APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

March 2020 through December 2021

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NOTICE OF APPEAL

In re A.R. (2021) 11 Cal.5th 234 [Alameda]

When a trial attorney fails to file a timely notice of appeal as requested by their client, the client is entitled to relief based on ineffective assistance of counsel.

The California Supreme Court held that when parents raise a timely claim of the deprivation of the statutory right to effective counsel has worked to undermine their right to appellate review of a termination of parental rights, the logical remedy is to afford them the appeal to which they are statutorily entitled even if the deadline for filing a notice of appeal has lapsed. When the juvenile court terminated mother's parental rights, mother promptly directed her court-appointed attorney to appeal. The attorney mistakenly filed the notice of appeal four days late and the Court of Appeal dismissed mother's appeal as untimely. The Supreme Court addressed the question of whether, as a result of her attorney's mistake, mother has irrevocably lost her right to appeal the termination of her parental rights and concluded the answer is "no."

By statute, every parent facing the termination of parental rights is entitled to the assistance of competent counsel as well as the right to appeal an adverse ruling. (§ 317.) Mother was a minor herself when A.R. was born and less than a year later, the child was detained based on mother's depression. Mother participated in reunification services while she finished high school but was unable to reunify. Mother filed a 388 petition requesting more reunification services and, two years after a dependency was declared, the court held a prima facie hearing on mother's 388 petition. The court rejected the evidence in mother's 388 petition and terminated parental rights. Five days after the hearing, mother asked her new court-appointed trial attorney to file a notice of appeal but this was forgotten until it was too late.

Mother timely filed her opening brief along with an application for relief from default. Mother acknowledged the late filing but asked the court to consider the notice of appeal to have been timely filed. The Court of Appeal denied the application and dismissed mother's appeal for lack of jurisdiction. Mother then filed a petition for a writ of habeas corpus in the Court of Appeal, alleging her attorney's substandard performance denied her the right to pursue an appeal. The court also denied her habeas corpus petition.

The California Supreme Court granted review, and directed the parties to address two issues: (1) whether a parent has the right to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights, and (2) if she has such a right, the proper procedures for raising such a claim.

Although claims of incompetent counsel would delay proceedings, the child's interest in finality is not the only value to consider; the child also has an important interest in ensuring that her relationship with a parent is not erroneously severed because of the incompetence of the parent's lawyer. As the high court has observed, "a lawyer who disregards specific instructions

from [his or her client] to file a notice of appeal acts in a manner that is professionally unreasonable." (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985.)

The Agency contends, and the court rejected, that to show prejudice for a late-filed notice of appeal, a parent must demonstrate that there is a reasonable probability she would have prevailed on appeal if the notice of appeal had been timely filed. For a parent with a late notice of appeal, the relevant injury is not denial of any specific substantive appellate victory; it is the opportunity to appeal at all.

A parent who seeks to challenge a termination order therefore must act promptly to avoid jeopardizing the child's long-term placement. The Supreme Court discussed requesting relief through a habeas petition. Mother contends the use of these formal procedures will cause needless delay, a result all parties wish to avoid. The opinion concludes the standard framework for habeas does not provide an ideal model for raising ineffective assistance of counsel in a dependency setting. No specific procedure is required by the court's opinion.

DELAY CAUSED BY QUARATINE

In re M.P. (2020) 52 Cal.App.5th 1013 (2d Dist., Div. 5) [Los Angeles]

Despite directives from the judicial branch, a continuance of 220 days is beyond the statutory mandates including those provided by emergency orders and the writ of mandate was granted.

In response to the COVID-19 global pandemic, the Governor of California and the Chief Justice of the California Supreme Court issued a series of orders that permit the extension of time within which certain hearings must occur. Presiding Judge of the Superior Court for the County of Los Angeles, issued a general order on March 17, 2020, providing that all courtrooms would remain closed for judicial business with the exception of specified "time-sensitive, essential functions." As part of the judicial branch's broad authority to manage its own operations, emergency orders were issued that if a court hearing cannot occur either in the courthouse or remotely, the hearing may be continued up to 60 days ...." (Emergency rule 6(c)(6).) Dependency cases were given priority. In anticipation of the reopening scheduled for June 2020, the prioritization of juvenile matters was updated because the court estimated that, despite efforts to hear essential matters remotely, more than 30,000 hearings would have to be continued.

The court took jurisdiction over the children at the end of 2019. In October, the children were placed with mother, monitored visitation for father, and under section 364, the court set a six-month review hearing in May 2020. In April 2020, the agency recommended terminating jurisdiction with family court orders. The scheduled hearing in May was continued. Based on the emergency rule, the court could continue the hearing only until mid-July 2020. The juvenile

court continued the section 364 status hearing for 220 days. Appellant filed a petition for mandate and the petition granted.

Continuing a six-month review hearing in dependency case beyond 60-day extended deadline authorized under emergency order issued by Governor, due to COVID-19 pandemic, is not permissible. The appellate court found that local courts cannot issue rules that are inconsistent with statutory time limits. The court issued a peremptory writ of mandate vacating the juvenile court's April 29, 2020, order continuing the section 364 review hearing and absent a new and different order continuing the hearing on a proper legal basis, the juvenile court was directed to hold the hearing within 15 days of remittitur issuance.

JURISDICTION

In re Cole L. et al*. (2021)* 70 Cal.App.5th 591 (2d Dist., Div. 7) [Los Angeles]

Where the basis for jurisdiction is pushing and shoving over possession of cell phone, without more, is not sufficient to support jurisdiction. The case began after the police were called to the home because of screaming and yelling and they found the home in disarray in what they described as evidence of domestic violence and both parents had scratches and bruises. The police also believed the children were difficult to rouse and must be under the influence of alcohol although later tests showed this was not true. The petition was filed, alleging both subds. (a) and (b), and used the identical description of the single incident as a violent altercation in the children's home. At the detention hearing, the court placed the children with mother and granted father supervised visits. The jurisdiction hearing was continued several times and was held nine months after the detention. At the jurisdiction hearing, mother argued for the petition to be dismissed because the case had been open for nearly 10 months without any issues for the children's safety. The trial court found a long history of domestic violence based on the agency's report of previous incidents between the parents.

The parents appeal from the jurisdiction findings under subds. (a) and (b) where the basis for the allegations was domestic violence. The children were then five and three years old. The parents argue the juvenile court improperly relied on unalleged acts in making its findings and there was insufficient evidence to support jurisdiction. The appellate court found that allegations of domestic violence under subd. (a), require evidence of a risk of physical injury "inflicted nonaccidentally upon the child." An unintended injury to a bystander child that results from an intentional act directed at another—for example, due to an object thrown by one parent at another during an argument—does not satisfy that statutory requirement. Further the court held the record is devoid of evidence of a substantial risk of nonaccidental injury to the children. The allegation did not allege the children were present and the evidence showed they were asleep in another room. As to whether the evidence supported jurisdiction under subd. (b), the appellate court found the social worker's conclusion that there was a

history of domestic violence was contrary to the other evidence in the record. Further, a verbal argument that escalated into pushing and shoving presented a minimal risk of physical harm to the children. The risk of similar incidents is to be considered at the time of the jurisdiction hearing. In this case, the children had been safely in mother's custody for nine months without incident with no further conflicts between the parents. The court was also not moved by the assertion that mother refused to begin services, which was not exactly true, but more was needed to support a jurisdiction finding. The Court of Appeal reversed with direction. [J. Price, mother; L. Villavaso, father]

In re L.O. (2021) 67 Cal.App.5th 227 (4th Dist., Div. 2) [San Bernardino]

Inadvertent exposure to sexual behavior is not sufficient to support a finding of jurisdiction under section 300, subdivision (d). The referral alleged physical and emotional abuse after the child disclosed mother's boyfriend had hurt him and this was supported by extensive bruising to his body and eye and a cut to the bottom of his foot. Father explained that he, mother, and her boyfriend had been in a physical confrontation where restraining orders were sought. Father also disclosed the child displayed sexualized behaviors upon return from mother's home, such as humping, moaning, and saying "oh yeah baby." During an interview with social workers, the child displayed the sexualized behavior, using profanity, and said mother told him to lie about how he got his marks and bruises. A petition was filed alleging father failed to adequately protect L.O. from physical harm and from physical abuse by mother and her boyfriend; father had a substance abuse problem; father had a history of engaging in domestic violence; and father exposed L.O. to inappropriate sexualized behaviors. Father confirmed a few instances of domestic violence with mother with the last one being three years before. Because father had recently tried to get custody of L.O. by reporting the physical abuse to the Family Law Court, and because he had reported the current abuse to the agency, the agency dismissed the willful failure to protect the physical harm allegations involving father. The only remaining allegations against father were father's history of engaging in domestic violence and exposing L.O. to inappropriate sexualized behaviors.

Father appealed. Father challenged the jurisdictional finding under section 300, subds. (b) [neglect] and (d) [sexual abuse] and removal of his 6-year-old son. The Court of Appeal found substantial evidence to support the subd. (b) allegation but insufficient evidence of the subd. (d) allegation and modified the order to strike this allegation. Despite the lack of any challenge to jurisdiction based on mother's conduct, the appellate court exercised its discretion to review the jurisdictional findings against father. The court found substantial evidence supporting jurisdiction under subd. (b) based on mother's and father's admissions of domestic violence in the past along with descriptions of the physical altercation involving father and mother's boyfriend.

As for the subd. (d) allegation, father argued the allegation did not fall within any of the statutes re: sexual abuse of a child. The Court of Appeal found the most analogous statute in Penal Code 647.6 and discussed a case involving taking "'crotch shots'" of fully clothed girls. The deciding factor for purposes of a Penal Code 647.6 charge is that the defendant has engaged in offensive or annoying sexually-motivated conduct which invaded a child's privacy and security. Although the record demonstrates L.O. was acting out sexually and possibly witnessed father engaging in sexual conduct with his girlfriend, there was no evidence to support a finding that such an error was sexually motivated. Allegations in the petition based on L.O.'s exposure to sexual conduct, even if true, do not constitute sexual abuse pursuant to section 300, subdivision (d) as a matter of law.

As to disposition, the Court of Appeal affirmed the trial court's removal order because it is still unknown where L.O. had learned his inappropriate sexual behavior and violent acting out so the child remained unprotected. The court agreed with father that the juvenile court's factual findings were deficient, however, the appellate court found this error harmless because it is not reasonably probable that a result more favorable to father would have been reached in the absence of the error. [E. Klippi, father]

In re J.N. (2021) 62 Cal.App.5th 767 (2d Dist., Div. 1) [Los Angeles]

Father contends, and the Court of Appeal agreed, that the challenged jurisdictional finding and removal order are solely based on father's incarceration and criminal record, and that such evidence is insufficient to support either jurisdiction or removal. Father also argued that the trial court erred in denying him reunifying services based on detriment under section 361.5, subd. (e), but the appellate court held section 361.5 is inapplicable. Nonetheless, the opinion vacated the detriment finding holding it could prejudice father in the future.

Father was jailed in 2019 and is not eligible for parole until 2023. The case began because of a positive drug test at the birth of the child's half-sibling, drug use by mother and her boyfriend, and an allegation of a recent physical altercation between mother and her boyfriend. A petition was filed for now seven-year-old J.N. against mother and the boyfriend but no allegations were made against father. An amended petition alleged risk of physical harm to J.N. as a result of father's "violent criminal history." The petition did not include an alleged incident of domestic violence between the parents in 2015, but rather relied exclusively on a list of his convictions and incarcerations. Starting in 2014, these included threatening a crime with intent to terrorize and exhibiting a deadly weapon (other than a firearm), assault with a deadly weapon (other than a firearm), causing a fire of an inhabited structure/property, and assault with a deadly weapon with force. Mother claimed she did not allow contact with father after the 2015 domestic violence incident. Father was found presumed and the court sustained the jurisdictional allegations against father as pled, noting father had "very serious convictions …

that impact child safety" including domestic violence. Despite not knowing if father requested custody, the trial court held placement with father was detrimental.

On appeal, the court rejected the agency's argument that the court need not address father's jurisdictional challenges because the unchallenged findings involving mother create an independent basis for jurisdiction. Father argued the allegations did not provide an actual nexus between this criminal history and any specifically identified, substantial, current risk of serious physical harm to J.N. and the appellate court agreed. The evidence supported a finding that father might commit crimes in the future, even violent crimes, but it does not show a substantial risk that J.N. will be harmed. None of father's crimes involved children or were against children and, although the agency may be correct that father exposing J.N. to his criminal ways could put J.N. at risk, the record does not provide any nonspeculative basis for the court to conclude that father is likely to do so. Father was not convicted of any domestic violence. Consequently, the Court of Appeal reversed the jurisdiction finding against father. The court reversed the court's dispositional order to the extent it removed J.N. from father. The court also addressed the application of the bypass provision. Section 361.5 are inapplicable where, as here, a child does not enter foster care, but is placed with a previously custodial parent. Even though father is not entitled to reunification services here, and because there is a nonspeculative risk that the erroneous detriment finding could prejudice father later in this case, the court vacated the detriment finding and the order denying services. [J. McCurley, father]

In re Nathan E. (2021) 61 Cal.App.5th 114 (2d Dist., Div. 1) [Los Angeles]

Domestic violence can be the basis for jurisdiction under section 300, subdivision (a), even though the risk to the children is not intentional action.

The case began because of continuing domestic violence. A restraining order existed between the parents and the police were called to the home numerous times. One officer confirmed he spoke to the parents about the detrimental effect of domestic violence on children. The oldest child reported being present at one domestic violence incident. The agency filed a petition alleging the children, then aged four, two, and less than one year old, were described by section 300, subds. (a) and (b). The court sustained the allegations based on multiple instances of domestic violence.

Mother challenged jurisdiction and removal. Initially, the agency argued the appeal is moot since father did not appeal so the allegations against mother are sufficient for jurisdiction. Although the Court of Appeal did not make a determination of mootness, it exercised its discretion and considered mother's issues. Mother argued subd. (a) is not applicable since any injury to a child during domestic violence between the parents would be accidental and not intentional. The appellate court followed an opinion from the 4th District finding that domestic violence is not accidental and subd. (a) is appropriate when, through exposure to the parents'

domestic violence, the child is injured or is at risk of injury. The court firmly rejected mother's contention that domestic violence cannot be the basis for a finding under subd. (a).

As to disposition, the agency provided a history that showed domestic violence between mother and father that spanned the entire duration of their marriage starting in 2015. Even though mother stabbed father, was arrested, and subsequently completed a 52-week domestic violence class, the conflicts between them continued. The parents had also each obtained a restraining order against the other but this did not resolve the problem. Further, the evidence showed the parents had their fights in front of the children. The appellate court rejected mother's argument that she became involved in services after the children were detained mitigating the risk to the children. The trial court found, and the Court of Appeal agreed, that mother had the benefit of a prior 52-week domestic violence class along with being counseled by police about the dangers of continued violence in the home, but the fighting persisted. As for whether reasonable means existed to protect the children, the court held that these did not exist since the record contained evidence that mother failed—over the course of many years—to comply with court-ordered restrictions and refrain from domestic violence with father, as well as evidence that completing a domestic violence training program did not stop her domestic violence with father. [R. Keller, mother]

In re K.B. (2021) 59 Cal.App.5th 593 (2d Dist., Div. 8) [Los Angeles]

Where drug use is apparent, the parents fail to supervise their children, and the parents decline to admit a drug problem which could lead to treatment, jurisdiction and removal are appropriate. The case began when mother tested positive for methamphetamine during a hospital visit where mother learned she was pregnant but this pregnancy ended in miscarriage. Mother had three children, then aged 14, 10 and seven years old, and father is presumed over the youngest child. At the hospital, medical personnel were concerned about mother's ability to care for her other children because she struggled to focus, stay awake, and appeared homeless. Mother confirmed marijuana use but denied current methamphetamine use. The two youngest children had numerous school absences and being tardy and school officials were concerned about their hygiene. The children confirmed physical discipline including hitting with hands, a belt, and a sandal. The parents initially agreed to a safety plan but did not complete all the drug tests and did not enroll in drug treatment. A petition was filed in January 2020 alleging the parents used marijuana and methamphetamine and both tested positive in November 2019. The parents were granted reunification services and supervised visits.

The parents appealed the jurisdiction orders sustaining the petition, finding the children were described by section 300, subd. (b), and removing the children. The Court of Appeal held ample evidence showed mother currently abuses drugs and the juvenile court was entitled to conclude the mother had been transparently dissembling in an attempt to hide her drug use. As to mother's challenge that the evidence did not show the children are a risk of harm, the

appellate court held the juvenile court fairly could infer the mother left her children largely unsupervised every evening because mother went to bed or became unavailable each evening around 5:00 p.m. The problems with school attendance and the sons' poor hygiene are consistent with lack of supervision, but the mother's actual failure to supervise is the direct evidence of substantial risk of harm. Father challenged jurisdiction based on his drug use by arguing he is employed, contributes to the home, and helps the children meet their developmental milestones. Although the court acknowledge these contributions, the court found substantial evidence of drug use because, although he initially denied drug use, he eventually confessed to a substantial history with methamphetamine, cocaine, and marijuana, he continued to deny using methamphetamine before his positive test, and refused to provide details about his current use. He and mother denied he drank alcohol at home, but the children said otherwise. Father also challenged the removal orders based on a lack of risk of harm. However, the trial court was entitled to infer past conduct will continue where the parents deny there is a problem as in the instant case.

DISPOSITION

In re Solomon B. (2021) 71 Cal.App.5th 69 (2d Dist., Div. 1) [Los Angeles]

Where mother did not abandon her children to an abusive father, presented no current risk of harm, and immediately took action to obtain custody, the trial court erred in finding placement with mother was detrimental. The children were removed when the agency visited the hotel where the children lived with father and found the children left in the care of an unnamed male, who was unable to locate father, the room was strewn with dirty clothing, partially eaten food, and other trash, marijuana paraphernalia, including a large glass bong, rolling papers, and a lighter which were kept on a table within reach of the children, and the children were dirty, and appeared to have developmental delays because they did not seem capable of speaking in sentences. Mother had moved to Texas because of father's domestic violence and, upon being notified, immediately returned to California before the detention hearing. She asserted the children should be placed with her as a nonoffending, noncustodial parent. When the petition is filed, allegations against mother include a history of domestic violence and a history of mental illness. The domestic violence history was a basis for a subd. (a) and a subd. (b) allegation. The jurisdiction hearing was held five months later and the trial court struck the allegations against mother finding no current risk of harm. Despite this, the juvenile court denied mother's request for placement finding detriment based on mother abandoning the children. The juvenile court took jurisdiction based on custodial father's substance abuse, as well as the children's filthy and dangerous living conditions.

Mother appealed the disposition order involving her five- and four-year-old sons arguing the lack of any risk of harm in placement with her. The Court of Appeal held that evidence was insufficient to support the finding that placement of dependent children with noncustodial,

nonoffending mother would be detrimental to children's physical or emotional well-being. The trial court's reasoning, primarily based on "abandonment," were insufficiently supported.

The Court of Appeal found that when children are detained, the trial court must determine if there is a non-custodial parent available for placement and must place with them unless the court finds such placement would be detrimental. (§ 361.2, subd. (a).) The appellate court found the record does not support the juvenile court's conclusion that mother lost contact with the children or "abandoned them" after she fled to Texas. To the contrary, she regularly checked in with the maternal grandmother about the children's welfare. Further, failure to keep in regular contact would not, by itself, be sufficient to support a finding of detriment. As for failing to protect the children from father's abusive behavior, mother did not believe that father's abusive conduct towards her indicated he would similarly abuse the children. Because there were no substantiated allegations that father physically or emotionally abused the children after mother left, her belief appears to have been correct. Importantly, the juvenile court specifically concluded that father's abusive conduct toward mother did not pose a current risk to the children given the couple's current separation. As to father's marijuana use, mother reported he did not marijuana around the children while she lived with him. Plus, mother acted protectively because she immediately returned to California when the children were detained, she attended the juvenile court hearings, sought placement, and participated in recommended services including parenting and a psychiatric evaluation. Despite five months to investigate, the agency provided scant evidence on the topic. The appellate court reversed and remanded jurisdiction and disposition orders at least as to placement with mother. *[J. Shargel, mother]*

In re I.R. (2021) 61 Cal.App.5th 510 (2d Dist., Div. 1) [Los Angeles]

When two instances of domestic violence are the basis for jurisdiction, and the parents are no longer together and no evidence is presented that father is generally violent, the trial court's order removing his child is improper. Father challenges both jurisdiction and disposition and the minor challenges removal. The trial court's orders are affirmed in part and reversed in part. The case began because of an incident of domestic violence between the parents witnessed by their almost two-year-old daughter and mother's 11-year-old son. The court found jurisdiction under subd. (b) and removed the child from father and placed with mother. The record does not contain substantial evidence that I.R. would be in "substantial danger" in father's care, nor does it contain substantial evidence that there were no "reasonable means" to protect I.R. other than removing her from father under section 361, subd. (c). The older sibling saw father throw a baby shoe at mother's chest, slap one side of her face with enough force to knock her earring off, and cause redness and swelling. After leaving the home, father visited I.R. almost daily until the agency filed a warrant preventing contact. The agency filed a petition pursuant to section 300, subds. (a) and (b), alleging the parents had a history of engaging in violent verbal and physical altercations, specifically the most recent incident. The children remained with mother and the agency found mother had acted in a protective way in the past. Father's

avoidance of the social workers and law enforcement demonstrated an unwillingness to take responsibility for his role in the domestic violence. Father was found presumed at the detention hearing and the children remained with mother. Father's request for return of I.R. was denied. Father enrolled in a 36-week domestic violence class shortly before the jurisdiction hearing. Father acknowledged his roll in the domestic violence incident in slapping mother, but claimed there were no prior conflicts. I.R.'s counsel urged placement with father so long as the parents remain separated and mother urged the court not to detain I.R. from father. Father and I.R. argue the record supported neither the court's finding that I.R. would be in substantial danger in father's custody, nor the finding that removing I.R. from father's custody was the only reasonable means of protecting her, and the appellate court agreed.

The appellate court held that the nature and frequency of the domestic violence incidents—two instances in which father slapped mother, the second of which also involved him throwing a baby shoe at her—do not support a reasonable inference that he is a generally violent or abusive person. Father has no child protective service history, no prior referrals, and no criminal record. The record contains only evidence suggesting danger to I.R. if the domestic violence between mother and father continues—not danger resulting from I.R. being in father's care. The issue is whether substantial evidence showed that the domestic violence between mother and father is likely to continue if I.R. is placed in father's care and the appellate court concluded it does not. The parents are not together and have not expressed any interest in reconciling and relatives approved to monitor visits can keep the parents from contact during exchanges. The dispositional order of the juvenile court is reversed to the extent it removes I.R. from father. [J. Shargel, father]

In re V.L. (2020) 54 Cal.App.5th 147 (2d Dist., Div. 2) [Los Angeles]

Where the evidence showed three prior incidents of domestic violence and father's bad judgment endangering mother, the Court of Appeal held removal from father was proper even if mother was the aggressor, father had started reunification services, and the trial court failed to state the reasons for removal. The case began after an incident caught on video where "[i]t is clear that mother instigated the situation and was the primary aggressor during the dispute, as father was sitting in his vehicle and he and his family members were blindsided by mother's attack." During the altercation, mother claimed father hit her with his car. Mother and the children also alleged prior domestic violence between the parents and, when father lived with them, he was always angry and used physical discipline. The petition made two allegations under section 300, subds. (a) and (b). The allegations asserted the parents have a history of physical altercations including a recent incident where the son was present. The petition also alleged that in 2017 father pushed the mother to the ground in the presence of daughter while mother was pregnant. The court sustained the petition and removed the children from father and placed them with mother. Father started reunification services and

unsupervised visits and completed a 12-week parenting class and a 26-week domestic violence class.

The disposition hearing was held in November 2019 and father requested the children be placed in his home, which the trial court denied. Father challenged removal of his eight- and 15-year-old children asserting insufficient evidence to support removal and failure to state the reasons for removal. The Court of Appeal affirm. The Court of Appeal's opinion relied on the standard of review set out by the California Supreme Court in *Conservatorship of O.B*. (2020) 9 Cal.5th 989, 995–996, 266 Cal.Rptr.3d 329, 470 P.3d 41 and held this standard is controlling in dependency cases.

The Court of Appeal found sufficient evidence for removal from father based on three prior domestic violence incidents where the children were present, father used dangerously poor judgment when his car was near or bumped into mother, and father's continued refusal to acknowledge his part in these incidents. As to father's participation in services, the court held it is merely conflicting evidence regarding the risk that he posed to them and, under the substantial evidence test, it must be disregarded. Finding substantial evidence supported removal, the appellate court rejected father's argument that the trial court's failure to state the reasons for removal was reversible error. The court found it is not reasonably probable that the juvenile court would have reached a different conclusion if it stated the facts it relied upon. [J. McCurley, father]

MOOTNESS

In re D.P., S267429, is pending in the California Supreme Court, regarding whether a jurisdiction appeal is moot. This is the statement of the issue:

The court ordered the parties to brief and argue the following issues: (1) Is an appeal of a juvenile court's jurisdictional finding moot when a parent asserts that he or she has been or will be stigmatized by the finding? (2) Is an appeal of a juvenile court's jurisdictional finding moot when a parent asserts that he or she may be barred from challenging a current or future placement on the Child Abuse Central Index as a result of the finding?

In re Rashad D. (2021) 63 Cal.App.5th 156 (2d Dist., Div. 7) [Los Angeles]

When the trial court terminates jurisdiction while the appeal is pending, the appeal is moot. Mother challenged jurisdiction asserting that her prior drug use and the possibility of relapse were insufficient to justify the trial court's orders. The Court of Appeal held that since the trial court terminated jurisdiction while the appeal was pending, the appeal is moot. Three months after sustaining the petition, while mother's appeal was pending, the juvenile court terminated jurisdiction and issued a custody order awarding sole physical custody of Rashad to mother and

joint legal custody to the parents. Mother argued this development did not moot her appeal because she previously had sole physical and legal custody of Rashad and the new custody order, awarding father joint legal custody and expanding his monitored visitation rights, adversely affects her on an ongoing basis. The appellate court held that for it to be able to provide effective relief, the parent must appeal not only from the jurisdiction orders but also from the orders terminating jurisdiction and modifying the parent's prior custody status. At the jurisdiction hearing, the trial court sustained "a fairly heavily amended version of b-1" to conform to proof, noting there really was no evidence of current abuse of illicit substances.

The Court of Appeal acknowledged dismissal of a dependency appeal for mootness following termination of jurisdiction "is not automatic, but 'must be decided on a case-by-case basis.'" However, unless the appellate court reverses or vacates the order terminating dependency, the juvenile court has no jurisdiction to conduct further hearings in the now-closed case, including modification of its custody order. By not appealing the orders terminating dependency jurisdiction, and awarding joint legal custody and expanding father's monitored visitation, mother forfeited any challenge to those rulings, including to the juvenile court's jurisdiction to issue them. Consequently, the court dismissed the appeal as moot. [M. Coffey, child]

SECTION 366.26

In re Caden C. (2021) 11 Cal.5th 614 [San Francisco]

The beneficial-relationship exception requires a three-step analysis to determine whether parental rights should be terminated. The juvenile court found the child was likely to be adopted but that mother had established parental-benefit exception, precluding termination of parental rights. The agency appealed and the Court of Appeal reversed. The Supreme Court granted review and reversed and remanded the Court of Appeal decision.

The Court of Appeal's holding that, given mother's substance-abuse and mental-health issues, no reasonable court could apply parental-benefit exception to termination of mother's parental rights to child was error. The appellate court treated the lack of progress in addressing substance abuse and mental health issues as a categorical bar to establishing the exception. The Supreme Court held parents need not show that they are actively involved in maintaining their sobriety or complying substantially with their case plan to establish the parental-benefit exception. Further, the parents need not demonstrate a likelihood that he or she will ever be able to regain custody.

Caden lived with his mother until he was four years old. He was removed Caden because Caden and his mother had been living in a car and mother admitted to recent drug use and suicidal ideation. Caden was returned to mother but she relapsed in 2016. The child went through three foster parent placements and the foster parents said they were exhausted by the multitude of services for Caden and expressed concern that visitation with mother made it difficult for him

to settle into their homes. When mother was denied placement as requested in a section 388 petition, she left residential rehabilitation. In response, the trial court reduced her visitation to monthly, limited her education rights, and set a section 366.26 hearing. The mother offered a bonding study and, since Caden did not want to participate in the hearing, the court relied on his letter and statements in the course of the bonding study to understand his feelings. Mother's expert suggested that, given the intense bond Caden had with his mother, losing contact with her would compound Caden's other traumas leading to significant emotional fluctuation, confusion, and acting out in the near term and in adolescence. In finding the beneficial-relationship exception applied, the trial court summed up its reasoning: "Caden loves his mother. And he does derive benefits from his visits with her."

In a clarification from *In re Autumn H*. (1994) 27 Cal.App.4th 567 and progeny, the Supreme Court provided a three-part test for the beneficial-relationship exception. What is required is for (1) a parent to establish that the parent has regularly visited with the child, that (2) the child would benefit from continuing the relationship, and that (3) terminating the relationship would be detrimental to the child.

The Supreme Court reviewed the first two elements that have been widely discussed in earlier cases. As to the third element, because terminating parental rights eliminates any legal basis for the parent or child to maintain the relationship, courts must assume that terminating parental rights terminates the relationship. Nothing that happens at the section 366.26 hearing allows the child to return to live with the parent. Accordingly, courts should not look to whether the parent can provide a home for the child. Even where it may never make sense to permit the child to live with the parent, termination may be detrimental.

A parent's continued struggles with the issues leading to dependency are not a categorical bar to applying the exception. On the other hand, a parent's struggles may mean that interaction between parent and child at least sometimes has a negative effect on the child. A parent's struggles with issues that led to dependency are relevant only to the extent they inform the specific questions before the court: would the child benefit from continuing the relationship and be harmed, on balance, by losing it?

As to the standard of review, the Supreme Court agreed with the hybrid standard which applied a substantial evidence standard of review to the first two elements and then an abuse of discretion to the third. At its core, the hybrid standard simply embodied the principle that "[t]he statutory scheme does not authorize a reviewing court to substitute its own judgment as to what is in the child's best interests for the trial court's determination."

Procedurally, the Supreme Court's decision does not assist *Caden* in the way the parties had hoped. The juvenile court applied the beneficial-relationship exception three years ago and the Supreme Court decision reversed the Court of Appeal decision. However, the agency has since filed a new petition to terminate parental rights, and the trial court held a new hearing and

terminated mother's parental rights. As a result, on remand, the Court of Appeal should dismiss this appeal as moot. [L. Barry, for the Supreme Court; N. Williams, for the Court of Appeal]

In re D.M. (2021) 71 Cal.App.5th 261 (2d Dist., Div. 8) [Los Angeles]

The parent's failure to attend his child's medical appointments is not sufficient evidence to deny application of the beneficial-relationship exception. The case began in 2017 due to domestic violence and drug use. The children were initially placed with mother but were later detained because mother left the youngest child unsupervised at the end of 2017. Father was granted visitation but he was not consistent until September 2019. Father's visits were temporarily interrupted by the pandemic, but father visited with the children by video. By March 2021, the father had resumed in-person visits. The contested section 366.26 hearing was held in April 2021. The trial court found father had monitored visits fairly consistently but not terribly consistent and he doesn't set up a schedule, doesn't know his children's medical needs, and hasn't attended any dental or medical appointments because he never asked anyone to attend. "[Father] [h]as not risen to the level of a parent."

Father appealed the termination of parental rights to now his 13-year-old, 10-year-old and six-year-old children. He contended the juvenile court abused its discretion because it applied the wrong legal standard. The appellate court found father met the first prong of the test and visited regularly, but the appellate court did not find substantial evidence to support the trial court's other findings. The trial court said nothing about the attachment between father and his children and *In re Caden C*. (2021) 11 Cal.5th 614, 278 Cal.Rptr.3d 872, 486 P.3d 1096 (*Caden C*.) made clear the beneficial-relationship exception is not focused on a parent's ability to care for a child or some narrow view of what a parent-child relationship should look like such as attendance at medical appointments.

Unfortunately, the agency's reports gave the court little evidence about the quality of the visits between father and the children, or how the children felt about father. What the record did include was father's testimony the children wanted to be returned to him, and that the youngest child cried when visits concluded. The juvenile court's express findings that father did not act like a parent demonstrated it considered factors which *Caden C*. has explained are inappropriate in determining whether the parental-benefit exception applies. The orders terminating parental rights is reversed and the matter is remanded for the juvenile court to conduct a new section 366.26 hearing in conformance with the principles articulated in *Caden C*. [C. Blake, father]

In re J.D. (2021) 70 Cal.App.5th 833 (1st Dist., Div. 2) [San Francisco]

After the appellant's opening brief was filed, the California Supreme Court decided *In re Caden C*. (2021) 11 Cal.5th 614, 278 Cal.Rptr.3d 872, 486 P.3d 1096 (*Caden C*.), which clarified how the beneficial-relationship exception must be applied. **Because the appellate court could not determine on this record that the juvenile court's ruling complied with the principles announced in the Supreme Court's decision, it reversed and remanded the case**.

In July 2018, shortly before turning three years old, J.D. was removed from his mother's custody following two violent altercations in his presence, between mother and the father of J.D.'s half-sister, where one incident seriously injured his six-month-old half-sister, R.G. The first was an argument between mother and R.G.'s father took place when the two encountered each other on a train platform and their argument escalated into a physical struggle while mother was holding her baby girl and J.D. either fell or was pushed onto the ground near the approaching train. Each parent blamed the other. The second incident happened a few days later and involved the children as well. Mother would receive close to two years of reunification services and struggled with conflicts with several people in her life including the caregiver. She made progress and was granted unsupervised and then overnight visits for a time. However, she continued to have conflicts and by the time of the 18-month review hearing, she was the subject of restraining orders protecting the father of J.D.'s sibling and the caregiver.

Reunification services were terminated in August 2020 and the section 366.26 hearing was held January 2021. In its report, the agency described the relationship between mother and son as a good relationship and they had been having virtual visits since March of 2020. The facts pertaining to the beneficial-relationship exception were elicited exclusively during cross-examination. In describing mother's visitation, the social worker admitted that during one visit J.D. was upset about not being able to come home to see his mother and that, in two other visits within the last three months, J.D. was asking to go to mother's house. At one of these, J.D. asked about it three times, in three different ways. The social worker's testimony revealed he had never asked J.D. how the child felt about being separated from his mother.

In its ruling, the court made few explicit factual findings concerning the parental-benefit exception but acknowledged J.D. has a positive relationship with mother but found their relationship did not "amount to [a] parental bond" and that "severing the relationship that does exist would not be so detrimental as to outweigh permanency for [J.D.]."

Whether mother had regular visitation and contact was not in dispute. As for whether mother proved the second and third elements, the appellate court concluded the juvenile court's ruling cannot be affirmed on this record, because it is not certain the juvenile court did not consider factors disapproved of in *Caden C*. and remand is necessary.

J.D. lived with his mother for just over half his life and, although the status reports are sparse in information about the quality and strength of J.D.'s attachment to his mother, there are indications he was clearly bonded to her when removed from her custody. And there is

abundant evidence that J.D.'s attachment to mother continued throughout the case, despite the fact that, due to the pandemic, she had no in-person visitation with him for the last 10 months of the case. The family therapist also wrote that, after 20 sessions, "[t]he family [including J.D.'s sibling who lives with her father] continues to demonstrate an affectionate relationship." J.D.'s caregiver acknowledged the positive bond J.D. had with mother, despite her own fraught relationship with mother. The trial court also considered the virtual visitation logs mother introduced into evidence. Many of the entries are intimate, personal and touching. The logs show mother consistently acted in a parental way and reflect J.D.'s attachment to mother.

The Court of Appeal indicated the agency reports provided little in describing J.D.'s relationship with his mother and by the time the juvenile court scheduled the section 366.26 hearing, the agency's prior reports should already have provided objective, disinterested information about the quality of J.D.'s attachment to his mother, which would have assisted the court in evaluating the beneficial relationship exception when mother asserted it. This was not done. The record contains the caregivers' views about mother's relationship with J.D. and about the importance of allowing them to have continued contact and such views by a child's long-term caretaker provide objective, third-party evidence of the parental bond and are sufficient to establish the exception in an appropriate case.

In reversing, the Court of Appeal held because it is unclear whether and to what extent the juvenile court considered improper factors at the second step of its analysis, it is unnecessary to address whether there also was an abuse of discretion at the third step. For guidance on remand, the appellate court offered two additional observations including that the court was troubled by the agency's failure in the later stages of the case to consider guardianship as an alternative to adoption given the nature of J.D.'s relationship with mother as reflected in the visitation logs. Next, the court noted that some of the agency's later criticisms of mother stemmed from the fact she sometimes mentioned her financial pressures to J.D. even though there was no evidence such comments caused J.D. any anxiety or were in any other way detrimental to him.

In re B.D. (2021) 66 Cal.App.5th 1218 (4th Dist., Div. 1) [San Diego]

Any analysis of the beneficial-relationship exception must follow the guidelines provided by the California Supreme Court in *In re Caden C.* (2021) 11 Cal.5th 614, 278 Cal.Rptr.3d 872, 486 P.3d 1096 (*Caden C.*). The Court of Appeal originally filed an opinion affirming the juvenile court's order denying the application of the beneficial-relationship exception. Before the opinion became final, mother filed a petition for rehearing arguing that the recent Supreme Court decision in *Caden C*. indicates that the juvenile court erred in terminating parental rights. The appellate court vacated its initial opinion and, having considered the supplemental briefs filed by the parties, it reversed the orders terminating parental rights. The juvenile court and social worker considered the parents' substance abuse without addressing whether this

continued substance abuse had any negative effect on the parent-child relationship. Because it is uncertain whether the juvenile court considered other factors proscribed by the Supreme Court in determining the beneficial nature of the parent-child relationship, the appellate court reversed.

The children, now nine and six years old, were originally detained in October 2018 because of domestic violence between the parents with the children present and because of drug use. The parents received six months of reunification services but could not reunite. At the section 366.26 hearing, the trial court terminated parental rights finding that, although the parents consistently visited the children, they did not fulfill a parental role.

The opinion reviews the holdings in *Caden C*. and focused on the juvenile court's reasoning that "the relationship at issue must be parental, no matter how loving and frequent the contact, and notwithstanding the existence of an emotional bond with the child." The court stated that despite the parents' progress with online services and their loving visits with the children, that the parents' remained untreated for substance abuse. Further, the juvenile court relied heavily, if not exclusively, on the fact that the parents had not completed their reunification plans and were unable to care for the children based on their long term and continued substance abuse.

On remand the juvenile court must consider whether the parents' continued struggles with the issues that resulted in this dependency proceeding (1) impacted the amount of visitation, (2) the nature of that contact, or (3) negatively affected the parent-child relationship. Also, the trial court must evaluate whether a significant positive emotional attachment existed between the parents and the children. The juvenile court considered improper factors at the second step of the analysis. Finally, the Court of Appeal express no opinion on whether the parent-child relationship exception applied here. [J. Smith, father; R. Keller, mother]

In re A.G. (2020) 58 Cal.App.5th 973 (6th Dist.) [Monterey]

When an offer of proof is required for a contested hearing on the beneficial-relationship exception, the trial court should liberally construe the offer of proof and use caution before denying the requested hearing and reversed and remanded for further proceedings.

Then four-year-old A.G. was detained because mother drove on two successive days under the influence with her son in the car. Mother received 12 months of reunification services but was unable to reunite with A.G. At the initial 366.26 hearing in January 2020, mother requested a contested hearing on the potential application of the beneficial parental relationship and the sibling relationship exceptions. The juvenile court requested mother provide an offer of proof and, through counsel, mother offered an oral offer of proof. The trial court required a supplemental written offer of proof. Her offer of proof was opposed by the agency and by minor's counsel. At a further hearing, the court found mother's offer of proof insufficient and

denied her request for a contested hearing. At the section 366.26 hearing, the court found A.G. adoptable and terminated parental rights.

Mother appealed and argued the rejection of her request for a contested hearing violated her due process rights and that her written offer of proof was a sufficient showing of proposed evidence of her regular contact with A.G. and the existence of a beneficial parent-child relationship to warrant a contested hearing.

The Court of Appeal held the juvenile court may, in its discretion and consistent with due process, condition a contested hearing upon a parent's submission of an offer of proof. The appellate court held the offer of proof must be specific and must address two components of the parental relationship exception -- the parent's regular contact and the existence of a beneficial parent-child relationship. The parent's offer of proof need not address the third component of the exception about whether the existence of that relationship constitutes a compelling reason for determining that termination would be detrimental to the child. Here, the appellate court found mother's written offer of proof was adequate.

The Court of Appeal held that because the termination of parental rights is at stake, the juvenile court, particularly where the parent's regular contact with the child is not in dispute, should exercise caution before denying the parent a contested hearing and should therefore construe the parent's offer of proof liberally in favor of its sufficiency. It is unclear from the record how the trial court exercised its discretion. The agency conceded mother maintained regular visitation. Mother's written offer of proof named nine potential witnesses on certain topics that were plainly relevant to the first two components of the parental relationship exception. Although mother's offer of proof had some generalities and, because these might be cured with leave to amend, the appellate court reversed the challenged order and remanded the case for the juvenile court's further consideration consistent with this opinion. The trial court shall permit further argument and, in its discretion, allow mother the opportunity to amend her prior offer of proof.

As to the offer of proof, the Court of Appeal discussed the principles concerning offers of proof generally under Evidence Code section 354 and these are relevant to an offer of proof required in juvenile dependency proceedings. The opinion reviewed three similar cases and their holdings. These cases hold due process does not require a court to hold a contested hearing if it is not convinced the parent will present relevant evidence on the issue he or she seeks to contest. As to whether the trial court's error was harmless, the appellate court found it cannot be determined from the record how persuasive mother and her other potential witnesses might have been in presenting evidence concerning mother's relationship with the minor, including the nature and frequency of their contacts. Consequently, the error was not harmless. [L. Barry, mother]

In re N.S. (2020) 55 Cal.App.5th 816 (ICWA) (4th Dist., Div. 1) [San Diego]

The Court of Appeal held the trial court is not required to follow the Tribe's preference for a permanent plan, trial counsel did not provide ineffective assistance of counsel for not further investigating tribal benefits, the Indian-child exception to adoption did not apply in this case and the court did not err in failing to apply the beneficial-relationship exception. N.S.'s father is a member of the San Pasqual Band of Mission Indians (the Tribe). The Tribe was involved in this case since the juvenile court found that N.S. is an Indian child and that the Indian Child Welfare Act (ICWA) applied.

August 2012, when N.S. was 16 months old, the agency detained him and filed a petition under section 300, subdivision (b), after mother's roommate found mother unresponsive, lying in her own vomit with N.S. in his crib in the same room. Mother had been using prescription drugs and alcohol since January 1, 2012. N.S. was placed with the maternal grandparents about three weeks after he was detained. In September 2014, the court ordered a permanent plan of guardianship, appointed the maternal grandparents as legal guardians, and terminated dependency jurisdiction. N.S. has been with his grandmother since 2013. In November 2018, mother filed a 388 petition to enforce her visitation claiming grandmother refused to allow visits once the guardianship was established. According to grandmother, mother's last visit occurred in December 2016 and she had to get a restraining order against mother in January 2016 because mother threatened to physically harm her. She continued to allow regular visits with the mother that year, but throughout 2017, her husband was very ill and was in and out of the hospital before he passed away in 2017. Grandmother indicated mother had been "in and out of different substance abuse programs 15 or more times."

The social worker supervised four visits and assessed that mother and N.S. generally enjoyed visits but mother allowed some misbehavior without consequences. Grandmother was aware she had violated the visitation orders but the relationship between mother and grandmother was strained by mother's drug use and grandmother believed mother had never been stable and it was not beneficial to N.S. to be subjected to Mother's lack of consistency, stability, and sobriety.

In January 2019, grandmother filed a 388 petition requesting the court set a section 366.26 hearing in order to terminate mother's parental rights so that grandmother could adopt N.S. In January 2019, the juvenile court took jurisdiction, acknowledged the applicability of the ICWA, and the tribe sent a representative to the hearing. Mother withdrew her 388 petition and the court set a section 366.26 hearing.

Before the hearing, mother had weekly visits and, even though she requested more, it was not increased because N.S. repeatedly expressed that he did not want more visitation and asked that it remain at one hour per week. Despite an improvement in the quality of visits, N.S. expressed excitement about being adopted by grandmother and did not want to live with mother. As for a permanent plan, grandmother, the Tribe and the Court Appointed Special

Advocate (CASA) were requesting, and the agency was recommending, a Tribal Customary Adoption (TCA) for N.S. The original May 2019 hearing was continued in order to provide notice to father. The agency changed its recommendation to adoption instead of a TCA because the Tribe changed its recommendation from TCA to guardianship. The agency wanted to recommend TCA but was opposed to guardianship. The agency consulted with an Indian expert to offer guidance about the permanent plan and he recommended the court follow the Tribe's preference for guardianship. Mother had also conferred with an Indian expert who agreed guardianship was best for N.S. to maintain his connections to his tribe.

The section 366.26 hearing was started in December 2019 but was continued for testimony from one of the Indian experts. The Indian representative from father's tribe testified if N.S. were adopted, the Tribe would no longer recognize him as an Indian child because a state adoption would sever all of his biological ties to the Tribe. Consequently, although he was not currently entitled to enroll, he would not be eligible for enrollment in the Tribe if the enrollment criteria would at some point otherwise make him eligible.

At the end of the section 366.26 hearing in January 2020, the court observed grandmother "has shown that she is well oriented towards what's in the best interests of this child. If he has Indian heritage, then [grandmother], I think, will recognize that and assist him." The court also noted that the tribe had not made efforts to contact and involve N.S. in tribal activities.

The juvenile court found the beneficial-relationship exception did not apply because the benefits and permanence of adoption by grandmother outweighed continued contact with mother. As for the Indian-related exceptions in section 366.26, subds. (c)(1)(B)(vi), the court held there was not a compelling reason not to terminate parental rights based on a substantial interference with N.S.'s connection to the Tribe. The trial court held that once grandmother was informed of the Tribe's expectations, she will comply, and that no one would deter N.S. from making up his own mind about his Indian heritage.

As for the tribe's recommendation for guardianship, the juvenile court found maintaining the status quo would not recognize the increasing, the deep, the published connection that N.S. has with his grandmother. Further, in light of N.S.'s current developmental progression and attachment to the grandmother, guardianship was not in his best interests and, consequently, the Tribe's identification of guardianship as N.S.'s permanent plan had not "been established as a compelling reason not to terminate parental rights."

As for the trial attorney's duties to find out what benefits N.S. would receive from the Tribe, mother specifically faulted N.S.'s counsel for not being aware that the Tribe would no longer recognize N.S. as an Indian child if he were adopted until counsel cross-examined the Tribe's Indian representative. Mother urged a finding of ineffective assistance of counsel (IAC) for not further investigating. The Court of Appeal found that even assuming that N.S.'s counsel did not sufficiently investigate whether termination of parental rights would cause N.S. to lose Tribal benefits, it concluded mother had not met her burden of showing that she was prejudiced by

counsel's allegedly deficient performance. The record indicated the Tribe took little interest in N.S. or this case during the period of grandmother's guardianship until grandmother filed her section 388 petition seeking adoption in January 2019. Further, the Tribe's representative did not testify or provide any information to the agency or grandmother before the hearing that there were Tribal benefits, other than his Indian child status, that N.S. would lose if the court terminated parental rights and ordered adoption. The trial court could reasonably infer from the record that there were no such undisclosed benefits and mother had not shown that there were such benefits. The appellate court found mother was essentially asking the court to conclusively presume such benefits are available to N.S. and they are of such magnitude that the court would have found them to be a compelling reason not to terminate parental rights. However, any such loss is speculative especially since N.S. is not eligible for enrollment in the Tribe at this time.

As for the Indian exceptions, the appellate court found the trial courts conclusion that grandmother would encourage N.S. to learn about his heritage going forward was supported by substantial evidence. Grandmother was willing to engage N.S. in Tribal activities and asked whether there was a mailing list that grandmother could be on. The agency analogized the relationship with the tribe to the concerns raised in the sibling exception and the Court of Appeal found he analogy between assurances of future sibling visitation and assurances of future efforts to foster an Indian child's connection to his or her tribe is valid. (§ 366.26, subd. (c)(1)(B)(v).) Further, the trial court's decision was supported by evidence that there was very little connection to interfere with. Mother faults grandmother for not fostering a tribal connection, but there are two other circumstances that factor into N.S.'s lack of connection with the tribe -- the lack of any evidence of a connection between N.S. and his paternal Indian relatives and the lack of interest in N.S. by the Tribe itself.

As to the issue of the application of the beneficial-relationship exception, the court found that "the benefits that the mother confers upon [N.S. are] greatly outweighed by his need for stability in placement, which can only be achieved by adoptive placement." Noting N.S.'s stability and developmental progress in grandmother's care and reiterating that the stability of N.S.'s placement with grandmother outweighed the benefits that he received from his contact with mother, the court concluded that "it would not be in [N.S.]'s best interests to promote or facilitate a mother-child relationship." The evidence that then eight-year-old N.S. is happy and thriving in grandmother's care and that he has consistently and unequivocally expressed the desire to be adopted by grandmother sufficiently supported the court's determination. [A. Greenleaf, mother]

In re S.S. (2020) 55 Cal.App.5th 355 (4th Dist., Div. 2) [Riverside]

Father inability to obtain housing based on poverty and his failure to start therapy or parenting class are not sufficient to find return to father is detrimental.

This appeal poses the question whether a juvenile court may, consistent with due process, terminate the parental rights of a noncustodial father who seeks custody even though the state detained and removed the child based only on allegations against mother and the court found giving father custody would be detrimental based on problems arising from his poverty.

The agency filed a petition seeking to remove an 18-month-old girl based on mother's substance abuse and mental health issues and noncustodial father's failure to provide for her. Father had been attempting to reunify with his daughter since mother took her at about four months old and he had paid child support since February 2018. He could not yet take custody because his housing, transportation, and employment weren't stable, but he had obtained work and was attempting to find suitable housing. The agency amended the petition to remove any allegations against father before the jurisdiction hearing. The parents were granted reunification services for six months and, about a year later, the court terminated parental rights. Prior to the section 366.26 hearing, father had filed a 388 petition to request custody because he had obtained full-time employment and had housing but the court denied his petition. The trial court found return to father detrimental at both the referral hearing and the section 366.26 hearing. Since father was not given his writ rights, he was allowed to appeal the detriment finding from the referral hearing.

The Court of Appeal held a juvenile court may not terminate parental rights based on problems arising from the parent's poverty, a problem made worse, from a due process standpoint, when the agency didn't formally allege those problems as a basis for removal. Absent those impermissible grounds for removal there wasn't clear and convincing evidence that returning the child to father would be detrimental to her.

Indigency, by itself, does not make one an unfit parent and "judges [and] social workers ... have an obligation to guard against the influence of class and life style biases." Where family bonds are strained by the incidents of poverty, the department must take steps to assist the family, not simply remove the child and leave the parent on their own to resolve their condition and recover their children. Father himself identified housing as a barrier to his taking custody of Serenity and repeatedly requested help from the social worker. Yet the agency did nothing to help him achieve those goals.

The agency also relied on the lack of consistent visitation as a basis for the detriment finding. However, the Court of Appeal found father's problems with visitation involved his problems with housing. There's no evidence he failed to make visits out of a lack of commitment to Serenity. Instead, the record shows he missed visits because the agency placed Serenity in a foster home far from where he worked and lived, required he visit during working hours, and father did not own a vehicle. The agency stood by and allowed father's reunification efforts to fail due to his lack of economic resources.

Next the agency found father's lack of participate in reunification services as a reason for the detriment finding. Here, the appellate court held father belatedly attended therapy and a

parenting class and he agreed they were helpful. However, there was no suggestion that either form of counseling had any bearing on the reasons he couldn't have custody of Serenity, nor was there evidence they were required to address any problem with his parenting. The court did not address father's argument about error for denying his 388 petition. Instead, based on the detriment issue, the Court of Appeal reverse and remand the case with directions. [E. Klippi, father]