

AMENDED IN SENATE APRIL 7, 2005

SENATE BILL

No. 218

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 amended, 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~~ *a commitment* to adopt the child, *and the caretaker has taken at least one step to facilitate the adoption, as specified*. 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, *except as specified*.

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

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

- 1 SECTION 1. Section 366.26 of the Welfare and Institutions
- 2 Code is amended to read:
- 3 366.26. (a) This section applies to children who are adjudged
- 4 dependent children of the juvenile court pursuant to subdivision
- 5 (c) of Section 360. The procedures specified herein are the
- 6 exclusive procedures for conducting these hearings; Part 2
- 7 (commencing with Section 3020) of Division 8 of the Family
- 8 Code is not applicable to these proceedings. Section 8714.7 of
- 9 the Family Code is applicable and available to all dependent
- 10 children meeting the requirements of that section, if the
- 11 postadoption contact agreement has been entered into
- 12 voluntarily. For children who are adjudged dependent children of
- 13 the juvenile court pursuant to subdivision (c) of Section 360, this
- 14 section and Sections 8604, 8605, 8606, and 8700 of the Family
- 15 Code and Chapter 5 (commencing with Section 7660) of Part 3
- 16 of Division 12 of the Family Code specify the exclusive
- 17 procedures for permanently terminating parental rights with
- 18 regard to, or establishing legal guardianship of, the child while
- 19 the child is a dependent child of the juvenile court.
- 20 (b) At the hearing, that shall be held in juvenile court for all
- 21 children who are dependents of the juvenile court, the court, in
- 22 order to provide stable, permanent homes for these children, shall
- 23 review the report as specified in Section 361.5, 366.21, or
- 24 366.22, shall indicate that the court has read and considered it,
- 25 shall receive other evidence that the parties may present, and then
- 26 shall make findings and orders in the following order of
- 27 preference:
- 28 (1) Terminate the rights of the parent or parents and order that
- 29 the child be placed for adoption and, upon the filing of a petition
- 30 for adoption in the juvenile court, order that a hearing be set. The
- 31 court shall proceed with the adoption after the appellate rights of
- 32 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.

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

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

(c) (1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21 or subdivision (b) of Section 366.22, and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted. A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights unless 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:

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

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

(C) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental

1 rights will not prevent finding the child a permanent family
2 placement if the parents cannot resume custody when residential
3 care is no longer needed.

4 (D) The child is living with a relative or foster parent who is
5 unable or unwilling to adopt the child because of exceptional
6 circumstances, that do not include an unwillingness to accept
7 legal or financial responsibility for the child, but who is willing
8 and capable of providing the child with a stable and permanent
9 environment and the removal of the child from the physical
10 custody of his or her relative or foster parent would be
11 detrimental to the emotional well-being of the child. This
12 subparagraph does not apply to any child who is living with a
13 nonrelative and who is either (i) under six years of age or (ii) a
14 member of a sibling group where at least one child is under six
15 years of age and the siblings are, or should be, permanently
16 placed together.

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

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

29 (2) The court shall not terminate parental rights if at each and
30 every hearing at which the court was required to consider
31 reasonable efforts or services, the court has found that reasonable
32 efforts were not made or that reasonable services were not
33 offered or provided.

34 (3) If the court finds that termination of parental rights would
35 not be detrimental to the child pursuant to paragraph (1) and that
36 the child has a probability for adoption but is difficult to place for
37 adoption and there is no identified or available prospective
38 adoptive parent, the court may identify adoption as the
39 permanent placement goal and without terminating parental
40 rights, order that efforts be made to locate an appropriate

1 adoptive family for the child within a period not to exceed 180
2 days. During this 180-day period, the public agency responsible
3 for seeking adoptive parents for each child shall, to the extent
4 possible, ask each child who is 10 years of age or older who is
5 placed in a group home for six months or longer from the date
6 the child entered foster care, to identify any individuals, other
7 than the child's siblings, who are important to the child, in order
8 to identify potential adoptive parents. The public agency may ask
9 any other child to provide that information, as appropriate.
10 During the 180-day period, the public agency shall, to the extent
11 possible, contact other private and public adoption agencies
12 regarding the availability of the child for adoption. During the
13 180-day period, the public agency shall conduct the search for
14 adoptive parents in the same manner as prescribed for children in
15 Sections 8708 and 8709 of the Family Code. At the expiration of
16 this period, another hearing shall be held and the court shall
17 proceed pursuant to paragraph (1) or (3) of subdivision (b). For
18 purposes of this section, a child may only be found to be difficult
19 to place for adoption if there is no identified or available
20 prospective adoptive parent for the child because of the child's
21 membership in a sibling group, or the presence of a diagnosed
22 medical, physical, or mental handicap, or the child is the age of
23 seven years or more.

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

39 (B) If the child is living with a relative or a foster parent who
40 is willing and capable of providing a stable and permanent

1 environment, but not willing to become a legal guardian, the
2 child shall not be removed from the home if the court finds the
3 removal would be seriously detrimental to the emotional
4 well-being of the child because the child has substantial
5 psychological ties to the relative caretaker or foster parents.

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

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

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

32 (d) The proceeding for the appointment of a guardian for a
33 child who is a dependent of the juvenile court shall be in the
34 juvenile court. If the court finds pursuant to this section that legal
35 guardianship is the appropriate permanent plan, it shall appoint
36 the legal guardian and issue letters of guardianship. The
37 assessment prepared pursuant to subdivision (g) of Section 361.5,
38 subdivision (i) of Section 366.21, and subdivision (b) of Section
39 366.22 shall be read and considered by the court prior to the
40 appointment, and this shall be reflected in the minutes of the

1 court. The person preparing the assessment may be called and
2 examined by any party to the proceeding.

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

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

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

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

35 (3) Private counsel appointed under this section shall receive a
36 reasonable sum for compensation and expenses, the amount of
37 which shall be determined by the court. The amount shall be paid
38 by the real parties in interest, other than the child, in any
39 proportions the court deems just. However, if the court finds that

1 any of the real parties in interest are unable to afford counsel, the
2 amount shall be paid out of the general fund of the county.

3 (g) The court may continue the proceeding for not to exceed
4 30 days as necessary to appoint counsel, and to enable counsel to
5 become acquainted with the case.

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

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

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

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

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

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

26 (B) After testimony in chambers, the parent or parents of the
27 child may elect to have the court reporter read back the testimony
28 or have the testimony summarized by counsel for the parent or
29 parents.

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

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

(j) If the court, by order or judgment, declares the 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. However, a petition for adoption may not be granted until the appellate rights of the natural parents have been exhausted. 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, ~~unless the child is living with a caretaker who has been designated by the court as a prospective adoptive parent. Notwithstanding Section 8704 of the Family Code or any other provision of law, the court may designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months and the caretaker has expressed the desire to adopt the child. 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. With~~ granted, except as specified in subdivision (n). With the consent of the agency, the court may appoint a guardian of the child, who shall serve until the child is adopted.

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

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

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

4 (A) A petition for extraordinary writ review was filed in a
5 timely manner.

6 (B) The petition substantively addressed the specific issues to
7 be challenged and supported that challenge by an adequate
8 record.

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

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

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

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

26 (B) The prompt transmittal of the records from the trial court
27 to the appellate court.

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

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

33 (4) The intent of this subdivision is to do both of the
34 following:

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

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

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

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

6 *(n) (1) Notwithstanding Section 8704 of the Family Code or*
7 *any other provision of law, the court, at a hearing held pursuant*
8 *to this section or anytime thereafter, may designate a current*
9 *caretaker as a prospective adoptive parent if the child has lived*
10 *with the caretaker for at least six months, the caretaker currently*
11 *expresses a commitment to adopt the child, and the caretaker has*
12 *taken at least one step to facilitate the adoption process. In*
13 *determining whether to make that designation, the court may*
14 *take into consideration whether the caretaker is listed in the*
15 *preliminary assessment prepared by the county department in*
16 *accordance with subdivision (i) of Section 366.21 as an*
17 *appropriate person to be considered as an adoptive parent for*
18 *the child and the recommendation of the State Department of*
19 *Social Services or licensed adoption agency.*

20 *(2) For purposes of this subdivision, steps to facilitate the*
21 *adoption process include, but are not limited to, the following:*

22 *(A) Applying for an adoption homestudy.*

23 *(B) Cooperating with an adoption homestudy.*

24 *(C) Being designated by the court or the licensed adoption*
25 *agency as the adoptive family.*

26 *(D) Requesting de facto parent status.*

27 *(E) Signing an adoptive placement agreement.*

28 *(F) Engaging in discussions regarding a postadoption contact*
29 *agreement.*

30 *(G) Working to overcome any impediments that have been*
31 *identified by the State Department of Social Services and the*
32 *licensed adoption agency.*

33 *(H) Attending classes required of prospective adoptive*
34 *parents.*

35 *(3) Prior to a change in placement and as soon as possible*
36 *after a decision is made to remove a child from the home of a*
37 *designated prospective adoptive parent, the agency shall notify*
38 *the court, the designated prospective adoptive parent, the child's*
39 *attorney, and the child, if the child is 10 years of age or older, of*
40 *the proposal in the manner described in Section 16010.6.*

1 (A) Within seven court days or 10 calendar days, whichever is
2 longer, of the date of notification, the child, the child's attorney,
3 or the designated prospective adoptive parent may file a petition
4 with the court objecting to the proposal to remove the child, or
5 the court, upon its own motion, may set a hearing regarding the
6 proposal. A hearing ordered pursuant to this paragraph shall be
7 held as soon as possible and not later than five court days after
8 the petition is filed with the court or the court sets a hearing
9 upon its own motion. At the hearing, the court shall determine
10 whether the proposed removal of the child from the home of the
11 designated prospective adoptive parent is in the child's best
12 interest, and the child may not be removed from the home of the
13 designated prospective adoptive parent unless the court finds
14 that removal is in the child's best interest.

15 (B) If a petition objecting to the proposal to remove the child
16 is not filed, and the court, upon its own motion, does not set a
17 hearing, the child may be removed from the home of the
18 designated prospective adoptive parent without a hearing.

19 (4) Notwithstanding paragraph (3), if the State Department of
20 Social Services or a licensed adoption agency determines that the
21 child must be removed from the home of the designated
22 prospective adoptive parent immediately, due to a risk of
23 physical or emotional harm, the agency may remove the child
24 from that home and is not required to provide notice prior to the
25 removal. However, as soon as possible and not longer than two
26 court days after the removal, the agency shall notify the court,
27 the designated prospective adoptive parent, the child's attorney,
28 and the child, if the child is 10 years of age or older, of the
29 removal. Within seven court days or 10 calendar days, whichever
30 is longer, of the date of notification of the removal, the child, the
31 child's attorney, or the designated prospective adoptive parent
32 may petition for, or the court on its own motion may set, a
33 noticed hearing pursuant to paragraph (3).

34 (5) Nothing in this section shall preclude a county child
35 protective services agency from fully investigating and
36 responding to alleged abuse or neglect of a child pursuant to
37 Section 11165.5 of the Penal Code.