

AMENDED IN ASSEMBLY JUNE 2, 2005

AMENDED IN SENATE APRIL 21, 2005

AMENDED IN SENATE APRIL 7, 2005

SENATE BILL

No. 218

Introduced by Senator Scott
(Coauthors: Senators Alquist and Migden)

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, the caretaker has expressed 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. The bill would require the Judicial Council to prepare forms to facilitate the filing of petitions under these provisions.

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~~ *which* 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:

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

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

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

12 (4) Order that the child be placed in long-term foster care,
13 subject to the periodic review of the juvenile court under Section
14 366.3.

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

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

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

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

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

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

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

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

36 (2) The court shall not terminate parental rights if at each and
37 every hearing at which the court was required to consider
38 reasonable efforts or services, the court has found that reasonable
39 efforts were not made or that reasonable services were not
40 offered or provided.

(3) If the court finds that termination of parental rights would not be detrimental to the child pursuant to paragraph (1) and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days. During this 180-day period, the public agency responsible for seeking adoptive parents for each child shall, to the extent possible, ask each 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, 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

1 in a group home for six months or longer from the date the child
2 entered foster care, shall be asked to identify any individuals,
3 other than the child's siblings, who are important to the child, in
4 order to identify potential guardians. The agency may ask any
5 other child to provide that information, as appropriate.

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

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

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

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

39 (d) The proceeding for the appointment of a guardian for a
40 child who is a dependent of the juvenile court shall be in the

juvenile court. If the court finds pursuant to this section that legal guardianship is the appropriate permanent plan, it shall appoint the legal guardian and issue letters of guardianship. The assessment prepared pursuant to subdivision (g) of Section 361.5, subdivision (i) of Section 366.21, and subdivision (b) of Section 366.22 shall be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court. The person preparing the assessment may be called and examined by any party to the proceeding.

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

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

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

(2) If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel shall not be appointed to represent both the child and his

1 or her parent. The public defender or private counsel may be
2 appointed as counsel for the parent.

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

10 (g) The court may continue the proceeding for not to exceed
11 30 days as necessary to appoint counsel, and to enable counsel to
12 become acquainted with the case.

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

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

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

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

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

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

33 (B) After testimony in chambers, the parent or parents of the
34 child may elect to have the court reporter read back the testimony
35 or have the testimony summarized by counsel for the parent or
36 parents.

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

1 (i) Any order of the court permanently terminating parental
2 rights under this section shall be conclusive and binding upon the
3 child, upon the parent or parents and upon all other persons who
4 have been served with citation by publication or otherwise as
5 provided in this chapter. After making the order, the court shall
6 have no power to set aside, change, or modify it, but nothing in
7 this section shall be construed to limit the right to appeal the
8 order.

9 (j) If the court, by order or judgment, declares the child free
10 from the custody and control of both parents, or one parent if the
11 other does not have custody and control, the court shall at the
12 same time order the child referred to the State Department of
13 Social Services or a licensed adoption agency for adoptive
14 placement by the agency. However, a petition for adoption may
15 not be granted until the appellate rights of the natural parents
16 have been exhausted. The State Department of Social Services or
17 licensed adoption agency shall be responsible for the custody and
18 supervision of the child and shall be entitled to the exclusive care
19 and control of the child at all times until a petition for adoption is
20 granted, except as specified in subdivision (n). With the consent
21 of the agency, the court may appoint a guardian of the child, who
22 shall serve until the child is adopted.

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

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

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

1 (A) A petition for extraordinary writ review was filed in a
2 timely manner.

3 (B) The petition substantively addressed the specific issues to
4 be challenged and supported that challenge by an adequate
5 record.

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

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

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

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

23 (B) The prompt transmittal of the records from the trial court
24 to the appellate court.

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

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

30 (4) The intent of this subdivision is to do both of the
31 following:

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

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

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

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

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

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

19 (A) Applying for an adoption homestudy.

20 (B) Cooperating with an adoption homestudy.

21 (C) Being designated by the court or the licensed adoption
22 agency as the adoptive family.

23 (D) Requesting de facto parent status.

24 (E) Signing an adoptive placement agreement.

25 (F) Engaging in discussions regarding a postadoption contact
26 agreement.

27 (G) Working to overcome any impediments that have been
28 identified by the State Department of Social Services and the
29 licensed adoption agency.

30 (H) Attending classes required of prospective adoptive
31 parents.

32 (3) Prior to a change in placement and as soon as possible after
33 a decision is made to remove a child from the home of a
34 designated prospective adoptive parent, the agency shall notify
35 the court, the designated prospective adoptive parent or the
36 current caretaker, if that caretaker would have met the threshold
37 criteria to be designated as a prospective adoptive parent
38 pursuant to paragraph (1) on the date of service of this notice, the
39 child's attorney, and the child, if the child is 10 years of age or

1 older, of the proposal in the manner described in Section
2 16010.6.

3 (A) Within five court days or seven calendar days, whichever
4 is longer, of the date of notification, the child, the child's
5 attorney, or the designated prospective adoptive parent may file a
6 petition with the court objecting to the proposal to remove the
7 child, or the court, upon its own motion, may set a hearing
8 regarding the proposal. The court may, for good cause, extend
9 the filing period. A caretaker who would have met the threshold
10 criteria to be designated as a prospective adoptive parent
11 pursuant to paragraph (1) on the date of service of the notice of
12 proposed removal of the child may file, together with the petition
13 under this subparagraph, a petition for an order designating the
14 caretaker as a prospective adoptive parent for purposes of this
15 subdivision.

16 (B) A hearing ordered pursuant to this paragraph shall be held
17 as soon as possible and not later than five court days after the
18 petition is filed with the court or the court sets a hearing upon its
19 own motion, unless the court for good cause is unable to set the
20 matter for hearing five court days after the petition is filed, in
21 which case the court shall set the matter for hearing as soon as
22 possible. At the hearing, the court shall determine whether the
23 caretaker has met the threshold criteria to be designated as a
24 prospective adoptive parent pursuant to paragraph (1), and
25 whether the proposed removal of the child from the home of the
26 designated prospective adoptive parent is in the child's best
27 interest, and the child may not be removed from the home of the
28 designated prospective adoptive parent unless the court finds that
29 removal is in the child's best interest. If the court determines that
30 the caretaker ~~does~~ *did* not meet the threshold criteria to be
31 designated as a prospective adoptive parent on the date of service
32 of the notice of proposed removal of the child, the petition
33 objecting to the proposed removal filed by the caretaker shall be
34 dismissed. If the caretaker was designated as a prospective
35 adoptive parent prior to this hearing, the court shall inquire into
36 any progress made by the caretaker towards the adoption of the
37 child since the caretaker was designated as a prospective
38 adoptive parent.

39 (C) A determination by the court that the caretaker is a
40 designated prospective adoptive parent pursuant to paragraph (1)

1 or subparagraph (B) does not make the caretaker a party to the
2 dependency proceeding nor does it confer on the caretaker any
3 standing to object to any other action of the department or
4 licensed adoption agency, unless the caretaker has been declared
5 a de facto parent by the court prior to the notice of removal
6 served pursuant to paragraph (3).

7 (D) If a petition objecting to the proposal to remove the child
8 is not filed, and the court, upon its own motion, does not set a
9 hearing, the child may be removed from the home of the
10 designated prospective adoptive parent without a hearing.

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

28 (5) Except as provided in subdivision (b) of Section 366.28, an
29 order by the court issued after a hearing pursuant to this
30 subdivision shall not be appealable.

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

35 (7) The Judicial Council shall prepare forms to facilitate the
36 filing of the petitions described in this subdivision, which shall
37 become effective on January 1, 2006.