation are reviewed de novo. (*In re M.C.* (2011) 199 Cal.App.4th 784, 804.)

The rules of statutory interpretation are clear. A reviewing court’s purpose in construing a statute is to ascertain the Legislature’s intent in order to effectuate the purpose of the law. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 595.) Thus, the reviewing court must first look to the words of the statute and give those words their normal, ordinary

meaning. (*Ibid.*) Only if the application of the ordinary meanings of the words of the statute results in more than one reasonable interpretation can the reviewing court resort to extrinsic aids such as legislative history, the statutory scheme, and public policy. (*In re M.C.*, *supra*, 199 Cal.App.4th at p. 806.) However, even then, the reviewing court must avoid any interpretation which would lead to absurd consequences. (*In re Luke W.* (2001) 88 Cal.App.4th 650, 655.)

“[T]he statutory language is generally the most reliable indicator of legislative intent.” (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) As noted *ante*, the beneficial parent-child relationship exception to adoption codified at section 366.26, subdivision (c)(1)(B)(i), provides that the juvenile court shall not terminate parental rights and select adoption as the dependent child’s permanent plan where “[t]he court finds a compelling reason for determining that termination would be detrimental to the child [because] [t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) Section 366.26, subdivision (c)(1)(B)(i), only directs the juvenile court to make three—and only three—determinations: 1) was there regular visitation and contact; 2) would the child benefit from continuing the relationship with the parent; and 3) is

there a compelling reason to find adoption would be detrimental to the child. (*In re Logan B.*, *supra*, 3 Cal.App.5th at pp. 1009-1013.) Thus, the clear and unambiguous words of section 366.26, subdivisions (c)(1)(B)(i), establish that the Legislature did not require the parent to show he or she has made progress in addressing the issues that led to dependency to prove the beneficial parent-child relationship exception to adoption is applicable.

Moreover, section 366.26, subdivision (c)(1), as a whole, demonstrates that it is not necessary for the parent show that he or she has made progress in addressing the issues that led to dependency to meet the beneficial parental relationship exception. “The words of the statute . . . should be construed in their statutory context.” (*Hassan v. Mercy American River Hospital*, *supra*, 31 Cal.4th at p. 715.) Thus, where the Legislature has included language in one part of a statute, but excluded it from another, a court should not imply the omitted provision in the part of the statute that does not contain it. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621-622.) Section 366.26, subdivision (c)(1), provides, in relevant part, that “[a] finding . . . that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights.” (§ 366.26, subd. (c)(1).) In other words, pursuant to section 366.26,

subdivision (c)(1), the juvenile court cannot even *consider* terminating parental rights *unless* the parent has had his or her reunification services terminated at a prior review hearing; i.e., the parent has failed to address the problems leading to the dependency. (§ 366.26, subd. (c)(1).) It is only after that determination has been made that the juvenile court considers whether or not the beneficial parent-child relationship exception to adoption applies. (§ 366.26, subd. (c)(1).) From this provision it is clear that the Legislature was aware of the reunification phase when drafting section 366.26, subdivision (c)(1), as it included the failure of reunification as a prerequisite to terminating parental rights. Thus, had the Legislature intended the juvenile court to consider the parent's progress in addressing the causes of the dependency in determining whether or not the beneficial parent-child relationship exception to adoption applies, then it would have included such a provision in section 366.26, subdivision (c)(1)(B)(i). But it did not. This Court cannot add to the statute what the Legislature left out or conform the statute to an assumed intent which does not appear from its language. (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1099.) Therefore, considering section 366.26, subdivision (c)(1), as a whole, the only reasonable interpretation of section 366.26, subdivision (c)(1)(B)(i) is that applicability of the beneficial parent-child relationship

exception to adoption does not require a showing that the parent has made progress in addressing the issues that led to dependency.

Finally, the purpose of section 366.26 is to select the most appropriate permanent plan for a child who cannot return home because reunification efforts have failed. (§ 366.26, subd. (b); *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 50; *In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1418.) The beneficial parent-child relationship exception to adoption was created to assure that, at this stage of the proceedings, the child is not deprived of an important parent-child relationship where there has been regular visitation and contact and there exists a beneficial relationship between the child and parent. (See *In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.)

Section 366.26 does not require the parent to show that he or she made progress in addressing the issues that led to dependency to meet the beneficial parent-child relationship exception. If section 366.26, subdivision (c)(1)(B)(i), is interpreted so that a parent's failure to address the problems that led to dependency can defeat application of the beneficial parent-child relationship exception, it will virtually assure that children will be deprived of important parent-child relationships, thereby defeating the purpose of the exception. This was not the intent of the Legislature.

D. Public Policy Prevents Imposition Of A Requirement That The Parent Make a Showing That He Or She Has Made Progress In Addressing The Issues That Led To The Dependency In Order For The Beneficial Parent-Child Relationship Exception To Adoption To Apply.

By the time of the section 366.26 hearing, the juvenile court has already determined that reunification services have been unsuccessful and the focus has turned to developing a permanent plan for the child. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309; *Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 253.) The beneficial parent-child relationship exception to adoption is meant to apply in those circumstances where it has been determined that, even if the parent may not ultimately regain custody, the parent should not be excluded from the child's life. (*In re S.B.*, *supra*, 164 Cal.App.4th at pp. 396-301; *In re Amber M.*, *supra*, 103 Cal.App.4th at pp. 689-691.) In fact, the Legislature created a framework such that the beneficial parent-child relationship exception does not become applicable until "[a]fter the parent has failed to reunify [i.e failed to comply with the service plan] and the court has found the child likely to be adopted." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 574.)

The Legislature has recognized that circumstances might exist where a parent was unable to reunify, but the child's bond with that parent is so strong as to outweigh the perceived benefits of adoption. The beneficial

parent child relationship exception to adoption provides protection for the child. Had the parent addressed the problems leading to dependency, the parent would have reunified with the child, would not be at risk of having parental rights terminated, and the exception would not be relevant. Hence, remaining focused on the parent's progress in addressing issues that led to the dependency, rather than the child's bond with the parent, is not what the Legislature intended.

Interpreting section 366.26, subdivision (c)(1)(B)(i), so that a parent's failure to address the problems that led to dependency can defeat application of the beneficial parent-child relationship exception would render the exception meaningless. Children would be unnecessarily denied the vital human relationship of a parent-child bond. This is a consequence which this Court must avoid.

E. Conclusion

In sum, the words of section 366.26, subdivision (c)(1)(B)(i) are clear: the exception applies when the parent has maintained regular visitation and contact with the child, the child has a beneficial relationship with the parent, and the circumstances of the relationship are so exceptional that terminating parental rights would be detrimental to the child. Thus, no

showing that the parent made progress addressing the problems leading to the child's dependency is required.

In the case at bar, the decision of Division One of the First District Court of Appeal rendered the beneficial parent-child exception to adoption meaningless. Despite the fact that Mother visited Caden consistently throughout the dependency and that Caden and Mother had a very strong, loving relationship that benefitted Caden to a great degree, the Court of Appeal reversed the juvenile court's finding that the beneficial parent-child relationship exception to adoption applied primarily because it did not believe that Mother had made sufficient progress in addressing the issues leading to Caden's dependency. The Court of Appeal focused on a factor not at issue during the permanency planning stage of dependency proceedings. This was error which requires this Court to reverse the decision of the Court of Appeal, First District, Division One and either reinstate the finding that the beneficial parent-child relationship exception to adoption applied or, at the very least, remand to the Court of Appeal with directions to determine whether or not the juvenile court abused its discretion when it found that the beneficial parent-child relationship exception to adoption applied without any consideration of Mother's progress in addressing her issues.

CONCLUSION

For all of the foregoing reasons, Appellant, Christine C., requests this Court find that the appropriate standard of review as to the beneficial parent-child relationship exception to adoption is the hybrid substantial evidence and abuse of discretion standard, that application of the beneficial parent-child relationship exception to adoption does not requiring a showing that the parent has made progress in addressing the issues leading to the child's dependency and that the Court of Appeal in *In re Caden C.* improperly applied the standard of review and imposed an inappropriate requirement on application of the beneficial parent-child relationship exception to adoption.

Dated: September 3, 2019

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

I certify that the foregoing brief complies with California Rules of Court, rule 8.520(c) and contains 13,210 words, including footnotes, according to the word count feature of Corel Word Perfect X8, the computer program used to prepare this brief.



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DECLARATION OF SERVICE

I, the undersigned, declare that I am over 18 years of age, residing or employed in the County of Orange, and not a party to the instant action. My business address is listed above and my e-service address is barry212303@gmail.com. On September 3, 2019, I served the attached **APPELLANT'S OPENING BRIEF ON THE MERITS** by placing true copies in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of the following persons at the following addresses:

Hon. Monica Wiley San Francisco Juvenile Court 400 McAllister St. San Francisco, CA 94102	Court of Appeal, First Dist., Div. 1 350 McAllister St. San Francisco, CA 94102 Christine C. address on record
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On September 3, 2019, I also transmitted a PDF version of this document, via email, to each of the following using the email address indicated:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 3, 2019, at Huntington Beach, California.


LESLIE A. BARRY