



# Children's Law Center of California

## ***“DEPENDENCY LEGAL NEWS”***

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### **NEW DEPENDENCY CASELAW**

#### **Due Process**

*In re A.V.*—published 1/12/22; Third Dist.

Docket No.: C092928; 73 Cal.App.5th 949

Link to case: <https://www.courts.ca.gov/opinions/documents/C092928.PDF>

**IT IS REVERSIBLE ERROR FOR THE COURT TO PROCEED IN A PARENT'S ABSENCE AT A JURISDICTIONAL HEARING WHEN THE PARENT HAS A DUE PROCESS RIGHT TO BE PRESENT AND HAD GOOD CAUSE TO MISS THE HEARING BECAUSE OF COVID-RELATED CONCERNS.**

The agency filed a petition in April 2020 regarding minor A.V. due to mother's failure to protect A.V. because of A.V.'s ongoing behavioral and mental health issues. The court detained A.V. from mother and set a jurisdiction hearing, which was continued on two occasions because of the ongoing COVID-19 pandemic and the filing of an amended petition. The day before the jurisdiction hearing, mother informed the social worker that A.V.'s infant sibling was sick with a fever and the child's pediatrician recommended that mother test the child for COVID-19. Mother expressed concern to the social worker about her inability to attend the jurisdiction hearing. The social worker advised mother to speak to her attorney but did not otherwise inform the juvenile court about mother's

inability to attend the hearing. Mother subsequently called her attorney and left a voicemail message after business hours, but mother's attorney did not receive the voicemail before the hearing. On the day of the jurisdictional hearing, mother did not appear. The juvenile court found there was no good cause to continue the hearing and sustained the petition against mother. Five days after the jurisdiction hearing, mother's counsel advised the juvenile court she had discovered that mother had left her a voicemail message regarding mother's absence from the hearing. Mother's counsel subsequently filed a motion requesting the court set aside the jurisdictional findings and allow mother to be present to contest the allegations. The agency opposed the motion, stating that mother should have made additional attempts to contact her attorney and that the social worker had no duty to inform the juvenile court of mother's absence. The court denied mother's motion, stating that although COVID-19 was an ongoing concern, "four months into it, it has been addressed" and found that there was an insufficient basis to set aside the jurisdictional findings made in mother's absence. The court declared A.V. a dependent at a subsequent disposition hearing. Mother appealed.

Reversed. The juvenile court erred in denying mother's motion to set aside the jurisdictional findings once mother provided a valid medical excuse for not appearing at the jurisdiction hearing. Mother had a procedural due process right to be heard at the jurisdictional hearing. While a parent's failure to appear at the hearing after being properly noticed is generally treated as a waiver of the right to be present, based on the totality of the circumstances in this case, mother established good cause for her absence due to her need to provide medical care for her child due to the ongoing COVID-19 pandemic. It is "troubling that the social worker did not apprise the court of her conversation with mother" given it was a minimal procedural step that would have allowed mother's counsel to clarify mother's absence from the hearing. Additionally, in mother's absence, the juvenile court found there was a factual basis for the allegations without considering or even admitting any reports or hearing any testimony. Accordingly, the juvenile court's error was not harmless, and the court is required to hold a contested jurisdictional hearing. (SW)

### **Beneficial Parental Relationship Exception—WIC 366.26**

*In re Eli B.*—published 1/14/22; First Dist., Div. Two

Docket No.: A162116; 73 Cal.App.5th 1061

Link to case: <https://www.courts.ca.gov/opinions/documents/A162116.PDF>

THE FIRST PRONG OF THE BENEFICIAL RELATIONSHIP EXCEPTION  
UNDER SECTION 366.26 EXAMINES WHETHER THE PARENT VISITED

CONSISTENTLY AND WHETHER THE PARENT TOOK ADVANTAGE OF VISITATION TO THE EXTENT PERMITTED BY COURT ORDERS. THE SECOND PRONG OF THE BENEFICIAL RELATIONSHIP EXCEPTION UNDER 366.26 INCLUDES CONSIDERATION OF THE POSITIVE OR NEGATIVE EFFECT OF INTERACTION BETWEEN PARENT AND CHILD, INCLUDING HOW THE CHILD RESPONDS EMOTIONALLY TO THE PARENT AND HOW, IF AT ALL, THE PARENT AND CHILD ENGAGE DURING VISITS.

In 2017, the agency filed a petition for 4-year-old Eli and 2-year-old A.B., after the parents inappropriately disciplined Eli and left the children with an unwilling caretaker. The juvenile court sustained multiple allegations under section 300, subdivision (b), and removed the children from mother and father. The parents received 16 months of reunification services, which were terminated in February of 2019. Pending the 366.26 hearing, the court ordered supervised visitation twice a week for three hours. The 366.26 hearing proceeded over multiple sessions, culminating in January 2021 with an order terminating parental rights. By that time, Eli was 7 and A.B. was 6. The court ruled the beneficial relationship did not apply to either parent and terminated parental rights. Both parents appealed.

Affirmed. Although father passed away during the pendency of the appeal, the Court of Appeal nevertheless considered the parties' positions and decided the case on its merits. The order terminating parental rights is affirmed. Pursuant to *In re Caden C.* (2021) 11 Cal.5th 614, the parent asserting the parental benefit exception must show by a preponderance of the evidence three things: (1) regular visitation and contact with the child, taking into account the extent of visitation permitted, (2) that 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, and (3) that terminating that attachment would be detrimental to the child even when balanced against the countervailing benefit of a new, adoptive home. Here, despite father's contentions, the record was sufficient to support the juvenile court's findings that father failed to maintain regular visitation and contact. Father's visitation throughout the dependency proceedings was sporadic and entailed significant gaps. Even during the roughly two-year period after his reunification services were terminated, father missed nearly 40 percent of all visits and, thus, failed to take advantage of visitation to the extent permitted by court orders. When father did visit, he was frequently late. Father's failure to visit regularly also negatively impacted Eli, who expressed anxiety and disappointment about the parents' inconsistency with visitation. Likewise, despite mother's contentions, the record supported the juvenile court's determination that mother did not establish the existence of a significant, positive emotional attachment to her by

either child. In short, mother had a “conflicted relationship” with the children. While the children were happy to see mother during some visits, there were many occasions where the children did not engage favorably with her or were negatively impacted by the visits. There were visits where mother barely participated with the children, where the children did not interact much with mother, and where the children expressed feelings of rejection and abandonment towards her. Finally, even though mother’s failure to satisfy the second prong is dispositive, mother also failed to satisfy the third prong. There was extensive evidence that the children were very anxious not knowing where they would live permanently, which impacted them negatively throughout the case emotionally and behaviorally, and that their behaviors improved when in-person visitation was suspended due to the pandemic. (AMC)

**WIC 388; WIC 366.3**

*In re Malik T.*—published 1/18/2022; Second Dist., Div. Seven

Docket No.: B311135; 73 Cal.App.5th 1109

Link to case: <https://www.courts.ca.gov/opinions/documents/B311135.PDF>

[1] IT WAS AN ABUSE OF DISCRETION FOR THE JUVENILE COURT TO DENY A MOTHER’S WIC 388 PETITION DUE TO AN ERRONIOUS ASSUMPTION THAT THE COURT COULD NOT ORDER FURTHER REUNIFICATION UNDER THE REUNIFICATION TIMELINES OF WIC 361.5(a), WHICH DO NOT APPLY TO POST-PERMANENCY REVIEW HEARINGS, AND WIC 366.3(e) AND (f) EXPRESSLY AUTHORIZE FURTHER REUNIFICATION IF IN THE BEST INTEREST OF THE MINOR. [2] MOTHER DID NOT FORFEIT THE ARGUMENT ON APPEAL BY NOT RAISING THE ISSUE OF THE COURT’S ERRONIOUS ASSUMPTION BECAUSE THE 388 PETITION INCLUDED APPROPRIATE AUTHORITY AND ARGUMENT.

In October of 2016 a petition was sustained on behalf of Malik T. and his siblings. The sustained allegations involved nonaccidental serious physical harm, domestic violence against the mother, and mother’s failure to protect. The children remained released to the mother until March of 2017, when a section 342 petition was filed alleging, among other things, physical abuse of one of the children and mother’s substance abuse. The petition was sustained, and mother was ordered to have reunification services. Mother’s progress in her case plan was inconsistent during her reunification time period, resulting in her services ultimately being terminated in September of 2018. A section 26 hearing was set but was continued multiple times. The oldest child was eventually placed with his father but was later removed due to domestic violence in June of 2019. His

father received reunification services, but mother did not since she had already received 18 months of services. Except for the oldest child, the permanent plan for the children was adoption with their grandmother. Mother filed section 388 petitions seeking six more months of reunification services, but the court denied the petitions. In March of 2020 mother filed a new set of 388 petitions seeking reunification services, which indicated she had made substantial progress in her previously ordered case plan and that it was in the children's best interest to be with their mother and know their extended family. The agency requested the court deny the petitions because it was in the best interest of the children to be adopted by their grandmother. They were also concerned she would be overwhelmed with all the children in her care. At the hearing on the petitions in March of 2021, mother's counsel argued mother made significant progress and maintained her sobriety and consistently visited the children who were bonded to her. She argued for a slow transition into her care by way of receiving six months of reunification services. The oldest minor's counsel argued it was not in his best interest. Counsel for the other minors argued that the court could not grant further reunification services because mother had used all her reunification time already, so the only option the court had was to either return the children to mother that day or deny the 388 petitions. She, however, asked the court to order the agency to assess the grandmother for guardianship instead of adoption since the children had become so bonded with their mother during this time. The agency's counsel joined in the argument that mother was out of time to reunify. The juvenile court agreed with the interpretation that the time for reunification had expired, and it was not in the children's best interest to be returned to the mother at that time. The juvenile court denied the 388 petitions. Mother appealed.

Reversed. The juvenile court abused its discretion by denying the mother's 388 petitions under an erroneous legal assumption. The timelines for reunification services outlined in section 361.5, subdivision (a) do not apply to post-permanency review hearings. Once a case has progressed to post-permanency plan review under section 366.3, subdivisions (e) and (f) explicitly allow further reunification services if they would be in the best interest of the children and if parental rights remain intact. Subdivision (f) states that a period of six months of reunification services followed by six months of family maintenance services may be provided to the parent. A section 388 petition is the proper procedural vehicle for a parent to request additional reunification services. The Supreme Court held that a parent is entitled to attempt to restore their reunification services if they can prove a change of circumstances through a section 388 petition. (*In re Marilyn H.* (1993) 5 Cal.4th 295.) The *Marilyn H.* holding is consistent with dependency statutes authorizing the juvenile court to make orders that are in the best interest of the children. (WIC 362; WIC 245.5; WIC 202(a).) Thus, it was an error of law for the juvenile court to deny the section 388

petitions because it believed mother could not have additional reunification time, and as such, was an abuse of discretion. While typically the principle of forfeiture applies in dependency law, it is generally applied to situations where a party fails to object to an order or failed to seek relief in the juvenile court that it is seeking on appeal. Here, the juvenile court denied the mother's request on an erroneous legal ground after mother appropriately petitioned the court with pertinent legal authority and argument, so the argument on appeal was not forfeited. The legal error by the juvenile court was not harmless, because mother was requesting reunification services and not immediate release, and the record contained evidence of mother's progress, her ongoing visitation, and the strong relationship she built with the children. The matter is remanded for the juvenile court to conduct a new section 388 hearing and evaluate the request under the correct legal standards. (KH)

### **Beneficial Parental Relationship Exception—WIC 366.26**

*In re A.L.*—published 1/18/22; Sixth Dist.

Docket No. H048761; 73 Cal.App.5th 1131

Link to case: <https://www.courts.ca.gov/opinions/documents/H048761.PDF>

THE PARENTAL BENEFICIAL RELATIONSHIP EXCEPTION DID NOT APPLY WHERE THE CHILD DID NOT HAVE DIFFICULTY SEPARATING FROM FATHER AT THE END OF VISITS; THE JUVENILE COURT'S REFERENCE TO FATHER'S LACK OF "PARENTAL ROLE" DID NOT VIOLATE THE TEST UNDER *IN RE CADEN C.*

In November 2018, three-year-old A.L. was detained from father after father left her with a daycare provider for several days. Father had been incarcerated and was unable to arrange care, and he had a history of drug and alcohol abuse. Father received 16 months of services, during which time he maintained consistent visitation and the visits went well. Father was inconsistent with his programs, and he tested positive for methamphetamines many times throughout the reunification period. The court terminated services in July 2020. Four months later, father filed a section 388 petition alleging he had completed his programs, had been sober since March 2020, and had acquired suitable housing. Father claimed to have a close bonded relationship with A.L. and that he maintained regular visitation. In a report for the combined 388 and section 366.26 hearings, the agency reported that father had tested negative five times for all substances. The section 366.26 report noted that A.L. loved her father and enjoyed their visits, but that she was closely bonded to her caregivers and was not negatively impacted when visits did not occur. The social worker testified that father's monitored visits were fun and enjoyable for A.L., that father was

very engaged with A.L., but that A.L. spoke very little to father. The social worker stated father's sobriety was recent. She also commented that father was not involved in A.L.'s education or schoolwork, not involved in her medical appointments, and was not a parental figure for her. Father testified the visits went very well and that A.L. called him "daddy." Father stated he and A.L. were closely bonded and that he had raised her from birth. The juvenile court denied father's section 388 petition and found that the parental beneficial relationship exception did not apply because although father was bonded to A.L. and she benefitted from the relationship, she would be able to adjust to the loss of it. The court also noted that the caregivers had "occupied the parental role" in A.L.'s life for the past 19 months. Father timely appealed, but only raised the beneficial relationship exception on appeal.

Affirmed. Father's contention that the juvenile court erred by not properly weighing the evidence in light of *In re Caden C.* (2021) 11 Cal.5th 614 ("*Caden C.*") is not supported by the record. The juvenile court found that the first two prongs of the *Caden C.* test were met. Father's contentions of error regarding the third prong of the test are without merit: 1) the juvenile court was not required to list all of the factors that went into its decision, 2) the record shows the juvenile court did weigh the potential harm to A.L. from not having father in her life, and 3) it was proper to consider the extent to which the caregivers and father occupied a parental role in the child's life. Specifically, the fact that the term "parental role" was not expressly used in *Caden C.* does not mean it was error to consider the term in the present case. The *Caden C.* Court acknowledged that in many cases the "strength and quality of the natural parent/child relationship" will substantially determine how detrimental it would be to terminate parental rights. Nowhere in *Caden C.* does the Court state that consideration of whether a parent occupies a parental role is improper. Further, the juvenile court properly considered the benefit A.L. would receive through adoption against the loss of the relationship with father, and it did not base its decision on whether father could regain custody. This case is distinguishable from *In re J.D.*, (2021) 70 Cal.App.5th 833, because there, the court erred by finding that the child did not *benefit* from the relationship due to mother's lack of a parental role during visits. Here, the court based its decision on the third prong of the test. The reference to the term "parental role" related to the strength and quality of father's relationship versus the caregivers, and whether it would be detrimental to A.L. to lose her relationship with father. (SH)

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## Statutory Timelines—WIC 361.5(a)

*In re M.F.*—published 1/20/22; Sixth Dist.

Docket No. H049128; 74 Cal.App.5th 86

Link to case: <https://www.courts.ca.gov/opinions/documents/H049128.PDF>

THERE IS NO ERROR NOR VIOLATION OF DUE PROCESS IN THE SETTING OF A COMBINED SIX- AND 12-MONTH REVIEW HEARING AS A RESULT OF A DELAY IN REACHING THE DISPOSITIONAL HEARING.

Mother’s children were taken into protective custody by police on July 5, 2020, after their younger sibling died from traumatic head injuries and then detained from their parents. On the date of initial removal from the parents’ physical custody, the children were under three years of age. After numerous continuances due in part to the pandemic, the jurisdiction hearing was held in February 2021. [The date the children entered foster care within the meaning of WIC 361.49 was on September 5, 2020, or 60 days after being taken into protective custody on July 5, 2020.] At the May 2021 dispositional hearing, the juvenile court denied father reunification services, granted mother reunification services, and set the initial review hearing six months out. Because the date of this hearing would be two months past the statutory 12-month date, it was set as a combined six- and 12-month review hearing. No party objected to the setting of the combined hearing. Mother appealed. During the pendency of the appeal, the children were returned to mother at the combined review hearing.

Affirmed. Mother contended the juvenile court erred in setting the initial review hearing as a combined six- and 12-month review hearing because it failed to consider the impact of the delays due to the pandemic. However, the statutory scheme sets an outer limit for review hearings. The six-month review hearing is to be held six months after the initial dispositional hearing but no later than 12 months after the date the child entered foster care, whichever occurs earlier. (WIC 366.21(e)(1).) Even though the statutes contemplate disposition occurring close to the date the child enters foster care (WIC 361.49, 361.5(a)(1)(B), 366.21(e)(1)), courts regularly enforce statutory limits when circumstances result in delays such as when a 12-month review hearing becomes the 18-month permanency planning hearing by virtue of the passage of time. Our Supreme Court in *Tonya M. v. Sup. Ct.* (2007) 42 Cal.4th 836 concluded that delays in the timing of one hearing should not affect the timing of subsequent hearings or the length of services to be ordered. *Tonya M.* held that, where delays in completing the prior review hearing would leave only four months of reunification before the next review date as prescribed by 366.21, the juvenile court should consider only what impact those four months of services would have on the parent and child, not any further hypothetical time. As the Supreme Court noted, “from the child’s



perspective, prompt, timely resolution *within 12 months* matters more than whether a full six months may have passed since the six-month review hearing ... [¶] Conversely, ... [t]here is no rational basis for concluding that a parent whose six-month hearing is delayed to the nine- or 10-month mark should be eligible for an extension to the 15- or 16-month mark of either services or reunification consideration ...” Thus, the juvenile court here properly applied the statutory timeline in this case and mother failed to provide any binding authority that the juvenile court should have limited the initial review hearing solely to a six-month review hearing despite it being set two months after the statutory 12-month review date. For the same reason, mother’s claim of ineffective assistance of counsel is rejected. Mother’s broader claims – that, in the event the children are later removed from her, the timing of the hearings could deprive her of the maximum possible time for reunification services and that the pandemic could have prevented her from fully benefiting from services – are rejected for lack of ripeness as her children had been returned to and remain with her. (ML)

**Nonminor Dependent; WIC 391; California Rules of Court, rule 5.555**

*In re Leon E.*—published 1/21/2022; First Dist., Div. Three

Docket No.: A161063; 74 Cal.App.5th 222

Link to Case: <https://www.courts.ca.gov/opinions/documents/A161063.PDF>

THE JUVENILE COURT MUST COMPLY WITH SECTION 391, AND CALIFORNIA RULES OF COURT, RULE 5.555, BEFORE TERMINATING JURISDICTION OVER A NONMINOR DEPENDENT; THE REQUIRED DOCUMENTATION MUST BE PROVIDED.

In 2018, the child, Leon, was declared a nonminor dependent. In 2020, probation recommended termination of AB12 services due to noncompliance. Probation asserted Leon did not provide proof that he was employed and did not maintain sufficient contact with his assigned probation officer; Leon moved to Washington and was unsure whether he would return to California. In the report recommending termination of services, the probation department checked boxes indicating Leon was provided with “information, documents, and services as required under section 391.” At the contested review hearing, Leon’s counsel argued he was applying to jobs in Washington and wished to have his AB12 placement moved to that state. The juvenile court terminated Leon’s nonminor dependency on the grounds that he was not participating in AB12 in good faith and not residing in approved placement. The case was continued after Leon’s counsel requested compliance with section 391, subdivisions (a) - (c) & (h). The juvenile court agreed to continue the matter in order for probation to provide a

90-day transition plan and to provide any required documents under section 391. At the continued hearing, Leon's counsel informed the juvenile court that the nonminor dependent had not received verification that probation provided the documents required under section 391. The juvenile court rejected counsel's challenge and terminated Leon's nonminor dependency. Leon appealed the termination.

Reversed. The juvenile court is authorized to terminate its jurisdiction over a nonminor dependent if the nonminor does not wish to remain subject to dependency jurisdiction, the nonminor is not participating in a reasonable and appropriate TILCP, or, after reasonable and documented efforts, the nonminor cannot be located. There was no dispute that Leon was not completing secondary education; nor was he enrolled in a postsecondary or vocational education institution or employed at least 80 hours a month at the time of termination. Further, Leon was not engaged in sufficient activities to promote employment. His reluctance to engage with the probation department and failure to inform anyone of his move to Washington was sufficient to support the juvenile court's termination findings. However, the juvenile court erred by failing to comply with section 391, subdivisions (a) - (c) & (h), and California Rule of Court, rule 5.555. Section 391 and rule 5.555 require the county welfare departments to verify they have made certain document and informational disclosures to nonminor dependents, and that the juvenile court makes related findings in order to terminate dependency jurisdiction. Under section 391 and California Rules of Court, rule 5.555, information and certain documents must be provided to the nonminor. A 90-day transition plan must be crafted and provided to the nonminor prior to termination of dependency jurisdiction. The 90-day transition plan is intended to provide minors and nonminors who are exiting dependency jurisdiction with resources to assist in transitioning to independence. In the present case, a 90-day transition plan was not attached to the initial report recommending termination of nonminor dependency. Although the agency's counsel told the juvenile court that the necessary documentation was submitted, there was no indication on the record that either Leon or the juvenile court received and reviewed the 90-day transition plan prior to termination of jurisdiction. These document and informational requirements are for the benefit of the nonminor in his or her efforts to transition from dependency, and thus, it is vital in and of itself that the agency verifies—and the juvenile court finds—that the nonminor dependent received all the law requires. Due to the failure to provide the nonminor a 90-day transition plan, it was premature to terminate his dependency jurisdiction. The order terminating jurisdiction was reversed. (MO)