

**FIRST DISTRICT APPELLATE PROJECT  
TRAINING SEMINAR  
January 31, 2020**

**ADOPTABILITY AND THE BENEFICIAL  
PARENT-CHILD RELATIONSHIP**

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## ADOPTABILITY AND THE BENEFICIAL PARENT-CHILD RELATIONSHIP

***In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803 and *In re Caden C.* (2019) 34  
Cal.App.5<sup>th</sup> 87, review granted (S255839)**

FDAP Annual Seminar January 31, 2020  
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### GENERAL CONSIDERATIONS

#### Overview

The purpose of the section 366.26 hearing is to select a permanent plan for the child. The court is not concerned with return of the child to the parent. Rather, the court considers 1) whether the child is adoptable and 2) what the appropriate permanent plan should be for the child. (§ 366.26, subd. (b); *In re Marilyn H.* (1993) 5 Cal.4<sup>th</sup> 295, 304-305.)

Only the juvenile court can determine and establish the permanent plan. (*In re Jason E.* (1997) 53 Cal.App.4<sup>th</sup> 1540 (settlement agreement between parents and relatives providing for long-term guardianship was unenforceable because parties lacked authority to settle matter, agreement was not enforceable, and neither the Department nor child's counsel participated in the settlement.)

#### Relevant Section 366.26 Language

Subdivision (c)(1): if the court determines, based on the assessment as ordered ...and any other relevant evidence, by a clear and convincing evidence standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis

for the court to conclude that it is not likely the child will be adopted...Under these circumstances, the court shall terminate parental rights unless either of the following applies: ...

(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: ...

(i) the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

## ADOPTABILITY

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| Overview |
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Whether a child is likely to be adopted is the “pivotal question” at the section 366.26 hearing. (*In re Tamneisha S.* (1997) 58 Cal.App.4<sup>th</sup> 798, 804.)

In determining the child’s adoptability, the court must focus on the child – whether the child’s age, physical condition, and emotional state lends him or her to finding an adoptive family. (*In re Carl R.* (2005) 128 Cal.App.4<sup>th</sup> 1051, 1061; *In re David H.* (1995) 33 Cal.App.4<sup>th</sup> 368, 378; § 366.22, subd. (b)(3).)

To be considered adoptable, a child need not be in a prospective adoptive home and there need not be a prospective adoptive parent “waiting in the wings.” (*In re Sarah M.* (1994) 22 Cal.App.4<sup>th</sup> 1642, 1649.)

While the court and Department have a valid interest in expeditiously concluding dependency matters [citation], testing the validity of evidence on adoptability before terminating parental rights serves the interest of all parties in increasing the likelihood that no child is left a legal orphan because an anticipated adoption does not occur. (*In re Thomas R.* (2006) 145 Cal.App.4<sup>th</sup> 726, 734.)

Mere interest or “willingness to explore” does not amount to a showing of adoptability. (*In re Asia L.* (2003) 107 Cal.App.4<sup>th</sup> 498, 512.)

The finding of adoptability is reviewed under the substantial evidence test. (*In re Asia L.* (2003) 107 Cal.App.4<sup>th</sup> 498, 509-510.)

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| General v. Specific Adoptability |
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The statutory framework does not distinguish between a child who is “generally adoptable” and one who is “specifically adoptable”.

*General v. specific adoptability*

- General adoptability – focus is on child
  - A child is “generally adoptable” if his “age, physical and emotional condition and other personal attributes are not likely to dissuade individuals from adopting him.” (*In re Sarah M.* (1994) 22 Cal.App.4<sup>th</sup> 1642, 1649-1650; *In re R.C.* (2008) 169 Cal.App.4<sup>th</sup> 486, 492.)
  - If a child a generally adoptable, the parent is not entitled to ask questions concerning the suitability of the prospective adoptive parents. (*In re Carl R.* (2005) 128 Cal.App.4<sup>th</sup> 1051, 1061; *In re Scott M.* (1993) 13 Cal.App.4<sup>th</sup> 839, 844.)
- Specific adoptability – focus is on the specific caregiver who is willing to adopt
  - A child who is not generally adoptable because of age, poor physical health, physical disability or emotional instability may nevertheless be specifically adoptable because a prospective adoptive family has been willing to adopt the child. (*In re Sarah M.* (1994) 22 Cal.App.4<sup>th</sup> 1642, 1650.)
  - When a child is deemed adoptable only because a particular caretaker is willing to adopt, the analysis shifts from evaluating the characteristics of the child to whether there are any legal impediments to prospective adoptive parent’s adoption and whether he or she is able to meet the needs of the child. (*In re Helen W.* (2007) 150 Cal.App.4<sup>th</sup> 71, 80.)
  - Legal impediments to adoption set forth in Family Code section 8601, 8602, and 8603. (*In re Carl R.* (2005) 128

Cal.App.4<sup>th</sup> 1051, 1063 [An inquiry into the prospective adoptive parents' specific educational plan for the child was not appropriate.]

- “It is always critical to make an accurate determination of adoptability at a section 366.26 hearing, but it is particularly critical in a specific adoptability case.” (*In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 818.)

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| Social Services Agency Has Burden of Proof |
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Social services agency has burden of proof on adoptability.

The social worker's conclusion that a child is adoptable is, standing alone, insufficient to support an adoptability finding. (*In re Asia L.* (2003) 107 Cal.App.4<sup>th</sup> 498, 512.)

*Forfeiture of issue on appeal*

The failure to object in the juvenile court to a finding that the minor is adoptable does not forfeit the issue for purposes of appeal when the challenge is to the sufficiency of the evidence. (*In re Gregory A.* (2005) 126 Cal.App.4<sup>th</sup> 1554, 1560; *In re Erik P.* (2002) 104 Cal.App.4<sup>th</sup> 395, 399.)

*In re Gregory A.* (2005) 126 Cal.App.4<sup>th</sup> 1554, 1557 [The parent may challenge the sufficiency of evidence supporting the juvenile court's finding of adoptability for the first time on appeal.]

*In re Brian P.* (2002) 99 Cal.App.4<sup>th</sup> 616, 623 [A parent may waive an objection that an adoption assessment does not comply with statutory requirements but a claim there was insufficient evidence of adoptability is not waived on appeal if not raised in the juvenile court.]

*In re Erik P.* (2002) 104 Cal.App.4<sup>th</sup> 395, 399 [Although father did not object to the adoptability finding at the section 366.26 hearing, he may still argue the adoptability finding was not supported by substantial evidence because “to hold otherwise would dilute the Department's

obligation to provide the juvenile court with the necessary facts regarding adoptability.”]

But, when the objection is to the adequacy of the adoption assessment report, that issue may be waived on appeal if not raised below:

*In re Crystal J.* (1993) 12 Cal.App.4<sup>th</sup> 407, 411, the Fourth Appellate District, Division One found mother’s failure to object to the assessment report at the selection and implementation hearing, waived the right to raise the issue on appeal.

*In re Urayna L.* (1999) 75 Cal.App.4<sup>th</sup> 883, 885-886; *In re Aaron B.* (1996) 46 Cal.App.4<sup>th</sup> 843, 846; *In re Dakota S.* (2000) 85 Cal.App.4<sup>th</sup> 494, 502.

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| Clear and Convincing Evidence |
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The Agency must show by clear and convincing evidence that it is likely that child will be adopted within a reasonable amount of time. (§ 366.26, subd. (c)(1); *In re Jerome D.* (2000) 84 Cal.App.4<sup>th</sup> 1200, 1204.)

“Clear and convincing’ evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.” (*In re David C.* (1984) 152 Cal.App.3d 1189, 1208.)

In the absence of clear and convincing evidence to satisfy the statute, it is error to leave a child without any parent. (*In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065.)

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| Likely To Be Adopted |
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“Likely” has been defined as having ordinary meanings such as “having a high probability of occurring or being true,” “very probable,” and “probable”. (*In re B.M.* (2018) 6 Cal.5<sup>th</sup> 528, 533.)

A juvenile court should find a child is likely to be adopted if it is very probable that adoption very probably will occur within a reasonable period of time. Because this determination is made on probabilities rather than certainty, it is a relatively “low threshold” even though it must be supported by clear and convincing evidence. (*In re K.B.* (2009) 173 Cal.App.4<sup>th</sup> 1275, 1292.)

“The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted.” (§ 366.26, subd. (c)(1).) “It is not necessary...that the child, at the time of the termination hearing, already be in a potential adoptive home. Rather, what is required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time.” (*In re Jennilee T.* (1992) 3 Cal.App.4<sup>th</sup> 212, 223.)

A prospective adoptive parent’s willingness to adopt generally indicates the child is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. (*In re Gregory A.* (2005) 126 Cal.App.4<sup>th</sup> 1554, 1562.)

The possibility a child may have future problems does not preclude a finding he or she is likely to be adopted. (*In re Jennilee T.* (1992) 3 Cal.App.4<sup>th</sup> 212, 223-225; *In re Helen W.* (2007) 150 Cal.App.4<sup>th</sup> 71, 79.)

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| Adoption Assessment |
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*Generally*

Section 366.26, subdivision (c)(1) requires an assessment as ordered under section 361.5, subd. (g)(1), 366.21, subd.(i)(1). 366.22, subd. (c)(1), or 366.25, subd. (b)(1); Cal Rules of Court, rule 5.708(b).)

“The Legislature has been quite clear that the child welfare agency’s preadoption study supplies the evidentiary foundation on which the juvenile court’s adoptability determination must rest.” (*In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 826.)

“The need for objective reporting from the social welfare agency is nowhere more important than at the permanency planning hearing under section 366.26.” (*In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 822.)

*Required contents of assessment*

The assessment shall include the following (§§ 361.5, subd. (g)(1), 366.21, subd.(i)(1). 366.22, subd. (c)(1), or 366.25, subd. (b)(1)):

- A report on current search efforts for an absent parent or parents or legal guardians and notification of noncustodial parent.
- A review of the amount of and nature of any contact between the child and his or her parents or legal guardians and other members of his or her extended family since the time of placement.
- An evaluation of the child’s medical, developmental, scholastic, mental and emotional status, including but not limited to,
  - A copy of the complete health and education summary as required under section 16010.
  - Name and contact information of the person(s) currently holding the right to make educational decisions for the child, which shall be redacted and withheld if disclosure of such information poses a threat to the health and safety of that individual.
- A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent...to include a social history including,
  - Screening for criminal records and prior referrals for child abuse or neglect,
  - Capability to meet the child’s needs,
  - Understanding of the legal and financial rights and responsibility of adoption and guardianship.
- Child’s relationship to any identified prospective adoptive parent or legal guardian.
  - The duration and character of the relationship,
  - The degree of attachment of the child to the prospective relative guardian or adoptive parent,
  - The relative’s or adoptive parent’s strong commitment to caring permanently for the child,

- The motivation for seeking adoption or guardianship,
- A statement from the child concerning placement and the adoption or guardianship, and whether the child, if over 12 years of age, has been consulted about the proposed relative guardianship arrangements, unless the child's age or physical, emotional, or other condition precludes his or her meaningful response and if so, a description of the condition.
- A description of efforts to be made to identify a prospective adoptive parent or legal guardian, including, but not limited to, child-specific recruitment and listing on an adoption exchange within the state or out of the state.
- An analysis of the likelihood that the child will be adopted in parental rights are terminated.

*Additional requirement for an Indian child:*

There must also be an assessment of the likelihood that the child will be adopted, when in consultation with the child's tribe, a tribal customary adoption, as defined in section 366.24, is recommended. If tribal customary adoption is recommended, the analysis shall included an assessment of 1) whether the tribal customary adoption would or would not be detrimental to the Indian child and the reasons for reaching that conclusion, and 2) whether the Indian child cannot or should not be returned to the home of the Indian parent or custodian and the reasons for reaching that conclusion.

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| No Report or Incomplete Report |
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*No report*

Where an investigative report is required prior to the making of a dependency decision and it is completely omitted, due process may be implicated. (*In re Crystal J.* (1993) 12 Cal.App.4<sup>th</sup> 407, 413; *In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 823.)

### *Incomplete report*

An inadequate assessment report may undermine the court's ability to select adoption as a child's permanent plan. (*In re Valerie W.* (2008) 162 Cal.App.4<sup>th</sup> 1, 14-15.)

### *When assessment report deemed incomplete:*

The assessment report stated child was adoptable based on "his good mental health, physical health, and sociability", "he appeared to be doing well in school, and currently requires no special treatment". Court found assessment report to be incomplete. Report did not provide additional information about physical or emotional state of consider the child's prosthetic eye which required care and treatment. The report also failed to consider the child's close relationship with mother. A home study had not been initiated and the assessment report did not address the caregiver's criminal history involving domestic violence or the fact he was listed with CPS as a perpetrator for emotionally abusing his niece and nephews. (*In re Jerome D.* (2000) 84 Cal.App.4<sup>th</sup> 1200, 1203-1205.)

### *When assessment incomplete but overall record contains substantial evidence that child is adoptable.*

Deficiencies in the adoption assessment report go to the weight of the evidence, "and may ultimately prove insignificant." (*In re John F.* (1994) 27 Cal.App.4<sup>th</sup> 1365, 1378; *In re Crystal J.* (1993) 12 Cal.App.4<sup>th</sup> 407, 413; *In re Dakota S.* (2000) 85 Cal.App.4<sup>th</sup> 494, 506.)

Court found there were omissions in the assessment report but the overall record contained substantial evidence the child was adoptable. (*In re K.B.* (2009) 173 Cal.App.4<sup>th</sup> 1275, 1292.)

### *The evidentiary record is necessarily limited to the information provided by the Agency to the court.*

The appellate court determines "whether the record contains substantial evidence from which the juvenile court could find clear and convincing evidence the child was likely to be adopted within a reasonable time." (*In re Michael G.* (2012) 203 Cal.App.4<sup>th</sup> 580, 589.)

The Court will not consider “critical information” not in the record, that would allegedly show child not likely to be adopted within a reasonable time had the information been before the court. In an unpublished decision *In re E.L.* (2017) B282104, the Second District Division Six noted that a parent’s contention that adoptability was not proved failed when parent argued that psychiatric exam should have been performed to determine if child had psychiatric issues. Court said “having failed to raise the missing ‘critical information’ issue in the juvenile court, father cannot raise it now in this appeal.” (See *Continental Baking C. v. Katz* (1968) 68 Cal.2d 512, 533; *In re A.A.* (2008) 167 Cal.App.4<sup>th</sup> 1292, 1317; *In re Joshua G.* (2005) 129 Cal.App.4<sup>th</sup> 189, 200, fn. 12.)

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| Due Process Considerations When Report Is Inadequate |
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*When is inadequate report a denial of due process?*

Where an assessment report is prepared, is available to the parties in advance of the hearing, and does address the principal questions at issue, errors or omissions in the report cannot be characterized in terms of denial of due process. (*In re Crystal J.* (1993) 12 Cal.App.4<sup>th</sup> 407, 413; *In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 824.)

*Due process rights of parents*

The Court found the due process rights of parents were not affected in *In re David H.* (1995) 33 Cal.App.4<sup>th</sup> 368. Father’s parental rights were terminated. Father did not contest adoptability because the Agency misrepresented to father that his son had a set of committed prospective adoptive parents waiting for him. Even though this was false, the Court stated that there was no guarantee that child would be placed with any particular family. The Court stated “as a general matter, it would be inimical to the policies underlying the juvenile court law to allow parents to raise a collateral challenge to an order terminating parental rights on the grounds that the child’s posttermination placement did not meet with the parents’ expectations.” (*Id.*, at pp. 384-385.) The juvenile court’s order terminating parental rights was affirmed.

### *Due process rights of minors*

The party most likely to suffer a due process violation when the Agency submits a wholly inaccurate report is the minor. (*In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 827.) “The minor-dependent is entitled to view the agency as his ‘champion’ [citations] and to place complete faith in its expert analysis of his adoptability.” “Given the stakes for the minor at the section 366.26 hearing, he had a fundamental liberty interest in accurate determination of the issue of adoptability on a full and complete record.” (*Id.*, at p. 826.)

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| The Role of Postjudgment Evidence |
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Adoptive placements can fail after the section 366.26 hearing and prior to the resolution of the appeal.

#### *Generally*

The general rule is that an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration. (*In re Zeth S.* (2003) 31 Cal.4<sup>th</sup> 396, 405.)

In very limited situations, post judgment evidence may be admitted.

#### *Post judgment evidence*

##### Use of Code of Civil Procedure section 909 motion

Appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 and rule 8.252 of the California Rules of Court, but the authority should be exercised sparingly. It will only be in a “rare and compelling case” “where postjudgment evidence stands to completely undermine the legal underpinnings of the juvenile court’s judgment under review.” (*In re Zeth S.* (2003) 31 Cal.4<sup>th</sup> 396, 399.) Absent exceptional circumstances, no such findings should be made. (*Id.*, at p. 405.)

*In re Elise K.* (1982) 33 Cal.3d 138, all of the parties agreed to stipulate that due to changed circumstances and the child’s advanced age, the child was no longer adoptable thereby undermining the foundational

basis of the juvenile court's order termination mother's custody and control over the minor. The Supreme Court determined it was appropriate to accept that stipulation, and on that basis the judgment of the superior court was reversed. (*Id.*, at p. 139.)

*In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 816, 818, the Court granted mother's motion to receive additional evidence under the *Elise K.* exception finding that it was one of those "rare and compelling" cases "where postjudgment evidence stands to completely undermine the legal underpinning of the juvenile court's judgment under review." The Court rejected the County's argument that section 366.26, subdivision (i)(3) provides a remedy where post judgment developments have fundamentally changed the child's prospects for adoption.

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| Role of section 366.26, subdivision (i)(3) |
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A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may seek reinstatement of parental rights by section 388 petition,

Section 366.26, subdivision (i)(3) is not an adequate remedy for a placement that has failed for a specifically adoptable child. (*In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 816.)

"Taking a 'let's wait-and-see' attitude towards Minor's adoptability for three years may, in fact, serve to compound the error." (*In re B.D.* (2019) 35 Cal.App.5<sup>th</sup> 803, 818.)

**WELFARE AND INSTITUTIONS CODE SECTION 366.26,  
SUBDIVISION (c)(1)(B)(i)  
Beneficial Parent-Child Relationship Exception**

Overview

If the court find that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. (§ 366.26, subd. (c).)

“The court, in exceptional circumstances, may choose an option other than the norm, which remains adoption.” (*In re Anthony B.* (2015) 239 Cal.App.4<sup>th</sup> 389, 394-395.)

This exception may be the “most unsuccessfully litigated issue in the history of law.” (*In re Eileen A.* (2000) 84 Cal.App.4<sup>th</sup> 1248, 1255, fn. 5, overruled on other grounds in *In re Zeth S.* (2003) 31 Cal.4<sup>th</sup> 396, 413.)

The parent has the burden of proving the exception. (*In re Autumn H.* (1994) 27 Cal.App.4<sup>th</sup> 567, 574; *In re I.W.* (2009) 180 Cal.App.4<sup>th</sup> 1517, 1527.)

Statutory Language

Section 366.26, subdivision (c)(1)(B)(i): The court shall terminate parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child as the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

Three-Prong Beneficial Relationship Test

This exception has been judicially interpreted to be a three-prong test: (*In re Logan B.* (2016) 3 Cal.App.5<sup>th</sup> 1000, 1009-1013; *In re Noah G.* (2014) 247 Cal.App.4<sup>th</sup> 1292, 1304; *In re E.T.* (2018) 31 Cal.App.5<sup>th</sup> 68, 76-77.)

- 1) Whether the parent maintained regular visitation and contact with the child;  
[Has parent visited consistently and to the extent permitted by court orders. (*In re I.R.* (2014) 226 Cal.App.4<sup>th</sup> 201, 212.) Inquiry is not into the “quality” of visitation. (*In re Grace P.* (2017) 8 Cal.App.5<sup>th</sup> 605, 612.)]
- 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;  
[The parent-child relationship is one involving a “significant, positive, emotional attachment from child to parent” the severance of which would cause the child to be “greatly harmed.” (*In re Autumn H.* (1994) 27 Cal.App.4<sup>th</sup> 567, 575.) The *Autumn H.* court developed factors for the juvenile court to assess when determining the nature and extent of the parent-child bond including 1) the age of the child, 2) the portion of the child’s life spent in the parent’s custody, 3) the positive or negative effect of interaction between the parent and child, and 4) the child’s particular needs. (*Id.*, at pp. 575-576.) In *In re S.B.* (2008) 164 Cal.App.4<sup>th</sup> 289, 296-301, the court held that a parent was not required to show “day-to-day contact” between the parent and the child or the existence of a “primary attachment.”]
- 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 benefit the child would receive from adoption (the balancing test).  
[The juvenile court must “balance the strength and quality of the natural parent-child relationship in a tenuous placement against the security and sense of belonging a new family would confer.” (*In re Autumn H.* (1994) 27 Cal.App.4<sup>th</sup> 567, 575.) “If severing the relationship would deprive child of substantial positive emotional attachment such that child would be greatly harmed. Preference for adoptive is overcome and natural parent’s rights should not be terminated.” (*Ibid.*; *In re Bailey J.* (2010) 189 Cal.App.4<sup>th</sup> 1308, 1315.)]

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| Relevant Case Law |
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*In re Autumn H.* (1994) 27 Cal.App.4<sup>th</sup> 567, 576

Because the parent has already been found to be unfit and failed to reunify, the focus of the exception is on the child, not the parent.

Exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent-child bond. Factors to be considered include the age of the child, portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, child's particular needs.

*In re Beatrice M.* (1994) 29 Cal.App.4<sup>th</sup> 1411, 1418-1420

The parent-child relationship contemplated by the exception excludes parents who do not "stand in a parental role to the child." Court found the caregiver occupied the "primary parental role" for the children and the relationship with mother was "akin to that of an extended family member."

*In re Amber M.* (2002) 103 Cal.App.4<sup>th</sup> 681, 690

Court reversed juvenile court's order and found beneficial relationship that outweighed the benefits of adoption. The parent's failure to rehabilitate and be ready for the child's return could not be the basis for an order terminating parental rights or a finding that the beneficial parent-child relationship exception did not apply. Court found the children had a "strong primary bond" with their mother.

*In re S.B.* (2008) 164 Cal.App.4<sup>th</sup> 289, 301

Court found beneficial relationship exception did apply. Father was in full compliance with the case plan, the child loved her father, wanted the relationship to continue, and the child derived some measure of benefit from the visits. Court stated that a parent does not need to demonstrate a "primary attachment" in order to meet the exception to show the parent and child have maintained day-to-day contact. "If that

were the standard, the rule would swallow the exception.” (*Id.*, at p. 299.)

*In re Noah G.* (2014) 247 Cal.App.4<sup>th</sup> 1292, 1302

Court held that 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.

*In re Breanna S.* (2017) 8 Cal.App.5<sup>th</sup> 636, 648

Court affirmed termination of parental rights finding 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.”

*In re E.T.* (2018) 31 Cal.App.5<sup>th</sup> 67, 77

Division Three of the First District reversed the termination of parental rights relying, in part, on mother’s efforts to rehabilitate, but also found that the children had a “substantial and positive attachment to mother.”

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| <p><i>In re C.C.</i> (2019) 34 Cal.App.5<sup>th</sup> 87, Supreme Court review granted (S255839)</p> |
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*Factual background*

A section 300, petition pursuant to subdivisions (b) and (j) was filed in September 2013, alleging that then four-year old Caden was subject to juvenile court jurisdiction due to mother’s substance abuse, mental illness, domestic violence, unstable housing, and that his half-siblings had previously been dependents. Jurisdiction was taken over Caden and mother was offered reunification services. At the six-month review hearing in July 2014, Caden was returned to mother’s custody under a family maintenance plan. Caden remained with mother until June 2016 when a section 387 petition was filed

alleging Caden's placement was no longer appropriate due to mother's unaddressed substance abuse and mental health concerns.

In August 2016, the parties reached an agreement under which mother agreed to submit to the supplemental petition and the Agency agreed to recommend a permanent plan of long-term foster care to give mother an opportunity to file a petition for modification. On January 5, 2017, mother filed a petition for modification that was denied after a contested hearing.

Throughout the case mother regularly visited with Caden. The Agency acknowledged Caden had a connection with mother but believed the relationship was not healthy and was sabotaging his stability in placement. Mother's visitation was reduced to once per month.

A contested section 366.26 hearing took place in January and February 2018. The court found that mother had established the beneficial relationship exception and authorized continued once per month visits. The Agency and counsel for the minor appealed the decision.

#### *Court of Appeal's decision*

In April 2019, in a published opinion (*In re Caden C.* (2019) 34 Cal.App.5<sup>th</sup> 87, reh'g. den. May 1, 2019, review granted July 24, 2019), the First District, Division One Court of Appeal reversed the juvenile court's findings that the beneficial parent-child relationship exception to adoption applied. The Court found that substantial evidence supported the juvenile court's findings that mother maintained regular visitation and contact with the child and that they had a parent-child relationship that was beneficial to the minor. (*Id.*, at pp. 107-109.) However, the court found there was no substantial evidence to support the juvenile court's findings that mother "substantially complied with her case plan" or that she "continues her efforts to maintain her sobriety and address her mental health issues." (*Id.*, at pp. 110-111.) The Court determine 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" the minor. (*Id.*, at pp. 110-113.)

## *Supreme Court review*

Two questions raised on review

1. What standard of review governs appellate review of the beneficial 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?

### *Question 1 - Standard of review*

All parties agree that the hybrid standard of review should apply.

Since the Sixth District's opinion in *In re Bailey J.* (2010) 189 Cal.App.4<sup>th</sup> 1308, there has been an emerging trend to a hybrid standard of review. Under this hybrid standard, the first two prongs of the exception (the frequency and consistency of the visitation and the nature of the parent-child relationship) are factual and should be reviewed under the substantial evidence standard of review.

Whether or not the parent's regular visitation and contact and 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 is better suited to the abuse of discretion standard of review.

### *Question 2 - Parental Inadequacy/Parent's Progress*

#### **Position of County and minor**

The County's position is that a parent is not required to show progress in addressing the issues that led to dependency to prove the exception, but the court must not be precluded from considering all relevant evidence in determining whether a relationship is beneficial.

The minor's brief argued that a parent need not show he or she has made progress in addressing the issues that led to the dependency to meet the beneficial relationship exception to adoption. Minor agreed that existing case law does not support a new rule that a parent must

demonstrate recent efforts to overcome problems that led to the dependency. Minor argued that the Court of Appeal correctly applied the law.

In response to amici briefing, County and the minor argued that the parent's progress with his or her case plan should be considered under the second and third prongs of the exception.

### **Position of mother and father**

Argument set forth by mother that a parent's progress may be considered under the second prong (whether the evidence established that the relationship is beneficial to the child and where the courts are required to consider the positive and/or negative effects of the interaction). Specifically, as to an assessment of the positive and negative effects of interaction between the parent and child.

However, it is inappropriate to consider that progress (or lack thereof) under the third prong (where the court balances whether the benefits resulting from maintaining that beneficial parent-child relationship outweighs the benefits of adoption.) The focus of this balancing test is on the interests of the child so parental inadequacies no longer have a place in the equation and should not be considered for a second time.

“It is not the purpose of the section 366.26 hearing to show parental inadequacy, which had to have been previously established, and there is not burden on the petitioning agency to show at the section 366.26 hearing that the parents are ‘at fault.’” (*Cynthia D. v. Superior Court* (1993) 5 Cal.4<sup>th</sup> 242, 254.)

The focus at the section 366.26 hearing is on the child. Once a court has determined the relationship is beneficial to the child, there is no longer a need to focus on the parent's progress. If a parent is required to have made progress (or have success) in addressing the issues that led to the dependency before the child's beneficial relationship with the parent can overcome the preference for adoption, the exception would be written out of existence.

*Amicus briefs*

**Children’s Law Center of California, LACY, Children’s Legal Services of San Diego**

Central question in this case is how best to evaluate a child’s relationship with his or her parent, giving due weight to the importance of the parent-child bond while maintaining focus on the child’s right to a safe, stable, permanent home.

The “heart of the beneficial relationship exception is the strength of the relationship and not what progress, if any, a parent has made toward reunification.”

Dependency scheme presumes that the parent’s problems that led to the initial taking of jurisdiction have *not* been resolved by the parent at the time of the section 366.26 hearing.

The amicus opined the Court of Appeal’s decision was correct even though the Court “overemphasized” the importance of the parent’s progress, it did not base its findings on mother’s lack of progress.

Provided overview of standards of review employed by Courts of Appeal.

**In support of minor**

**Advokids, East Bay Children’s Law Offices and Legal Services for Children**

Amicus asked the Court to interpret the beneficial parental relationship exception to clarify that juvenile courts must not only consider the detriment that might result from terminating parental rights but must also consider the detriment that an otherwise adoptable child would suffer if that child is not adopted and has instead the insecurity and instability of long-term foster care.

## **In support of County**

### **California State Association of Counties (CSAC)**

Argued that whether a parent has made progress in addressing the issues that led to dependency may be considered as a factor in evaluating the second and third prongs of the beneficial parent-child relationship.

Stated that the parent is not required to show progress in addressing issues that led to dependency but it can be relevant and may be considered under the second and third prongs – whether a parent-child relationship exists and in the weighing analysis of whether that relationship represents a compelling reason to forego termination of parental rights.

Argued that courts have been authorized to consider a parent's progress since *In re Autumn H.*

## **In support of mother**

### **California Dependency Trial Counsel** (authored by Orange County Public Defender's Office)

Parent-focused inquiry into whether the beneficial relationship exception should apply can lead to inaccurate, inconsistent, and unjust results for families and render the exception illusory.

Requirement of parent progress will set an impracticable and unfair standard for parents hoping to meet the exception. If the juvenile court focuses on whether or not parent made progress that would lead to inaccurate decisions as the exception would not be fairly evaluated.

Focus of inquiry should be on assessing the parent-child relationship not simply the parent's progress. Case law over the years has shifted the focus of the inquiry giving undue consideration to parents' progress in addressing the issues that led to the dependency and by narrowly defining the "parental role" parents must occupy to meet the exception.

**Professors of Family and Clinical Law** (authored by Amy Mulzer, NYU School of Law Family Defense Clinic)

Provided Court with information on the policy and social science context of terminating parental rights.

The beneficial relationship exception should be a counterbalance to the swing towards adoption and severing parental rights.

Argued that termination of parental rights causes lifelong harm, creates instability for children who are not adopted or whose adoptions fail, the exception is a protection, requiring progress from parent would constrain applicability of exception and contradict its underlying purpose of protecting children.

Focus should be on the child and the child's relationship with the parent, rather than on the successes or failures of the parent with regard to the issues that led to the dependency.

Amicus made the distinction between relational permanency that a child needs vs. legal permanency desired by the courts.

The exception is meant to specifically apply in those cases where, despite the parent's failure to reunify and despite the fact that they may never be able to act as a full-time custodial parent to their child, the court can still find that the parent-child bond is so important to the child that the parent should not be permanently cut out of the child's life.

Child is blameless for parent's failure and child should not be denied benefit of the exception.