CASE NO. S255839

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re CADEN C.,

A Person Coming Under Juvenile Law.

SAN FRANCISCO HUMAN SERVICES AGENCY,

Plaintiff and Appellant,

v.

CHRISTINA C., et al.,

Defendants and Respondents.

Court of Appeal Case Nos. A153925, A154042

San Francisco Superior Court Case No. JD153034

AGENCY'S ANSWER TO AMICI CURIAE BRIEFS FILED IN SUPPORT OF MOTHER CHRISTINE C.

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

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I. INTRODUCTION

Appellant and Supreme Court Respondent San Francisco Human Services Agency ("Agency") submits this brief in answer to the briefs amici curiae in support of mother Christine C. filed by "California Dependency Trial Counsel" ("CDTC") and by "Professors of Family and Clinical Law." Agency joins in the answer filed by minor's counsel to the amici curiae brief filed the law professors.[1]

II. ARGUMENT

A. Amici state a position that is both internally inconsistent and in conflict with mother's Reply Brief contentions.

When seeking review in this Court, mother contended that a parent's compliance with court-ordered reunification services and the degree to which the parent ameliorated the causes of the child's dependency *should never* be a consideration in determining whether or not the beneficial parent-child relationship exception to adoption applies. (Mother's Pet. at 8.) At that time, mother wrote "[i]mposing a requirement that the parent have complied with their court-ordered

[1] Agency adopts and supports in full the arguments set forth in the excellent and well-researched briefs amici curiae filed in support of Agency by the California State Association of Counties, and filed in support of minor by Advokids, East Bay Children's Law Offices, and Legal Services for Children.

service plan and rehabilitated upon application of the ... beneficial parent-child relationship exception to adoption is inconsistent with the purpose of the exception and renders the exception meaningless." (*Id.* at 14.)

Mother made the same argument in her Opening Brief on the Merits ("MOBM"), contending that "applicability of the beneficial parent-child relationship exception to adoption does not require a showing that the parent has made progress in addressing the issues that led to dependency" (MOBM 54-55), and that interpreting the relevant section "so that a parent's failure to address the problems that led to dependency can defeat application of the beneficial parent-child relationship exception would render the exception meaningless" (MOBM 57).

Mother has changed her position in her Reply, now conceding that the parent's progress *may* be a relevant consideration in determining whether the beneficial parent-child relationship exception to adoption applies, admitting that a showing that a parent has made progress is *sometimes* necessary to meet the exception. (Mother's Reply Brief (MRB) at 13-15.) Mother contends, however, that a parent's progress is only relevant as to the second prong of the exception (the existence of the beneficial relationship), but never as

to the third (a compelling reason to find that the detriment to the child of severing that child's relationship with the natural parent outweighs the benefits of adoption). (*Id.* at 5-7, 10-19.) Mother seems to be asking the Court to declare that the juvenile court is precluded from considering evidence of a parent's progress once the court has found that a beneficial relationship exists.

In contrast, amici CDTC do not argue for that outcome, nor do they express a consistent position. On the one hand, they seek a declaration from this Court along the lines of mother's original petition, that a court may never consider a parent's progress in addressing the issues that led to the dependency when considering the exception. (CDTC Br. at 15.) (Such a declaration, as argued in Agency's Answering Brief and mother's Reply Brief, would be overbroad and would prevent the juvenile courts from considering relevant and admissible evidence. (Agency's Answering Brief on the Merits at 65-68; MRB at 14-15.) On the other hand, amici CDTC also appear to argue a contrary position, that a court *can* consider a parent's progress or lack thereof in addressing the issues that led to the dependency when the court is focusing on the effect of that progress on the current and likely future interaction between parent and child

(CDTC Br. at 10).[2] These positions are inconsistent, and the second of the two directly contradicts mother's position.

As noted, mother does contend that evidence of a parent's progress may be relevant to a determination of the "nature and quality of the parent-child relationship" (i.e., the second prong), but also contends that evidence of a parent's efforts to address the problems leading to the dependency have no place in the court's consideration of the third prong. (MRB at 17 [stating that once a beneficial relationship is found, then "parental inadequacies no longer have a place in the equation"].) Mother appears to argue that if a parent's conduct does not prevent a court from finding the existence of a beneficial relationship, then that same conduct cannot prevent the court from finding that the detriment to the child of terminating the relationship with the natural parent outweighs the benefits of adoption. (MRB at 18.)

There are at least three problems with this contention. First, it assumes that the same 'progress in addressing the issues' offered on the third prong will already have been considered on the second prong, even though the 'progress' or 'issues' that may be relevant

[2] It should be noted that amici also appear to state that there is no "evidentiary nexus" between such progress and "nature and quality of the parent-child relationship." (CDTC Br. at 14.)

when balancing the detriment to the child caused by terminating the relationship against the benefit of adoption may not be relevant when considering the existence of a beneficial relationship. A parent in dependency often faces more than one challenge, as mother did here.[3] By the time of the 366.26 hearing, for example, the parent may have made progress in treating substance abuse but failed to make progress in treating mental illness, preventing domestic violence, or ameliorating some other condition that has put the child at risk or caused the child to suffer physical or emotional harm. The parent may also have begun to face new issues, arising after the dependency was instituted or even after reunification services were terminated.

Second, mother provides no authority for the argument that the same evidence cannot be used to prove two different elements of the test, as is common in other legal tests. As an example, a party seeking to change a juvenile court order under Welfare and Institutions Code

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[3] The concept of "progress" can encompass all sorts of issues, conditions, and conduct. In granting review, this Court asked about "progress in addressing the issues that led to dependency." The discussion by parties and various amici have referenced the parent's "progress," but also "efforts," "amelioration of problems," "rehabilitation," "conduct," and "compliance with a case plan," among other things. Amici CDTC reference a parent's "shortcomings." (CDTC Br. at 14-15.) Mother references "parental inadequacy." (MRB at 17.) In addition, consideration of a parent's "progress" at the time of the section 366.26 hearing should not preclude consideration of issues that did not *lead* to the dependency but arose *after* the dependency was instituted.

section 388 must demonstrate the existence of two prongs: a change of circumstance or new evidence, and that the proposed change is in the child's best interests. (Welf. & Inst. Code § 388;[4] *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) A hypothetical parent seeking to expand visitation to overnight unsupervised visits might want to show, as evidence of new or changed circumstances, that she has obtained new housing close to the child's school and that she has successfully completed parenting courses. If she meets her evidentiary burden to show a change of circumstances, she may seek to rely on the same evidence to show that overnight unsupervised visits are in the child's best interests. The court is not precluded from considering the same evidence on both prongs of the statutory requirement. (See, e.g., *In re Jasmon O.*, *supra*, 8 Cal.4th at 416-417 [child's development of separation anxiety disorder was both evidence of change of circumstance and evidence that the previous order placing child with father was not in child's best interests].) The same is true for the three-prong test a parent must meet to establish the statutory exception in question here.

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[4] All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

Third, as pointed out by amici California State Association of Counties ("CSAC"), if a court, having found the existence of a beneficial parent-child relationship, were then required to ignore negative information about the impact of the relationship when considering whether a compelling reason exists to preserve the parental rights, then the "compelling reason" language of section 366.26, subdivision (c)(1) is rendered meaningless. (CSAC Br. at 38.) Such a result contravenes the principle of statutory interpretation that every word, phrase, and provision employed in a statute is intended to have meaning. (*Id.*, citing *In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1206-1207.)

In sum, amici CDTC do not appear to agree with mother's position, and do not completely disagree with Agency's position. When they write "any facts considered by the courts should be germane to assessing the interaction between parent and child and not merely whether the parent has made progress" (CDTC Br. at 4), they appear to agree that all relevant evidence is admissible and should be considered by the court. When bearing in mind that the parent bears the burden of proof on each element of the beneficial relationship exception (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345); that the

exception is to be applied in *exceptional circumstances* (*In re Celine R.* (2003) 31 Cal.4th 45, 53 (emphasis in original), citing *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348-1349); and that the child's need for permanence and stability are paramount at this stage of the dependency (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307), it becomes immediately apparent that a party opposing application of the exception must not be precluded from introducing relevant evidence bearing on the issue under consideration. (Evid. Code § 351 ["Except as otherwise provided by statute, all relevant evidence is admissible."].)[5]

B. Evidence of a parent's progress in addressing the issues that led to dependency can be relevant on consideration of the third prong, as it was in Caden's case.

Despite arguing that the juvenile court must consider evidence germane to assessing the interaction between parent and child when considering the beneficial relationship exception (CDTC Br. at 4),

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[5] As amici CSAC point out, section 366.26, subdivision (c)(1) directs the juvenile court not to consider certain evidence when making its determination whether to terminate parental rights. ("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.") The section does *not* prohibit the court from considering a parent's progress when considering the exceptions to the termination of parental rights. (CSAC Br. at 30.) In fact, the section directs the court to make its determination based on the assessment report provided by the child services agency, "*and on any other relevant evidence*." (§ 366.26, subd. (c)(1).)

amici CDTC seek a declaration that a court may never consider a parent's progress when considering the exception (CDTC Br. at 15). They argue that a parent seeking to establish the applicability of the exception should not be subjected to arguments based on the same evidence that resulted in the termination of reunification services. (CDTC Br. at 14-15.) Amici CDTC take issue with the Court of Appeal's decision, arguing that the court improperly "considered Mother's lack of progress by itself to be a sufficient basis on which to deny application of the beneficial relationship exception." (CDTC Br. at 11.) This contention ignores the context in which the Court of Appeal made its determination and it misconstrues the court's holding.[6]

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[6] Amici also contend that the Court of Appeal improperly based its decision on four cases purportedly applying or upholding application of the exception where the parents were actively involved in maintaining their sobriety or complying substantially with their case plan. (CDTC Br. at 11-12, citing *Caden C.*, *supra*, 34 Cal.App.5th at 112.) Because amici did not have access to the briefs on appeal, they would not have reason to know that three of the four cases cited by the Court of Appeal (*In re S.B.* (2008) 164 Cal.App.4th 289, *In re Amber M.* (2002) 103 Cal.App.4th 681, and *In re Brandon C.* (1999) 71 Cal.App.4th 1530) were all cases on which mother relied in her Respondent's Brief for the proposition that mother's relationship with Caden is similar to the parent-child relationships in those cases. (Mother's Respondent's Brief at 110-111 (*Brandon C.*), 113-115 (*Amber M.*), 117-118 (*S.B.*).) Although it did not specifically state as much, the Court of Appeal appears to have chosen those same cases to distinguish their circumstances from mother's. The fourth case, *In re E.T.* (2018) 31 Cal.App.5th 68, had not been decided by the time mother filed her Respondent's Brief but is in line with the first three.

Certainly, as amici CDTC point out, the Court of Appeal decried the trial court's clear error in finding that mother had "substantially complied with her case plan" and had "continues her efforts to maintain her sobriety and address her mental health issues." (*Caden C., supra*, 34 Cal.App.5th at 110.) It is also true, however, that the decision stated at least three times that the court was focused on the lengthy period *following* the termination of reunification services, leading up to the 366.26 hearing.[7] The Court of Appeal noted "mother's chronic substance abuse and failure to seek treatment *continued unabated up to the permanency planning hearing*" (*Caden C., supra*, 34 Cal.App.4th at 110, emphasis added); that mother made no attempt "to maintain her sobriety or seek treatment to address her addiction and mental health issues *in the 10 months prior to the permanency planning hearing*" (*id.* at 111, emphasis added); and that "mother failed to engage in her case plan or seek treatment of any kind

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[7] While most 366.26 hearings are held no later than 120 days from the date of the hearing at which reunification services are terminated (CDTC Br. at 14, fn 5; § 366.21, subds. (e)(3) and (g)(4); § 366.22, subd. (a)(3)), *Caden C.* is somewhat unusual in that mother's reunification services had been terminated 18 months before the 366.26 hearing concluded. (3CT 684-689, 692-697, 4CT 1204-1210.) The parties' initial stipulated settlement after Caden was removed provided for a plan of foster care with the goal of legal guardianship. (3CT 684.) It was mother's conduct during this post-reunification period, combined with the foster mother's willingness to adopt Caden, that prompted the Agency to seek adoption. (4CT 1127.)

in the 10 months leading up to the permanency hearing, was actively abusing drugs again, and was in denial about her ability to parent under the influence of methamphetamine" (*id.* at 112, emphasis added). The court also noted that mother testified twice that she was unwilling to acknowledge that her drug abuse negatively impacted Caden. (The first testimony was at the six-month post-permanency review (*id.* at 111), the second at the 366.26 hearing (*id.*). Both were well after reunification services had been terminated.)

The Court of Appeal also made clear that it was focusing on this post-reunification period because "[t]he juvenile court was required to balance 'the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.'" (*Id.* at 113, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The court was very aware of the "years of trauma and instability" Caden had suffered "as a direct result of mother's entrenched and unresolved substance abuse and mental health issues – the very problems that led to Caden's removal from her care in the first place." (*Caden C.*, 34 Cal.App.4th at 110.) The court identified the relevant inquiry as "whether mother's bond with Caden was such a positive influence on his young life that an uncertain future is an acceptable price to pay for maintaining it." (*Id.* at 113.) The Court of Appeal looked not only to the conduct

consisting of mother's continued unresolved substance abuse and mental health issues, but also to her conduct during visits, when she would engage in anxiety-provoking behavior, causing the young boy to feel the need to take care of mother and ensure her safety. (*Id.* at 114.) The court noted the evidence of the "11-member review team" who found that Caden's visitation with mother in the post-reunification period "was unhealthy and was sabotaging his stability." (*Id.* at 115.) Whether we call mother's conduct "lack of progress" or a "shortcoming," the fact that it continues to cause "trauma and instability" for the child is certainly relevant to the question of whether mother's bond with Caden is such a positive influence "that an uncertain future is an acceptable price to pay for maintaining it."

Contrary to amici CDTC's reading of the decision, the Court of Appeal was most concerned that the trial court had abused its discretion by failing to consider whether there was a compelling reason to find that the detriment to the child of severing Caden's relationship with mother outweighed the benefits of adoption. The Court of Appeal recognized that a trial court considering the third prong would need to account for mother's ongoing conduct when determining just how uncertain a future Caden is likely to face. (*Caden C.*, *supra*, 34 Cal.App.5th at 115 ["Given all of these circumstances, when the strength and quality of mother's relationship

with Caden in a tenuous placement is properly balanced against the security and sense of belonging adoption by Ms. H. would confer, no reasonable court could have concluded that a compelling justification had been made for forgoing adoption."])

C. The Court should decline to consider the "related problem" raised for the first time in CDTC's amici curiae brief.

In the final section of CDTC's brief, amici raise what they call a "related problem" concerning "the standards that determine the 'parental role' a parent must occupy in order to meet the [beneficial relationship] exception." (CDTC Br. at 15-16.) The Court should decline to consider this issue, for at least three reasons.

First, the issue was not one specified for review. "[I]t is the general rule that an amicus curiae accepts the case as he finds it and may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record....' " (*E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510–511 quoting *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 143.) While this Court has recognized two exceptions to this rule -- amicus curiae may raise an issue which will support affirmance, and amicus curiae may assert jurisdictional questions that cannot be waived even if not raised by the parties (*id.* at 511) -- neither exception applies here.

Second, the issue has not been briefed by the parties.

Third, the issue has no bearing on the current matter. Amici are concerned that parents are sometimes required to demonstrate a "primary parental role" in order to meet the beneficial relationship exception. (CDTC Br. at 17-18.) Here, the trial court expressly found that mother stood "in a parental role to her son" and the Court of Appeal agreed. (*Caden C.*, *supra*, 34 Cal.App.5th at 107, 109.)

III. CONCLUSION

"By the time of a section 366.26 hearing, the parent's interest in reunification is no longer an issue and the child's interest in a stable and permanent placement is paramount." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Once it has been determined that reunification will not occur, "it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home." (*In re Cynthia D.* (1993) 5 Cal.4th 242, 256.)

No juvenile court, when considering whether the beneficial relationship exception applies to overturn the statutory preference for adoption, should be precluded from considering any evidence relevant to the important question, as framed by the Court of Appeal below, of whether the parent's bond with the child is such a positive influence on the child's young life that an uncertain future is an acceptable price to pay for maintaining it. There can be no question that where a parent's behavior at the time of the 366.26 hearing is likely to have a

destabilizing effect on a child, that behavior is relevant to determining whether any benefit that may result from the parent-child relationship outweighs the benefits of adoption. There can be no question that a court weighing the detriment to a child of terminating the parental relationship against the benefits of adoption must also consider the potential detriment to that child if parental rights are not terminated. To preclude a juvenile court from considering evidence of such detriment creates an inappropriate obstacle to permanency, improperly burdening the efforts to place the child in a safe, stable, and permanent home.

Dated: January 10, 2020

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE
(California Rules of Court, rule 8.204(c)(1), 8.360(b), and 8.412(a).)

I certify that this brief complies with Rule 8.204, because it uses proportionately spaced font with a typeface of 13 point and contains 3,463 words.

To assess the number of words, I utilized the word count function of Microsoft Word program with which this brief was drafted.

Dated: January 10, 2020

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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is 1901 Harrison Street, 14th Floor, Oakland, California, 94612. On January 10, 2020, I served the attached **AGENCY'S ANSWER TO AMICI CURIAE BRIEFS FILED IN SUPPORT OF MOTHER CHRISTINE C.** in said action by depositing it in a sealed envelope, postage prepaid, in the United States Mail, addressed as follows:

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On January 7, 2020, I also transmitted a PDF version of this document, via email, to each of the following using the email address indicated:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on January 10, 2020, at Oakland, California.

Linda J. Halperin