

Introduced by Senator Scott

February 10, 2005

An act to amend Section 366.26 of the Welfare and Institutions Code, relating to termination of parental rights.

LEGISLATIVE COUNSEL'S DIGEST

SB 218, as introduced, Scott. Termination of parental rights: prospective adoptive parents.

Existing law provides that if the court, by order or judgment, declares a child free from the custody and control of both parents, or one parent if the other does not have custody and control, the court shall at the same time order the child referred to the State Department of Social Services or a licensed adoption agency for adoptive placement by the agency. Existing law provides that the State Department of Social Services or licensed adoption agency shall be responsible for the custody and supervision of the child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption is granted.

This bill would create an exception to that provision if the child is living with a caretaker who has been designated by the court as a prospective adoptive parent. The bill would authorize a court to designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least 6 months and the caretaker has expressed the desire to adopt the child. The bill would further provide that a child living in the home of a designated prospective adoptive parent may only be removed from that home after a noticed hearing in which the court finds that removal from the home is in the child's best interest.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 366.26 of the Welfare and Institutions Code is amended to read:

366.26. (a) This section applies to children who are adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360. The procedures specified herein are the exclusive procedures for conducting these hearings; Part 2 (commencing with Section 3020) of Division 8 of the Family Code is not applicable to these proceedings. Section 8714.7 of the Family Code is applicable and available to all dependent children meeting the requirements of that section, if the postadoption contact agreement has been entered into voluntarily. For children who are adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360, this section and Sections 8604, 8605, 8606, and 8700 of the Family Code and Chapter 5 (commencing with Section 7660) of Part 3 of Division 12 of the Family Code specify the exclusive procedures for permanently terminating parental rights with regard to, or establishing legal guardianship of, the child while the child is a dependent child of the juvenile court.

(b) At the hearing, that shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, or 366.22, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference:

(1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.

(2) On making a finding under paragraph (3) of subdivision (c), identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.

(3) Appoint a legal guardian for the child and order that letters of guardianship issue.

1 (4) Order that the child be placed in long-term foster care,
2 subject to the periodic review of the juvenile court under Section
3 366.3.

4 In choosing among the above alternatives the court shall
5 proceed pursuant to subdivision (c).

6 (c) (1) If the court determines, based on the assessment
7 provided as ordered under subdivision (i) of Section 366.21 or
8 subdivision (b) of Section 366.22, and any other relevant
9 evidence, by a clear and convincing standard, that it is likely the
10 child will be adopted, the court shall terminate parental rights and
11 order the child placed for adoption. The fact that the child is not
12 yet placed in a preadoptive home nor with a relative or foster
13 family who is prepared to adopt the child, shall not constitute a
14 basis for the court to conclude that it is not likely the child will
15 be adopted. A finding under subdivision (b) or paragraph (1) of
16 subdivision (e) of Section 361.5 that reunification services shall
17 not be offered, under subdivision (e) of Section 366.21 that the
18 whereabouts of a parent have been unknown for six months or
19 that the parent has failed to visit or contact the child for six
20 months or that the parent has been convicted of a felony
21 indicating parental unfitness, or, under Section 366.21 or 366.22,
22 that the court has continued to remove the child from the custody
23 of the parent or guardian and has terminated reunification
24 services, shall constitute a sufficient basis for termination of
25 parental rights unless the court finds a compelling reason for
26 determining that termination would be detrimental to the child
27 due to one or more of the following circumstances:

28 (A) The parents or guardians have maintained regular
29 visitation and contact with the child and the child would benefit
30 from continuing the relationship.

31 (B) A child 12 years of age or older objects to termination of
32 parental rights.

33 (C) The child is placed in a residential treatment facility,
34 adoption is unlikely or undesirable, and continuation of parental
35 rights will not prevent finding the child a permanent family
36 placement if the parents cannot resume custody when residential
37 care is no longer needed.

38 (D) The child is living with a relative or foster parent who is
39 unable or unwilling to adopt the child because of exceptional
40 circumstances, that do not include an unwillingness to accept

1 legal or financial responsibility for the child, but who is willing
2 and capable of providing the child with a stable and permanent
3 environment and the removal of the child from the physical
4 custody of his or her relative or foster parent would be
5 detrimental to the emotional well-being of the child. This
6 subparagraph does not apply to any child who is living with a
7 nonrelative and who is either (i) under six years of age or (ii) a
8 member of a sibling group where at least one child is under six
9 years of age and the siblings are, or should be, permanently
10 placed together.

11 (E) There would be substantial interference with a child's
12 sibling relationship, taking into consideration the nature and
13 extent of the relationship, including, but not limited to, whether
14 the child was raised with a sibling in the same home, whether the
15 child shared significant common experiences or has existing
16 close and strong bonds with a sibling, and whether ongoing
17 contact is in the child's best interest, including the child's
18 long-term emotional interest, as compared to the benefit of legal
19 permanence through adoption.

20 If the court finds that termination of parental rights would be
21 detrimental to the child pursuant to subparagraph (A), (B), (C),
22 (D), or (E), it shall state its reasons in writing or on the record.

23 (2) The court shall not terminate parental rights if at each and
24 every hearing at which the court was required to consider
25 reasonable efforts or services, the court has found that reasonable
26 efforts were not made or that reasonable services were not
27 offered or provided.

28 (3) If the court finds that termination of parental rights would
29 not be detrimental to the child pursuant to paragraph (1) and that
30 the child has a probability for adoption but is difficult to place for
31 adoption and there is no identified or available prospective
32 adoptive parent, the court may identify adoption as the
33 permanent placement goal and without terminating parental
34 rights, order that efforts be made to locate an appropriate
35 adoptive family for the child within a period not to exceed 180
36 days. During this 180-day period, the public agency responsible
37 for seeking adoptive parents for each child shall, to the extent
38 possible, ask each child who is 10 years of age or older who is
39 placed in a group home for six months or longer from the date
40 the child entered foster care, to identify any individuals, other

than the child's siblings, who are important to the child, in order to identify potential adoptive parents. The public agency may ask any other child to provide that information, as appropriate. During the 180-day period, the public agency shall, to the extent possible, contact other private and public adoption agencies regarding the availability of the child for adoption. During the 180-day period, the public agency shall conduct the search for adoptive parents in the same manner as prescribed for children in Sections 8708 and 8709 of the Family Code. At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1) or (3) of subdivision (b). For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is the age of seven years or more.

(4) (A) If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, because one of the conditions in subparagraph (A), (B), (C), (D), or (E) of paragraph (1) or in paragraph (2) applies, the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care. Legal guardianship shall be considered before long-term foster care, if it is in the best interests of the child and if a suitable guardian can be found. A child who is 10 years of age or older who is placed in a group home for six months or longer from the date the child entered foster care, shall be asked to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential guardians. The agency may ask any other child to provide that information, as appropriate.

(B) If the child is living with a relative or a foster parent who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian, the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker or foster parents.

1 (C) The court shall also make an order for visitation with the
2 parents or guardians unless the court finds by a preponderance of
3 the evidence that the visitation would be detrimental to the
4 physical or emotional well-being of the child.

5 (5) If the court finds that the child should not be placed for
6 adoption, that legal guardianship shall not be established, and
7 that there are no suitable foster parents except exclusive-use
8 homes available to provide the child with a stable and permanent
9 environment, the court may order the care, custody, and control
10 of the child transferred from the county welfare department to a
11 licensed foster family agency. The court shall consider the
12 written recommendation of the county welfare director regarding
13 the suitability of the transfer. The transfer shall be subject to
14 further court orders.

15 The licensed foster family agency shall place the child in a
16 suitable licensed or exclusive-use home that has been certified by
17 the agency as meeting licensing standards. The licensed foster
18 family agency shall be responsible for supporting the child and
19 providing appropriate services to the child, including those
20 services ordered by the court. Responsibility for the support of
21 the child shall not, in and of itself, create liability on the part of
22 the foster family agency to third persons injured by the child.
23 Those children whose care, custody, and control are transferred
24 to a foster family agency shall not be eligible for foster care
25 maintenance payments or child welfare services, except for
26 emergency response services pursuant to Section 16504.

27 (d) The proceeding for the appointment of a guardian for a
28 child who is a dependent of the juvenile court shall be in the
29 juvenile court. If the court finds pursuant to this section that legal
30 guardianship is the appropriate permanent plan, it shall appoint
31 the legal guardian and issue letters of guardianship. The
32 assessment prepared pursuant to subdivision (g) of Section 361.5,
33 subdivision (i) of Section 366.21, and subdivision (b) of Section
34 366.22 shall be read and considered by the court prior to the
35 appointment, and this shall be reflected in the minutes of the
36 court. The person preparing the assessment may be called and
37 examined by any party to the proceeding.

38 (e) The proceeding for the adoption of a child who is a
39 dependent of the juvenile court shall be in the juvenile court if
40 the court finds pursuant to this section that adoption is the

1 appropriate permanent plan and the petition for adoption is filed
2 in the juvenile court. Upon the filing of a petition for adoption,
3 the juvenile court shall order that an adoption hearing be set. The
4 court shall proceed with the adoption after the appellate rights of
5 the natural parents have been exhausted. The full report required
6 by Section 8715 of the Family Code shall be read and considered
7 by the court prior to the adoption and this shall be reflected in the
8 minutes of the court. The person preparing the report may be
9 called and examined by any party to the proceeding. It is the
10 intent of the Legislature, pursuant to this subdivision, to give
11 potential adoptive parents the option of filing in the juvenile
12 court the petition for the adoption of a child who is a dependent
13 of the juvenile court. Nothing in this section is intended to
14 prevent the filing of a petition for adoption in any other court as
15 permitted by law, instead of in the juvenile court.

16 (f) At the beginning of any proceeding pursuant to this section,
17 if the child or the parents are not being represented by previously
18 retained or appointed counsel, the court shall proceed as follows:

19 (1) In accordance with subdivision (c) of Section 317, if a
20 child before the court is without counsel, the court shall appoint
21 counsel unless the court finds that the child would not benefit
22 from the appointment of counsel. The court shall state on the
23 record its reasons for that finding.

24 (2) If a parent appears without counsel and is unable to afford
25 counsel, the court shall appoint counsel for the parent, unless this
26 representation is knowingly and intelligently waived. The same
27 counsel shall not be appointed to represent both the child and his
28 or her parent. The public defender or private counsel may be
29 appointed as counsel for the parent.

30 (3) Private counsel appointed under this section shall receive a
31 reasonable sum for compensation and expenses, the amount of
32 which shall be determined by the court. The amount shall be paid
33 by the real parties in interest, other than the child, in any
34 proportions the court deems just. However, if the court finds that
35 any of the real parties in interest are unable to afford counsel, the
36 amount shall be paid out of the general fund of the county.

37 (g) The court may continue the proceeding for not to exceed
38 30 days as necessary to appoint counsel, and to enable counsel to
39 become acquainted with the case.

1 (h) (1) At all proceedings under this section, the court shall
2 consider the wishes of the child and shall act in the best interests
3 of the child.

4 (2) In accordance with Section 349, the child shall be present
5 in court if the child or the child's counsel so requests or the court
6 so orders. If the child is 10 years of age or older and is not
7 present at a hearing held pursuant to this section, the court shall
8 determine whether the minor was properly notified of his or her
9 right to attend the hearing and inquire as to the reason why the
10 child is not present.

11 (3) (A) The testimony of the child may be taken in chambers
12 and outside the presence of the child's parent or parents, if the
13 child's parent or parents are represented by counsel, the counsel
14 is present, and any of the following circumstances exist:

15 (i) The court determines that testimony in chambers is
16 necessary to ensure truthful testimony.

17 (ii) The child is likely to be intimidated by a formal courtroom
18 setting.

19 (iii) The child is afraid to testify in front of his or her parent or
20 parents.

21 (B) After testimony in chambers, the parent or parents of the
22 child may elect to have the court reporter read back the testimony
23 or have the testimony summarized by counsel for the parent or
24 parents.

25 (C) The testimony of a child also may be taken in chambers
26 and outside the presence of the guardian or guardians of a child
27 under the circumstances specified in this subdivision.

28 (i) Any order of the court permanently terminating parental
29 rights under this section shall be conclusive and binding upon the
30 child, upon the parent or parents and upon all other persons who
31 have been served with citation by publication or otherwise as
32 provided in this chapter. After making the order, the court shall
33 have no power to set aside, change, or modify it, but nothing in
34 this section shall be construed to limit the right to appeal the
35 order.

36 (j) If the court, by order or judgment, declares the child free
37 from the custody and control of both parents, or one parent if the
38 other does not have custody and control, the court shall at the
39 same time order the child referred to the State Department of
40 Social Services or a licensed adoption agency for adoptive

1 placement by the agency. However, a petition for adoption may
2 not be granted until the appellate rights of the natural parents
3 have been exhausted. The State Department of Social Services or
4 licensed adoption agency shall be responsible for the custody and
5 supervision of the child and shall be entitled to the exclusive care
6 and control of the child at all times until a petition for adoption is
7 granted, *unless the child is living with a caretaker who has been*
8 *designated by the court as a prospective adoptive parent.*
9 *Notwithstanding Section 8704 of the Family Code or any other*
10 *provision of law, the court may designate a current caretaker as*
11 *a prospective adoptive parent if the child has lived with the*
12 *caretaker for at least six months and the caretaker has expressed*
13 *the desire to adopt the child. A child living in the home of a*
14 *designated prospective adoptive parent may only be removed*
15 *from that home after a noticed hearing in which the court finds*
16 *that removal from the home is in the child's best interest.* With
17 the consent of the agency, the court may appoint a guardian of
18 the child, who shall serve until the child is adopted.

19 (k) Notwithstanding any other provision of law, the
20 application of any person who, as a relative caretaker or foster
21 parent, has cared for a dependent child for whom the court has
22 approved a permanent plan for adoption, or who has been freed
23 for adoption, shall be given preference with respect to that child
24 over all other applications for adoptive placement if the agency
25 making the placement determines that the child has substantial
26 emotional ties to the relative caretaker or foster parent and
27 removal from the relative caretaker or foster parent would be
28 seriously detrimental to the child's emotional well-being.

29 As used in this subdivision, "preference" means that the
30 application shall be processed and, if satisfactory, the family
31 study shall be completed before the processing of the application
32 of any other person for the adoptive placement of the child.

33 (l) (1) An order by the court that a hearing pursuant to this
34 section be held is not appealable at any time unless all of the
35 following applies:

36 (A) A petition for extraordinary writ review was filed in a
37 timely manner.

38 (B) The petition substantively addressed the specific issues to
39 be challenged and supported that challenge by an adequate
40 record.

1 (C) The petition for extraordinary writ review was summarily
2 denied or otherwise not decided on the merits.

3 (2) Failure to file a petition for extraordinary writ review
4 within the period specified by rule, to substantively address the
5 specific issues challenged, or to support that challenge by an
6 adequate record shall preclude subsequent review by appeal of
7 the findings and orders made pursuant to this section.

8 (3) The Judicial Council shall adopt rules of court, effective
9 January 1, 1995, to ensure all of the following:

10 (A) A trial court, after issuance of an order directing a hearing
11 pursuant to this section be held, shall advise all parties of the
12 requirement of filing a petition for extraordinary writ review as
13 set forth in this subdivision in order to preserve any right to
14 appeal in these issues. This notice shall be made orally to a party
15 if the party is present at the time of the making of the order or by
16 first-class mail by the clerk of the court to the last known address
17 of a party not present at the time of the making of the order.

18 (B) The prompt transmittal of the records from the trial court
19 to the appellate court.

20 (C) That adequate time requirements for counsel and court
21 personnel exist to implement the objective of this subdivision.

22 (D) That the parent or guardian, or their trial counsel or other
23 counsel, is charged with the responsibility of filing a petition for
24 extraordinary writ relief pursuant to this subdivision.

25 (4) The intent of this subdivision is to do both of the
26 following:

27 (A) Make every reasonable attempt to achieve a substantive
28 and meritorious review by the appellate court within the time
29 specified in Sections 366.21 and 366.22 for holding a hearing
30 pursuant to this section.

31 (B) Encourage the appellate court to determine all writ
32 petitions filed pursuant to this subdivision on their merits.

33 (5) This subdivision shall only apply to cases in which an
34 order to set a hearing pursuant to this section is issued on or after
35 January 1, 1995.

36 (m) Except for subdivision (j), this section shall also apply to
37 minors adjudged wards pursuant to Section 727.31.