

JUDICIAL DISCRETION AT THE INTERSECTION OF CONFLICTING PUBLIC POLICIES: THE CASE FOR STRONG DEFERENCE TO THE “FRAUGHT” JUDGMENTS OF JUVENILE DEPENDENCY TRIAL COURTS⁺

MICHAEL C. KELLEY*

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⁺ The thesis of this article was inspired by my frequent interactions with my fellow judicial officers on the Los Angeles Superior Court who preside in juvenile dependency matters. Their daily commitment to the children and families involved in these cases and to doing the hard analytical work that the law requires to be done as we balance the goals of keeping children safe and reunifying families in specific cases, struck me as sufficiently unique that it warranted an examination of how those individualized and nuanced judgments should be reviewed on appeal. While I credit these colleagues for triggering the idea of examining the issues addressed in this article, sole responsibility for the analysis, research and conclusions must rest with me.

* Judge, Los Angeles Superior Court. B.A. Political Science 1976, University of Southern California; J.D. 1979, Yale Law School.

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I. INTRODUCTION

The decision of the California Supreme Court in the case of *In re Caden C.*, clarified an important legal issue in juvenile dependency law.¹ The issue is this: when a child has been removed from a parent and is poised to be adopted because the parent has failed to reunify, what must the parent prove to avoid the termination of parental rights under the statutory² “parental-benefit” exception in the Welfare and Institutions Code?³ The Court also resolved a conflict regarding the standard of appellate review that applies to such decisions.

The Court’s opinion, which had been anxiously awaited by lower courts and dependency practitioners since review was granted in July 2019,⁴ is very significant. However, its implications may transcend the formal holdings on the legal questions it granted review to resolve. That is because the opinion authored by Justice Cuéllar for a unanimous Court includes an eloquent reminder of the complex, delicate judgments juvenile

¹ *In re Caden C.*, 486 P.3d 1096 (Cal. 2021).

² All statutory references are to the California Welfare & Institutions Code.

³ CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(i) (Deering, LEXIS through 2022 Reg. Sess.). The exception provided in this section is referred to variously in case law as the “parental-benefit exception,” the “beneficial parental relationship exception,” the “parental bond exception,” and the “beneficial relationship exception.” For consistency, this article will refer to the exception as the “parental-benefit exception” except where quoting from a source that uses one of the other formulations.

⁴ In granting review, the California Supreme Court requested the parties to brief the following issues: “(1) what standard governs appellate review of the parental-benefit exception to adoption; and (2) whether a showing that a parent has made progress in addressing the issues that led to dependency is necessary to meet the parental-benefit exception.” *In re Caden C.*, 444 P.3d 665, 665 (Cal. 2019).

dependency trial courts must make as they balance multiple (often conflicting) policy goals and assess future risks to children from alternative case outcomes. It also strongly reaffirms the deferential standards of review that must guide appellate courts when they review these decisions and in doing so lays the analytical foundation for the argument made in this article for explicit recognition of a rule of “strong deference” that would apply in many dependency appeals.

At issue in *Caden C.* was a trial court decision *not* to terminate a mother’s parental rights where her nine-year old child had been out of her care for nearly half his life, was clearly adoptable by a caregiver with whom he had lived for several years, and where the mother continued to struggle with the substance abuse and mental health issues that led to the child’s original detention.⁵ After a four-day hearing that concluded in February 2018, the trial court found that the mother had established the factual predicates to avoid the termination of her parental rights because the parental-benefit exception applied.⁶

The San Francisco Human Services Agency (“Agency”) appealed, as did the child.⁷ Both argued that the court had erred in depriving the child of the opportunity to be adopted by recognizing the parental relationship exception to termination of parental rights.⁸ In April 2019, the Court of Appeal for the First Appellate District reversed the trial court’s decision as an abuse of discretion holding that “no reasonable judge could have concluded that a compelling justification was made to forgo adoption and order a permanent plan of long-term foster care for Caden.”⁹ In reaching this conclusion, the Court of Appeal placed great weight on the evidence that the mother still struggled with drug usage and mental health issues,¹⁰ treating those facts as essentially preclusive of a finding that the parental-benefit exception might be found to apply. In doing so, it relied on several other cases which held that unresolved circumstances that led to dependency jurisdiction were proper bases for finding the exception did not apply.¹¹ The California Supreme Court heard argument on March 2,

⁵ *In re Caden C.*, 486 P.3d at 1101–05.

⁶ *Id.* at 1103–04.

⁷ *Id.* at 1104.

⁸ *In re Caden C.*, 245 Cal. Rptr. 3d 797, 810 (Cal. Ct. App. 2019), *rev’d*, 486 P.3d 1096 (2021).

⁹ *See id.* at 816.

¹⁰ *Id.*

¹¹ *Id.* at 817.

2021, and, in its opinion issued May 27, 2021, reversed the Court of Appeal's ruling.¹²

II. THE CALIFORNIA SUPREME COURT'S CLARIFICATION OF THE PARENTAL-BENEFIT EXCEPTION EMPHASIZED THE CRITICAL ROLE OF THE TRIAL COURT'S COMPLEX JUDGMENTS

The very first paragraph of the California Supreme Court's decision in *Caden C.* provides a succinct overview of California's dependency system and the fundamental tension between the overarching goals of protecting children and preserving families:

All too often, children experience harm—and shoulder long-term consequences—because their physical and emotional needs are neglected by their parents. In California, we rely on social services and statutory procedures to strike a delicate balance between protecting children from abuse or neglect and ensuring the continuity of children's emotionally important relationships, especially with their parents. The resulting balance sometimes gives a struggling parent enough time and support to overcome deficiencies and regain custody. When such success is not achieved, the dependency statutes require the court to hold a hearing under Welfare and Institutions Code section 366.26. At that hearing, the court determines whether to terminate parental rights, making way for adoption, or to maintain parental rights and select another permanent plan.¹³

¹² While intervening events had rendered the issues moot (the trial court had held a further California Welfare and Institutions Code section 366.26 hearing after the remand from the Court of Appeal decision and terminated mother's parental rights), the Supreme Court exercised its discretion to decide the case as one presenting an issue of "public importance, capable of repetition, yet tending to evade review." See *In re Caden C.*, 486 P.3d at 1005 n.3 (citing Conservatorship of Wendland, 28 P.3d 151, 154 n.1 (Cal. 2001); *In re Keisha E.* 859 P.2d 1290, 1294 n.5 (Cal. 1993)). To support the decision to decide the case notwithstanding its mootness, the Court described the parental-benefit exception as "of great importance and one of the most litigated issues in dependency proceedings." *Id.* This characterization has been validated by subsequent events. In the months following *Caden C.*, a number of courts of appeal have reversed trial court decisions as conflicting with the Supreme Court's guidance. See *infra* notes 48–50 and accompanying text.

¹³ *In re Caden C.*, 486 P.3d at 1096.

A. THE ROLE OF THE DEPENDENCY TRIAL COURT

Turning to the role of dependency judges in these proceedings,¹⁴ the opinion recounted the challenges they face. It referred to the determination of the parental-benefit exception as “fraught,” necessitating the court to “sift through often complicated facts to weigh competing benefits and dangers for the child,” to “consider practical realities over which it has limited control and envision a child’s future under contingent conditions,” and in doing so the trial court “must navigate situations that can change as quickly as the children before the court do.”¹⁵

The Court noted that a trial court’s task was “ease[d]” by the “carefully calibrated process” required by the statute,¹⁶ but it also recognized that the decision, particularly the assessment of the impact on the child from severing the natural parent-child relationship, is “a subtle enterprise” and where (as is often the case) the relationship with a parent “involves tangled benefits and burdens” the trial court “faces the complex task of disentangling the consequences of removing those burdens along with the benefits of the relationship.”¹⁷

The facts before the California Supreme Court in *Caden C.* presented a stark “case in point,” illustrating the decisional challenges mentioned in the opinion.¹⁸ The trial judge heard testimony over four days from numerous witnesses, including the mother; a social worker; a Dr. Molesworth, who was qualified as an expert in child psychology, bonding studies, and parent-child attachment (who testified for the mother); and a Dr. Lieberman who prepared a “clinical consultation report” for the Agency countering Dr. Molesworth’s views.¹⁹ It also considered reports from the Agency and a letter from the child.²⁰

The trial judge concluded that, while the experts agreed that the child had a loving relationship with the mother, they disagreed on the breadth of the bond, the extent to which continuance of the relationship held risk of

¹⁴ Many dependency cases are heard by commissioners as well as judges, and there are also highly experienced referees who hear dependency cases. The convention in this article will be to refer to the “trial court” or the “trial judge” to simplify the expression. The intent is to embrace within these phrases all of the highly capable judicial officers who work at the trial level in this field regardless of their title.

¹⁵ *In re Caden C.*, 486 P.3d at 1102.

¹⁶ *Id.*

¹⁷ *Id.* at 1108.

¹⁸ *Id.*

¹⁹ *Id.* at 1103.

²⁰ *Id.*

harm to Caden if he remained in foster care, and the degree to which harm from termination of that relationship with his mother would be offset by the anticipated stable relationship with the prospective adoptive parent.²¹ Weighing the evidence, the trial judge decided that, while the child had a “strong and developing” relationship with the prospective adoptive parent, “that relationship in and of itself does not negate the harm that Caden would experience from the loss of his most significant emotional relationship. . . . with his mother” and thus found the exception to apply.²²

As the Court of Appeal noted, there was also evidence that the current caregiver, who had provided important stability for Caden and who was willing to adopt, was not willing to provide permanency in a manner that would avoid the termination of parental rights (for example, by becoming Caden’s legal guardian rather than an adoptive parent).²³ Thus, the only options available were either long term foster care with the mother retaining parental rights or adoption with the mother’s rights being terminated. As noted above, the Court of Appeal reversed the trial judge’s decision to maintain the parental relationship and eschew adoption, as an abuse of discretion.²⁴

B. THE LEGAL STANDARD FOR RECOGNIZING THE PARENTAL-BENEFIT EXCEPTION

The California Supreme Court started its analysis by noting that the statute establishing the parental-benefit exception clearly lays out three elements a parent must prove: “(1) regular visitation and contact, and (2) a relationship, the continuation of which would benefit the child such that (3) the termination of parental rights would be detrimental to the child.”²⁵

After considering the statutory language, the Court noted that the “seminal” opinion articulating how the statutory exception is to be applied

²¹ *In re Caden C.*, 245 Cal. Rptr. 3d 797, 816, *rev’d*, 486 P.3d 1096 (Cal. Ct. App. 2019).

²² *Id.*

²³ *Id.* at 810.

²⁴ *Id.* at 816–17.

²⁵ *In re Caden C.*, 486 P.3d at 1106 (emphasis omitted). In relevant part, California Welfare and Institutions Code section 366.26(c)(1) provides that if the court finds a child is adoptable at a § 366.26 hearing, the court “shall terminate parental rights unless either of the following applies: . . . (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(i) (Deering, LEXIS through 2022 Reg. Sess.).

is *In re Autumn H.*,²⁶ which the Court observed “has guided the thousands of Court of Appeal decisions on the exception” since it was issued.²⁷ The California Supreme Court identified the “crucial aspect of the trial court’s responsibility” under *Autumn H.* as being this: “in assessing whether termination [of parental rights] would be *detrimental*, the trial court must decide whether the harm from severing the child’s relationship with the parent outweighs the benefit to the child of placement in a new adoptive home.”²⁸

The Court then turned to the analysis of the issue by the Court of Appeal. While the Court of Appeal had recognized that “it cannot be seriously disputed that Caden had a beneficial relationship with mother[,] . . . a significant relationship for termination of which would cause him detriment[,]”²⁹ and while it also cited to and quoted from *Autumn H.*, its decision departed from *Autumn H.*’s formulation of the test and focused on two distinct lines of precedent as support for its conclusion that the trial court had abused its discretion.³⁰

The first was a line of cases which found the parental-benefit exception to be inappropriate when the parent asserting the exception had yet to address the underlying issues that resulted in the child being removed.³¹ The California Supreme Court found this to be error. It held that a parent, who is facing potential termination of parental rights at a Welfare and Institutions Code section 366.26 hearing, by definition has failed to reunify with the child and the conditions that justified removing the child in the first place remain unaddressed.³² Thus, the Court held that precluding a parent who is not making progress in a court-ordered case plan, or who is not “actively involved in maintaining their sobriety” from demonstrating that the harm to the child from terminating parental rights would outweigh the benefits of adoption, would “write the exception out of the statute.”³³ Accordingly, the California Supreme Court disapproved

²⁶ *In re Caden C.*, 486 P.3d at 1106 (citing *In re Autumn H.*, 32 Cal. Rptr. 2d 535 (Cal. Ct. App. 1994)).

²⁷ *See id.*

²⁸ *Id.* (emphasis in original).

²⁹ *Id.* at 1114.

³⁰ *In re Caden C.*, 245 Cal. Rptr. 3d 797, 816 (Cal. Ct. App. 2019).

³¹ See *In re Caden C.*, 486 P.3d at 1110–12, 1110 n.6 (citing *In re Noah G.*, 203 Cal. Rptr. 3d 91, 99, 100–01 (Cal. Ct. App. 2016) (unresolved substance addiction); *In re Breanna S.*, 214 Cal. Rptr. 3d 98, 106 (Cal. Ct. App. 2017) (unresolved violence between the parents); *In re Marcelo B.*, 146 Cal. Rptr. 3d 908, 914 (Cal. Ct. App. 2012) (chronic alcoholism)).

³² *Id.* at 1110.

³³ *Id.*

of the cases relied upon by the Court of Appeal to the extent that they held that a parent's continued struggles with the issues that led to the child's dependency constitute a categorical bar to the parental-benefit exception.³⁴

The Court did acknowledge that a parent's continued struggles with the issues that triggered dependency may be *relevant* to the analysis required to assess the asserted parental-benefit exception.³⁵ For example, it indicated that such issues might be relevant to assessing whether the child's interactions with the parent are likely to have negative or positive effects on the child in the future.³⁶ They might also be relevant to assessing the detriment to a child from terminating parental rights.³⁷ However, the Court emphasized that such issues 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?"³⁸ To eliminate future uncertainty, the Court held that a parent's unresolved case issues are not (1) relevant in their own right to the exception; (2) relevant because the issues led to dependency; or (3) relevant because they might keep the parent from regaining custody.³⁹ Further, it expressly disapproved cases that had considered such issues to be relevant in these ways.⁴⁰

The second flaw in the Court of Appeal's decision was that it repeatedly posed the issue before it as whether the trial court erred because no reasonable judge could find that there was "a compelling justification" to forgo adoption and order a permanent plan of long term foster care.⁴¹ This framing of the issue essentially layered an additional element on top of the three inquiries identified in *Autumn H.* and affirmed by the California Supreme Court in *Caden C.* as the definitive test. The California Supreme Court squarely rejected the notion—evident throughout the Court of Appeal decision (and present in several other opinions the California Supreme Court expressly disapproved)—that the factors required under the *Autumn H.* formulation had been modified by legislative changes made in 1998, which added the "compelling

³⁴ *Id.* at 1110 n.6.

³⁵ *Id.* at 1111.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1111 n.7.

⁴¹ *In re Caden C.*, 245 Cal. Rptr. 3d 797, 810–14, 816 (Cal. Ct. App. 2019).

“justification” language to the statute.⁴² These opinions had wrongly interpreted these changes in the statute as suggesting that “parents must prove something more than *Autumn H.* required, some heightened level of harm or an additional ‘compelling reason.’”⁴³

In reiterating the standard articulated in *Autumn H.* as the definitive test, and emphasizing its requirement that the trial court gauge and balance the positive and negative dimensions of the parent-child relationship, assess the harm the child would suffer from termination of the relationship, as well as the extent to which that harm could potentially be outweighed by the enhanced and presumably positive stable relationship with adoptive parents, the California Supreme Court took express note of the “daunting prospect” these mandated analyses imposed on the trial court.⁴⁴ But it also recognized this is “what the statute requires—and the legislative history confirms it.”⁴⁵ In short, the California Supreme Court made clear that there are no doctrinal shortcuts of the sort applied by the Court of Appeal that might obviate the hard, analytical work⁴⁶ that must be done to assess the parental-benefit exception to termination of parental rights in the manner the controlling legal standard requires.⁴⁷

⁴² *In re Caden C.*, 486 P.3d at 1109.

⁴³ *Id.* at 1109, 1109 n.5 (explaining that the legislature had added the phrase in order to conform California law to the Adoption and Safe Families Act of 1997); *see also* Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997).

⁴⁴ *In re Caden C.*, 486 P.3d at 1109.

⁴⁵ *Id.*

⁴⁶ The Court took note of the fact that the results of a “bonding study” had been presented in the underlying trial and had been found “informative” by the trial and appellate court. *Id.* at 1103, 1107 n.4. While it did not mandate such a study, the California Supreme Court did comment that “[t]rial courts should seriously consider, where requested and appropriate, allowing for a bonding study or other relevant expert testimony.” *Id.* at 1107, 1107 n.4. In considering whether to allow such studies and/or testimony in the future, trial courts are likely to consider both the neutral terms the California Supreme Court chose to use on the subject as well as the overall tenor of the opinion as vesting wide discretion in the trial court to decide if a bonding study should be considered. Of relevance to this point is that one of the amicus briefs submitted by children’s advocates argued that such studies “rarely give the court helpful evidence” and “[m]ore useful evidence are testimony and reports from the child(ren)’s therapist, testimony from people who observe visits, observations of the child(ren)’s behaviors before and after visits with the parent(s) over time, and evidence related to the child(ren)’s special needs and the ability of the parent(s) to provide for those needs. Brief for Advokids et al. as Amici Curiae Supporting the Minor at 20–21, *In re Caden C.*, 444 P.3d 665 (Cal. 2021) (No. S255839) (citing CAL. JUV. DEPENDENCY PRAC. § 8.33, Westlaw (database updated March 2021)).

⁴⁷ As discussed in Section III(B), *infra*, there are circumstances where, over time, appellate courts may constrain the scope of trial court’s discretion by establishing legal rules. However, that process must occur after the courts collectively have enough experience to determine that such rules can be articulated and that they are in fact legal rules that must be followed. In the case of the parental-benefit exception, the courts of appeal did attempt to declare legal rules that

Developments since *Caden C.* was decided underscore just how daunting the decisions can be. Several Court of Appeal opinions issued in the wake of *Caden C.* have reversed trial court decisions that had rejected a parent's claim that the parental-benefit exception applied, either because the trial court may have considered inappropriate factors,⁴⁸ failed to articulate adequately the basis for its conclusions⁴⁹ or because the agency reports upon which the court had relied did not adequately investigate and report on the key issues.⁵⁰

As discussed in greater detail in Section III(B), these developments further support the central thesis of this article—that such juvenile court decisions should be classified as among those where strong appellate deference should be recognized. Where trial courts must exercise broad discretion on subjects where legal rules are not readily available or capable of articulation that would guide or constrain that discretion, existing doctrine and theories of appellate review support a rule of strong deference. However, some of the unique aspects of juvenile dependency law actually warrant such broad deference for an additional reason. Deference is not warranted solely due to the impracticality of constraining that discretion with articulatable legal rules, but because the law actually mandates individualized, nuanced judgments that are ill-suited to review under a standard that is not highly deferential.⁵¹

C. APPELLATE REVIEW OF DECISIONS REGARDING THE PARENTAL-BENEFIT EXCEPTION IS GOVERNED BY A DEFERENTIAL, HYBRID STANDARD

After clarifying the legal standard trial courts must apply to determine if the parental-benefit exception applies, the California Supreme

narrowed the broad, open-textured rules the trial courts were applying by emphasizing the importance of a parent seeking to establish the exception demonstrating that they had addressed the underlying problems that led to dependency. The California Supreme Court rejected that effort at revising the law as incorrect. At least for now, the standard the trial courts must apply will remain as complex and inherently discretionary as the California Supreme Court described it.

⁴⁸ See *In re B.D.*, 281 Cal. Rptr. 3d 726, 737 (Cal. Ct. App. 2021) (trial court considered improper factors); *In re D.M.*, 286 Cal. Rptr. 3d 195, 195 (Cal Ct. App. 2021).

⁴⁹ *In re J.D.*, 284 Cal. Rptr. 3d 608, 631 (Cal Ct. App. 2021) (“[W]e cannot be sure whether the juvenile court’s determination that mother did not occupy a ‘parental’ role encompassed factors that *Caden C.* deems irrelevant.”).

⁵⁰ *Id.* at 626–27 (noting that agency reports provided very little information on the child/parent relationship, which is a “disservice” to the parent and the court).

⁵¹ See *infra* Section III(B).

Court turned to the standard of appellate review in such cases.⁵² As noted by the Court of Appeal in *Caden C.*, there had been some disagreement among appellate courts on the subject. One line of cases had held that review of a decision on the exception should be under the substantial evidence standard.⁵³ Other courts reviewed such decisions for abuse of discretion.⁵⁴ Finally, some courts had applied what the Court of Appeal called a “hybrid” approach, applying the substantial evidence standard to the trial court’s factual findings regarding the relationship between parent and child and applying the abuse of discretion standard to the court’s weighing of the issues to determine if terminating parental rights would be detrimental to the child.⁵⁵ The Court of Appeal in *Caden C.* applied the hybrid approach.⁵⁶

The California Supreme Court agreed that the hybrid approach was correct. It held that the substantial evidence standard of review applies to elements (1) and (2) (that is, has the parent regularly visited and is there a beneficial relationship).⁵⁷ It also recognized that the third element (that is, would termination of parental rights be detrimental) also entails some decisions that are factual in nature and thus appropriate for substantial evidence review.⁵⁸ It identified “specific features of the child’s relationship with the parent and the harm that would come from losing those specific features” as being factual decisions.⁵⁹ It also suggested that “determin[ing], for the particular child, how a prospective adoptive placement may offset and even counterbalance those harms” may entail “explicit or implicit findings ranging from specific benefits related to the child’s specific characteristics up to a higher-level conclusion about the benefit of adoption all told.”⁶⁰ These too it classified as factual determinations “properly reviewed for substantial evidence.”⁶¹

However, “the court must also engage in a delicate balancing of these determinations as part of assessing the likely course of a future situation

⁵² This was actually the first issue the Court had identified when it accepted review. *See supra* note 4.

⁵³ *See, e.g., In re G.B.*, 174 Cal. Rptr. 3d 405, 420 (Cal. Ct. App. 2014).

⁵⁴ *See, e.g., In re Jasmine D.*, 93 Cal. Rptr. 2d 644, 652 (Cal. Ct. App. 2000).

⁵⁵ *See, e.g., In re E.T.*, 242 Cal. Rptr. 3d 391, 397 (Cal. Ct. App. 2018).

⁵⁶ *See In re Caden C.*, 245 Cal. Rptr. 3d 797, 813 (Cal. Ct. App. 2019) (citations omitted).

⁵⁷ *In re Caden C.*, 486 P.3d 1096, 1111–13 (Cal. 2021).

⁵⁸ *Id.* at 1109, 1112–14.

⁵⁹ *Id.* at 1112.

⁶⁰ *Id.*

⁶¹ *Id.*

that's inherently uncertain" and while it is not the same as deciding to transfer a child from one caregiver to another, it does "require assessing what the child's life would be like in an adoptive home without the parent in his life."⁶² This "ultimate decision" whether termination of parental rights would be detrimental is "discretionary and properly reviewed for abuse of discretion."⁶³

With respect to substantial evidence review, the Court stated that "a reviewing court should 'not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts.'"⁶⁴ And the trial court's determinations should "be upheld if . . . supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence."⁶⁵

The Court also noted that review for abuse of discretion "is subtly different, focused not primarily on the evidence but the application of a legal standard. A court abuses its discretion only when 'the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.'"⁶⁶ This means that "[w]hen two or more inferences can reasonably be deduced from the facts, the reviewing court has *no authority* to substitute its decision for that of the trial court."⁶⁷ In citing its prior decision in another dependency case, *Stephanie M.*, rather than any of the numerous other precedents that discuss the abuse of discretion standard, the Supreme Court can be taken as intending to underscore the particular relevance that its strongly deferential articulation of the standard has in the context of dependency cases.

In *Stephanie M.*, the Court of Appeal had reversed a trial court's decision denying a request to change a child's placement from a foster home to a relative (a grandmother who resided in Mexico) at the stage of a case after the court had terminated the parents' family reunification services.⁶⁸ The Court of Appeal held that the trial court had erred in three respects: (1) by failing to give adequate weight to the relative placement preference;⁶⁹ (2) by failing to give sufficient weight to the positive

⁶² *Id.*

⁶³ *In re Caden C.*, 486 P.3d at 1111.

⁶⁴ *Id.* (quoting *In re Dakota H.*, 33 Cal. Rptr. 337, 344 (Cal. Ct. App. 2005)).

⁶⁵ *Id.*

⁶⁶ *Id.* (quoting *In re Stephanie M.*, 867 P.2d 706, 718 (Cal. 1994)).

⁶⁷ *Id.* (emphasis added).

⁶⁸ *In re Stephanie M.*, 867 P.2d at 709–12.

⁶⁹ *Id.* at 719–21.

assessment of the grandmother's home by Mexican social services agency,⁷⁰ and (3) by failing to accord sufficient weight to the family bond the grandmother was striving to retain.⁷¹

The Supreme Court held that the Court of Appeal overstepped its role. The trial court had been fully aware that, at the permanency planning stage, the focus of the court "shifts to the needs of the child for permanency and stability," and had made a decision that the parents had not met their burden—a decision that was committed to the trial court's sound discretion.⁷² In language to which it would return in *Caden C.*, the Supreme Court held that the Court of Appeal lacked the "authority" to substitute its decision for the trial court's where alternative inferences could be drawn from the facts.⁷³

Finally, the Court in *Caden C.* noted that the "practical differences between the two standards of review [(substantial evidence and abuse of discretion)] are not significant"⁷⁴ but emphasized that:

At its core, the hybrid standard we now endorse simply embodies 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 in that regard, reached pursuant to the statutory scheme's comprehensive and controlling provisions."⁷⁵

The phrasing of this holding, with its emphasis on the court of appeal's lack of *authority* to substitute its own judgment for the trial court, especially when considered in tandem with similar expressions in prior dependency cases,⁷⁶ should be regarded as underscoring that the mandated deference is more than a prescription for restraint, but rather is a recognition of an important limitation on the scope of review.

The implications of *Caden C.* go beyond the issues presented when a parent seeks to avoid termination of parental rights in the later phases of a dependency case by invoking the parental-benefit exception. The kind of nuanced, multivariant, and inherently predictive judgments at issue in

⁷⁰ *Id.* at 721–22.

⁷¹ *Id.* at 722–23.

⁷² *Id.* at 718 (quoting *In re Marilyn H.*, 851 P.2d 826, 835 (Cal. 1993)).

⁷³ *Id.* at 719.

⁷⁴ *In re Caden C.*, 486 P.3d 1096, 1111–13 (Cal. 2021) (quoting *In re Jasmine D.*, 93 Cal. Rptr. 2d 644, 652 (Cal. Ct. App. 2000)).

⁷⁵ *Id.* at 1113 (quoting *In re Zeth S.*, 73 P.3d 541, 550 (Cal. 2003)).

⁷⁶ See generally *In re Stephanie M.*, 867 P.2d at 718–20.

Cadence C. are made throughout the extended life of the typical dependency case. Many of these decisions entail making factual findings that are subject to the substantial evidence standard of review on appeal,⁷⁷ and many decisions regarding issues pertaining to a judgment about the best interests of a child are also made by trial courts and are reviewed for abuse of discretion.⁷⁸ In sum, trial courts every day wrestle with the kind of “delicate” balancing and “daunting” judgments as were raised in *Caden C.*, and the deferential standards of appellate review mandated by the Supreme Court should fully apply to those findings and exercises of discretion as well.⁷⁹

III. A RULE OF STRONG DEFERENCE TO JUVENILE DEPENDENCY TRIAL COURT JUDGMENTS SHOULD BE RECOGNIZED EXPLICITLY

While the Supreme Court expressed a rule of deference in *Caden C.*, consistent with other opinions it has issued in dependency cases,⁸⁰ there is also support in more broadly applicable appellate doctrines in California for giving particular deference to the large number of discretionary decisions dependency trial courts must make. The academic literature on review of discretionary decision-making by lower courts also justifies a rule of strong deference in this area. Finally, there are a number of policy

⁷⁷ See GARY C. SEISER & KURT KUMLI, SEISER AND KUMLI ON CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE § 2.190(14)(b) (2021) (citing cases subject to the substantial evidence standard of review on appeal).

⁷⁸ *Id.* § 2.190(14)(c) (citing cases regarding abuse of discretion).

⁷⁹ The decision in *Caden C.* mandating deference on decisions concerning the parental-benefit exception is not an isolated instance. In 2013, the California Supreme Court decided another case that also presented the highly complex dependency issue of when a court can infer that parental sexual abuse of one child might support finding of risk to another child who is younger or of a different gender than the original victim. *In re I.J.*, 299 P.3d 1254, 1256 (Cal. 2013). The Court announced another highly complex test (requiring the balancing of the seriousness of the potential harm along with the risk that it may occur), thus entrusting yet another “fraught” decision to the dependency trial courts. *Id.* at 1261. As the Court noted, the legislature did not require the trial courts in such cases to consult scientific authority or empirical evidence before making a substantial risk determination; “[r]ather, after considering the nature and severity of the abuse and the other specified factors, the juvenile court is supposed to use its *best judgment* to determine whether or not the particular substantial risk exists.” *Id.* at 1262 (emphasis added). Consistent with its opinion in *Stephanie M.*, and as in *Caden C.*, the Court in *In re I.J.* emphasized that appellate review of these factual findings was to be under the deferential substantial evidence standard pursuant to which the appellate court does not reweigh the evidence or exercise independent judgment. *Id.* at 1257–58.

⁸⁰ *In re Caden C.*, 486 P.3d at 1112–13.

factors that apply to California dependency trial courts that further support a rule of strong appellate deference.

A. CALIFORNIA LAW ON STANDARDS OF APPELLATE REVIEW SUPPORTS STRONG DEFERENCE

A 1994 report on the California appellate system recognized that appellate review advances multiple societal goals, including: (1) correcting errors; (2) ensuring a consistent and uniform declaration of what the law is in a specific appealed case as well as other similar cases; and (3) promoting public confidence in a system that must address the public demand for justice, which includes a “demand that important grievances be heard and resolved by the highest possible governmental authority.”⁸¹

In analyzing appellate standards of review, the Special Report noted that deferential standards of review advance several goals. Deferring to trial court factual findings minimizes the risk of judicial error by “assigning primary responsibility for resolving factual disputes to the court in the ‘superior position’ to evaluate and weigh evidence—the trial court.”⁸² This standard also relieves the appellate court of the burden of a full-scale independent review and “[c]onsequently, valuable appellate resources are conserved for those issues that appellate courts in turn are best situated to decide.”⁸³

In the case of the abuse of discretion standard, the Special Report noted that “[a]part from legal errors in the exercise of discretion, however, little useful purpose would be served by carefully scrutinizing *the sort of decisions subject to the abuse of discretion standard*.⁸⁴ It is telling, that, at least in 1994, when the Special Report was written, the list of trial court decisions subject to the abuse of discretion standard warranting discussion consisted essentially of “procedural and administrative matters” which “raise few public policy concerns and just as few concerns about the correctness of the ultimate judgment in the case.”⁸⁵

It should not be surprising that, viewed in this fashion, the Special Report had little difficulty justifying the “highly deferential” abuse of

⁸¹ J. Clarke Kelso, *Special Report on California Appellate Justice: A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 434–35 (1994).

⁸² *Id.* at 471 (quoting *People v. Louis*, 728 P.2d 180, 189–90 (Cal. 1986)).

⁸³ *Id.* at 471–72.

⁸⁴ *Id.* at 475 (emphasis added).

⁸⁵ *Id.* (mentioning trial continuances and exclusion of cumulative evidence as examples).

discretion standard as furthering all of the goals of appellate review.⁸⁶ It should also not be surprising that today, when appellate scrutiny is focused not on “procedural and administrative” decisions with little impact on the ultimate outcome, but on substantive (indeed often case-dispositive) issues in dependency cases, that the notion of a highly deferential standard of appellate review may seem less obviously appropriate. However, the Supreme Court unanimously affirmed the point in *Caden C.*, and in doing so it was articulating a view of the limits of appellate power to question a trial court’s judgments that rests solidly within prevailing legal principles.

It has been recognized that the discretion of a trial judge “is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action.”⁸⁷ Moreover, the scope of discretion always “resides in the particular law being applied” and “[a]ction that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an ‘abuse’ of discretion.”⁸⁸ Thus, the particular law that a trial judge is applying will influence the ambit of his or her discretion.

As noted by the California Supreme Court, the legal principles that the legislature has adopted to govern dependency cases require the trial courts to render highly complex and nuanced judgements about an uncertain future. These judgements often are made at the intersection of competing goals that the legislature has both expressed in general terms and placed squarely in the hands of trial courts to balance. For example, the legislature has stated the “purpose” of the dependency law as including the following:

[T]he purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. This safety, protection, and physical and emotional well-being may include provision of a full array of social and health services to help the child and family and to prevent reabuse of children. *The focus shall be on the*

⁸⁶ *Id.*

⁸⁷ *Westside Cnty. for Indep. Living v. Obledo*, 657 P.2d 365, 369 (Cal. 1983) (quoting 6 WITKIN CAL. PROC. § 244 (2d ed. 1971)).

⁸⁸ *City of Sacramento v. Drew*, 255 Cal. Rptr. 704, 710 (Cal. Ct. App. 1989) (citation omitted).

*preservation of the family as well as the safety, protection, and physical and emotional well-being of the child.*⁸⁹

Perhaps the most concise, if understated, expression of the role of dependency trial courts comes from the recent Court of Appeal decision in *In Re D.N.*: “Dependency cases require the wisdom of Solomon. This is because juvenile courts typically balance parental rights against the child’s best interests, important interests that sometimes conflict.”⁹⁰

Given that the substantive law requires dependency courts to reconcile and balance such conflicting policy goals, it follows that the manner in which a court strikes that balance or reconciles those policies in a particular case will, almost by definition, fall somewhere on a wide spectrum of outcomes that the law anticipates. This is another way of saying that the legal principles providing the context for dependency trial courts’ decisions are spacious and allow for a wide range of discretionary choices to be made. As such, the boundaries the appellate court has power to establish by declaring a decision to be an abuse of discretion must also be quite expansive.

This is not to argue that a trial court decision infected with legal error should be afforded deference. Legal issues are clearly subject to review *de novo*.⁹¹ It is also clear that the substantial evidence standard is neither hollow nor *pro forma*. Findings supported by only a scintilla of evidence may be reversed,⁹² and inferences relied upon to meet the substantial evidence standard must be supported by logic and reason, and not merely conjecture or speculation.⁹³ It is also now clear that, where the issue at trial is one governed by a higher standard of proof, such as clear and convincing evidence, a reviewing court must “account for” the higher standard in its review, which results in a higher degree of scrutiny.⁹⁴

However, broadly expressed “open textured” laws that mandate the trial court to make hard decisions balancing competing policies do not lend themselves to review for legal error, and appellate efforts to correct an “error” by the lower court through the articulation of a new rule of law

⁸⁹ CAL. WELF. & INST. CODE § 300.2 (Deering, LEXIS through 2022 Reg. Sess.) (emphasis added).

⁹⁰ *In re D.N.*, 270 Cal. Rptr. 3d 620, 624 (Cal. Ct. App. 2020).

⁹¹ See, e.g., *In re R.T.*, 399 P.3d 1, 4–7 (Cal. 2017) (reviewing *de novo* the interpretation of § 300(b)).

⁹² See *In re David M.*, 36 Cal. Rptr. 3d 411, 415 (Cal. Ct. App. 2005).

⁹³ *Id.*

⁹⁴ See Conservatorship of O.B., 470 P.3d 41, 51–55 (Cal. 2020).

can be problematic. This is what happened in *Caden C.* The Court of Appeal, rather than confronting directly the trial judge's decision to recognize the parental-benefit exception, concluded that the trial court had abused its discretion because it had failed to properly consider the mother's failure to address her substance abuse issues in its analysis, a legal proposition that the Supreme Court reversed.

From opinions issued after the opinion in *Caden C.* was issued, it seems clear that the problem will persist. None of the decisions reversing trial courts on these issues provide any meaningful guidance in the form of prospective legal rules that reduce the broad scope of the judgments that need to be made.⁹⁵ For the most part, the opinions simply conclude that the trial judge may have considered factors the Court in *Caden C.* ruled irrelevant.⁹⁶

B. ACADEMIC LITERATURE ON THE REVIEW OF TRIAL COURT DISCRETIONARY DECISIONS SUPPORTS A RULE OF STRONG DEFERENCE

There is a rich body of legal scholarship focused on appellate review of discretionary decisions by trial courts. However, much of it focuses on federal law or on identifying which trial court decisions should be reviewed under an abuse of discretion standard rather than on how that standard should be applied. There is also a dearth of academic commentary regarding abuse of discretion review in juvenile dependency cases. Nonetheless, there are still important analytical insights that can be distilled from this general legal commentary in support of the instant argument for "strong" deference to dependency trial courts.

A common observation of various academic commentators is that discretionary decision-making by a trial court can be justified in circumstances where controlling legal principles have not been expressed that would operate to both restrict the choices available to the decision maker and require more intense scrutiny of the choice by an appellate court.⁹⁷ In this respect, they echo observations that go back as far as H.L.A. Hart and even Cardozo.⁹⁸

⁹⁵ See cases cited *supra* notes 48–50.

⁹⁶ Conservatorship of O.B., 470 P.3d at 51–55. The one effort to provide some clarification did not meaningfully focus the analysis. See *In re B.D.*, 281 Cal. Rptr. 3d 726, 735–736 (Cal. Ct. App. 2021) (attempting to define "significant positive emotional attachment," but recognizing that doing so still requires an expansive inquiry into highly subjective matters).

⁹⁷ See Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROC. 47 (2000) [hereinafter *Standards of Review*]; Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990); Robert C.

Standards of appellate review are not new.⁹⁹ They signal the degree of deference an appellate court should afford to the decisions under review; constituting an expression of “the power not only of the appellate court, but also of the tribunal below, measured by the hesitation of the appellate court to overturn the lower court’s decision.”¹⁰⁰ A leading scholar placed all appellate issues into three categories for purposes of standards of review: (1) review of facts (generally reviewed under the deferential “clearly erroneous” or “substantial evidence” standards); (2) review of questions of law including “mixed” questions of law and fact (generally reviewed *de novo*); and (3) discretionary decisions (generally reviewed under the standard of “abuse of discretion”).¹⁰¹ In the case of dependency courts, the last category embraces many of the most significant issues with which appellate courts must concern themselves, as illustrated by the California Supreme Court’s opinions in dependency cases discussed in Section II(C).¹⁰²

While discretion as a judicial concept has attracted meaningful scholarly analysis, even thoughtful discussion of the topic can still drift into aphorism. Discretion has been referred to as “the hole in the donut”¹⁰³

Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169 (1984); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

⁹⁸ In Hart’s view discretionary decisions exist in the vacuum created when authoritative rules run out. As Yablon puts it “[t]he judge then has the authority and role of a legislator.” Yablon, *supra* note 97, at 239. Yablon also notes that this echoes the view of Cardozo on the similarity between a judge hearing a case where there was no controlling precedent and a legislator:

Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. . . . Nonetheless, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made.

Id. at 239 n.27 (quoting BENJAMIN N. CARDODO, THE NATURE OF THE JUDICIAL PROCESS 113–15 (Yale Univ. Press 1977)).

⁹⁹ See *Standards of Review*, *supra* note 97, at 47 (“The idea of using standards to guide appellate review of decisions of tribunals below has existed from the beginning of American jurisprudence, but the articulation of those standards is a fairly recent and still not always clear development.”).

¹⁰⁰ *Id.* at 47–48.

¹⁰¹ Rosenberg, *supra* note 97, at 645–46.

¹⁰² See *supra* note 79 and accompanying text; see also *supra* Section II(C).

¹⁰³ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 48 (1978).

as well as a concept that is “lawless, in the literal sense of that term.”¹⁰⁴ An often-cited comment from an early English case refers to discretion as the “law of tyrants.”¹⁰⁵ No less a legal luminary than Judge Henry Friendly, who devoted his remarks at an important lecture to the topic,¹⁰⁶ was able to invoke provocative quotes from Justice Frankfurter (“abuse of discretion” . . . is “a verbal coat of . . . many colors”);¹⁰⁷ Chief Justice Marshall (discretionary choices are not left to a court’s “inclination, but to its judgment; and its judgment is to be guided by sound legal principles”);¹⁰⁸ and Professor Maurice Rosenberg (“abuse of discretion” does not communicate meaning but is a “form of ill-tempered appellate grunting and should be dispensed with.”).¹⁰⁹

Yet, there are some useful frameworks suggested in the ample academic literature. Professor Rosenberg noted that the fundamental concept underlying discretion is “choice” by the decision maker and that discretion can be broadly separated into two types: “primary or “true” discretion, which he also refers to as “decision-liberating choice”; and “secondary” discretion, which he also describes as “review-limiting” choice.¹¹⁰ This second species of discretion has also been referred to as “guided” discretion.¹¹¹

In this taxonomy, primary or true discretion empowers the decision maker absolutely because there are no controlling rules or guidelines. As Professor Davis puts it, in such matters the “court can do no wrong, legally speaking, for there is no officially right or wrong answer.”¹¹² As an example, she points to the pre-Sentencing Guidelines era when a trial judge’s choice of a sentence within the statutorily prescribed limits was insulated as a discretionary decision.¹¹³ In such matters, an appellate court may review the underlying *process* for legal errors, but the *substantive* choice made is not reviewable. Such potent discretion is noted to be

¹⁰⁴ HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 290 (Stanford Univ. Press 1968).

¹⁰⁵ Post, *supra* note 97, at 208 n.168 (quoting Doe v. Kersey (1765) (C.P.) (unreported)).

¹⁰⁶ Friendly, *supra* note 97, at 762–84.

¹⁰⁷ *Id.* at 763, 763 n.55.

¹⁰⁸ *Id.* at 784.

¹⁰⁹ Rosenberg, *supra* note 97, at 659.

¹¹⁰ *Id.* at 636–38.

¹¹¹ *Standards of Review*, *supra* note 97, at 52.

¹¹² *Id.*

¹¹³ *Id.* at 54 n.26 (discussing the Sentencing Reform Act of 1984).

uncommon outside of the context of certain procedural decisions¹¹⁴ or decisions that have little impact on the case outcome or where a legislature has limited or proscribed appellate review.¹¹⁵

Of interest for dependency law, Professor Rosenberg, also notes that discretion in a trial court can operate as the “effective individualizing agent of the law” and cites to the example of “proceedings for custody of children, where compelling consideration[s] cannot be reduced to rules, . . . determination must be left, to no small extent, to the disciplined but personal feeling of the judge for what justice demands.”¹¹⁶ As developed more fully, *infra*, this individualized agency of the law—in other words, decisions crafted for the unique needs of children and their parents, by trial judges uniquely situated to make just decisions in particular cases—is among the reasons dependency trial court decisions have been, and should be, afforded strong deference.¹¹⁷

Within the Rosenberg framework, secondary or guided discretion of a trial court may be subject to more searching appellate scrutiny than primary discretion, but that scrutiny exists on a spectrum that ranges from what he characterizes as “the toughest, most impenetrable” discretion on one end, to the “types that are too flimsy to ward off any appellate scrutiny.”¹¹⁸ Also, in the realm of secondary discretion, if a decision maker considers factors that are not correct in exercising discretion or if the choice is contrary to the evidence or experience or arbitrary, the reviewing court may reverse.¹¹⁹ However, Professor Rosenberg notes that there is sound reason to grant a relatively strong form of review-limiting (or secondary) discretion to a trial judge in those situations where there exists “the sheer impracticability of formulating a rule of decision for the matter in issue.”¹²⁰ This type of discretion generally exists when the law is unclear, or a problem is novel and thus appellate deference will persist until a higher court articulates a legal standard that operates to constrain

¹¹⁴ *Id.* at 53 n.22 (referring to mid-trial evidentiary rulings).

¹¹⁵ *Id.* at 54 n.24 (noting that before 1988, courts had no jurisdiction to review veterans benefit determinations).

¹¹⁶ Rosenberg, *supra* note 97, at 642–43 (alteration in original) (quoting KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 17 (1969)) (citing Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individualized Special Case*, 35 N.Y.U. L. REV. 925 (1960)).

¹¹⁷ See *infra* Section III(C).

¹¹⁸ Rosenberg, *supra* note 97, at 650.

¹¹⁹ *Standards of Review*, *supra* note 97, at 54.

¹²⁰ Rosenberg, *supra* note 97, at 662.

the scope of that discretion. The U.S. Supreme Court has endorsed this rationale as a “‘good’ reason[]” for a “deferential” standard of review.¹²¹

Such amplified discretion can be justified where an issue does not fall within the appellate court’s then-existing capacity to articulate a rule of general application, or where the trial court enjoys some superior position to make the required judgment call. As noted by Professor Davis, this rationale, which varies among substantive areas of law and can even evolve over time in particular areas as more and more cases are heard and provide the experiential raw material for attempts at fashioning general rules of law, causes the concept of discretion “to be in a constant state of flux.”¹²² The implications of these insights for dependency appeals are clear. The manner in which the Supreme Court described the issues dependency courts regularly deal with aligns quite closely with the “non-amenability to rule” problem Professor Rosenberg described.¹²³ These issues are the archetype, presenting “multifarious, fleeting, special, narrow facts that utterly resist generalization.”¹²⁴ As such, they are instances where the law amplifies the trial court’s discretion and thus warrants strong appellate deference.

Another scholar, Professor Robert Post, argued for a more encompassing concept of discretion, arguing that the “binary” notion of discretion and law as opposites “blinds us to the subtle and various ways in which law and discretion are in fact related.”¹²⁵ Post urges a view of discretion that recognizes that “[o]ur judicial system contains numerous examples of decision making that is both discretionary and guided by legal standards.”¹²⁶ He posits that the vast majority of legal standards that courts must apply will fall in the mid-range of a spectrum that extends from a standard that provides no guidance to the decision maker, to the opposite end, which requires specific rules to be mechanically applied.¹²⁷

In this middle segment of the spectrum, Post argues that the standards will have “an open texture requiring the exercise of independent judgment for their implementation” and he refers to this type of discretion as “weak

¹²¹ See *Pierce. v. Underwood*, 487 U.S. 552, 561–63 (1988).

¹²² *Standards of Review*, *supra* note 97, at 56.

¹²³ Rosenberg, *supra* note 97, at 663.

¹²⁴ *Id.* at 662.

¹²⁵ Post, *supra* note 97, at 169.

¹²⁶ *Id.* at 207.

¹²⁷ *Id.* at 212. The examples given by Professor Post for the opposite ends of this spectrum are: a rule that authorizes a police officer to regulate traffic at an intersection “as [they] think[] fit,” and a rule that mandates traffic to flow two minutes in one direction and three minutes in the other. *Id.*

discretion” a phrase he attributes to Ronald Dworkin.¹²⁸ Weak discretion may exist in different degrees, according to Post, and a key element in understanding these differences requires understanding the gradations of appellate control. He notes that “[t]he stricter the form of appellate review, the less discretion a trial court can be said to have.”¹²⁹

There are three forms of review in Post’s view: “(1) independent review, (2) deference, and (3) delegation.”¹³⁰ In the area of the First Amendment, which was the focus of Post’s argument, notwithstanding the general standards that the courts must apply, the appellate courts independently review trial court decisions, which “gives appellate courts license to second guess the ‘weak discretion’ that derives from the open-textured quality of certain constitutional standards.”¹³¹ Given the issues at stake in First Amendment cases, it is understandable that Post sees value in a less deferential standard of appellate review of the trial courts’ discretionary decisions, particularly in the context of the specific issue he was concerned with: the U.S. Supreme Court’s deferential review of a trial court decision balancing the interests of efficiently managing discovery through protective orders restricting disclosure of information obtained in discovery against the First Amendment right to be free from prior restraints on speech.¹³²

However, in the context of dependency cases such as *Caden C.*, the competing interests are not so clearly weighted in one direction. The legislature has made it clear that protecting children, helping them achieve permanency *and* reunifying parents with their children are all important policies. Dependency judges must make those tough balancing judgments all the time and, as shown by the Supreme Court’s reversal of the Court of Appeal’s effort to constrain the trial court’s discretion with a new legal rule in *Caden C.*, the area can be one in which there are, at least at times, few constraining legal standards that can be articulated to guide the exercise of discretion.

Judge Henry Friendly also considered the theoretical underpinnings for limiting appellate review of discretionary trial court decisions and reached similar conclusions to Professors Rosenberg and Post, particularly in relation to the existence of a spectrum of deference to discretionary

¹²⁸ *Id.* (citing DWORKIN, *supra* note 103, at 31).

¹²⁹ *Id.* at 213.

¹³⁰ *Id.*

¹³¹ *Id.* at 214.

¹³² *Id.* at 170 (discussing Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)).

decisions by trial courts,¹³³ and to the justifications for strong appellate deference in certain cases.¹³⁴ Judge Friendly argued that there is value in appellate review of discretionary decisions to further the development of the law, through articulating a “principle of preference” or through the “specification of factors” to guide the trial courts’ exercise of discretion, but even he acknowledged some circumstances warranted a rule of strong deference.¹³⁵

While Judge Friendly’s perspective aligns with the broad consensus that appellate review ought to be most robust when it comes to questions of law, there is no immutable reason that a deferential standard of review for a particular type of discretionary decision by the trial court cannot coexist with the appellate court’s ability to fully implement its law-declaring responsibilities.¹³⁶

Finally, Professor Yablon argues that insights from the competing perspectives of legal realists and legal proceduralists can be melded to obtain some new understandings of discretionary decision-making.¹³⁷ In an effort to gain further insight to how discretionary decisions can be justified within an institutional structure that includes appellate review, he discusses several categories of discretionary decisions, which he describes as “Discretion as Skill;” “Discretion as Expediency;” and “Discretion as Creativity.”¹³⁸ His approach is to focus on how judges exercising discretion *justify* their decisions, in an effort to find a middle ground

¹³³ Friendly, *supra* note 97, at 763 (“There are a half dozen different definitions of ‘abuse of discretion,’ ranging from ones that would require the appellate court to come close to finding that the trial court had taken a leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.”).

¹³⁴ *Id.* at 764–65, 764 n.62 (arguing that a case for “broad” or expansive interpretation of abuse of discretion can be made where there is “no law to apply”).

¹³⁵ *Id.* at 770, 772 (“When circumstances are either so variable or so new that it is not yet advisable to frame a binding rule of law, trial courts may be given discretion until the factors important to a decision and the weight to be accorded them emerge from the montage of fact patterns which arise.”).

¹³⁶ See Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 14 (2020). As noted by Steinman, “[e]ven under deferential review, the appellate court must determine the metes and bounds of the space within which trial courts may operate. Whether the appellate court ultimately approves or disapproves of a particular trial court decision, it can shed light on what is legally permissible going forward.” *Id.* at 12–13. In particular, he noted that in a recent U.S. Supreme Court case, a trial court decision regarding enhanced damages in patent cases was reviewed for abuse of discretion, yet the Court did not view deferential standard as an obstacle to clarifying when such enhanced damages were appropriate. *Id.* at 3–5; see also *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016).

¹³⁷ Yablon, *supra* note 97, at 234.

¹³⁸ *Id.* at 260–77.

between the purely theoretical perspective of discretion central to those commentators he describes as the “jurisprudes” and the essentially descriptive factual account of the power relationships among decision makers, which is the focus of those he refers to as the “proceduralists.”¹³⁹

Of particular relevance here is Yablon’s description of “discretion as skill.” The model of discretion as skill is “based on the shared assumption of trial and appellate judges that there are certain legal decisions that can be made correctly at the level of practice, but cannot be reduced to rules and, accordingly, cannot be reviewed based on correct compliance with the rules.”¹⁴⁰

In this model, which has great similarity to the role of the trial judge in dependency cases:

The decisions of the trial judge are presumed superior to those of the appellate judge. Trial court opinions embody these presumptions as they seek to demonstrate that the decision was made skillfully, carefully, and with attention to all the facts. An appellate court judge, if convinced that the decision was made with the requisite skill, will not reverse it, even if she would reach a contrary decision. Thus, the trial court judge justifies her decision not by showing that it is correct, but by demonstrating her superior institutional competence to the appellate court.¹⁴¹

This highlights a final point of consensus among the scholars that is worth emphasizing, which is the importance that the trial court’s exercise of discretion be implemented in a manner that meets basic requirements of accountability. Professor Post identifies three distinct accountability requirements for trial court discretionary decisions: “[they] must be supported by a record; they must be based upon specific findings; and there must be an articulation of the reasons for the decision.”¹⁴² This improves the quality of decision making by requiring decisions to be made in “a careful and self-conscious manner,” and also facilitates meaningful appellate review.¹⁴³

As Professor Rosenberg also stated: “Review-limiting discretion in its stronger forms confers upon the trial judge unusual power with regard

¹³⁹ *Id.* at 234.

¹⁴⁰ *Id.* at 267.

¹⁴¹ *Id.* at 267–68.

¹⁴² See Post, *supra* note 97, at 232 (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101–02 (1981)).

¹⁴³ *Id.*

to many issues and, as a corollary, grave responsibility.”¹⁴⁴ That responsibility entails “plac[ing] on the record the circumstances and factors that were crucial to [the] determination”¹⁴⁵ and “spell[ing] out his reasons as well as he can so that counsel and the reviewing court will know and be in a position to evaluate the soundness of his decision.”¹⁴⁶ This enables the reviewing court to assess if the trial court considered inappropriate factors or to intelligently articulate factors that should guide exercises of discretion in such cases.¹⁴⁷ Courts in California have expressed the same idea.¹⁴⁸

Judge Friendly agreed that a trial judge exercising discretion must “articulate the basis for its decision” but also took note of a confounding perception held by some that a trial judge who fails to articulate the rationale for a decision may have a better chance of being affirmed.¹⁴⁹ Friendly, supported by thoughtful precedent, disagreed.¹⁵⁰ Regardless of its grounding in appellate theory, the requirement that dependency judges state the basis for their decisions is well-established in California, both in

¹⁴⁴ Rosenberg, *supra* note 97, at 665.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 665–66.

¹⁴⁷ *Id.* at 666.

¹⁴⁸ See *In re A.S.*, 141 Cal. Rptr. 3d 255, 262 (Cal. Ct. App. 2012) (noting that the case presented an “excellent example of the abuse of discretion standard of review in operation” where the trial court “carefully explained its exercise of discretion” in authorizing separate placements of siblings to maximize placement options and finding no abuse of discretion); see also *In re J.D.*, 284 Cal. Rptr. 3d 608, 630 (Cal Ct. App. 2021). The court, in a case decided a few months after the opinion in *Caden C.*, reversed a trial court decision rejecting a parent’s argument that the parental-relationship exception applied. *In re J.D.*, 284 Cal. Rptr. at 630. The court found it “problematic” that the trial judge had found that the second prong of the *Caden C.* test (whether there was a beneficial relationship) was not established through a “conclusory” finding that the relationship did not “amount to a parental bond.” *Id.* There are probably scores of decisions following the seminal decision in *In re Autumn H.*, 32 Cal. Rptr. 2d 535 (Cal. Ct. App. 1994), which have used one or another formulation of the requisite relationship that must be shown as a “parental” one. Yet, given the open-textured standard articulated by the court in *Caden C.*, such shorthand references to this extant line of authority may now be deemed “conclusory” or sufficiently general as to leave open the possibility that the trial judge may not have applied an “incorrect” standard. Thus, trial courts are incentivized to both express the legal standard they are applying and state, in non-conclusory terms, the basis for the conclusion on the question of whether the standard is met.

¹⁴⁹ Friendly, *supra* note 97, at 770.

¹⁵⁰ *Id.* at 770–71 (quoting *United States v. Crider*, 648 F.2d 814, 819 (3d Cir. 1981)) (“[A]rticulation of the reasons for the decision tends to provide a firm base for an appellate judgment that discretion was soundly exercised.”).

statutory provisions that require the judge to state reasons for findings supporting certain key decisions¹⁵¹ and in case law.¹⁵²

C. POLICY CONSIDERATIONS SUPPORT A RULE OF STRONG DEFERENCE

The strong appellate deference rule advocated here for the discretionary decisions in dependency cases is of a different character from one that simply recognizes that discretion should reside in the interstices of positive law.¹⁵³ It is not a rule of discretion by default (that is, because there is a lack of legal guidance), but rather it is discretion that is created and amplified by positive law, which is to say it is discretion that the architects of the dependency system created purposefully to address the unique nature of the highly individualized and nuanced issues that the courts handling such cases are required to address.

The system includes multiple institutional features intended to improve the quality of the initial decision by the trial court, which is recognized as being advantaged by its proximity to, and intimacy with, the facts and the parties. Among these features are mandated reports for every important hearing from agencies with expertise addressing the issues; specially qualified, appointed counsel available to all participants, and bench officers with special training and skill in the substantive and procedural legal issues as well as with the underlying subject matters often at the core of dependency cases.¹⁵⁴ These features distinguish dependency cases from other situations where deference generally has been accorded to trial courts based on a presumption that the trial court is better situated to make a “correct” decision because it has some “superior access to pertinent facts such as ‘the feel of the case’”¹⁵⁵ or is able to assess

¹⁵¹ See, e.g., CAL. WELF. & INST. CODE § 319(g) (Deering, LEXIS through 2022 Reg. Sess.) (noting reasons for detention); *id.* § 361(e) (noting reasons for removal at disposition); *id.* § 366.21(e)(2) (noting reasons for finding detriment precluding return of child to parent at six-month hearing); *id.* § 366.21(f)(2) (noting reasons for finding detriment precluding return of child to parent at twelve-month hearing); *id.* § 366.22(a)(2) (noting reasons for finding detriment precluding return of child to parent at eighteen-month hearing).

¹⁵² See, e.g., *In re D.P.*, 258 Cal. Rptr. 3d 313, 320–21 (Cal. Ct. App. 2020).

¹⁵³ See *supra* notes 120–121 and accompanying text.

¹⁵⁴ The list in the text is a partial one. For a full discussion of the policy reasons supporting a rule of strong deference, see *infra* notes 158–170 and accompanying text. Another unique aspect of many dependency cases is that the court often has the benefit of input from Court Appointed Special Advocates (“CASAs”) for children. The CASAs “improve the quality of judicial decision making by providing information to the court concerning the child.” CAL. R. CT. 5.5655 cmt.

¹⁵⁵ Post, *supra* note 97, at 216.

demeanor and make better quality judgements about issues such as credibility.¹⁵⁶ It is also not a rule of deference mandated by practical constraints making it difficult or sub-optimal to provide more close appellate scrutiny (for example, mid-trial rulings on evidence).¹⁵⁷

As the foregoing demonstrates, the strong deference rule being urged here in many respects should not be seen as breaking new ground. It is supported by well-established jurisprudence expressed by the California Supreme Court as well as commentary on the nature and application of standards of appellate review in California. It is also fully consistent with the analytical frameworks employed by leading scholars of appellate review of trial court discretionary decision-making. When these principles are considered with an enriched understanding of the unique role of the dependency trial court, it can be argued that a strong and explicit articulation of a deferential standard of review for such cases is warranted. This result is further supported by a number of policy considerations.

First, the legislature has mandated that dependency judges must have specialized training.¹⁵⁸ This training is so broad that it warrants careful attention by the judge to avoid becoming an expert in the very case she is deciding, as a leading treatise cautions.¹⁵⁹ This specialized training provides further support for deferring to the trial court's judgments.

Second, juvenile court judges in California are expected to have minimum tenure in their position (three years) which provides the ability to develop both subject matter expertise and familiarity with the specific parents and children who come before the court over the typical timespan of these cases.¹⁶⁰ This experience not only correlates with enhanced

¹⁵⁶ See *id.*; Friendly, *supra* note 97, at 759–61.

¹⁵⁷ See *supra* note 114 and accompanying text.

¹⁵⁸ See CAL. WELF. & INST. CODE § 304.7 (Deering, LEXIS through 2022 Reg. Sess.).

¹⁵⁹ See SEISER & KUMLI, *supra* note 77, § 1.20(1)(b) (noting juvenile judges' training on "child development, child abuse, substance abuse, medical and psychological diagnosis and treatment, and a host of other topics" triggers the need to protect the parties due process rights by being careful to not become an undisclosed witness).

¹⁶⁰ See CAL. R. CT. Standard 5.40(a). As the Advisory Committee Comment to Standard 5.40(a) states:

Considering the constantly evolving changes in the law, as well as the unique nature of the proceedings in juvenile court, the juvenile court judge should be willing to commit to a tenure of three years. Not only does this tenure afford the judge the opportunity to become well acquainted with the total juvenile justice complex, but it also provides continuity to a system that demands it.

general knowledge of the legal and factual issues in dependency cases, but also with family-specific insights from repeated interactions over the life of the case, which justifies greater deference to decisions affecting those particular parties.¹⁶¹

Third, the unique role of the dependency judge as an authority who can and is expected to speak publicly on a range of issues that affect children and families is explicitly recognized in the law, and in a manner that underscores the abilities of these bench officers to appreciate and address the many nuanced issues and dynamics that often lie at the core of these cases.¹⁶² Failing to accord appropriate deference to the judgments of dependency judges in specific cases could, in subtle but unmistakable ways, undermine the full realization of judges' ability to play this important public role.

Fourth, the unique role of dependency judges is recognized nationally. The Judicial Standards of Administration in California encourage judges in California to follow guidelines established by the National Council of Juvenile and Family Court Judges.¹⁶³ These guidelines aptly describe the breadth and depth of knowledge and experience of dependency judges:

The judge's role in child abuse and neglect cases was conferred on them by federal legislation, and it is a role that is distinct and unique compared to the traditional role of a judge in other litigation venues. The law makes the

Id. cmt. This familiarity with the specific case was cited by the Amicus Brief submitted by the Children's Law Center in the *Caden C.* case. *See* Brief for Advokids et al. as Amici Curiae Supporting the Minor at 23, *In re Caden C.*, 444 P.3d 665 (Cal. 2019) (No. S255839).

¹⁶¹ This point aligns closely with the concept of the "effective individualizing agent of the law" discussed by Professor Rosenberg. *See* Rosenberg, *supra* note 97, at 642.

¹⁶² CAL. R. CT. Standard 5.40(e), (h). The Advisory Committee Comment to 5.40(e)(11) makes the point well.

A superior court judge assigned to the juvenile court occupies a unique position within California's judiciary. In addition to the traditional role of fairly and efficiently resolving disputes before the court, the juvenile court judge is statutorily required to discharge other duties. California law empowers the juvenile court judge not only to order services for children under its jurisdiction, but also to enforce and review the delivery of those services. This oversight function includes the obligation to understand and work with the public and private agencies, including school systems, that provide services and treatment programs for children and families. As such, the juvenile court assignment requires a dramatic shift in emphasis from judging in the traditional sense.

CAL. R. CT. Standard 5.40(e)(11) cmt.

¹⁶³ *See* CAL. R. CT. Standard 5.45(a).

judge and the judicial process integral parts of a larger, extra-judicial process, the goal of which is to achieve safe, timely permanence for abused and neglected children in a nurturing family setting, preferably with a parent. The law also requires the judge to monitor the work of the other participants in this process and to require that each participant fulfills his or her responsibilities within the statutory timeframe. In order to fulfill this role—not simply to make the requisite judicial determinations but also to work to achieve the broader goals of safety, permanency, and child well-being—the judge must be knowledgeable about many domains outside of the law, which include the people he or she is dealing with (e.g., their culture, history, etc.), the extra-judicial stakeholders and systems involved in the process, the issues underlying child abuse and neglect cases, and the services needed to effectively address those underlying issues.¹⁶⁴

Fifth, given their caseloads, the typical dependency judge has heard many hundreds (if not thousands) of cases and has deep experience with the recurring issues. This too supports the soundness of deferring to the trial court's judgment in particular cases.

Sixth, the law requires cases to be heard and resolved expeditiously and the appellate process can lead to delays. *Caden C.* is an example. At the time of the original hearing in the trial court on the parental-relationship exception, Caden had been in a dependency case for four and a half years and been in a foster home for several years. By the time the Court of Appeal decision was rendered more than another year had passed. The legislature in numerous places has emphasized the importance of expeditious handling of dependency cases by trial courts.¹⁶⁵ The courts of

¹⁶⁴ See SOPHIE I. GATKOWSKI, NANCY B. MILLER, STEPHEN M. RUBIN, PATRICIA ESCHER & CANDICE MAZE, NAT'L COUNCIL JUV. & FAM. CT. JUDGES, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 25 (2016).

¹⁶⁵ See, e.g., CAL. WELF. & INST. CODE § 350(a)(1) (Deering, LEXIS through 2022 Reg. Sess.) (declaring that the judge is to control all proceedings with a view to the “expeditious” finding of jurisdictional facts and ascertainment of facts related to present condition and future welfare of the child); *id.* § 352 (declaring that no continuances of hearings should be permitted if contrary to minor’s welfare, and in considering the minor’s interests, the court is to give “substantial weight” to the minor’s need for prompt resolution of custody status, the need for stable environments and the harm from prolonged temporary placements).

appeal are also required to prioritize dependency appeals.¹⁶⁶ This militates in favor of streamlining appeals where there is a risk of delaying the dependency case and a more robust deference to the trial court decisions can contribute to that goal.

Seventh, the sheer volume of dependency appeals means that the courts of appeal are burdened with considering many hundreds of appeals each year. Statewide, approximately 23% of recent appeals have been in juvenile dependency cases.¹⁶⁷ In the Second District, which is the largest court, more than 30% of all recent appeals have been in juvenile dependency cases.¹⁶⁸ This underscores that robust application of deferential standards of review in these cases may promote more efficient processing of appeals and contribute to conserving these high-demand legal resources for other cases where in-depth appellate scrutiny may be more appropriate.

Eighth, while the number of *reported* opinions in dependency cases may not appear unusual, the vast majority of opinions are unreported.¹⁶⁹ This also suggests that the courts of appeal perceive that only a small percentage of dependency appeals present opportunities to make declarations of legal principles to guide future decisions, which comports with the main thrust of the argument in this article: a rule of strong deference to dependency trial court judgments would be consistent with general principles of appellate review.¹⁷⁰

¹⁶⁶ See *id.* § 395(a)(1) (declaring appeals take “precedence” over other matters); CAL. R. CT. 8.416(f) (declaring “exceptional” good cause required to grant extension of time in appeal from certain dependency trial court orders).

¹⁶⁷ See Tables Showing 2020–2021 Filings and Dispositions, JUD. COUNCIL CAL. (2021) (on file with author) (showing statistics for the period of July 2020 to March 31, 2021).

¹⁶⁸ *Id.*

¹⁶⁹ While many appeals are resolved without an opinion, there are still a large number of dependency appeals that result in opinions. According to a LEXIS search for cases involving California Welfare and Institutions Code section 300 petitions in the four-years ending on December 31, 2020, the courts of appeal issued 1,972 opinions, of which 68 (3%) were published.

¹⁷⁰ As the courts transition out of the period when many civil and criminal trials could not be completed because of the COVID-19 pandemic, there are concerns that a wave of trial court decisions may be on the horizon that will confront the courts of appeal with a surge in cases. Thus, finding ways to discourage dependency appeals that lack merit from being filed or to streamline the consideration of the appeals that are filed, could be particularly important to managing this anticipated backlog.

IV. CONCLUSION

The recent decision by the California Supreme Court in *In re Caden C.* should be seen as more than a decision that clarifies the legal standard for finding an exception to the termination of parental rights in the case of an adoptable child who has a strong bond with his or her parent. The Court also granted review to resolve a split among lower courts regarding what appellate standard of review (substantial evidence or abuse of discretion) applies in such cases. The Court did resolve that conflict and in doing so articulated a deferential standard that should be fully applicable to many juvenile dependency appeals, regardless of the particular issues at stake.

It also discussed at length and in depth the multifaceted and highly complex decisions the dependency trial courts are required to make and at least implicitly laid the intellectual foundation for express recognition of a robust application of a particularly deferential standard of review in juvenile dependency appeals. Such a standard would not only be well-founded in the law, as well as legal scholarship on appellate review, but it would also animate a number of important public policies.