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

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

MADERA COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

JOSE S.,

Defendant and Appellant.

F064683

(Super. Ct. No. MJP016746)

**OPINION**

**THE COURT\***

APPEAL from an order of the Superior Court of Madera County. Thomas L.  
Bender, Judge.

Mary L. Williams, under appointment by the Court of Appeal, for Defendant and  
Appellant.

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\* Before Wiseman, Acting P.J., Cornell, J. and Gomes, J.

Douglas W. Nelson, County Counsel, and Miranda P. Neal, Deputy County Counsel, for Plaintiff and Respondent.

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Jose S. appeals from the juvenile court's order terminating his parental rights (Welf. & Inst. Code, § 366.26)<sup>1</sup> to his infant son, Adrian M. Challenging orders made at the dispositional hearing, he contends both his trial attorney and the juvenile court failed to consider and apply section 361.2, which requires the court to place a child with a noncustodial parent if that parent requests custody, unless the court finds placement would be detrimental to the child. He also contends the juvenile court was precluded from terminating his parental rights because it never found giving him custody would be detrimental to Adrian. On review, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The Madera County Department of Public Welfare (Department) initiated dependency proceedings over Adrian on July 6, 2011,<sup>2</sup> after he tested positive for methamphetamines at birth. His mother, Melissa S. (mother), told the social workers Adrian's father was Ricardo M., and that his name was on the birth certificate. Mother has five other children, none of whom were in her custody. Three of the children were in a guardianship with their maternal grandmother, one was in a guardianship with a maternal uncle, and another, then 10-year-old Cassandra S., was adopted after being the subject of dependency proceedings in which mother failed to reunify with her. Mother said she completed a rehabilitation program in 2007, but relapsed after getting back with her "ex-husband" Jose, with whom she used methamphetamine and engaged in domestic violence. Three months after her fifth child was born in December 2009, she left Jose

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<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> All references to dates are to the year 2011, unless otherwise stated.

and started a relationship with Ricardo, who at the time of the detention hearing was in jail on a probation violation.

The Department alleged in the dependency petition that mother placed Adrian at substantial risk of physical harm or illness due to her ingestion of methamphetamine during pregnancy and her failure to obtain appropriate prenatal care (§ 300, subd. (b)). The petition also alleged Adrian was at risk of harm because mother had not addressed her substance abuse problem which had resulted in termination of her parental rights to Adrian's half-sibling, Cassandra, and Cassandra's adoption (§ 300, subd. (j)). The petition listed Ricardo as Adrian's alleged father.

Mother and Ricardo appeared at the July 7 detention hearing. County counsel informed the court the Department believed Jose was the presumed father based on information it had that mother and Jose were married. Mother confirmed she and Jose married on June 4, 2008, but said they separated "[a] year later[,]" although they were still married. Mother gave the court Jose's mother's address. While mother knew Jose was serving a prison sentence somewhere in Arizona after he was sentenced out of Madera, she did not know where he was, his release date or the charge. Mother claimed that Ricardo, with whom she started a relationship in January 2009, was Adrian's father. Although Ricardo was not at Adrian's birth and did not "sign the papers," mother said his name was on the birth certificate. Adrian was still in the hospital, but would be released soon.

The juvenile court found Jose to be Adrian's presumed father and Ricardo an alleged father. The court ordered paternity testing for Ricardo, advised Ricardo's attorney, Karen Mitchell, that she could look into whether he wanted to sign a declaration of paternity, and stated notice would have to be given to Jose, who could be tracked down through his mother, M.H. The court detained Adrian from mother and Ricardo, and ordered him placed, at the Department's recommendation, with Ricardo's mother, B.L. A contested jurisdictional hearing was set for July 19.

On July 15, the Department mailed notice of the jurisdictional hearing to Jose at a post office box in Ellijay, Georgia, which the Department stated in its jurisdiction report was his residence. At the July 19 hearing, mother and Ricardo were present, but Jose was not. The court acknowledged notice was sent him at a post office box in Georgia. The hearing was continued to July 26.

At the July 26 jurisdictional hearing, the Department, mother, Ricardo and Adrian's attorney all submitted on the Department's report. Jose was not present. The court adopted the recommended findings and orders, including findings that the petition's allegations were true and Adrian was a person described by section 300, subdivisions (b) and (j). The dispositional hearing was set for August 18. Notice of the dispositional hearing was mailed to Jose at the post office box in Ellijay, Georgia.

On August 16, the Department filed a motion to continue the dispositional hearing, as Jose had been located on August 15, the Department was attempting to provide him with notice, and it needed additional time to determine if Jose could be offered reunification services. The Department mailed notice of the August 18 dispositional hearing to Jose at an address in Eloy, Arizona, on August 17.

At the August 18 hearing, County counsel informed the court she had information on someone with Jose's name who was committed to state prison, but she did not know if that person was Jose. The Department sent the incarcerated person a "JV 505" form, which is a parentage questionnaire, along with notice and "copies of things." The court noted that Mitchell was Jose's attorney; Mitchell acknowledged receiving Jose's contact information.<sup>3</sup> She explained that she looked up Jose's name on the prison locator system; she was unsure if it was Jose since there was no date of birth listed. The court continued

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<sup>3</sup> It is not clear from the record precisely when Mitchell was appointed to represent Jose. The first mention of her representation of him is at the August 18 hearing.

the dispositional hearing to September 8. On August 25, the Department mailed notice of the September 8 hearing to Jose at the address in Eloy, Arizona.

The Department's report for the dispositional hearing updated the status of the determination of biological paternity. On August 12, the Department received the genetic test results which showed that Ricardo is not Adrian's biological father. Mother then told a social worker that Jose might be Adrian's biological father. In telephone conversations with a social worker on August 24 and 25, Jose explained he was paroled on November 1, 2010 and "slept with" mother "one time" that same day. While on parole, he was arrested for possession and transportation of a controlled substance. He was sent back to prison for a parole violation on November 26, 2010, and was serving a four-year prison sentence in a correctional facility in Eloy, Arizona. Jose wanted genetic testing to determine if he was Adrian's biological father. The Department did not obtain a social study for mother or Jose, since it recommended denial of reunification services. In a section entitled "Consideration of Placement with Non-Custodial Parent," the Department noted Jose's incarceration in an Arizona prison, that he was reportedly serving a four-year sentence, and he was unable to take placement of Adrian at that time. Adrian remained placed with Ricardo's mother, B. B.'s home had been assessed, but not approved, due to conditions around the home. While B. wanted to continue to care for Adrian even though Ricardo was not his biological father, she needed financial assistance to do so. The Department, however, could not issue foster care payments until she completed the relative approval process.

The Department recommended denial of reunification services for mother under section 361.5, subdivision (b)(10) and (11), and for Jose under section 361.5, subdivision (e)(1), as he was incarcerated and it would be detrimental to Adrian to provide Jose services. In support of the denial, the Department reported that Jose told a social worker on August 24 that while he began serving a four year sentence on November 26, 2010, he should only have to serve "half-time" and hoped to be released by November 28, 2012.

Jose had not met Adrian and did not have an opportunity to bond with him due to his incarceration. The Department further noted that reunification services for a child under three were not to exceed six months, and Jose's incarceration and expected release from prison fell outside that time frame. The Department was not aware of any detriment that would result to Adrian if Jose did not receive reunification services.

On August 25, Jose completed a JV-505 "Statement Regarding Parentage," which was filed with the court on September 7. Jose asserted he did not know if he is Adrian's parent; he requested blood or DNA testing to determine whether he is his biological parent. In a written statement, Jose explained that he was transferred to the Arizona prison due to overpopulation of California state prisons, he would be released by next year, he wanted a DNA test because he "believe[d] this child is not mine[,] and if after the DNA test results "it comes out that the child is mine, I will take full responsibility [for] my part as a father." In an accompanying letter to the court, Jose acknowledged receiving a number of forms. He stated he wanted a DNA test as soon as possible and was "not signing any papers admitting as being the parent to Adrian [],[,]" as he "very strongly believe[d] I am not the father of this child." Jose asked that the DNA test be taken at the Arizona prison, as he did not want to return to Madera County since he wanted to complete the prison drug program in which he was participating.

Neither Ricardo nor Jose was present at the September 8 hearing, although they were represented by Mitchell. The hearing was continued to September 22 after mother requested a contested hearing. The court ordered genetic testing for Jose.

At the September 22 dispositional hearing, neither Ricardo nor Jose were present, but they were again represented by Mitchell. Mitchell acknowledged Jose was a presumed father, but stated DNA tests were pending; she also stated that mother and Ricardo were an intact couple. Mitchell had not been in contact with Ricardo. The court asked if Ricardo wanted to try to elevate his paternity status from alleged to something

else. County counsel stated he was excluded based on the genetic testing, and Mitchell agreed.

The court proceeded with the contested hearing. The Department's dispositional report, with its attachments, was entered into evidence, and Department social worker, Valerie Rutherford, testified. Rutherford had spoken with Jose. Mitchell asked Rutherford if Jose had "an interest in this child if it's his?" Rutherford responded, "Yes, he does." Rutherford believed Jose said his release date was in two years and agreed November 2012 was the date he mentioned. Jose explained he was in a prison program which would cut off some of his time. Rutherford did not know if Jose's DNA test had been completed. Mother also testified. Regarding Jose, she testified their relationship began in 1999 and they used drugs together throughout their relationship. After completing a court-ordered drug treatment program in 2007, mother stopped using and remained sober, but relapsed after she got back together with Jose following his release from prison in January 2008. They got married, but their relationship was not healthy. Mother left Jose when she was pregnant with her fifth child. Mother said that when she and Jose were together, they engaged in continued drug use because they were both addicts.

After testimony concluded, the attorneys and court discussed Ricardo's status and whether he had signed a declaration of paternity. Mitchell did not think he signed one, explaining that while they had talked about doing it, they wanted to do the DNA test first and "it kind of stopped there" after Ricardo found out he was not the biological father and Jose appeared on the scene. Mitchell added, for the record, that Jose did not think testing would show him as the father, but if it did, she would have a conflict at that time. Mitchell agreed with the court that Ricardo had been excluded after the DNA test showed he was not the biological father. The court concluded Ricardo was an alleged father, as there was no evidence of a birth certificate with his name on it or that he had signed a paternity declaration. With that resolved, the court stated it was inclined to follow the

Department's recommendation and deny reunification services to mother, to Ricardo as an alleged father, and to Jose because he was incarcerated. The Department's and Adrian's attorney submitted on the recommendation. Mitchell stated she had no argument for Jose, "because of what the Court stated," and for Ricardo, she submitted on that.

The court rejected mother's argument for services, adopted the recommended findings and orders, and set a section 366.26 hearing for January 17, 2012. The findings included the following: (1) by clear and convincing evidence, Jose was incarcerated and could not arrange for Adrian's care (§ 361, subd. (c)(5)), and (2) Jose was incarcerated and services to him would be detrimental to Adrian (§ 361.5, subd. (e)(1); Cal. Rules of Court, rule 5.695(f)(12)). The court declared Adrian a dependent, removed him from mother's physical custody, placed Adrian in the Department's care, denied reunification services to mother and Jose, and ordered an adoption assessment prepared.

On September 27, the court mailed a notice of the setting of the section 366.26 hearing and advisement of the right to file a writ petition to Jose at his address in Eloy, Arizona. The notice advised Jose he had 12 days from the date the notice was mailed to file a notice of intent to file writ petition.

On November 18, laboratory results were filed with the court which stated Jose's probability of paternity was 99.99 percent and he could not be excluded as Adrian's biological father. In a November 17 letter to the court, which was filed November 21, Jose stated Rutherford told him in a telephone conversation on November 16 that the paternity test came back the week before confirming he is Adrian's father. Rutherford told Jose Adrian was placed in another home the previous week. Jose asked Rutherford why neither he nor his mother M. was consulted about this, as M. had gone to "CPS" and told them she wanted custody or guardianship of Adrian if Jose was the father. M. attended an orientation class and gave CPS her information. Jose said he also gave M.'s information to Rutherford and another social worker, and told them M. was going to

speak with them because if the “test confirms I am the father we would like to be a part of my child’s life.” Jose was having difficulty reaching his lawyer and asked to have another social worker assigned to the case, as Rutherford had been rude to him and was not accepting his calls. Jose said he was filling out the JV-820 and JV-825 forms. He wanted to exercise his paternal rights, did not want them severed, and wanted to find out about guardianship or custody for his mother until his release on November 21, 2012. Jose attached another page to the letter, in which he stated he had just gotten off the telephone with Rutherford, who told him his parental rights were terminated at the last court date on September 22. Jose wanted to know how that could happen, since he just found out he was the father.

On November 22, Mitchell filed a request for appointment of another attorney to represent Jose due to a conflict of interest. Mitchell also filed a section 388 petition on Jose’s behalf, asserting that since the setting of the section 366.26 hearing the results of Jose’s DNA test showed him to be Adrian’s biological father and that he “is presumed father due to being married to mother.” Mitchell asked for family reunification services for Jose and review of his relatives for placement of Adrian. Mitchell asserted it would benefit Adrian to have his biological father receive services to enable Jose to parent his child.

On November 28, Jose filed a notice of intent to file a writ petition, along with a petition in which he asked for reunification services, visitation, and custody of Adrian. In a letter filed with the juvenile court that same day, Jose said Mitchell advised him not to submit the notice of intent and petition, but he did not want to lose any rights to Adrian and wanted the court to know his family would care for Adrian. He did not file the notice sooner because his lawyer advised him there was no need to do so. Jose also submitted certificates of appreciation and completion of a residential drug abuse program.

The Department filed written opposition to the section 388 petition. The Department asked that the petition be denied without a hearing because (1) it failed to

allege adequate facts showing how Adrian's best interests would be served, (2) section 361.5, subdivision (e) continued to apply, as Jose had not demonstrated he could take immediate custody of Adrian due to his incarceration, (3) Jose's claim of presumed parentage under Family Code section 7611, subdivision (a) carried less weight than a claim based on Family Code section 7540, as he did not have a parent-child relationship with Adrian, (4) Jose has child welfare and criminal histories that mitigate toward a finding that services would not be in Adrian's best interests, and (5) Adrian has a right to permanence and stability at the earliest possible time.

In an accompanying declaration, Rutherford stated that Adrian was moved to an approved relative home on November 18. The family had already adopted two of Adrian's maternal siblings; both the Department and state adoptions believed the family was suitable as a prospective adoptive family. Adrian was removed from B.'s custody because she never completed the approval process, was no longer considered a relative placement since Adrian was not genetically related to her, and there were other concerns about Adrian while in her care. Jose's mother, M., had initiated, but not completed, the relative approval process.

At a December 1 hearing, the juvenile court relieved Mitchell of her representation of Jose and appointed another attorney, Brent Woodward, for him. The court signed a transportation order for Jose, and set another hearing to address the section 388 petition and a request for de facto parent status filed by B.

On December 5, 2011, this court issued an order stating that, pursuant to California Rules of Court, rule 8.450(e), the notice of intent counsel for Jose filed in Madera Superior Court on November 23 was untimely and the case may be dismissed unless Jose could provide good cause for the late filing. We gave counsel for Jose 10 days from the date of the order to file a letter explaining why this court should not dismiss the petition.

At the December 8 hearing, at which Jose was not present, the court stated it was inclined to deny the section 388 petition without a hearing. Mitchell explained she filed Jose's section 388 petition the day before her conflict and understood the court would not decide the petition until Jose's new attorney, Woodward, could review it. Woodward said he had not yet spoken with Jose and it was possible Jose had some facts that could be used to support the petition. The court denied the petition with Woodward's agreement without prejudice to file another petition in the future. The court also denied B.'s request for de facto parent status.

A section 366.26 WIC report was prepared by an adoption specialist with the California Department of Social Services - Adoption Bureau. The specialist had completed an adoption assessment; it was determined that Adrian was suitable for adoption, which would be in his best interests. On November 18, Adrian was placed with the prospective adoptive parents who were Adrian's maternal relatives and had adopted Adrian's older sister and a maternal cousin. The specialist found Adrian to be adoptable and the likelihood of his adoption excellent, as the adoptive parents expressed a strong commitment to a permanent plan of adoption. The adoption bureau recommended the court terminate parental rights and order a permanent plan of adoption.

On December 23, this court issued an order dismissing the writ proceeding as the notice of intent was untimely filed and a letter was not provided as requested in the December 5 order.

On January 17, 2012, the court continued the section 366.26 hearing to February 16, 2012, as Jose had not been transported from the Arizona prison. The court subsequently rescheduled the hearing for February 23, 2012. On February 9, 2012, Rutherford received a letter from Jose enclosing certificates of completion for participation in drug recovery programs in prison. Rutherford noted Jose had eight months remaining on his current sentence.

At the February 23, 2012 hearing, mother officially withdrew her contest. Jose was not present. Woodward had not had any contact with Jose, although Jose had tried to reach him by telephone a number of times since his appointment in December 2011. Woodward was having difficulty setting up a telephone conference with Jose through the prison, but was trying to do so. Woodward had not counseled Jose about his position or posture in the case. Jose was not transported despite Woodward's best efforts. Woodward requested a continuance so Jose could be physically present. Woodward did not know what Jose would say; Jose had not written to him directly, but Mitchell had already dealt with "the main issue" under the section 388, which was his request for reunification services based on his status as biological father, that the court denied; Woodward was not aware of any new facts that would be relevant under section 388 or 366.26. The court continued the hearing to March 29, 2012.

At the March 29, 2012 hearing, Jose was present by telephone from the Arizona prison. The Department, mother's attorney, and Adrian's attorney all submitted on the Department's report. When Woodward started to state Jose's position, Jose said he could not hear what his attorney was saying. The court addressed Jose, telling him the Department recommended termination of his parental rights, the plan was for adoption of Adrian by the couple who had adopted his other child, and the court was inclined to agree that such an order was in Adrian's best interests. The court explained Adrian was put in his current placement because, while Jose's mother had come forward earlier, she did not complete the relative approval process.

Jose told the court that before he knew he was the father, he gave Rutherford his mother's information, but Rutherford said nothing could be done since the DNA test had not confirmed he was the father. Jose said he called the Department periodically to ask how the baby was even before he found out he was the father; during one call he was told the results had come back showing he was the father. Jose asked where Adrian was and was told he was placed in a different home. Jose asked why they did not contact his

mother, as he had called the Department and gave them her address and cell phone number, and told them she wanted to get involved, but they said it was “because my ex mother-in-law had wanted the baby there.” Jose said his mother went to the Department and started doing “things” to get the baby, but “there’s no way that my mom could get the baby or there’s no way that when I get out, because I only have like seven months left.” Jose said he “just barely talked to my lawyer two days ago.” He found out he had a different lawyer “just a while back[,]” when he tried to reach Mitchell and found out she had a conflict of interest. Jose talked to his lawyer, who told him the Department should have contacted his mother.

The court responded that it understood the Department did contact his mother, but she could not complete the relative approval process because of “some people living in her home.” Jose responded he told Mitchell he had an older brother who had been to prison, but his crimes were not “sex offender crimes.” Mitchell told him the judge could make an exception. Jose asked if it was possible for his aunt to get his son. Jose appreciated that the prospective adoptive parents had taken care of his oldest daughter, but he claimed they did not allow either he or his family to see her, and asked that they allow him and his family to visit her.

Woodward told the court he did not believe there were any section 366.26 issues to be raised, as Adrian was adoptable and none of the exceptions to termination of parental rights applied. Woodward requested a continuance so he could file a section 388 petition asking the court to consider placing Adrian with one of Jose’s relatives. He needed the continuance to further investigate placement with Jose’s mother and whether the Department properly handled her request for placement. He also wanted to explore possible placement with Jose’s aunt, who had come forward asking for placement a few weeks before. In the alternative, Woodward rested on Jose’s comments to the prospective adoptive couple and hoped they would keep them in mind.

County counsel objected to the continuance, as there had been time to file a section 388 petition before the hearing. County counsel pointed out that a section 388 petition was filed on Jose's behalf on November 22, dealing with the same issue, which was denied. At Jose's request, the Department did contact his mother and a social worker could testify she personally ensured M. received the information on the relative approval process, which M. worked on but never finished. Since M. was never approved, she was never analyzed for placement under section 361.3. County counsel asserted it was not in Adrian's best interest to continue the hearing to consider another placement, and there was no change of circumstance that would warrant a section 388 petition. Adrian had been in the prospective adoptive parents' home since November; as soon as they found out about Adrian's existence, they came forward and worked assiduously to get approved. Moreover, state adoptions indicated their home study was virtually complete, so the adoption could move forward quickly.

Adrian's attorney joined in County counsel's arguments, asserting the request for a continuance should be denied. She added that Adrian is very bonded to his prospective adoptive parents, was with a full sister, and she understood from the prospective adoptive parents that no one from the paternal side of the family had ever tried to contact them or pursue a relationship with their oldest daughter.

Woodward responded that, based on his conversations with Jose and M., he believed M. would testify she was "somewhat discouraged from the process," as she was told there were issues with the people in her home and the only way she could fight that would be to hire her own attorney at a cost exceeding \$10,000. He did not think that was a proper thing to say and he was concerned about the evaluation process, which necessitated further investigation. The court asked if M. had done anything to change her situation. Woodward responded that her husband and adult son, who both needed exemptions, were still living in the home, and he was not sure M. understood she could change the situation.

County counsel believed the exemption packets were provided to M. but were never submitted so they could be fully analyzed as to whether exemptions were possible or whether there were some non-exemptible crimes that may even prevent adoption. While County counsel could not say for sure, she believed it would be a “daunting task for [M.] to pass.”

The court denied the motion to continue the hearing to file a section 388 on behalf of either M. or the aunt, as the aunt did not come forward in a timely manner, and while M. attempted to obtain placement, she was not approved and could not be approved because the same people were living in the home. The court found a continuance would not be in Adrian’s best interest and would not result in any change. All parties submitted on the section 366.26 hearing. The court admitted the report and adopted the recommended findings and orders. The court terminated the parental rights of mother, Jose and Ricardo.

### **DISCUSSION**

#### *Issues Arising from the Dispositional Hearing*

Jose appeals from the section 366.26 hearing order terminating his parental rights. Most of the issues he raises, however, pertain only to orders made at the September 2011 dispositional hearing. These issues center on the failures of his first attorney, Mitchell, to (1) recognize that, despite his incarceration, as a noncustodial presumed father he was entitled to ask for custody of Adrian under section 361.2, and (2) raise this issue at the dispositional hearing. He asserts Mitchell’s errors were compounded by her conflict of interest in representing both Ricardo and himself, and the Department’s failures to use reasonable diligence to locate him and to include in its dispositional report information needed to make a custody determination under section 361.2. He further asserts the juvenile court erred in failing to ask him whether he wanted custody of Adrian pursuant to section 361.2.

At the dispositional hearing, the court denied reunification services to Adrian's parents and set a section 366.26 hearing. To challenge orders made at that hearing, Jose was required to petition for writ review, which is the exclusively prescribed vehicle for appellate review of all orders issued when a section 366.26 hearing is set. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021-1023; § 366.26, subd. (l).) While Jose did file a notice of intent to file a writ petition, it was untimely. Accordingly, we advised him of that fact and gave him and his attorney an opportunity to explain the reason for the delay; neither Jose nor his attorney did so, resulting in the dismissal of the writ proceeding. Failure to timely seek writ review forecloses Jose from seeking relief from any order made at or before the September 22, 2011 dispositional hearing. (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 815-816; see also *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151 (*Meranda P.*) [pursuant to the waiver rule "an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order . . ."].)

Jose acknowledges that normally he would be precluded from challenging orders made at the dispositional hearing. Nevertheless, he asserts we should find he did not forfeit his challenges on due process grounds. He correctly points out that the waiver rule will not be enforced if due process forbids it. (*In re Janee J.* (1999) 74 Cal.App.4th 198, 208 (*Janee J.*)) Due process precludes application of the waiver rule where a defect so fundamentally undermined the statutory scheme that the parent was denied its protections as a whole, such as where the parent lacked notice of the right to petition for review of the order setting the section 366.26 hearing. (*Id.* at pp. 208-209.) Review of even a fundamental defect, however, may be forfeited if, after receiving notice, the defect is not raised in the trial court, or an appeal is not taken at the earliest opportunity. (*In re B.G.* (1974) 11 Cal.3d 679, 689; *In re Wilford J.* (2005) 131 Cal.App.4th 742, 754.) "[T]o fall outside the waiver rule, defects must go beyond mere errors that might have been held

reversible had they been properly and timely reviewed.” (*Janee J., supra*, 74 Cal.App.4th at p. 209.)

Jose contends his due process rights were fundamentally undermined by Mitchell’s failure to ascertain whether he could assume custody of Adrian under section 361.2 and to raise the claim in the juvenile court, as well as by the juvenile court’s failure to make the findings required by section 361.2, subdivision (a). He asserts Mitchell’s misunderstanding of the law – that his incarceration did not disqualify him from seeking custody under section 361.2 – deprived him of knowing the basis for writ review – that section 361.2 gave him a right to assume custody. He likens his situation to *In re S.D.* (2002) 99 Cal.App.4th 1068 (*S.D.*), in which the appellate court refused to apply the waiver rule where the mother’s attorney conceded jurisdiction based on an erroneous understanding of the law since “the error here was entirely legal, and quite fundamental. . . . [T]he parent is hardly in a position to recognize, and independently protest, her attorney’s failure to properly analyze the applicable law.” (*Id.* at pp. 1074-1075, 1077-1078, 1080.) Jose claims, like the parent in *S.D.*, he was not in a position to recognize and protest independently by way of a petition for writ review his attorney’s failure to properly analyze the applicable law.

Once a child is removed from the physical custody of one parent at the disposition hearing, the court’s next statutory obligation regarding custody is to inquire whether there is a noncustodial parent who is interested in assuming custody. (§ 361.2, subd. (a).)<sup>4</sup> It has been held that incarcerated parents have the same right as other parents to be given

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<sup>4</sup> Section 361.2, subdivision (a) provides: “When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.”

the opportunity to request custody under section 361.2. (*In re V.F.* (2007) 157 Cal.App.4th 962, 965-966 (*V.F.*)) Under the reasoning of that case, the court should have asked Jose, as the noncustodial parent, whether he desired custody of Adrian; if he requested custody, the court would have determined whether “placement with that parent would be detrimental to the child’s safety, protection, or physical or emotional well-being.” (*Id.* at p. 966.) While a finding of detriment cannot be based solely on the fact that a parent is incarcerated, factors that may be considered include “the noncustodial, incarcerated parent’s ability to make appropriate arrangements for the care of the child and the length of that parent’s incarceration.” (*V.F.*, *supra*, 157 Cal.App.4th at pp. 966, 972; see also *S.D.*, *supra*, 99 Cal.App.4th at p. 1077; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 700.)

At the dispositional hearing, Jose’s attorney did not raise the issue of section 361.2 and the juvenile court did not inquire whether Jose wanted custody of Adrian. Assuming this was error, Jose has not shown why considerations of “‘fundamental fairness’” would require reversal at this stage of the proceedings. (*Meranda P.*, *supra*, 56 Cal.App.4th at p. 1151.) To determine whether a forfeited review should be allowed to go forward, we must weigh whatever benefits Jose might obtain from such review against “[t]he state’s [strong] interest in expedition and finality” and “[t]he child’s interest in securing a stable, ‘normal’ home. . . .” (*Meranda P.*, *supra*, 56 Cal.App.4th at p. 1152.) Because Jose would not benefit from review of nonreversible harmless error, we turn to the merits of the parties’ contentions to determine whether the alleged errors under section 361.2 were in fact harmless.

As Adrian’s presumed father, Jose held the greatest rights that can be conferred on a man in a dependency proceeding vis-à-vis the dependent child, most notably custody absent a finding of detriment and reunification services. (§§ 361.2, subd. (a), 361.5, subd. (a).) As a presumed father, his rights to his child were superior to the rights of a biological father, who is entitled only to reunification services if the court finds services

would benefit the child. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15, 451 (*Zacharia D.*); § 361.5, subd. (a).) The lowest class of paternity is the alleged father, who may be a child's father but who has not established biological paternity or presumed father status. (*Zacharia D., supra*, 6 Cal.4th at p. 449, fn. 15.) An alleged father has no cognizable interest in the dependent child (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1352); he is entitled to notice of the proceedings, which provides an opportunity to appear and assert a position. (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.)

Although Jose, as Adrian's presumed father, was entitled to request custody of Adrian under section 361.2, there is nothing in the record that shows that on or before the dispositional hearing Jose unequivocally wanted custody. When Jose first received notice of the dependency proceedings, he told the social worker he wanted genetic testing to determine if he was Adrian's biological father. In his statement regarding parentage, he asserted he did not believe Adrian was his child, but he would "take full responsibility" for his part as a father *if* genetic testing showed Adrian was his biological child. Despite being Adrian's presumed father, he refused to acknowledge paternity until his biological connection to Adrian was established.

For this reason, even if Jose's counsel advised him he had a right to request custody under section 361.2 and raised the issue with the juvenile court, the court would have rejected any custody claim, as Jose did not then want physical custody of Adrian as required to invoke section 361.2, subdivision (a). (See *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 55; *V.F., supra*, 157 Cal.App.4th at p. 971; cf. *R.S. v. Superior Court* (2007) 154 Cal.App.4th 1262, 1271.) "[W]hen section 361.2, subdivision (a) refers to a parent's request for 'custody,' it means the parent is asking . . . to have possession of the child – i.e., the parent is seeking . . . physical custody." (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1130-1131 (*Austin P.*)) At best, Jose asserted an intention to obtain physical custody of Adrian *in the future*, i.e. when and if Adrian was determined to be his biological son. But section 361.2, subdivision (a) concerns the immediate placement of a

child after a child has been removed from a custodial parent. (See *Austin P.*, *supra*, 118 Cal.App.4th at p. 1131.) As our Supreme Court has stated, section 361.2, subdivision (a) “assumes the existence of a competent parent able to *immediately assume custody.*” (*Zacharia D.*, *supra*, 6 Cal.4th at p. 454, italics added.) Since Jose was not seeking immediate custody, any failure of the Department to include in its report for the dispositional hearing the information necessary to make a section 361.2 determination was harmless.

Jose asserts Mitchell was ineffective for failing to ask for a continuance of the dispositional hearing until the genetic test results were received. To succeed on a claim of ineffective assistance of counsel, Jose would have to prove both that counsel failed to act in a manner to be expected of a reasonably competent attorney practicing in the field of juvenile dependency law, and that but for that error, he would have received a more favorable result. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668.) In this case, there was no prejudice, as Jose did not need a continuance to enable him to assert his legal rights since he was Adrian’s presumed father. He did not have to wait until his biological paternity was confirmed to assert a claim for custody, since it is possible to be a presumed father without being the biological father. (*Zacharia D.*, *supra*, 6 Cal.4th at p. 450, fn. 18.)

Consequently, any failure by the Department to use reasonable diligence to locate him after the detention hearing was not prejudicial. Once Jose was located, he was given notice of the proceedings, he was able to make his desires known to the social worker and court, and he had the right to ask for custody at the dispositional hearing. That he did not do so, and instead waited until his biological paternity was confirmed, was a condition he placed on whether he would exercise parental control; whether he was the biological father did not affect the legal proceedings or his rights.

Jose contends prejudice can be presumed because Mitchell had an actual conflict of interest at the dispositional hearing since she was representing both Ricardo and

himself, citing *People v. Hardy* (1992) 2 Cal.4th 86, 135. Rule 3-310 of the Rules of Professional Conduct provides that an attorney cannot represent more than one client in a matter in which the clients' interests actually or potentially conflict without each clients' informed written consent. Simultaneous representation of more than one client when their interests actually conflict is the "most egregious example" of a violation of this rule. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282-283.) Jose claims Mitchell had an actual conflict from which prejudice can be presumed because she actively represented conflicting interests at the dispositional hearing, since there was an issue as to which man, himself or Ricardo, would have the opportunity to develop a parental relationship with Adrian. (See *Hardy, supra*, 2 Cal.4th at p. 135 [prejudice is presumed when counsel is burdened by an actual conflict of interest, but the presumption arises "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'"]].)

We conclude, however, that no actual conflict of interest was present at the dispositional hearing. By that hearing, genetic testing had confirmed that Ricardo was not Adrian's biological father. His paternity status remained that of an alleged father and he had no cognizable interest in Adrian. Mitchell did not attempt to elevate Ricardo's status to that of a presumed father; instead, she agreed at the dispositional hearing that the genetic testing excluded him from paternity, and there is nothing in the record to suggest that Ricardo wanted to elevate his status to that of presumed father. On the other hand, Jose was Adrian's presumed father and had every right to request custody and reunification services. There was no conflict between the two positions, since Ricardo did not want to elevate himself or assert parental rights.

We need not carve out an exception to *Meranda P.*'s waiver rule, because the errors of which Jose complains were harmless. Jose made clear that he did not want custody of Adrian unless and until he was confirmed as Adrian's biological father. There was no need for the court to continue the hearing for those results, as Jose was Adrian's

presumed father with a legal right to custody. Given Jose’s position, there is nothing in the record to suggest that, had the issue been raised at the dispositional hearing, the court would have given Jose custody of Adrian. Because the alleged errors were harmless, we conclude Jose could derive no benefit from appellate review. Accordingly, since Jose did not raise these issues in a petition for writ review from the order setting the section 366.26 hearing, he has not preserved them for review. (*Meranda P.*, *supra*, 56 Cal.App.4th at pp. 1150-1152; *Janee J.*, *supra*, 74 Cal.App.4th at pp. 208-209.)<sup>5</sup>

#### *Termination of Parental Rights*

Jose contends the juvenile court was precluded from terminating his parental rights because it never found it would be detrimental to Adrian to give him custody. He contends the only evidence presented at disposition on this issue was his incarceration, and without a section 361.2 determination, a detriment finding cannot be implied.

Parents have a fundamental interest in the care, companionship, and custody of their children, which requires proof of unfitness by clear and convincing evidence. (*Santosky v. Kramer* (1982) 455 U.S. 745, 747–748, 758.) California’s dependency system comports with these requirements because, by the time parental rights are terminated, the juvenile court has made multiple prior findings that the parent was unfit. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254, 256.) The term “parental unfitness” is no longer used; instead a finding that awarding custody of a dependent child to a parent would be detrimental to the child is required. (*In re Z.K.* (2011) 201

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<sup>5</sup> On September 6, 2012, Jose’s appellate counsel filed a motion asking this court to take additional evidence through sworn declarations of Jose and his court-appointed trial counsel, Mitchell and Woodward, under section 909 of the Code of Civil Procedure. (See Cal. Rules of Court, rule 8.252(c) [a party may request the reviewing court to take evidence on appeal].) Jose’s appellate counsel asserted the evidence was relevant to the issue of whether Mitchell rendered ineffective assistance. The Department opposed the motion. We ordered the motion to be considered with the appeal. We now deny it, as the information contained therein is not relevant to whether the purported errors are harmless.

Cal.App.4th 51, 65.) To satisfy due process, the detriment finding must be made by clear and convincing evidence before terminating a parent's parental rights. (*In re Frank R.* (2011) 192 Cal.App.4th 532, 538 (*Frank R.*) [juvenile court failed to meet *Santosky* requirements by failing to make a finding of detriment by clear and convincing evidence with respect to the nonoffending father].)

Jose relies on cases involving nonoffending noncustodial parents in which the reviewing court reversed termination of parental rights due to the lack of unfitness findings, *Frank R., supra*, 192 Cal.App.4th 532 and *In re Gladys L.* (2006) 141 Cal.App.4th 845. In contrast to those cases, here the juvenile court did make a detriment finding at the dispositional hearing when it denied Jose reunification services under section 361.5, subdivision (e)(1) after finding it would be detrimental to Adrian to order reunification services. This finding constitutes a sufficient basis for termination of parental rights. (§ 366.26, subd. (c)(1).)

Jose contends this finding is invalid because the court never made a section 361.2 determination and there is no evidence in the record to support a detriment finding. The detriment finding, however, was made at the dispositional hearing by clear and convincing evidence. Jose did not challenge the finding by way of writ. Jose's due process rights were not violated by the detriment findings so the waiver or forfeiture rule applies. The findings and orders became final when Jose failed to challenge them, and they are now *res judicata*. (*In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1705; see also *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 854.)

#### **DISPOSITION**

The motion to take additional evidence on appeal is denied. The order terminating parental rights is affirmed.