No. 923-2012

IN THE SUPREME COURT OF THE

STATE OF WHITTIER

Megan MILES,
Petitioner,

v.

STATE of Whittier,
Kathryn Chandler,
Director of the Whittier Department of Child Welfare,
Respondent

ON APPEAL FROM THE

WHITTIER COURT OF APPEAL

BRIEF FOR RESPONDENT

Team 11
January 3, 2013

Counsel for Respondent

QUESTIONS PRESENTED

I. Did the Juvenile Court properly terminate reunification services at the permanency hearing, given that the Department of Child Welfare made reasonable efforts to rehabilitate and there was not a substantial probability that Destiny would be returned to Petitioner?

II. Did the Juvenile Court properly deny Petitioner's request to place Destiny with her aunt and siblings, in light of the fact that Destiny had already experienced significant bonding with the Griffin family and the sibling relationship was non-existent?

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OPINION BELOW

The unreported opinion of the Whittier Court of Appeal appears on pages 1-16 of the record. *Miles v. State of Whittier*, No. 923-2012 (Whit. Ct. App. Nov. 1, 2012).

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Preliminary Statement

On April 2, 2012, the Juvenile Court held a permanency hearing regarding Destiny Miles, a minor child. R. 4. It could not find a substantial likelihood that Destiny would be returned to her biological mother, Petitioner, under Whittier Juvenile Code § 400(b)(1)-(3), and further held there was a substantial risk of detriment to Destiny if she were returned to Petitioner. R. 7. The Juvenile Court also declined to place Destiny with her aunt, Shauna Stone, who adopted two other children borne by Petitioner, because it found that the sibling relationship with Destiny had been terminated along with Petitioner's parental rights to those children, Desiree and Dakota. R. 7. Thus, the Juvenile Court terminated reunification services and identified a permanent plan of adoption by the Griffin family, with whom Destiny had bonded during eleven months of foster care. R. 7. Prior to a hearing to terminate parental rights, Petitioner filed a timely appeal of the Juvenile Court's order. R. 7. On November 1, 2012, the Court of Appeal affirmed the Juvenile Court. R. 1. The Whittier Supreme Court granted certiorari on November 16, 2012. R. 17.

Statement of Facts

On April 1, 2011, 18-year-old Megan Miles (hereinafter referred to as "Petitioner") gave birth to her third child, Destiny Miles, at Jenning County Hospital. R. 1. At birth, Destiny's blood-alcohol level was .06, and she tested positive for methamphetamine. R. 2. Destiny was forced to stay in the hospital for the first month of her life due to severe withdrawal symptoms. R. 2. Her facial features indicate fetal alcohol syndrome, which significantly hinders normal brain development and will continue to require ongoing special education and behavioral interventions. R. 3. Destiny already failed to reach early developmental milestones. R. 4. On top of these risk factors, Petitioner was homeless and prostituting in the nearby neighborhood at

the time Destiny was born. R. 2. Destiny was placed in protective custody with the Department of Child Welfare (DCW), pending the success or failure of reunification efforts. R. 2. Destiny has been in the care of her foster family, the Griffins, since she was one month old. R. 3.

Petitioner has faced numerous obstacles in her life, and continues to struggle to find her own way. She was placed in foster care at the age of 5 due to chronic physical and sexual abuse. R. 1. At age 14, she dropped out of school. R. 2. She began using drugs and alcohol, joined a gang, ran away from her foster home, and became pregnant for the first time. R. 1. In addition, Petitioner's parental rights were involuntarily terminated with respect to her two other children, Desiree (age 5) and Dakota (age 3) who are in the custody of their aunt, Shawna Stone. R. 2.

During Destiny's recovery in the hospital, the Juvenile Court adjudicated her a dependent child under Whittier Juvenile Code § 100(b). R. 2. The DCW created a reunification plan for Petitioner, which required that she: 1) complete a drug and alcohol treatment program; 2) obtain lawful employment with a steady income; 3) obtain housing for herself and Destiny; 4) conduct herself in a manner consistent with the law; and 5) avoid circumstances which might result in Destiny's continued dependency. R. 2. The DCW conducted a thorough search for family members willing to care for Destiny, but found none other than Ms. Stone, who declined due to concerns of disrupting her family routine. Ms. Stone asked that she not be contacted again. R. 2. Thus, Destiny was placed with Carl and Chelsea Griffin, newlyweds who decided to adopt a foster child, provided all ties to the biological family would be cut. R. 3. Mr. Griffin owns and operates a local bakery; Ms. Griffin is a special education teacher and grew up with a sister with special needs. *Id*. Destiny has made developmental progress with the Griffins. R. 7.

While Destiny was in the care of the Griffins, Petitioner began the court-ordered process of recovery. The Juvenile Court had ordered her to attend a 90-day residential substance abuse

program at the Union House, followed by weekly parenting classes. R. 3. During this time, Petitioner was provided weekly 1-hour supervised visits with Destiny. R. 3. Petitioner ended visits early and seemed distracted, unsure about parenting an infant. R. 3. She showed some improvement after enrolling in an infant development class, unlike what Ms. White had observed with the previous two children, Desiree and Dakota. R. 3. Nevertheless, Petitioner failed a routine drug test after discharge from Union House, testing positive for marijuana. R. 3. The same day, Petitioner visited with the Griffins; she acknowledged that Destiny's developmental challenges were her fault and indicating a desire to be a better mother. R. 4.

In October 2011, Petitioner had her six-month status review hearing. R. 4. Ms. White's report noted incremental progress, but cautioned that reunification was not yet appropriate. R. 4. Ms. White cited Destiny's ongoing developmental challenges and Petitioner's relapse of drug use, as well as the need to see if Petitioner could sustain her new employment. R. 4. The month before, she began working at a local 24-hour diner and had saved enough money to rent a studio apartment. R. 4. She moved out of the neighborhood where she prostituted, acquired baby supplies at an event for low-income mothers, and missed just one visit with Destiny. R. 4. Still, Destiny's counsel agreed with Ms. White's recommendation to make reunification contingent on sustained results. R. 4. Thus, the Juvenile Court extended Petitioner's services for six months, and increased visitation to three 2-hour visits per week, with overnights scheduled at the DCW's discretion. R. 4.

Struggling to find a healthier outlet for her frustration, Petitioner drank a beer during her shift the day after the hearing and was sent home without pay. R. 5. A co-worker, Bill Franklin, came over later that night with a bottle of vodka that Petitioner drank with him. R. 5. He spent the night, and in the morning encouraged Petitioner to miss her visit with Destiny so that they

could finish off the bottle of vodka. R. 5. Although Petitioner refused the offer, she smelled of alcohol and Ms. White refused to allow her to visit with Destiny, which again led Petitioner to become upset and blame others for her custody problems. R. 5. During the next several months, Petitioner made admirable strides, starting a GED program and being promoted to shift leader. R. 5. In addition, Ms. Stone began bringing Desiree and Dakota to the diner weekly for lunch, so they could visit with Petitioner. R. 5. Unfortunately, Mr. Franklin had moved in with Petitioner and occasionally hit her while drinking, leaving her with visible bruises. R. 5.

Ms. Miles has experienced a number of highs and lows, which do not lend themselves to a stable environment for Destiny. Upon passing her GED test, Mr. Franklin gave her a black eye and she was forced to stay with Ms. Stone for a week. R. 5. The relationship with Mr. Franklin has since ended, although Ms. Miles welcomes seeing him at the diner. R. 6. Just prior to the twelve-month permanency hearing, Ms. Stone changed her mind and offered to adopt Destiny, but there is evidence that Destiny has already bonded with the Griffins. R. 6. Destiny cries and pulls away when Ms. Miles holds her, on one occasion burying her face in Ms. Griffin's shoulder and clinging to her. R. 6. Again, Ms. Miles got upset that she was being rejected by Destiny, and missed one visit every week after that. R. 6. On April 2, 2012, a twelve-month permanency hearing was held, at which Ms. White, Destiny's independent attorney, and a child psychologist recommended Destiny remain with the Griffins. R. 6.

SUMMARY OF ARGUMENT

The Juvenile Court properly terminated reunification services because reasonable efforts had been made, and yet there remained a substantial risk of detriment to Destiny. The DCW's plan directly addressed the problems which prompted removal, notably the substance abuse that disabled Destiny at birth. Petitioner enrolled in the most intensive treatments available, and also

the visitation schedule was gradually increased to promote transition of custody. Unfortunately, this did not occur because Petitioner relapsed and failed to demonstrate the capacity to provide a stable environment for her child, missing numerous visits with Destiny. As such, there was not a substantial probability that reunification would occur if services were extended for six months, which is already a disfavored policy. The Juvenile Court also properly rejected placement with Destiny's aunt and siblings based on the best interests of the child. Once Ms. Stone declined the DCW's request for a relative placement, Destiny was placed with the Griffin family and, over time, developed a strong emotional attachment. Destiny's psychological well-being would be harmed if there were a change in placement, the importance of consistency and stability being enhanced by her special needs. The sibling relationship was also terminated with Petitioner's previous parental rights, and where there is no preexisting relationship between siblings it must not be a determining factor in custody. Accordingly, this court should affirm the Whittier Court of Appeal and maintain Destiny's placement with the Griffin family.

ARGUMENT

I. Standard of Review

The decision to terminate reunification services is reviewed on a sufficiency of the evidence standard, *Amanda H. v. Superior Court*, 166 Cal.App.4th 1340, 1346 (2008), and will be overturned only where such findings are found to be clearly erroneous. *In re Daniel C.*, 63 Conn.App. 339, 496 (2001). In assessing the sufficiency of the evidence, the reviewing court must "draw all legitimate inferences in support of the findings of the Juvenile Court." *In re Alvin R.*, 108 Cal.App.4th 962, 971 (2003).

II. THE JUVENILE COURT PROPERLY TERMINATED SERVICES BECAUSE THE DEPARTMENT OF CHILD WELFARE MADE REASONABLE EFFORTS AT REUNIFICATION AND THERE WAS NOT A SUBSTANTIAL PROBABILITY THAT DESTINY WOULD BE RETURNED TO PETITIONER

The evidence in the record amply supports the Juvenile Court's findings. Specifically, that the Department of Child Welfare (DCW) "made reasonable efforts to assist Petitioner in correcting the problems that led to Destiny's removal" and that nevertheless the court "could not find a substantial likelihood that Destiny would be returned to [Petitioner.]" R. 7. In light of these findings, the Juvenile Court's termination of services was not only proper, but also required under Whittier state law.

The decision of the Juvenile Court to terminate reunification services within the context of a permanency hearing is governed by §400(a)-(c) of the Whittier Juvenile Code, "which follows from the federal Adoption and Safe Families Act (ASFA)." R. 8; *see generally* 42 U.S.C. §671 et seq. Pursuant to §400(b), "services may only be extended an additional six months if there is a substantial probability that the child will be returned to the parent's custody within the next six months." In the absence of such probability, the Juvenile Court is obligated to terminate services so long as it able to find "by clear and convincing evidence that the Department of Child Welfare has offered reasonable services to the parent(s)." Whit. Juv. Code §400(c).

A. The Department of Child Welfare Offered Reasonable Reunification Services to Petitioner.

The term "reasonable efforts" has never been explicitly defined by the legislature, but rather is understood as "a directive whose meaning will obviously vary with the circumstances of each individual case." *Suter v. Artist M.*, 503 U.S. 347, 360 (1992). However, the Adoption and Safe Families Act declares unequivocally "in determining reasonable efforts to be made with respect to a child…and in making such reasonable efforts, the child's health and safety shall be the paramount concern." 42 U.S.C. §671(15)(A). This is a deliberate departure from previous national policy, which emphasized family preservation. *See In re C.B.*, 611 N.W.2d 489, 493

(2000) (attributing the shift in emphasis to the perception that strict adherence to "the family preservation concept...was found to be detrimental to children in some cases."). To that end, although the State is required to make reasonable efforts to reunify Destiny and Petitioner, this obligation does not extend indefinitely. Indeed, with the passage of time the delivery of services is "first presumed, then possible, then disfavored." *Tonya M. v. Superior Court*, 42 Cal.4th 836, 845 (2007). Once reasonable efforts have been made and it appears reunification is not likely in the foreseeable future, reunification services must be terminated and adoptive efforts pursued.

When reunification services are terminated, state courts have consistently found the reasonable efforts requirement to be satisfied where the Department has: 1) identified the problems leading to the loss of custody; 2) offered services designed to remedy those problems; 3) maintained reasonable contact with the parents during the court of the service plan; and 4) made reasonable efforts to assist the parents in areas where compliance proved difficult." *In re Alvin R.*, 108 Cal.App.4th 962, 972 (2003) (referencing *In re Riva M.* 235 Cal.App.3d 403, 414 (1991)); *accord Robin v. Superior Court*, 33 Cal.App.4th 1158, 1165 (1995).

1. Petitioner's reunification plan was specifically tailored to address the problems which prompted Destiny's removal.

The Petitioner's substance abuse was the primary impetus for Destiny's removal. Destiny was declared a dependent child pursuant to §100(b) of the Whittier Juvenile Code because she was born with a blood alcohol level of .06 and tested positive for methamphetamine exposure. The very first provision of Petitioner's reunification plan directly targeted this obstacle by requiring that the Petitioner complete a drug and alcohol treatment program. Additionally, at the time of Destiny's birth, the Petitioner was also homeless and known for engaging in prostitution. Her reunification plan therefore contained requirements that she obtain housing for herself and her child as well as obtain lawful employment and a steady legal source of income. The

Petitioner's reunification plan was therefore not merely a form-based plan, but was instead specifically tailored to address the issues which led to the child's removal.

2. Petitioner received services promptly, continuously, and in good faith during the entire 12-month period leading up to the permanency hearing.

Beyond establishing a specifically tailored reunification plan, DCW provided Petitioner with timely services which were reasonably calculated to assist her in achieving the requirements of that plan. In assessing the quality of reunification efforts, courts recognize a "critical need for services to be implemented by the [State] early in the intervention process." *In re C.B.*, 611 N.W.2d 489, 495 (2000). Moreover, courts generally require that the efforts be made in good faith, defined by the Supreme Court of Utah as, "a fair and serious attempt to reunify a parent with a child prior to seeking to terminate parental rights." *State ex rel. K.F.*, 201 P.3d 985, 997 (2009). *See also*, *Division of Family Service (DFS) v. N.X.*, 802 A.2d 325, 333 (2002) (requiring a "meaningful case plan" and "meaningful process" that will help the parent be reunited with the child); *Robin v. Superior Court*, 33 Cal.App.4th 1158, 1164 ("the [State] must make a good faith effort to develop and implement a family reunification plan.") (internal citations omitted).

Meaningful services were promptly offered to Petitioner beginning at the outset of the reunification period. By the time Destiny was four months old, Petitioner had already attended and completed a 90-day residential substance abuse program at Union House. During her time at Union House and continuing following her release, Petitioner was afforded weekly one-hour visits with Destiny under the supervision of her caseworker, Ms. White. The visitation schedule was eventually increased to three times a week for two hours. In addition to all of the above, Petitioner was to attend weekly parenting classes. By virtue of these services, DCW maintained consistent and meaningful contact with Petitioner on a weekly basis for the entire 12-month

period. To the extent there was ever a lapse in services, such lapse was attributable to a failure on the part of the Petitioner to take advantage of the services, not a failure by DCW to offer them.

The services offered by DCW represent a good faith attempt to reunify Petitioner with her daughter.[1] In fact, there were several instances where DCW scaffolded its services to meet Petitioner's individual needs. When Petitioner began ending visits early because she was unsure how to parent an infant, she was able to enroll in a weekly infant development class. And her performance during the following visits improved somewhat. While Destiny was not returned to Petitioner at the six-month hearing, due to Destiny's ongoing developmental needs and Petitioner's own challenges, the court did increase the visitation schedule three-fold. Despite numerous failures on the part of Petitioner to attend these visitations (as well as attending one visit at which she tested positive on a routine drug test and another visit visibly intoxicated) the DCW did not cease or reduce visitation. The DCW demonstrated the "full measure of patience" often necessary with parents who attempt to remedy a lack of requisite parenting skills. *In re C.B.*, 611 N.W.2d 489, 494 (2000). The Department clearly acted in earnest in their efforts to resolve the issues that prompted the initial removal.

3. While additional services may have been helpful for Petitioner's personal development, the DCW is responsible for offering reasonable services, not all possible services.

The fact that DCW did not provide services to Petitioner relating to domestic violence is immaterial. The inquiry is "not whether [the department] did everything possible," but instead, "whether [the department] complied with the minimum required under law." *State ex. rel.*

[1] The DCW was arguably under no statutory obligation to make *any* efforts toward reunification with respect to Destiny. Whittier state law contains an exemption from the reasonable efforts requirement where parental rights have been previously terminated with respect to siblings of the child at issue. Whit. Juv. Code § 200(b)(9). Although not at issue, Petitioner's parental rights to Desiree and Dakota were previously involuntarily terminated by the Juvenile Court.

Children, Youth & Families Dept., 47 P.3d 859, 864 (2002). Put differently, "reasonable efforts means doing everything *reasonable,* not everything possible." *In re Eden F.*, 710 A.2d 771 (1998) (emphasis added). Which services are reasonable will be determined by the circumstances of each individual case. *See Elijah R. v. Superior* Court, 66 Cal.App.4th 965, 969 (1998). To that end, the fact that certain services which may have been helpful to Petitioner were not offered does not equate to a failure on the part of the State to make reasonable efforts. *In re Alvin R.*, 134 Cal. Rptr. 2d 210, 218 (2003). This is particularly true where an additional service, while potentially helpful, would not have affected the outcome of the case.

Petitioner takes issue with the fact that services directed towards domestic violence were not offered once domestic violence became a concern. This challenge is misguided for at least three reasons. First, domestic violence was not a concern which prompted the initial removal. The State is only required to offer services reasonably intended to resolve the issues which led to DCW's intervention in the first place. *In re Alvin R.*, 108 Cal.App.4th 962, 972 (2003). The State is neither responsible for, nor capable of, repairing and/or maintaining every aspect of an individual's life that may need attention. To hold otherwise would place a nearly impossible burden on the State. With respect to meeting the reasonable efforts requirement of section 400(c) the extent of DCW's burden reaches to the very limits of the issues which led to Destiny's removal, but no further. Additionally, the record does not indicate that Ms. White or anyone else at DCW was even aware of the domestic violence situation until after the fact. It is well settled that a department is not culpable when it fails to provide services that a parent fails to request. *In re C.B.,* 611 N.W.2d 489, 493-494 (2000). Lastly, even if DCW *had* offered domestic violence related services, this would not have changed the outcome of the Juvenile Court's decision. Such services would not have obviated the fact that Petitioner had tested positive on a routine drug test

during a visit with her child and continues to occasionally consume alcohol. These facts pertain directly to the primary motivation for removal, which was substance abuse. Moreover, by the time the decision to terminate services was made, the abusive relationship had ended. Domestic violence services could have achieved no better result for purposes of the hearing.

B. There Was Not a Substantial Probability That Destiny Would Be Returned to Petitioner's Custody Within the Next Six Months.

The evidence in the record supports the Juvenile Court's finding that there was not a substantial probability the child would be returned to Petitioner if services were extended. The presence of such probability is governed by §400(b) of the Whittier Juvenile Code, which states:

> (b) [T]o determine whether there is a substantial probability that the child will be returned to the parent, the court must find:
>
> 1. The parent has consistently contacted and visited the child;
> 2. The parent has made significant progress in resolving the problems that led to the child's removal; and
> 3. The parent has demonstrated the capacity and ability to complete the objectives of the treatment plan and provide for the child's safety, protection, and physical and emotional well-being.

An application of the evidence to these criteria demonstrates that there was not a substantial probability that the child would be returned to Petitioner within the next six months. A court's finding under § 400(b) must also be understood in light of the ASFA's unwavering focus on the health and safety of the child.

1. Petitioner consciously and voluntarily failed to attend numerous scheduled visits with Destiny.

As part of the reunification plan and related services ordered by the Juvenile Court, the Petitioner was to participate in weekly one-hour visits with her child during the first six months of the reunification period. During this time, Petitioner's participation and attendance was for the

most part consistent.[2] However, following the six-month status review hearing, at which the visitation schedule was enhanced to three two-hour visits per week, Petitioner's performance declined more than it improved. She arrived for her first visit following the status hearing smelling of alcohol, having consumed hard liquor the night before. As a result, the visit could not take place. Following another problematic visit in the weeks leading up to the permanency hearing, Petitioner declared that "she was not going to come to visits anymore if she was just going to be rejected by her own daughter." R. 6. Petitioner missed a visitation every week since. A parent's refusal or failure to take advantage of offered services is a material concern in determining the probability of reunification. *See In re Kayla S.*, 772 A.2d 858, 863 (2001); *SD v. Carbon County Dept. of Family Services*, 57 P.2d 1235, 1241 (2002). Given Petitioner's conscious and voluntary refusal to attend scheduled visitations with her daughter, the Juvenile Court could not have found that Petitioner consistently visited with her child.

2. Petitioner tested positive on a routine drug test, even after completion of her court-ordered substance abuse program, and continues to occasionally consume alcohol.

The central concern which prompted the child's removal in this case was the Petitioner's substance abuse, which resulted in Destiny being born with a blood alcohol level of .06 and testing positive for methamphetamine exposure. As a result, Petitioner was ordered to complete a 90-day residential substance abuse program. Courts generally consider residential (in-patient) programs to be markedly more effective in addressing serious cases of substance abuse than out-patient programs. *Division of Family Services v. N.X.*, 802 A.2d 325, 337 (2002). To the State's knowledge, Petitioner has refrained from drug use for the majority of the reunification period. However, shortly after release following completion of the program, Petitioner tested positive on

[2] Petitioner missed one of her weekly visitations due to a work schedule conflict and tested positive for marijuana during a routine drug test during another visit.

a routine drug test during a visit with her child. Also, by the time Petitioner had completed her court-ordered substance abuse program, the child had developed facial features indicative of fetal alcohol syndrome. Fetal alcohol syndrome is a serious chronic condition which can result in decreased muscle tone, poor coordination, heart defects, and delayed development in: thinking, speech, movement, and social skills. U.S. Dept. of Health & Human Servs., Fetal Alcohol Exposure, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, Mar. 2012. Petitioner has acknowledged that she was at fault for Destiny's condition.

Given these facts, it is reasonable to conclude that Petitioner understood the severely detrimental role that alcohol played in the birth of her daughter and the risk of future harm that may result from her continued consumption. Nevertheless, Petitioner quickly relapsed following the six-month status review hearing. Indeed, the day following the hearing she was sent home from work without pay for drinking beer on the job. That same night she consumed vodka with a male co-worker and arrived for visitation the next morning smelling of alcohol. These incidents, where Petitioner consumed alcohol in inappropriate places and in inordinate amounts, do not represent moderate use; they represent a risk for continued abuse.

In light of Petitioner's positive test result following an intensive rehabilitation program and her continued occasional alcohol consumption, the Juvenile Court could not have found that Petitioner made significant progress in resolving the problems that lead to the child's removal.

3. Petitioner has failed to demonstrate an ability to complete the objectives of her reunification plan and provide for Destiny's safety, protection, and physical and emotional well-being.

Petitioner has made an effort to comply with the terms of her reunification plan (e.g., employment, housing, etc.). But substantial compliance with the terms of a reunification plan, while necessary for establishing that a child will likely be returned to a parent, is not by itself

sufficient for such a finding. The overarching concern is always whether the Petitioner has demonstrated an ability to provide a safe and healthy environment for the child. Here, the Petitioner has failed to make such a demonstration.

Petitioner indicated to her supervisor that she "wanted to do what was right for Destiny," and that she was serious about being Destiny's mother. R. 3. However, the determinative inquiry does not look to the sincerity of an individual's desire to act as a parent, but whether they are indeed capable of doing so. Petitioner has demonstrated on a number of occasions that she still lacks the skills she would need in order to provide for her child's safety, protection, and physical and emotional well-being. Specifically, Petitioner has demonstrated an inability to cope with the stresses of parenting through a pattern of poor and rash decision-making, precisely the opposite of the stability and maturity that Destiny needs at this critical time in her development.

The day after the six-month status hearing, Petitioner was sent home from work without pay for drinking on the job, evidently distraught that Destiny had not been returned to her at that time. She arrived for her first visit following the hearing noticeably smelling of alcohol. For three of the six months since the hearing Petitioner was involved in an abusive relationship with her co-worker, which ultimately forced her to abandon the apartment she had originally secured for herself and Destiny. In the weeks leading up to the permanency hearing, Petitioner consciously and voluntarily failed to attend scheduled visitations due to the perception that her daughter was rejecting her. If the bond that has formed between Destiny and her foster parents is cause for surrender at this point, there is no reason to believe that the circumstances will have improved if services were extended *another* six-months.

The path to reunification is likely to be paved with similar obstacles to what Petitioner has already encountered. Though Petitioner has made some improvements to her situation and has

expressed a sincere desire to parent Destiny, her progress has been limited and inconsistent. In light of the facts, there is no basis for extending the reunification period yet again in the hopes that Petitioner will finally right her course. As stated by the Supreme Court of Iowa, "the crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems," and children "must not be made to await their mother's maturity." *In re C.B.*, 611 N.W.2d 489, 494 (2000). Applying the facts of Petitioner's circumstances to the enumerated criteria of §400(b), the Juvenile Court properly found that there was not a substantial likelihood that the child would be returned to Petitioner if services were extended.

III. Standard of Review

Juvenile cases regarding relative preference involve issues of both fact and law. Where the court is interpreting a statute, these cases are reviewed de novo on the record, and this court reaches its conclusions independently of the Juvenile Court's findings. *In re Meridian H.*, 281 Neb. 465, 474 (2011). Where application of the evidence is in conflict, however, the court may give weight to the fact that the Juvenile Court observed the witnesses and "accepted one version of the facts over another." *In re Damien S.*, 19 Neb. App. 917, 923 (2012).

IV. THE JUVENILE COURT PROPERLY DENIED A RELATIVE PLACEMENT BECAUSE RELATIVE PREFERENCE IS SUBJECT TO THE BEST INTEREST OF THE CHILD, PARTICULARLY SINCE DESTINY HAS BONDED WITH THE GRIFFINS AND THE SIBLING RELATIONSHIP IS NON-EXISTENT.

A preference for relative placement does not trump the best interests of the child. Under state law, a request for placement made by a relative of the child is typically given preferential consideration when compared to a non-relative placement. Whit. Juv. Code § 500(b). Biological connections are not dispositive, however. The Department of Child Welfare (DCW) must also make a determination that placement with a relative is "appropriate" based on the best interest of the child. Whit. Juv. Code § 500(c). As the Supreme Court has pointed out, "we cannot dismiss

the foster family as a mere collection of unrelated individuals." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977). The best interest of the child may be satisfied when: 1) there has been "significant bonding" with foster parents; 2) the child has spent a majority of her life with the foster parents; and 3) the foster parents can give "love, affection, and guidance, and their home provides the stability that the child needs now and may need in the future." *In re Kayla M.*, 785 A.2d 330, 334 (Me. 2001). Attachment theory suggests that the lifelong bonds that develop between child and caretaker occur in the first eighteen months of life. Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. Rev. 1, 30 (2011). Because such attachments are forged over time, Ms. Stone's delay in claiming her preferential status has, in effect, negated it. At the time of the permanency hearing, Destiny had spent eleven months in the care of the Griffins, and made developmental progress with them despite the obstacles she faced at birth.[3] Ms. Stone, on the other hand, is a stranger to Destiny.

The sibling relationship is only relevant insofar as an actual relationship exists. A parent-child relationship may be fundamental, but no such protection has been uniformly applied with regard to siblings. *See* Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 Cornell L. Rev. 1187 (1993) (noting that state courts rarely address constitutional issues involved in sibling visitation, and that federal courts are split). Where a preference exists, state courts consider such factors as: 1) whether the child was raised with a sibling in the same home; 2) whether the child has shared significant common experiences; or 3) whether the child has existing close and strong bonds with a sibling. *In re Erik P.*, 127 Cal Rptr. 2d 922, 928 (2002). Under state law, minor siblings are governed by a different statute than adult relatives, one that only applies to siblings

[3] At the time this case is argued before the Whittier Supreme Court, Destiny will have been in the care of the Griffin family for twenty-one months, nearly two years.

who are detained in protective custody. Whit. Juv. Code § 600(b). As such, this statute – along with its federal counterpart – will not apply in the present case because Desiree and Dakota have already been permanently adopted, which terminated the legal relationship between siblings. *In re Adoption of Schumacher*, 458 N.E.2d 94, 97 (Ill. App. Ct. 1983). Moreover, the record shows that Destiny has never lived in the same home as Desiree and Dakota; in fact, she has never even met them. The reality that no sibling relationship exists, either in fact or at law, militates against removing Destiny from the stability of the Griffin's care.

A. Placement with Ms. Stone is inappropriate because relative preference is subject to the best interests standard and Destiny is bonded to the Griffins.

While relative preference may be a logical starting place, it is not the end of the inquiry. Indeed, the overriding concern in dependency proceedings "is not the interest of extended family members but the interest of the child." *In re Lauren R.*, 148 Cal. App. 4th 841, 855 (2007). In determining the best interest of the child, the Whittier legislature has enumerated several factors. Whit. Juv. Code § 500(c). Therefore, this court must consider: 1) Destiny's special physical, psychological, educational, medical, and emotional needs; 2) the wishes of Petitioner, Ms. Stone, and Destiny; 3) the placement of Destiny's siblings, Desiree and Dakota, in the same home, provided that such placement is in the best interest of each of the children; 4) the moral character of Ms. Stone and other adults living in the home; 5) the nature and duration of the relationship between Destiny and Ms. Stone, as well as Ms. Stone's desire to care for Destiny; and 6) Ms. Stone's ability to provide a safe and stable environment, including legal permanence. Whit. Juv. Code § 500(c). Importantly, no single factor is outcome-determinative. *In re M.F.*, 1 S.W.3d 524, 532 (1999). While these factors focus primarily on the fitness of the relative in question, the development of a bond with a foster parent may require that placement with an otherwise qualified relative be rejected, regardless of a relative preference statute. *In re Lauren.*, 148 Cal.

App. 4th at 855. The totality of the factors weighs against placement with Ms. Stone because of Destiny's special needs, as well as Ms. Stone's lack of a relationship with her and admitted difficulty parenting three adopted children. On top of that, relative preference is mooted by the fact that Destiny has bonded with the Griffins, the only family she has ever known.

1. The totality of the statutory factors regarding relative placement weigh against placement with Ms. Stone.

Application of the statutory factors supports the Juvenile Court's decision. First, there is the matter of Destiny's special physical, psychological, educational, medical, and emotional needs. Whit. Juv. Code § 500(c)(1). For children with special needs, consistency and stability are extremely important, and the ability to provide additional assistance is paramount. *Lucy J. v. State Dept. of Health & Soc. Servs.*, 244 P.3d 1099, 1120 (Alaska 2010) (noting that foster mother had special skills and training as a therapist). Moreover, a disruption to daily routines can affect behavior and learning, and result in unnecessary stress to both the parent and the child. *When Parents of Children with Disabilities Divorce*, GPSolo, April/May 2008, at 36. The DCW and Destiny's independent attorney find that Destiny is making developmental progress in her current placement. This could be attributed to Ms. Griffin's professional training and her prior experience with a family member with special needs. To remove Destiny from an environment where she has established routines may very well be detrimental to that progress.

In fact, disruption of routines was the very reason Ms. Stone gave when she declined the DCW's first attempt at placement. This is linked to the second factor, which considers the wishes of the parent, the relative, and the child. Ms. Stone felt that another child with behavioral problems and developmental challenges would disrupt her family's routine. At the same time, she stated that she and her husband had done enough for Petitioner, and requested that her family not be contacted again. She now claims she wishes to adopt Destiny, but her original response is

telling. Implicit is an admission that either Destiny's care would be lacking, or that Desiree and Dakota's care would be diminished. Neither of these is acceptable.

With regard to the third factor, siblings in the same home, the Whittier statute expressly states that placement is contingent on the continued best interests of each child. Whit. Juv. Code § 500(c)(3). It is unwise to disrupt two families – the Stones and the Griffins – whose children require consistency and stability. It appears that Ms. Stone's mind may have changed out of sympathy for Petitioner, who has made admirable, albeit incomplete, progress in her recovery. Petitioner has likewise only encouraged placement with Ms. Stone once it appeared unlikely she herself would receive custody. Perhaps most important, Destiny's guardian *ad litem* agrees with the DCW's position and recommends placement with the Griffins.

The fourth factor, Ms. Stone's moral character, has not been disputed. Whit. Juv. Code § 500(c)(4). She should be commended for taking Petitioner's two other children into her care and adopting them. If anything, Ms. Stone may be too giving, as she is now considering taking on an additional child that she previously admitted would put strain on her family.

The fifth factor, the nature and duration of the relationship between the relative and child, provides the strongest case against placement with Ms. Stone. Whit. Juv. Code § 500(c)(5). At the time the Juvenile Court rejected a relative placement, Destiny and Ms. Stone had never had any contact. Still, no relationship exists, and it is folly to uproot Destiny from her only known family. The psychological health of the child is the tiebreaker between two qualified parents, particularly where no preexisting relationship is there to affirm the biological link. *In re Meridian H.*, 281 Neb. 465, 470 (2011). For example, in *In re Meridian H.*, a licensed mental health practitioner noted that both the biological family and foster family demonstrated "responsible parenting skills," but recommended placement with the foster family, stating:

> While Meridian shares a common genetic makeup with the siblings, there is no emotional bond built from early-shared experience and common caretaking. At this critical stage of brain development, creating another attachment break has significant negative implications for future emotional and cognitive development. *Id*.

This observation carries equal force here. The entirety of Destiny's early experience has been shaped by her time in the care of the Griffins. While Destiny may share genetics with Ms. Stone, Desiree, and Dakota, that is where the connection ends. There are neither shared memories nor shared lessons learned because their lives have been structured apart. Quite separate from the progress Destiny has made with the Griffins, there is a bona fide risk that Destiny may even be harmed by a change in her placement. While relative preference is a logical starting point, it is not the end of the inquiry. Once a significant bond has been established between a child and her foster parents, concerns of stability supersede those of family preservation.

The sixth factor, Ms. Stone's ability to provide a safe and stable environment, including legal permanence if reunification fails, has not been demonstrated. Whit. Juv. Code § 500(c)(6). The material facts are the same as when she declined custody after Destiny's birth. Ms. Stone previously expressed concern that taking Destiny would disrupt her family's routine, and has not offered any evidence to the contrary. While custody with a relative may seem like an appealing alternative to custody with Petitioner, Ms. Stone's offer was only made in the final weeks of the reunification period, with the permanency hearing looming. The totality of the statutory factors weighs against placement with Ms. Stone because that would prioritize a blood relationship *after* an emotional bond has already stabilized Destiny's life with the Griffin family.

2. Ms. Stone declined the DCW's first placement request, and the months of delay led Destiny to become psychologically attached to the Griffins.

While a relative placement may be preferable in the beginning, such claims weaken with the passage of time. To be sure, a relative seeking placement is given priority over a non-relative

placement. Whit. Juv. Code § 500(b). But the DCW adhered to this policy by considering Ms. Stone as the very first placement option for Destiny. Ms. Stone declined. Not only is the degree of bonding with foster parents a "significant factor" in determining custody, but also delay by a blood relative in filing a petition may be consequential. *In re M.F.*, 1 S.W. 3d 524, 537 (Mo. Ct. App. 1999) (denying custody to aunt who allowed fourteen months to pass before filing petition). Ms. Stone did more than decline placement; she told Ms. White not to contact her again. Indeed, it was not until just prior to the twelve-month permanency hearing that Petitioner informed Ms. White that Ms. Stone had changed her mind. There is nothing in the record to indicate that Ms. Stone contacted the DCW personally, or filed any formal request. As Destiny's aunt, Ms. Stone is not to be summarily dismissed solely by virtue of her late entry into these proceedings, but the court must recognize that Destiny's best interests have changed as a result of the extended period of time she has been in the capable care of the Griffin family. Given that Destiny was placed in the care of the Griffins only after Ms. Stone originally denied placement, these eleventh hours claims of relative preference are unavailing.

It could also be error to ignore a relative's request for custody while reunification efforts are ongoing, but the DCW's obligation to explore relative placements is limited. Once a foster family is in place, placement with a relative should occur "before any substantial damage would be done to the child by a change in placement." *In re Joseph T., Jr.*, 163 Cal. App. 4th 787, 797 (2008). The Juvenile Court employed attachment theory to determine the psychological effect of removing Destiny from her custodial environment. An attachment is defined as "a reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver through which a child forms [her] concept of self, others, and the world." Mandelbaum, 41 N.M. L. Rev. at 30. A child's first attachment typically appears between five and eight months of age. Mary Main,

Erik Hesse, Siegfried Hesse, *Attachment Theory and Research: Overview with Suggested Applications to Child Custody*, 49 Fam. Ct. Rev. 426, 437 (2011). Once an emotional bond has been established, separation usually involves "loud, hopeful crying and calling for the attachment figure," followed by phases of anger, ambivalence, and defiant behavior. *Id*. at 430. Despite the biological link that exists between them, Ms. Stone is a stranger to Destiny. The Griffins, on the other hand, have served as Destiny's primary caregivers since she was one month old, and are now attached to the child. As Ms. White's final report points out, Destiny "clings to Ms. Griffin during visits, cries for Ms. Griffin ... and appears both comforted by and *attached* to Ms. Griffin." R. 6. (emphasis added). As such, relative preference must now give way to what is in the best interest of the child, which is Destiny's continued placement with the Griffins.

B. There is no constitutional right to sibling contact, especially where Petitioner's parental rights have been terminated and Destiny had bonded with the Griffins.

The fundamental rights attendant to the parent-child relationship are well established, but no such rights have been extended to the sibling relationship. Parents have a substantive due process right to "bring up [their] children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that familial relations is "the oldest of the fundamental liberty interests")). Of course, parental rights are not absolute; they must be balanced against the state's interest in protecting children. *Doe v. Heck*, 327 F.3d 492, 520 (7th Cir. 2003). These very proceedings show that Petitioner, the biological mother, has received the process that is due to her before parental rights are terminated. Yet Petitioner now claims that Destiny has the same right to placement with her aunt and siblings. The Supreme Court has declined to decide whether siblings have a constitutional right to associate. *Adoption of Hugo*, 428 Mass. 219 (1998), *cert denied*, 526 U.S. 1034 (1999). In fact, most courts are reluctant to extend due process rights to siblings, particularly after one or more of them have been adopted,

unless there is evidence of a strong sibling bond or evidence of harm. Mandelbaum, 41 N.M. L. Rev. at 20-21. Destiny has no relationship with Desiree and Dakota whatsoever, so this court is not compelled to create an exception where a constitutional right does not exist.

Outside of the parent relationship, a fundamental right has only been found where there is a prolonged caretaker relationship. The Supreme Court identified the type of relationship that could receive due process protection using a three-part test: 1) the relationship must be a biological one; 2) it must involve "emotional attachments that derive from the intimacy of daily association" with each another; and 3) it must have "its origins entirely apart from the power of the State." *Smith*, 431 U.S. at 843-845. This analysis highlights that Destiny's aunt and siblings do share a biological link that, unlike a foster family, has origins apart from the State. Destiny's relatives ultimately the test, however, because they lack the emotional attachment; there is no intimacy because the only people Destiny has associated with daily are Carl and Chelsea Griffin. In contrast, foster parents have been awarded a limited liberty interest in those instances where: 1) biological parental rights have been terminated; 2) the foster parents have cared for the child for more than twelve months since infancy; and 3) the foster parents have entered into an adoptive placement agreement for the child. *Rodriguez v. McLoughlin*, 49 F. Supp. 2d 186, 199 (S.D.N.Y 1999) (noting that this holding "recognizes such a liberty interest in only a discretely identifiable set of foster parents); *see also Brown v. County of San Joaquin*, 601 F. Supp. 653, 661 (E.D. Cal. 1985) (noting that a foster family has "precisely the same form and content as a healthy biological parent-child relationship, and ... and the circumstances of its creation are immaterial). The Griffin family is prepared to adopt Destiny; they have now cared for the child for nineteen months, both before and after Petitioner's parental rights were terminated.

1. Neither federal nor state law creates a right for siblings to associate, particularly since Desiree and Dakota have been permanently adopted.

Ms. Miles is mistaken in her claim that federal law changes the outcome of this case. She attempts to supplement state law with the federal Fostering Connections, and argue that the DCW must seek to place Destiny with her siblings where available. The Fostering Connections Act compels states to make reasonable efforts to place siblings together in the same foster care, kinship guardianship, or *adoptive placement*, unless the joint placement is found to be contrary to the safety and well-being of any sibling. 42 U.S.C. § 671(a)(31)(A) (emphasis added). It has been argued, however, that the term "adoptive placement" is distinct from the word "home," and that the statute does not apply once a sibling's adoption is permanent. Mandelbaum, 41 N.M. L. Rev. at 11. Other courts find that applicability of the Act is "less than clear" where a child was born after her siblings were adopted, and thus "never lived with or knew either of those children as her siblings." *In re Meridian H.*, 281 Neb. 465, 472 (2011). Adoption of siblings as a unit mirrors state law, which requires in the case of children in protective custody that social workers "place the minor together with any siblings or half-siblings *who are also detained* or include in their detention report the continuing efforts to place the siblings together, or the reasons why the siblings are not placed together." Whit. Juv. Code § 600(b) (emphasis added). The thrust of a sibling preference is that children find permanence together. In this case, Desiree and Dakota did just that, but Destiny should not now be ripped from the place she considers "home." In any event, the best interests of the child overrides per se joint placement.

2. Termination of parental rights terminates the sibling relationship and visitation is unnecessary because Destiny's siblings are strangers to her.

Once an order of adoption is entered, the biological parent experiences a "complete and permanent severance of all rights" with regard to her child. *In re Adoption of Schumacher*, 458 N.E.2d at 96. The majority view is that this termination also extends to visitation by others, such

as grandparents, even where visitation is authorized by statute. *Id*. at 97. While some courts seek to encourage sibling contact, such intervention is only warranted where the children have a relationship upon which they can build. *See Matter of Adoption of Anthony*, 448 N.Y.S.2d 377 (Fam. Ct. 1982) (awarding visitation where child had visited siblings and been in phone contact). The DCW has no constitutional obligation to "affirmatively insure a given type of family life." *Black v. Beame*, 419 F. Supp. 599, 607 (S.D.N.Y. 1976) *aff'd*, 550 F.2d 815 (2d Cir. 1977). The Griffin family represents a stable adoptive placement that is in Destiny's best interest. Sibling relationships do not receive "presumptive weight," but rather are one more factor to consider in a flexible best interest standard. *Adoption of Hugo*, 428 Mass. 219, 231 (1998). The Griffins have expressed a desire to sever all contacts with the biological family, but this is within their rights as adoptive parents. *In re Adoption of Vito*, 728 N.E.2d 292, 302 (Mass. 2000). The fact remains that Destiny has never met her biological siblings. As a result, the Juvenile Court was neither compelled to create a familial bond where one does not exist, nor make it a determining factor in assigning custody. Petitioner exaggerates the bond between siblings and the legal significance of relatives who are strangers. The sibling relationship is simply insufficient to outweigh adoptive placement with the Griffins, which the Juvenile Court found to be in Destiny's best interest.

CONCLUSION

For the aforementioned reasons, this court should affirm the decision of the Whittier Court of Appeal.

Dated: January 3, 2013

Respectfully submitted,

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Team 11
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