

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re K.M., a Person Coming Under the Juvenile
Court Law.

FRESNO COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MARIA M.,

Defendant and Appellant.

F063492

(Super. Ct. No. 10CEJ300111-1)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Mary Dolas,
Commissioner.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and
Appellant.

* Before Gomes, Acting P.J., Poochigian, J. and Detjen, J.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

Maria M. (mother) appeals from a September 27, 2011 order terminating parental rights (Welf. & Inst. Code, § 366.26)¹ to her then nearly three-year-old daughter, K.M. Mother contends the court violated her due process rights at the termination hearing by proceeding in her absence because the Fresno County Department of Social Services (Department) did not provide her with notice of the hearing and violated a statutory requirement (§ 294, subd. (a)(5))² to serve the maternal grandparents with notice of the termination hearing when it could not locate her.³

We affirm, as mother does not and, on this record, cannot make any showing of prejudice. Assuming for the sake of argument that the Department should have served her with notice when she appeared for visits with K. after the court found the Department had exercised due diligence in attempting to locate her, and given a concession that the Department did not serve notice on the maternal grandparents, we conclude the Department's errors were harmless. (*In re James F.* (2008) 42 Cal.4th 901, 916-918 (*James F.*.)

FACTUAL AND PROCEDURAL BACKGROUND

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² Section 294, subdivision (a)(5) requires that notice of a section 366.26 hearing be given to a dependant child's grandparents, if their address is known and the parent's whereabouts are unknown.

³ K.'s father never appeared as a party in these proceedings. While mother identified one man as K.'s father, whom the Department considered an alleged father because he was not married to mother, had not provided ongoing care or support, and was not listed on K.'s birth certificate, he was excluded from the case after paternity testing revealed he was not K.'s biological father. Mother thereafter identified another man as K.'s possible father, but she never provided any information regarding him.

In May 2010, a social worker investigating a referral the Department received from mother's brother found mother and K. at the address the brother provided. Also at the address was K.'s maternal grandmother, Stacy O., who had an open court case involving her own children. Mother told the social worker that while she was living at that address, which was her brother's home, she was homeless and about to obtain her own apartment. Mother, who knew 18-month-old K. had eczema, claimed she knew how to care for it. Mother admitted she had never taken K. to a doctor for medical treatment, stating it was because she had just received K.'s medical card, she had transportation problems, her phone was disconnected, she was "having a hard time," and she was "lazy." The social worker saw that K. had severe eczema all over her body and K. had scratched herself to the point that she bled. Mother had two other children, K.'s half-siblings, who lived with their paternal grandmother, Sheryl K., who was applying for legal guardianship of the children.

A protective hold was placed on K. and the Department initiated dependency proceedings over her based on mother's failure to provide adequate medical care for K.'s eczema and to obtain medical treatment for K. since K.'s birth, and mother's history of substance abuse, which included marijuana and alcohol. At K.'s detention, mother listed her mailing address as her brother's address. At the May 6, 2010 detention hearing, which mother attended, the juvenile court ordered the Department to offer mother an array of services and provide her reasonable supervised visits with K. no less than twice per week.

Mother attended the June 8, 2010 jurisdiction hearing, at which the juvenile court found true allegations of an amended petition after mother submitted on jurisdiction. The dispositional hearing was continued several times; mother appeared at hearings held on July 13 and 27, 2010, and August 24, 2010, but did not appear at the September 21, 2010 hearing at which the dispositional orders were made. In the report prepared for the July 13 hearing, the social worker stated that mother had visited K. on May 10, 12 and 17.

The visits went well; mother played with K. and tended to her needs. As of the writing of the report, supervised visits were occurring twice a week. Mother entered a residential treatment program on May 14, 2010. On June 29, she was transferred to a second substance abuse treatment program, but she self-exited that program on July 1, 2010, and asked to be referred to Turtle Lodge.

At the September 21 hearing, the juvenile court exercised its dependency jurisdiction over K. and, having adjudged her a dependent, removed her from parental custody and offered mother reunification services. The court ordered reasonable supervised visits between mother and K. At mother's counsel's request, the court ordered a post-disposition mediation for October 26, 2010.

Mother appeared for the post-disposition mediation. The mediation agreement stated that mother was receiving supervised visits twice per week. With respect to her treatment for substance abuse, the agreement stated that after mother discharged herself from a program on July 1, 2010, the Department twice directed her to participate in other programs, once in July and again in August, but mother did not appear at either program. There were no openings at the Turtle Lodge program that mother wanted to attend. The social worker was going to schedule a staffing to admit mother into another residential program until there was an opening at Turtle Lodge. The court adopted the mediation agreement at a hearing held on October 26, 2010.

Six-Month Status Review

Mother thereafter failed to participate in any court-ordered services. Despite numerous referrals to inpatient drug treatment, she failed to enter a program. She told a social worker on December 8, 2010, that she was living in an apartment near Dakota and Cedar, but she was planning on moving by the end of the week. Mother agreed her address was her brother's address and provided her telephone number. At a December 10, 2010 staffing, mother stated she lived with her boyfriend's mother, but she did not provide his name. Although mother agreed to enter residential treatment at that meeting

and was referred to yet another program, she failed to enter the program. When the social worker tried to call the phone number mother provided, the phone was disconnected. Mother left a voice message with the Department on December 16, 2010 stating that she would come by the office, as she did not have a phone number to call her back. Mother, however, never appeared.

In a report prepared for the March 15, 2011 six-month review hearing, the Department recommended the court terminate mother's reunification services (§ 366.21, subd. (e)), and set a section 366.26 hearing to select and implement a permanent plan for K. The social worker reported that mother failed to visit K. consistently. While mother was scheduled to visit K. twice a week, on Wednesdays and Fridays, she visited only on Wednesdays and did not explain why she did not visit on Fridays. Mother had not visited K. since December 16, 2010. Visits were moved from the Department to the Abrazo Agency due to mother's inconsistent visitation and failure to contact the Department. When mother showed up for a visit at the Mercer building on December 29, 2010, she was told the visits had been transferred to the Abrazo Agency and given the telephone number to call to schedule her visits. Mother, however, did not call the number or contact the social worker regarding visitation. The social worker spoke to Stacy about mother's visits, but Stacy did not know how to reach mother. Stacy also told a social worker who contacted her on March 1, 2011 that she would attend a permanency team meeting and would let mother know about the meeting if she saw her. Neither Stacy nor mother, however, attended the meeting.

Mother appeared at the March 15, 2011 six-month review hearing, which was continued so a contested hearing could be held. Mother, however, failed to appear at the March 30, 2011 settlement conference. Mother's counsel, who said she had contacted mother earlier that day, confirmed the matter for trial on April 5.

When mother failed to appear at the April 5 hearing, mother's counsel asked that the matter be trailed until mother arrived, but stated she had no information regarding

mother's whereabouts or arrival time. The juvenile court proceeded with the hearing after noting that mother was present at the March 15 hearing, when she was ordered to appear for the April 5 hearing. The juvenile court found mother had received proper notice of the hearing and determined by clear and convincing evidence that she failed to regularly participate in services, failed to regularly contact and visit K., and made no progress. The court ordered reunification services terminated and set a July 19, 2011 section 366.26 hearing to select and implement a permanent plan for K. The court reduced mother's visits to once per month supervised by the Department or an approved third party, conditioned on mother contacting the Department and requesting visits. Notice of the right to seek review of the court's decision by way of writ petition was served by mail to mother at her brother's address and the address of the first treatment program mother entered. Mother did not pursue writ review.

The Due Diligence Finding

The Department unsuccessfully attempted to serve mother with notice of the section 366.26 hearing at her brother's address, both by certified mail and personal service. When personal service was attempted, the male occupant who answered the door said he did not know mother. The Department sent mother notice of the hearing at another address by certified mail, and attempted to personally serve her there, but the address did not exist. The Department attempted to personally serve mother notice at a third address on 14 separate occasions, but there was either no answer or the process server could not get into the gated community. The Department also sent a notice to mother at the third address by certified mail.

A Department clerk conducted a search of 14 different sources in an effort to locate and serve mother with notice. Those sources included the Department's case management records, child support, a prison locator, the sheriff's department records, parole, county jail, adult probation, CALWIN/HSS, CWS/CMS, Department of Motor Vehicles, SSDI and Meds Lite. The clerk also searched property rolls and the white

pages as well as conducted a Zaba search. The search yielded nine possible addresses for mother in Fresno, which included the addresses mentioned above. The Department sent letters addressed to mother at each of those locations in an attempt to provide her notice, but as of July 8, 2011, the Department had not received any responses.

The Department filed a request to continue the July 19 section 366.26 hearing to perfect notice of the hearing on mother. The Department asked the juvenile court to find it had exercised due diligence in attempting to serve mother and to authorize substituted service on her counsel, as permitted by statute (§ 294, subd. (f)(7)(A)).⁴ The social worker stated that on May 23, 2011 she spoke with mother by phone regarding visits, but had since been unable to locate her as her phone and message phone numbers, as well as her address, were invalid. The Department also filed a declaration of due diligence, which listed the sources searched for mother's address, the addresses obtained, and the attempts made to serve her both personally and by certified mail, none of which were successful.

At the July 19, 2011 hearing, the juvenile court found that mother's whereabouts were unknown at that time, based on the declaration of due diligence, as well as mother's failures to appear, respond to the service attempts, and maintain contact with the Department or juvenile court. The juvenile court authorized the Department to send notice of the hearing to mother's counsel, as mother was aware of her appointed counsel

⁴ Section 294, subdivision (f)(7)(A) provides, as pertinent here, that when a parent's identity is known but his or her whereabouts are unknown, and the parent cannot be served with reasonable diligence in the manner provided by statute, the Department shall file an affidavit with the court describing the efforts made to locate and serve the parent, and if the court determines there has been due diligence in attempting to locate and serve the parent, service shall be to the parent's attorney of record. The court is also required to order that notice be given to the child's grandparents, if their identities and addresses are known.

and how to reach her, and continued the hearing to September 27, 2011. The Department served mother with notice of the hearing by mailing the notice to her counsel on July 22.

Section 366.26 Hearing

Pending the section 366.26 hearing, the Department prepared a report in which it recommended that the court implement a permanent plan of adoption on K.'s behalf and terminate parental rights, as K. was generally adoptable and likely to be adopted, mother failed to provide for K.'s needs and had not maintained consistent contact with her, and K. was developing a parent/child relationship with her foster parent, who was willing and able to provide her with a permanent plan of adoption.

The social worker stated in the report that between December 16, 2010 and April 5, 2011, when visitation was reduced to once monthly, mother visited only once, on January 11, 2011. Once visits were reduced, they were to take place on the third Friday of the month, supervised by the Department. After the case was transferred to Assessment/Adoptions on May 6, 2011, mother's whereabouts had been unknown or unreliable. Mother did not always keep her monthly visits due to the lack of stable housing. The social worker stated: "There were scheduled visitation dates, once [mother's] location or phone number was known to the Department, on the following dates: 6/17/2011 no show; 7/29/2011 present; 8/31/2011 present; and 9/26/2011, no show due to illness."

The social worker opined that K. did not have a parent/child bond with mother due to mother's lack of consistent contact with K., which led to mother's relationship being more like a visitor. The social worker reported that hour-long visits were observed. There was little evidence mother was able to provide structure for K., as mother would sit on a chair and occasionally converse with K. or interact with her during play, and she was not always able to get K. to follow her directions or respond if she asked K. a question. Mother offered little physical or emotional nurturing during visits. K. would distance herself from mother by playing with toys, and would not respond to mother. On one visit

mother asked K. if she loved her and K. stated “no” twice. On another visit, mother asked K. what she ate for breakfast and K. stated her “mommy” had made her oats, referring to her foster parent. When mother told K. that she was her mommy, K. hesitated and finally said “you are mommy.” Mother also had difficulty engaging K.

Mother did not appear at the September 27, 2011 section 366.26 hearing. The juvenile court noted the July 19 declaration of due diligence regarding the Department’s efforts to locate mother, the court’s previous finding that mother’s whereabouts were unknown, and the court’s authorization to serve mother’s counsel. Mother’s counsel objected to the Department’s recommendation of adoption as a permanent plan since there appeared to have been recent communication between mother and the Department based on the statement regarding visitation in the social worker’s report that on September 26, there was a “no show due to illness.” The court responded that clearly mother had not maintained contact with the Department, had not attended court hearings, and it did not appear she was maintaining contact with her attorney. The court proceeded with the hearing, finding that notice of the hearing was sent to all parties as required by law and noting that no one claiming to be K.’s parent had appeared. Having found it was likely K. would be adopted, the court ordered parental rights terminated.

DISCUSSION

Mother contends the Department failed to give notice of the pending section 366.26 hearing as required by statute. While she does not claim that the juvenile court erred in authorizing service on her attorney after finding the Department exercised due diligence in attempting to locate her, she does claim that once she “re-surfaced” by attending visits in July and August 2011, the Department was statutorily required to serve her with notice of the hearing, as provided in section 294, subdivision (f)(7)(C).⁵ She

⁵ Section 294, subdivision (f)(7)(C) provides that “[i]n any case where the residence of the parent becomes known, notice shall immediately be served upon the parent” as provided in Section 294, subdivision (f)(2) through (f)(6).

contends the Department could have served her personally at one of those visits or, at a minimum, verbally informed her of the hearing. She also asserts the Department could have contacted Sheryl, the paternal grandmother of K.'s half-siblings, who may have known her whereabouts. Mother further contends the Department violated its statutory duty to serve notice of the section 366.26 hearing on K.'s maternal grandparents, as required by section 294, subdivision (f)(7)(A). She concludes by arguing these errors were structural in nature and therefore require per se reversal of the order terminating her parental rights. (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116 (*Jasmine G.*))

The Department counters the notice to mother satisfied the requirements of section 294, subdivision (f)(7)(A). The Department asserts the record does not affirmatively show that mother's residence became known to it after the juvenile court authorized service on mother's attorney, and therefore the Department was not required by section 294, subdivision (f)(7)(C) to serve mother after she appeared for visits. Relying on the well-settled principle that an appellant must make an affirmative showing of error by an adequate record (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 72), the Department contends that mother's assertion that she could have been provided verbal notice of the hearing at one of the visits fails because the record is silent on what mother was told, or not told, during visits. While the Department concedes it did not serve notice of the section 366.26 hearing on K.'s maternal grandfather as required by section 294, subdivisions (a)(5) and (f)(7)(A), the Department asserts the due process error was harmless beyond a reasonable doubt, as there is no indication in the record that serving the maternal grandfather would have facilitated notice to mother and the undisputed facts preclude a finding that actual notice to mother would have changed the outcome of the section 366.26 hearing.

Since the Department has conceded it failed to provide the maternal grandfather notice pursuant to section 294, subdivisions (a)(5) and (f)(7)(A), we will assume, without deciding, that the Department also was obligated to serve notice of the section 366.26

hearing on mother once she appeared for visits after the due diligence finding. We conclude, however, that these due process and statutory violations were not structural errors and therefore do not require automatic reversal of the order terminating parental rights. (*James F.*, *supra*, 42 Cal.4th at pp. 918-919.) We further conclude under the facts of this case that mother suffered no prejudice, even under a harmless beyond a reasonable doubt standard, and therefore is not entitled to reversal.

No Structural Error

Relying on *Jasmine G.*, *supra*, 127 Cal.App.4th at p. 1116, mother contends that due process violations, and in particular deficient notice to a parent and grandparent of a section 366.26 hearing, is a structural defect that requires automatic reversal. Her reliance on *Jasmine G.*, however, is misplaced.

In *Jasmine G.*, a social services agency made absolutely no effort to locate and serve notice on a parent for approximately five months prior to a section 366.26 permanency planning hearing, even though it had eight telephone contacts and one meeting with the parent during that time period and had obtained the parent's current residence. (*Jasmine G.*, *supra*, 127 Cal.App.4th at pp. 1113-1114 & 1116.) The appellate court held the failure to comply with the notice requirements constituted a due process violation, which was structural in nature requiring automatic reversal, rather than trial error subject to harmless error analysis. (*Id.* at pp. 1114-1116.)

The court began by discussing *Arizona v. Fulminante* (1991) 499 U.S. 279 (*Fulminante*), a criminal case, which explained that all constitutional errors are not equal. (*Jasmine G.*, *supra*, 127 Cal.App.4th at p. 1115.) In *Fulminante*, the United States Supreme Court distinguished trial errors, which may be evaluated to see if the error was harmless beyond a reasonable doubt, from structural errors, which defy analysis by a harmless-error standard and demand automatic reversal. (*Jasmine G.*, *supra*, 127 Cal.App.4th at p. 1116, citing *Fulminante*, *supra*, 499 U.S. at pp. 307-309.) Structural defects are those "affecting the framework within which the trial proceeds, rather than

simply an error in the trial process itself. ‘Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.’” (*Fulminante, supra*, 499 U.S. at p. 310.)

The *Jasmine G.* court observed that California courts have applied *Fulminante* outside the criminal context, including notice failings in juvenile dependency proceedings, although the courts were divided on whether such due process errors were structural in nature. (*Jasmine G., supra*, 127 Cal.App.4th at p. 1115.) Notably, one of the California decisions cited was *In re Angela C.* (2002) 99 Cal.App.4th 389 (*Angela C.*), an opinion from this court, which came down on the side of trial, rather than structural, error. The court in *Jasmine G.*, however, distinguished *Angela C.*, as there the error was the social services agency’s failure to give the parent, who failed to appear at the selection and implementation hearing despite being given proper notice, notice of a continued hearing date, while the failure in *Jasmine G.* was “qualitatively different,” as the social services agency never tried to give the parent notice of the hearing, despite having been in regular contact with her and having a current address. (*Jasmine G., supra*, 127 Cal.App.4th at pp. 1117-1118.) The appellate court held the failure to attempt to give a parent statutorily required notice of a selection and implementation hearing is a structural defect that requires automatic reversal, reasoning that the absence of any reasonable attempt to provide such notice goes well beyond trial error. (*Id.* at p. 1116.)

We are not persuaded by mother’s reliance on *Jasmine G.* First, the situation in *Jasmine G.* is factually distinguishable from the circumstances here, as here the Department did attempt to give mother the required notice of the section 366.26 hearing by searching numerous resources in an effort to locate her and attempting to serve notice at the addresses it uncovered, and did so in a time-sensitive manner. While mother appeared for visits at the Department after the due diligence finding was made, there is no evidence that, like the social services agency in *Jasmine G.*, the Department ever

obtained a current address for her or failed to tell her about the hearing. Moreover, as noted above, this court in *Angela C.*, *supra*, 99 Cal.App.4th at p. 395, and other cases, including *In re Sara D.* (2001) 87 Cal.App.4th 661, 673, has held due process errors in dependency cases may be reviewed under a harmless error standard.

Most importantly, mother overlooks *James F.*, in which our Supreme Court cautioned against using the structural error doctrine in dependency cases. (*James F.*, *supra*, 42 Cal.4th at pp. 915-916.) The issue in that case was whether a juvenile court's error in the procedure used to appoint a guardian ad litem for a parent in a dependency proceeding required automatic reversal or was subject to harmless error review. (*Id.* at pp. 904-905.) While there was no dispute that due process was not satisfied, the court concluded the due process violation was trial, not structural, error and therefore was amenable to harmless error analysis. (*Id.* at pp. 905, 915, 918-919.)

The court explained that the structural error doctrine was developed in criminal cases, citing *Fulminante*, *supra*, 499 U.S. 279 and *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 (*Gonzalez-Lopez*). The court noted that in *Fulminante*, the United States Supreme Court distinguished between ““trial errors”” that ‘occur[] during the presentation of the case to the jury’ and the effect of which can ‘be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt’ [citation], from other, less common constitutional errors that are ‘structural defect[s] affecting the framework within which the trial proceeds’ so that they ‘defy analysis by “harmless-error” standards’ and can never be harmless.” (*James F.*, *supra*, 42 Cal.4th at p. 914.) Our Supreme Court further explained that “[s]tructural defects requiring automatic reversal of a criminal conviction typically involve basic protections without which ““a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair[,]”” such as the total deprivation of the right to counsel, denial of the right of self-representation, trial before a judge who is

not impartial, unlawful exclusion from a grand jury of members of the defendant's race, denial of the right to trial, and admission of a defendant's involuntary confession. (*Id.* at p. 914.)

The court noted that in *Gonzalez-Lopez, supra*, 548 U.S. 140, the United States Supreme Court explained, when holding that erroneous deprivation of a criminal defendant's Sixth Amendment right to counsel of choice was a structural defect requiring automatic reversal, that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (*Id.* at p. 150.)" (*James F., supra*, 42 Cal.4th at p. 914.)

The *James F.* court pointed out significant differences between juvenile dependency proceedings and criminal proceedings that affect the determination of whether an error requires automatic reversal of the resulting judgment. (*James F., supra*, 42 Cal.4th at p. 915.) These differences include (1) different rights and protections for parents in dependency proceedings than for criminal defendants, such as reliance on hearsay and the unavailability of the Fourth Amendment exclusionary rule in dependency proceedings; (2) a criminal defendant's entitlement to trial by jury, while in dependency cases the juvenile court makes all factual and legal determinations; (3) differing burdens of proof; and (4) that the contested issues in criminal proceedings normally involve historical facts, whereas the issues in dependency proceedings normally involve evaluations of the parents' present willingness and ability to provide appropriate care for the child, and the existence and suitability of alternative placements. (*Id.* at p. 915.) The court also noted that the ultimate consideration in a dependency proceeding is the child's welfare, which has no clear analogy in a criminal proceeding. (*Ibid.*) The court

explained that these differences “provide reason to question whether the structural error doctrine that has been established for certain errors in criminal proceedings should be imported wholesale, or unthinkingly, into the quite different context of dependency cases.” (*Id.* at pp. 915-916.)

Our Supreme Court then noted that while the Court of Appeal had concluded the procedural error at issue caused no actual harm under the facts of the case, it nonetheless decided the error was structural, thereby precluding harmless error analysis. (*James F.*, *supra*, 42 Cal.4th at pp. 916-917.) The court, however, rejected the Court of Appeal’s finding of structural error, instead concluding it was appropriate to use a harmless error analysis because, unlike structural error, prejudice could be determined without ““a speculative inquiry into what might have occurred in an alternate universe.”” (*Id.* at p. 914.) Although the court recognized that the United States Supreme Court had categorized “a very few constitutional errors” as structural, “not because they defied harmless error analysis, but because prejudice was irrelevant and reversal deemed essential to vindicate the particular constitutional right at issue,” the court also noted the United States Supreme Court had not applied that reasoning outside the context of criminal proceedings or ever held that harmlessness is irrelevant when the right of procedural due process has been violated. (*Id.* at p. 917.) The court could not “agree with the Court of Appeal majority that prejudice is irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child.” (*Id.* at p. 917.) The court concluded: “If the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required.” (*Id.* at p. 918.)

Given our Supreme Court’s caution in *James F.* against a broad use of structural error analysis in dependency proceedings and its holding that denial of notice and a hearing may be harmless where the outcome of the proceeding has not been affected, we

have reviewed the record to determine whether the due process error caused mother any actual harm. We conclude it did not.

First, neither the failure to provide notice directly to mother after the juvenile court's due diligence finding nor the failure to serve the grandparents deprived mother of the opportunity to communicate with counsel and present her side prior to losing her parental rights. The record well establishes that even when mother received proper notice of other hearings over the course of the dependency, she did not maintain contact with counsel and absented herself from those hearings. Neither did the notice failures prevent mother's counsel from being able to adequately represent her. Counsel tried to remain in contact with mother and was vigorous in protecting her rights. The fact that counsel could do little more than object to termination is not the Department's fault. Rather, it was mother's lapses that gave counsel no evidence with which to make a case that parental rights should not be terminated.

Further, while the implications of a section 366.26 hearing are considerable, the substantive scope of the hearing is fairly limited. The court must first determine whether the child is likely to be adopted (§ 366.26, subd. (c)(1)). We note mother does not contest on appeal the sufficiency of the evidence to support the court's adoptability finding. If a dependent child is likely to be adopted, the statutory presumption is that termination is in the child's best interests and therefore not detrimental. (§ 366.26, subs. (b), (c)(1); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) It would have been mother's burden to show that termination would be detrimental under one of the statutory exceptions in section 366.26, subdivision (c)(1)(B). (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

The only potentially applicable exception in this case would have been the beneficial relationship exception (§ 366.26, subd. (c)(1)(B)(i)) based on (1) a parent's regular visitation and contact with the child and (2) the benefit the child would receive from continuing the relationship. However, as the court expressly found at the March

2011 six-month status review hearing, mother failed to regularly contact and visit K. As the record shows, in the nine months between December 2010 and September 2011, mother visited K. only three times. Therefore, mother could not have effectively made, let alone prevailed on, a beneficial relationship exception claim.

Under these circumstances, we conclude the notice problems at the section 366.26 stage caused no actual harm to mother. Any error was harmless beyond a reasonable doubt.

DISPOSITION

The order terminating parental rights is affirmed.