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"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

Guardian Ad Litem--Penal Code 1367

In re Samuel A.—published 9/21/21; Second Dist., Div. Seven
Docket No.: B306103; 69 Cal.App.5th 67
Link to case: https://www.courts.ca.gov/opinions/documents/B306103.PDF

A PARENT'S DELIBERATE FAILURE TO COOPERATE WITH COUNSEL, WITHOUT MORE, DOES NOT DEMONSTRATE INCOMPETENCY

The juvenile court sustained allegations that mother had a long unresolved history of alcohol abuse and that she suffered from severe and untreated anxiety and depression, which made her unable to provide regular care for Samuel. Despite the sustained allegations, a 730 evaluator opined that mother did not suffer from any major mental illness that impaired her ability to parent her child. The evaluator, in consultation with mother's treating psychologist, concluded that mother's anxiety and anger management difficulties were a "direct result of the dependency proceeding" and not any underlying mental illness. Mother's anger management difficulties led to mother having four court appointed attorneys in less than eight months. Each time, following a Marsden

hearing the court denied mother's request to dismiss her appointed counsel. Each time, counsel moved to be relieved as counsel, citing mother's hostile behavior and even threats to counsel, which made zealous representation impossible. The court granted each motion to be relieved. After granting the request of mother's fourth appointed counsel to be relieved, the court sua sponte raised the possibility of appointing a guardian ad litem (GAL). At the initial GAL hearing, the court explained to mother its conclusion that there was some impediment to suggest mother lacked the capacity to advise and accept direction from counsel, consult rationally, and understand the proceedings. Mother adamantly refused to consent to the appointment of a GAL; the court agreed not to appoint a GAL. Months later, at a second GAL hearing the court stated that although initially it believed mother was incapable of understanding and assisting her counsel because she did not understand and appreciate the nature of the proceedings, the court had a feeling mother understood the proceedings, so her conduct was actually a knowing and deliberate effort to obstruct proceedings she believed were not going to be favorable to her. The court appointed a GAL instructing mother to communicate with her counsel only through her GAL. At mother's counsel's request, the court stayed the appointment to allow counsel to consult with mother and determine if a GAL was, in fact, necessary. Subsequently, mother's counsel filed a stipulation signed by all counsel to lift the stay of the GAL appointment. The court lifted the stay. Mother filed a timely notice of appeal.

Reversed and remanded. The court's appointment of a GAL for mother was not supported by substantial evidence. If the court appoints a GAL without the parent's consent, the record must contain substantial evidence of the parent's incompetence. The juvenile court expressly found mother's clashes with counsel were not the result of any mental health disorder but were deliberate and strategic, designed to frustrate and delay proceedings, she believed were going to be unfavorable to her. Also, none of mother's counsel expressed any doubt about mother's competence, nor did her responses to the court during the hearing suggest it. The test for mental competence is whether the parent has the capacity to understand the nature or consequences of the proceeding and to rationally assist counsel in preparing the case. A parent's unwillingness to assist and cooperate with their counsel does not constitute incompetency. Appointing a GAL for a legally competent, yet exceedingly difficult parent is a violation of the parent's due process right to communicate directly with counsel in proceedings that could culminate in the termination of her parental rights. Furthermore, the appointment of the GAL was not harmless; therefore, the juvenile court was ordered to vacate the appointment of a GAL and all subsequent orders in which mother was denied the right to directly communicate with her counsel, including the court's orders at the 366.21(e), 366.21(f), and

366.26 hearings that resulted in the termination of mother's parental rights. (NS)

Beneficial Parental Relationship Exception – WIC 366.26

In re J.D. — published 9/29/21; First Dist., Div. Two
Docket No. A161973
Link to case: https://www.courts.ca.gov/opinions/documents/A161973.PDF

A PARENT'S LACK OF PROGRESS IN REDRESSING ISSUES THAT LED TO DEPENDENCY IS IRRELEVANT TO THE SECOND PRONG OF THE BENEFICIAL RELATIONSHIP EXCEPTION UNDER SECTION 366.26, UNLESS IT IS EVALUATED IN THE CONTEXT OF THE EMOTIONAL ATTACHMENT BETWEEN PARENT AND CHILD.

EVALUATION OF THE THIRD PRONG OF THE BENEFICIAL RELATIONSHIP EXCEPTION UNDER 366.26 PRECLUDES CONSIDERATION OF ANY POSSIBLE POST-ADOPTION CONTACT.

In 2018, the agency filed a petition for 3-year-old J.D. due to domestic violence involving mother. The court sustained allegations that mother failed to protect based on two fighting incidents in J.D.'s presence and that father was unable to care for J.D. and left him without support due to incarceration. The juvenile court ordered reunification services for mother, bypassed services for father, and removed J.D., who was soon thereafter placed with mother's relative, C.J. (Mother, herself, had been a dependent and was cared for by C.J. for part of her childhood.) During the nearly two-year reunification period, mother made significant progress, visiting regularly and even progressing to overnight visitation, but her momentum was undermined by periodic conflict with the caregiver and recurring angry episodes. The court terminated mother's reunification services in 2020 and set a section 366.26 hearing. In January 2021, a contested .26 hearing was held where mother asserted the beneficial parental relationship exception. The juvenile court terminated mother's parental rights but made few explicit factual findings regarding the exception, acknowledging that J.D. had a positive relationship with mother but that it did not "amount to [a] parental bond" and that "severing the relationship… would not be so detrimental as to outweigh permanency for [J.D.]." Mother appealed.

Reversed and remanded. Based on the record, it cannot be determined whether the juvenile court's ruling complied with the principles announced in the California Supreme Court decision, *In re Caden C.* (2021) 11 Cal.5th 614, specifically with regard to the second prong of the test (beneficial relationship)

and the third prong (balancing the harm of severing the parent/ child relationship against the benefits of adoption). As to the second prong of the test, whether "the child has a substantial, positive, emotional attachment to the parent—the kind of attachment implying that the child would benefit from continuing the relationship," it is uncertain whether the juvenile court considered factors disapproved of in *In re Caden C.* In brief closing arguments, neither counsel for the agency nor the minor, who were aligned, addressed whether J.D. had an emotional attachment to mother, and they both alluded to factors deemed irrelevant in *Caden C.* For example, "[t] he agency argued mother's visits were still supervised, erroneously implying the court could consider the mere fact she had been unable to succeed in overcoming her parental struggles as a reason to rule against her, regardless of whether or how her son was affected by these shortcomings." Furthermore, the agency's reports provided limited information about the quality of mother's relationship with J.D. or the nature of her interactions with him during visitation. Conversely, mother presented evidence that she had a beneficial relationship with J.D., specifically that J.D. had lived with mother for over half his life, that J.D. exhibited a strong bond when removed from mother and throughout the case, that J.D. displayed a positive attitude towards his mother and appeared happy and comfortable with her, and that mother was regularly affectionate, encouraging, and comforting to J.D. While the agency noted J.D.'s bond with his caretaker, this does not preclude a finding that he also had a significant positive attachment to mother. As to the third prong, the Supreme Court made clear that consideration of the possibility of a post-adoption contract between parent and child is not permitted in this analysis. Here, the juvenile court assumed that a post-adoption contract was not necessarily foreclosed and, thus, it cannot be determined whether the juvenile court properly evaluated the evidence. The order terminating parental rights is reversed and the case is remanded to hold a new 366.26 hearing consistent with *In re Caden C.* (AMC)

WIC 366.22; WIC 352

Michael G. v. Superior Court—published 10/6/2021; Fourth Dist., Div. Three Docket No. G060407; 69 Cal.App.5th 1133;
Link to case: https://www.courts.ca.gov/opinions/documents/G060407.PDF

[1] REGARDLESS OF WHETHER REASONABLE SERVICES ARE PROVIDED, WIC 366.22(a)(3) REQUIRES A JUVENILE COURT TO TERMINATE REUNIFICATION SERVICES AT AN 18-MONTH HEARING IF THE STATUTORY EXCEPTIONS TO TERMINATION IN WIC 366.22(b) DO NOT APPLY. [2] IT WAS NOT AN ABUSE OF DISCRETION TO TERMINATE REUNIFICATION SERVICES INSTEAD OF CONTINUING SERVICES

UNDER WIC 352 BECAUSE MORE SERVICES WERE NOT IN THE MINOR'S BEST INTEREST, GIVEN THE PARENTS' LACK OF PROGRESS.

The juvenile court took jurisdiction over A.G. due to father's serious mental health issues and mother's mental health issues, criminal history, and failure to maintain a relationship with A.G. At the 6-month hearing, the juvenile court found that both parents were in minimal compliance with their case plans and that reasonable services had been provided to the parents. At the 12-month hearing, the juvenile court found father's progress to be moderate as he had started complying with some aspects of his case plan, mother's progress minimal, and that the parents again were provided reasonable services. At the 18-month hearing, the juvenile court terminated the parents' reunification services over the objection of the parents and their requests to continue reunification services pursuant to WIC 366.22, WIC 352, and due process. The juvenile court found that the during this review period the parents were not provided reasonable services, but still terminated reunification services, citing WIC 366.22(b), the parents' lack of progress, that more reunification would not be in A.G.'s best interest, and that further services would not be likely to reunify A.G. with her parents. A section 366.26 hearing was set. Mother and Father filed writ petitions.

Affirmed. A court must terminate reunification services at the 18-month hearing if the exceptions listed in section 366.22 subdivision (b) do not apply, even if reasonable services were not provided to the parents. WIC 366.22(b) allows for an additional six months of reunification services beyond the 18-month date if the court finds that it would be in the best interest of the child and reasonable services were not provided to the parent or there is a substantial probability of return within a further review period; however this only applies if the parent is making significant and consistent progress in a court ordered residential treatment program, is a minor or dependent parent making significant and consistent progress, or was recently discharged from incarceration, institutionalism, or the Department of Homeland Security's custody and making significant and consistent progress. Unless the child is returned to parental custody, reunification services must be terminated at the 18-month hearing unless those limited conditions in WIC 366.22(b) are met. (WIC 366.22(a)(3).) The ability to set a 26 hearing is not conditioned on a finding of reasonable services at the 18-month hearing. However, there is a split in case law on the issue of whether reunification services can be extended beyond the 18-month date if reasonable services were not provided. (See *In re M.F.* (2019) 32 Cal.App.5th 1, which held that dependency statutes allow for reunification services to be extended beyond the 18-month date if reasonable services were not provided.) In the instant case, deferring to the language of section 366.22 subdivision (a)(3), the juvenile court did not err in terminating reunification

services. Furthermore, a continuance under section 352 must not be contrary to the interest of the minor, and given the parents' lack of consistent progress, it was not in A.G.'s best interest to continue reunification services. (KH)

UCCJEA

In re Ari S.—published 10/6/21; Second Dist., Div. Eight
Docket No. B307714, B3111334
Link to case: https://www.courts.ca.gov/opinions/documents/B307714.PDF

WHEN THERE IS NO HOME STATE, HAVING FREQUENT REGULAR CONTACTS WITHIN THE STATE AND EVIDENCE OF ABUSE OR NEGLECT IN THE STATE IS ENOUGH TO EXERCISE JURISDICTION

Ari S. (born 2013) is one of three adopted children. Mother adopted Ari in Nevada and moved around frequently. In 2019, the family was in Montana when child protective services removed Ari and a sibling from mother's care. The children were returned to mother, who travelled to California in March 2019. In spring of 2020, the family then lived in Washington state, where they were investigated by child protective services due to mother's mental health issues. Mother had delusions that King Louis V was her father and that Michelle Obama and Queen Elizabeth communicate to her through satellites. Ari stated that mother smoked marijuana a lot and he sometimes holds his breath to avoid breathing in the smoke. In June 2020, the family reportedly lived in San Bernardino County, but could not be found. Mother then filed a federal lawsuit alleging delusional facts, including that mother was the "current elected citizen president." In July 2020, mother and Ari were in a hotel in Downey, California, when a referral was called in alleging mother heard someone make a bomb threat. When police arrived, mother removed some clothing and defecated on herself, prompting police to place her on a psychiatric hold. The agency filed a 300 petition. Mother stated she had lived in Dana Point prior to living in Downey, that she had no family in California but that she had lived in Niland, California with her other child, Genesis. Further, mother owned 10 acres of property in Newberry Springs, California. The juvenile court detained Ari in July 2020 and asserted emergency jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"). The trial court contacted Washington state regarding jurisdiction and discovered there was no current court case involving Ari and that the state declined jurisdiction. Mother did not object to this finding, nor did she assert that another state, such as Montana, had jurisdiction. At the jurisdiction/disposition hearings, the court sustained the petition allegations involving mother's mental health and removed Ari from her custody. Mother again did not object under the UCCJEA. Mother appealed the

jurisdiction and disposition orders. The juvenile court held a six-month review hearing and continued family reunification services. Mother again did not object to the finding of subject matter jurisdiction but appealed the six-month review findings.

Affirmed. The juvenile court had jurisdiction under the UCCJEA. There are four ways to obtain jurisdiction under the UCCJEA, one of which is the significant connections jurisdiction. If either there is no home state, or the home state declines to exercise jurisdiction, and the child and at least one parent have a significant connection with the state, the target state can exercise jurisdiction under the UCCJEA. While the agency argued that mother forfeited her claims by failing to object in the juvenile court, since there is jurisdiction under the UCCJEA the issue of forfeiture is not reached. For over a year before the dependency proceedings began, mother and Ari had significant contacts with various parts of California and had moved in and out of the state. Mother stated her intent was to continue to travel within California, and she owned land in the state. Several referrals within the state evidenced mother's lack of proper care of Ari and ample evidence showed mother and Ari's significant connections to the state justifying jurisdiction. (SH)

Domestic Violence — WIC 300(a) & (b)

In re Cole L.—published 10/19/21; Second Dist., Div. Seven
Docket No. B310319
Link to case: https://www.courts.ca.gov/opinions/documents/B310319.PDF

(I) AN ACCIDENTAL INJURY TO A BYSTANDER CHILD DUE TO THE PARENTS' DOMESTIC VIOLENCE DOES NOT SUPPORT WIC 300(A) JURISDICTION WHERE THERE IS INSUFFICIENT EVIDENCE OF A RISK OF PHYSICAL INJURY INFLICTED NONACCIDENALLY UPON THE CHILD. (II) THE APPELLATE COURT WILL NOT CREATE A NEW JURISDICTIONAL THEORY BASED ON A FINDING OF FACT THAT THE TRIAL COURT NEVER MADE IN THE FIRST PLACE.

The family was brought to DCFS's attention when police were called to a domestic violence incident at the home on March 20, 2020. Mother was found to have bruises and scratches and father had scratches. The children were sleeping in a room, were difficult to awaken by the officers, and had no marks or bruises that would indicate abuse or neglect. Mother reported getting into an argument with father about his infidelity but denied that they had a physical altercation nor any history of domestic violence. The parents did not live together. DCFS filed a WIC 300 petition under subdivisions (a) and (b) based on the March 20

domestic violence incident. The children were detained from father and released to mother on condition she continue to live with her mother, drug test, and take any prescribed medication. Mother also requested a restraining order against father for herself and children based on his "erratic behavior." Prior to the jurisdiction hearing, mother gave clean tests, was taking her meds, and the children were doing well. In the DCFS reports, mother again insisted there had only been a verbal altercation over father's infidelity. Mother said they had been grabbing at father's phone because she wanted him to delete a girl's Facebook profile. When father admitted cheating, mother went to the room where the children were napping while father went to the front and watched TV; thereafter, the police arrived. DCFS recommended sustaining the petition because the parents had a "history of unresolved domestic violence disputes," mother reportedly acknowledged having verbal arguments with father in the home that "escalated into physical altercations," and took no responsibility for the endangering situation. At the jurisdictional hearing, the court sustained the petition as pled, finding there was a "long history of these parents having some domestic violence issues," and made dispositional orders as recommended by DCFS. The parents appealed.

Reversed. As to 300(a) jurisdiction, the evidence must show that the children suffered or were at substantial risk of suffering serious physical harm inflicted nonaccidentally by the parent. Certain circumstances of domestic violence (DV) that occur in the child's immediate presence may support a 300(a) finding. For example, the risk of harm may be properly viewed as nonaccidental where a father strikes mother while she holds the baby or where an older child intervenes during a fight to protect mother from father. (See, e.g., *In re M.M.* (2015) 240 Cal.App.4th 703, 720.) However, the more common examples of a bystander-child's accidental injury during DV– such as one due to an object thrown by a parent at another – is one that constitutes 300(b) or possibly 300(c) jurisdiction. This Court acknowledges several courts of appeal have disagreed with this analysis, holding instead that an unintended injury to a child due to being exposed to DV is a proper basis for a 300(a) finding because acts of DV themselves are nonaccidental. (E.g., *In re Nathan E.* (2021) 61 Cal.App.5th 114, 121-122; *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 599.) "Those decisions fail to recognize the fundamental difference between a failure to protect a child from the unintended consequences of intentional behavior and the deliberate ["nonaccidental"] infliction of injuries upon the child, the distinction between subdivisions (a) and (b)." Here, there was no evidence that any violence took place in the children's presence, let alone under circumstances that they were at substantial risk of suffering serious physical harm inflicted nonaccidentally – they were asleep in a bedroom, away from their parents, during the single domestic disturbance. As to the 300(b) finding, there was insufficient evidence to support it. Here, the juvenile court did *not* base its jurisdictional finding on a

single incident, as the evidence showed, but erroneously found that the parents had engaged in multiple acts of DV over an extended time. On appeal, DCFS concedes the basis for the court's finding was in one statement by the social worker that mother had acknowledged the parents' verbal arguments in the home escalated into physical altercations. Yet, that purported admission from mother was not in the section that contained the same social worker's detailed interviews replete with quotes. Recognizing this deficiency, DCFS argues on appeal that jurisdiction should still be affirmed based on the single incident coupled with mother's denial of the incident and refusal to participate in services. This argument is rejected because to do so would entail the appellate court's creation of an entirely new theory based on a factual finding that the juvenile court never made in the first place. Moreover, the threat of physical danger to the children was minimal because the single incident involved at most some pushing and grabbing for a phone that took place outside their presence. Additionally, the issue under 300(b) is whether a single episode of endangering conduct will reoccur, and the record here shows no evidence of that. More is required to support a jurisdictional finding. "DCFS cannot use such generalities to satisfy its burden of proving an 'identified, specific hazard in the child's environment' that poses a substantial risk of serious physical harm to him." (*In re J.N.* (2021) 62 Cal.App.5th 767, 776.) (ML)

ICWA; WIC 224.2(b) & 224.3(a)(5)(C)

In re Y.W.—published 10/19/21; Second Dist., Div. Seven
Docket No.: B310566
Link to Case: https://www.courts.ca.gov/opinions/documents/B310566.PDF

THE HOLDING IN IN RE AUSTIN J. IS INCONSISTENT WITH WIC SECTION 224.2, SUBDIVISION (B), THE AGENCY HAS AN ONGOING DUTY TO CONTACT EXTENDED FAMILY MEMBERS REGARDING POSSIBLE INDIAN ANCESTRY; THE AGENCY MUST ALSO ENSURE ICWA NOTICES ARE CORRECT AND DO NOT OMIT REQUIRED INFORMATION.

Initially, mother alleged she did not have Indian ancestry. However, mother was adopted and had no information regarding her biological family's history and possible Indian ancestry. After the agency located and spoke to mother's adoptive parents, the juvenile court instructed the agency to interview mother's adoptive parents and obtain names and contact information for mother's biological family. Mother's adoptive parents did not know of any Indian ancestry in regard to mother and her biological family. The adoptive parents provided the agency contact information for a maternal aunt and provided the name of mother's father. The agency did not contact the maternal aunt nor did they

attempt to locate mother's biological father. Throughout dependency proceedings, father asserted possible Indian heritage. Father indicated that he may be a member of the Cherokee tribe. When the agency submitted their ICWA-030 notices, the agency failed to include information of the paternal grandmother's birthdate, birthplace and the date of death. At the 366.26 hearing, the juvenile court found ICWA notice was proper and terminated the parents' parental rights. The parents timely appealed.

Reversed. Section 224.2, subdivision (b), requires the child protective agency to ask "the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled." If the court or child protective agency "has reason to believe that an Indian child is involved in a proceeding, but does not have sufficient information to determine that there is reason to know that the child is an Indian child," the court and the Department "shall make a further inquiry regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable." In regard to mother, this Court disagrees with the narrow view of the duty of inquiry under ICWA in *In re Austin J.*, (2020) 47 Cal.App.5th 870, and found the agency to have "failed to satisfy its duty under WIC section 224.2, subdivision (b)." The agency failed to make meaningful efforts to locate and interview mother's biological parents, who were "extended family members" as defined by ICWA and related California law. This Court also rejects the holding in *In re A.C.*, (2021) 65 Cal.App.5th 1060, and its finding that, "a parent asserting failure to inquire must show—at a minimum—that, if asked, he or she would, in good faith, have claimed some kind of Indian ancestry." (*Id*. at p. 1069.) It is unreasonable to require a parent to make an affirmative representation of Indian ancestry where the Department's failure to conduct an adequate inquiry deprived the parent of the very knowledge needed to make such a claim. As to father, the failure to include the paternal grandmother's information violated ICWA law. Pursuant to WIC section 224.3, subdivision (a)(5)(C), ICWA notices must include, "[a] grandparent's … places of birth and death …" The absence of such information within the submitted ICWA notices was found to have violated both federal regulations and state law. ICWA notice requirements are strictly construed and must include enough information for the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership. (MO)

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ICWA—Duty of initial inquiry; WIC 224.2

In re Benjamin M.—published 10/22/21; Fourth Dist., Div. Two
Docket No.: E077137; 69 Cal.App.5th 67
Link to case: https://www.courts.ca.gov/opinions/documents/E077137.PDF

THE AGENCY'S FAILURE TO COMPLY WITH ITS DUTY OF INITIAL INQUIRY UNDER ICWA IS PREJUDICIAL WHERE THERE WAS READILY OBTAINABLE INFORMATION THAT WAS LIKELY TO BEAR MEANINGFULLY UPON WHETHER THE CHILD IS AN INDIAN CHILD.

During dependency proceedings mother denied Indian ancestry. Father never made an appearance, and the agency was unable to locate or contact father. Nevertheless, the agency spoke with father's sister-in-law, brother, and collaterals. At the combined jurisdiction and disposition hearing, the court found that ICWA did not apply. Mother's parental rights were eventually terminated; mother appealed, raising only ICWA compliance related to father's possible Indian ancestry.

Conditionally reversed and remanded. The agency conceded that the court and the agency failed to comply with their duty of initial inquiry under the ICWA provisions; however, the agency contended that the error was harmless. Both federal and state law impose an affirmative and continuing duty to inquire whether a child in a dependency proceeding is or may be an Indian child. Although federal regulations place the duty of initial inquiry only on courts, state law also imposes the duty on the agency to ask the child, parents, legal guardian, Indian custodian, extended family members, and others who have an interest in the child. Where there was a violation of only state law, the Court may not reverse unless the error was prejudicial. In determining prejudice in ICWA cases, the Court declined to apply the rule from cases such as *In re A.C.* (2021) 65 Cal.App.5th 1060, which held that in order to demonstrate prejudice a parent asserting failure to inquire must show that if asked he or she would, in good faith, have claimed some kind of Indian ancestry. Such a rule is contrary to the framework of ICWA. Instead, prejudice is demonstrated where the record indicates there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child. The information father's relatives could have given would likely shed a light on whether there is reason to believe Benjamin is an Indian child, therefore, the error was prejudicial. (NS)

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Non-custodial parents; WIC 361.2

In re Solomon B.—filed 10/1/21, cert. for publ. 10/29/21; Second Dist., Div. One
Docket No. B311250
Link to case: https://www.courts.ca.gov/opinions/documents/B311250.PDF

THE LACK OF IN PERSON CONTACT BETWEEN THE NON-CUSTODIAL MOTHER AND CHILDREN AND THE FAULTY CONCLUSION THAT MOTHER FAILED TO PROTECT THE CHILDREN FROM FATHER, EVEN THOUGH SHE WAS NON-OFFENDING IN THE PETITION, WAS NOT SUFFICIENT TO SUPPORT A DETRIMENT FINDING UNDER SECTION 361.2

Mother and father had a volatile relationship for several years, including several instances of domestic violence where the police were called to the home, including two incidents after which a parent was arrested. In September 2019, mother left the family home, gave father custody of the children Solomon and Samuel, then ages 4 and 3, respectively. Mother later reported she left to break out of the toxic environment and separate from father, with the intention of regaining custody once settled. Mother moved to Texas but would videoconference the children almost every weekend when they stayed with maternal grandmother. Mother also called maternal grandmother regularly to check up on the children's welfare. A year after mother left, a social worker found the children in their motel room where they lived with father with an unknown man, the room was full of trash and partially eaten food, had drug paraphernalia within reach of the children, and the children appeared developmentally delayed. Father submitted to a drug test and tested positive for marijuana and oxymorphone. The social worker called mother in Texas to inform her; mother came back to California for the detention hearing. The agency detained the children from both parents. The section 300 petition alleged the children were at risk due to mother's mental health, a history of domestic violence between the parents, father's marijuana and opioid use, and father establishing a detrimental home environment for the children. Mother requested release at detention but was denied. At the jurisdiction hearing, the juvenile court sustained only the counts against father, rendering mother non-offending. Mother requested placement of the children at disposition. The juvenile court found placement with mother would be detrimental due to her "abandonment" of the children and having not seen them physically in over a year, as well as her failure to protect the children from the father. Mother timely appealed.

Reversed. The juvenile court's conclusion that mother abandoned the children is not supported by substantial evidence and, even if true, is not sufficient to support a detriment finding under section 361.2. Mother regularly kept in

contact with the children and checked on their welfare with maternal grandmother. Maintaining only virtual contact because she lived in another state, and especially during the pandemic, was reasonable and appropriate. Mother also did not fail to protect the children from father. When mother left, she did not believe the domestic violence issue posed a risk to the children if they were alone with father and given the lack of evidence that father ever directed any physical or emotional abuse toward the children, this belief was reasonable. Further, mother had not ever seen father use marijuana around the children while she lived with him and saw no evidence of any neglect during her video calls. Maternal grandmother also reported not seeing any evidence father was using drugs around the children. Once mother learned of the issues in father's home, she immediately returned to California, sought placement, attended all dependency hearings, and participated in recommended services. The agency presented very little investigation of mother's suitability for placement of the children in the five months in between detention and disposition. The juvenile court's findings do not rise to the high level of clear and convincing evidence that placement with mother would be detrimental to the children's safety, protection, or physical or emotional well-being. (SH)

Beneficial Parental Relationship Exception – WIC 366.26

In re D.M. — filed 11/01/21; Second Dist., Div. Eight
Docket No.: B312479
Link to case: https://www.courts.ca.gov/opinions/documents/B312479.PDF

WHETHER A PARENT OCCUPIES A PARENTAL ROLE IN A CHILD'S LIFE IS IRRELEVANT TO THE SECOND PRONG OF THE BENEFICIAL RELATIONSHIP EXCEPTION UNDER SECTION 366.26, UNLESS IT IS EVALUATED IN THE CONTEXT OF THE EMOTIONAL ATTACHMENT BETWEEN PARENT AND CHILD.

In 2017, the agency filed a petition for children D.M., R.M., and I.M, following a domestic violence incident between the parents and father's admission to mother that he was using methamphetamines. (The children are now ages 13, 10, and 6, respectively.) The court sustained domestic violence allegations, removed the children from father, and ordered services and unmonitored visits for father. In 2018, allegations in an amended 342 petition were sustained, after mother left the youngest child, then two years old, unattended and father was found to have resumed residence in the family home in violation of the court's orders. Reunification services were ordered for the parents along with monitored visitation. During the reunification period, father completed parenting and domestic violence programs and consistently tested negative for drugs, but he

was often non-responsive to the social worker, failed to provide a home address for the agency to assess, and was inconsistent with visits because he did not always call to confirm visits in advance (resulting in cancellation of his visits). When visits did occur, father had trouble engaging and redirecting the children, particularly when R.M. and I.M. had tantrums, but the children were affectionate with him. The court terminated parents' reunification services in 2019 and set a section 366.26 hearing. In April 2021, a contested .26 hearing was held where father asserted the beneficial parental relationship exception. The juvenile court terminated father's parental rights, finding "there is no (c)(1)(B)(1) exception. Father's been having monitored visits fairly consistently but not terribly consistent. Doesn't set up a schedule. Doesn't know his children's medical needs. Hasn't attended any dental or medical appointments. He never asked anyone to attend. Has not risen to the level of a parent." Father appealed.

Reversed and remanded for a new section 366.26 hearing. Substantial evidence did not support the court's findings as to the second and third prongs of the test set forth in *In re Caden C*. (2021) 11 Cal.5th 614. As to the second prong of the test, whether "the child has a substantial, positive, emotional attachment to the parent—the kind of attachment implying that the child would benefit from continuing the relationship," the court focused on whether father occupied a "parental role" in the children's lives, equating that role with attendance at medical appointments and understanding their medical needs, but was silent as to the attachment between father and his children. Additionally, the agency's reports provided limited information about the quality of visits between father and the children or how the children felt about their father. Conversely, father testified that the children wanted to be returned to him, that the youngest child cried when visits concluded, and that each child had lived with him for a period of years (nearly eight years for D.M., five for R.M., and two for I.M.) while the family was intact and father was the breadwinner. The court's express findings that father did not act like a parent demonstrate that the court considered factors deemed irrelevant in *Caden C.* The order terminating parental rights is reversed and the case is remanded to hold a new 366.26 hearing consistent with *In re Caden C*. (AMC)