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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

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

H037568  
(Santa Cruz County  
Super. Ct. No. DP001671)

SANTA CRUZ COUNTY HUMAN  
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

D.M. et al.,

Defendants and Appellants.

Mother M.T. (mother) and presumed father D.M. (father) (collectively parents) appeal from the juvenile court's order terminating their parental rights and selecting adoption as the permanent plan in dependency proceedings on behalf of P.M. (hereinafter P.). (See Welf. & Inst. Code, §§ 366.26; 395.)<sup>1</sup> Mother maintains that the court improperly terminated her parental rights because the parent-child relationship exception applies in this case. Father argues that the court's denial of his counsel's request for a

<sup>1</sup> All further statutory references are to Welfare and Institutions Code unless otherwise specified.

continuance of the section 366.26 hearing constitutes prejudicial error. He also joins in mother's argument. We find no merit to these contentions.

## I

### *Procedural Background*

On April 21, 2009, the Santa Cruz County Human Services Department (Department) filed a juvenile dependency petition on behalf of P., then two years old, alleging that P. came within the juvenile court's jurisdiction based upon parental failure to protect and failure to provide support. (§ 300, subds. (b), (g).) The petition stated that P. had been previously removed from her mother on March 29, 2007, and family reunification and family maintenance services had been provided until April 22, 2008. It indicated that reunification services to father in those prior dependency proceedings, however, had been terminated on November 2, 2007.

According to the 2009 petition, mother admitted that she had relapsed into substance abuse by actively using methamphetamines, marijuana, and beer since April 5, 2009, and she had left her daughter in the care of a parolee and methamphetamine user. A Watsonville police officer had placed P., who had been picked up from the parolee's home by a maternal aunt who had "a CPS history" and was unable to care for P., in protective custody on April 19, 2009. According to the petition, father was incarcerated and could not arrange care for P.

The "Jurisdiction/Disposition Report," dated and filed May 26, 2009, reported that P. was then residing in a licensed foster home.

An amended dependency petition was filed on August 19, 2009.<sup>2</sup> The amended petition additionally stated that father had not been "able to care for [P.] due to being incarcerated for most of his daughter's life" and had not "provided for [her] safety,

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<sup>2</sup> The amended petition contained in the appellate record did not allege that P. came within the jurisdiction of the juvenile court under section 300, subdivision (g).

supervision, or protection . . . since she was approximately five months old." It further indicated that father had "requested placement in a Sober Living Environment" and "an Alcohol and Drug Assessment." It indicated that, since mother and father were in a relationship, mother's "current substance use puts [father's] sobriety at risk." Father's "self reported concern of possible relapse" put P. at "substantial risk" of "serious physical harm or illness."

On August 24, 2009, following a contested jurisdiction hearing as to mother, the juvenile court sustained the amended petition.<sup>3</sup> A memo to the court, filed September 29, 2009, indicated that father had been released from incarceration on August 10, 2009, he had requested to participate and had participated in the visit between P. and mother at the Parent Center on August 11, 2009, and the parents had agreed to drug testing that day. Father's test was negative but mother tested positive for marijuana. The Department recommended that father receive family reunification services.

In its dispositional orders, the court removed P. from parental custody, declared her to be a dependent child of the court, required reasonable reunification services to be provided to mother and father, and ordered visitation between P. and each parent.

At the three-month interim review hearing, it was reported that P. was living with her maternal aunt and both parents were actively involved in the family preservation court program.

The "Six Month Review Report," filed February 23, 2010, stated that P. was residing with a paternal aunt, her fourth placement in this dependency case. The report disclosed that father had violated parole by coming to Santa Cruz without checking in with his parole officer in southern California, he had turned himself in and served a 90-day jail term for violating parole, he had entered a residential program after his release in

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<sup>3</sup> The court found that P. was a person described in subdivisions (b) and (g) of section 300. No claim of error is raised on appeal concerning that finding.

November 2009, but he had left the program the following day, and he had been arrested and new criminal charges were pending. The Department recommended that reunification services to father be terminated.

As to mother, the "Six Month Review Report" disclosed that she had been "an active participant in the Family Preservation Court," had "engaged in her case plan and continue[d] to make progress in areas of concern." It stated that mother had "proven" she had "adequate parenting skills from the reports provided by the Parent Center staff and the undersigned who supervised her visits for approximately two months . . . ." Mother was beginning to have unsupervised overnight visits with P. The Department recommended that reunification services to mother be continued.

After the six-month review hearing, the court continued P. as a dependent child of the court under the Department's care, custody and control in an out-of-home placement. (See § 366.21, subd. (e).) In a bifurcated proceeding in March 2010, the court terminated family reunification services for father.

Memos to the court and interim review minute orders reflected mother's steady progress with respect to her case plan and sobriety. In an April 2010 memo to the court, the Department indicated that mother had reported feeling stable in her sobriety and P.'s overnight visits with mother were increased from Thursday through Monday.

On May 27, 2010, consistent with the Department's recommendations, the court continued P. as a dependent child of the court, returned P. to her mother under the Department's care, custody and control, and ordered family maintenance services.

Minute orders of subsequent interim reviews and the November 18, 2010 supplemental report pursuant to section 364 indicated mother's progress in the family preservation court program. Although the supplemental report commended mother for her hard work and emotional growth, it expressed some concerns with regard to recent changes in mother's behavior. Mother had "stopped doing sober support about three

weeks" prior to the report and she had failed to pay rent for two months and she had been given a 30-day notice.

On November 18, 2010, the court ordered P. continued as a dependent child of the court under the Department's care, custody and control and ordered family maintenance services to be continued.

On March 30, 2011, the Department filed a supplemental dependency petition on behalf of P., who was then four years old. (See § 387.) The petition indicated that mother had again relapsed. A drug test in early February 2011 had been positive for THC and amphetamines and, since that time, mother had "failed to comply with the components of her safety plan intended to support and confirm her sobriety." The petition further indicated that mother had not been working with her sponsor, submitting to regular drug testing, participating in "aftercare," or checking in daily with her social worker. It stated that "minor cannot remain safely in her mother's care, based on her mother's recent relapse and inability to follow the safety plan." The Department's memo to the court provided further details and recommended detention of P. On April 1, 2011, the court ordered P. detained and again placed her under the Department's care and supervision.

The "387 Adjudication Report" stated that "mother continues to struggle with substance abuse issues" and "father is incarcerated, and not expected to be released until next year." Mother had told the social worker that she could not take care of P. and was not in the mental or physical condition to safely care for her. Mother indicated that she stayed in bed every day unless she had a visit with P. The report stated that P. had been placed in a licensed foster home, P.'s foster parents were willing to adopt her, and mother had expressed her wish for P. to be adopted by those foster parents. It indicated that the time for family reunification services had expired. The Department recommended that the court set a section 366.26 hearing to determine the most appropriate permanent plan for P.

On May 26, 2011, the court found, by a preponderance of the evidence, that the supplemental petition's allegations were true and the previous disposition had not been effective in protecting the child. (See Cal. Rules of Court, rule 5.565(e)(1).)

On June 2, 2011, after an off-the-record settlement conference, mother submitted the matter for disposition on the supplemental petition. The court found by clear and convincing evidence that P.'s welfare required her removal from mother's physical custody because there was or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there were no reasonable means by which the minor's physical health could be protected without removing the minor from parental physical custody. (See § 361, subd. (c)(1); Rules of Court, rule 5.565(e)(2).) The court continued P. as a dependent child of the court, removed her from her mother's physical custody, and set a section 366.26 hearing. It ordered supervised visitation between P. and mother a minimum of four times per month.

Notice was given of the section 366.26 hearing set for September 22, 2011. The Department filed its "366.26 WIC Report," which recommended termination of parental rights and a permanent plan of adoption. The report stated that P. was currently residing in a foster home with prospective adoptive parents. P. had been previously placed in that home for a time in 2009 until being placed with a relative.

The report of the court appointed special advocate (CASA) for P. was filed. The report indicated that P. was doing very well with her foster family. P. was calling her foster parents "Mom" and "Papa" and she adored her foster sister. The CASA recommended that P. remain in her current foster care placement.

On September 22, 2011, father was not transported from prison to court as ordered due to a transportation problem. Mother's counsel informed the court that mother did not agree with the Department's recommendation and was requesting the matter be set for

hearing. The court scheduled a settlement conference on November 3, 2011 and scheduled a contested section 366.26 hearing on November 7, 2011.

On November 3, 2011, no settlement agreement was reached between parents, counsel, and the Department. Also, the court considered and granted the foster parents' request for de facto parent status. On that date, the foster parents filed a "Caregiver Information Form" providing further information concerning P. They reported that P.'s emotional health had improved, she was becoming more skilled at verbalizing her feelings and negotiating conflicts with words rather than engaging in aggressive behavior, P. was seeing a therapist weekly, she was identifying them as "her mama and daddy," she was taking swimming and gymnastics lessons, and she had adjusted well to their family and home.

At the time set for the contested section 366.26 hearing on November 7, 2011, father's counsel requested a continuance to allow father to contact his brother regarding placement of P. with him. The court denied the request.

Mother testified in her own behalf and presented evidence. Her counsel argued for a plan of guardianship rather than a termination of mother's parental rights on the ground that such plan would "better serve her child" and would allow mother "to be part of [P.'s] life." Father's counsel also argued for legal guardianship as the permanent plan, arguing that mother's relationship with P. "carrie[d] with it such a weight as to outweigh [P.'s] need for permanence with an adoptive home." Mother's counsel then indicated that mother was asserting the parent-child exception provided by section 366.26, subdivision (c)(1)(B)(i).

Following the section 366.26 hearing, the court found, by clear and convincing evidence, that it was likely P. will be adopted. Although the court recognized that mother clearly loved P., it found that the benefit of the relationship did not outweigh P.'s needs for stability and permanency that would be met in adoption. The court observed that P. had just recently turned five and this was her second dependency case and she had been

removed from her mother three times and she had been in six placements. It discussed P.'s expression of anger and emotional upset when she was removed most recently and noted that P. was settling down and starting to stabilize. The court selected adoption as the appropriate permanent plan. It terminated the parental rights of mother, father, and all unknown fathers.

## II

### *Discussion*

#### *A. Parent-Child Exception to Termination of Parental Rights*

At a section 366.26 hearing, the court must terminate parental rights and order the child placed for adoption if it determines, under the clear and convincing standard, that it is likely the child will be adopted. (§ 366.26, subd. (c)(1).) A statutory exception to this rule exists where "[t]he court finds a compelling reason for determining that termination would be detrimental to the child" because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

If the evidence establishes that a parent maintained regular visitation and contact with his or her child and some benefit would result from continuation of the parent-child relationship, the court's determination whether or not there was "a compelling reason for determining that termination [of parental rights] would be detrimental to the child" (§ 366.26, subd. (c)(1)(B)(i)) is reviewed for abuse of discretion. (See *In re C.B.* (2010) 190 Cal.App.4th 102, 123; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315; see also *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350-1352.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

In the "366.26 WIC Report," dated September 22, 2011, the Department recommended termination of parental rights and selection of a permanent plan of adoption. The report provided the following history. P. was first removed from mother's care on March 16, 2007 when P. was about six months old due to mother's serious substance abuse issues. P. was in foster care until she was reunited with mother on September 14, 2007 when she was 11 months old. P. was again removed from mother's care on April 19, 2009 when she was two and a half years old because mother was having serious substance abuse issues and had left P. with an inappropriate caretaker. P. "experienced repeated moves from emergency foster homes to a foster adoptive home to a relative placement . . . ." P. was reunited with mother on May 5, 2010 with a plan of family maintenance services. On April 1, 2011, P. was removed from her mother's care for a third time because of her mother's relapse into substance abuse and she was placed in foster care with the nonrelative foster family with whom she had previously lived. The report indicated that P. had been through six placements during the course of this dependency.

As to the parent-child relationship, the September 2011 report stated: "[A]t this time, the minor does not have a parent/child relationship with her mother. While the mother [M.T.] has participated in regular and consistent visitation with [P.] throughout the life of this case, she has not built a strong parental relationship with her daughter. At the best, she is playful and affectionate with her daughter during visits and is clearly delighted to see her daughter." It indicated that sometimes mother was "extreme and inconsistent in her responses to the minor" and gave examples. The report further stated: "At the end of visits, [P.] is able to say goodbye easily to her mother, and offer lots of hugs and kisses without distress. Due to the mother's long history of substance abuse, mental health issues, and her inability to ameliorate these concerns, the mother has failed to provide for the child's most basic needs for stability, consistency, and nurturance."

The report indicated that P. was thriving in the care of her current caretakers. It asserted that "[t]he minor's need for emotional stability, security and sense of belonging that her prospective adoptive family can provide outweighs any possible parent/child relationship." According to the report, mother had "admitted that she continues to be unable to provide for [P.'s] safe and appropriate care." When asked about where she should live, P. answered, "I think that I should live with my mom."

At the hearing, mother testified that she saw her daughter four times a month for an hour. Mother stated that P. was very excited to see her at the time of visitation. During the visits, mother played with P. and tried to show her affection but indicated that it was difficult to be affectionate because someone was watching her every move and following her around. Mother did not want her parental rights terminated because she loves her daughter "a lot with all [her] heart" and she wanted her daughter to be able to come home. Evidence of mother's latest recovery efforts and continued visitation with P. were introduced.

Mother asserts that undisputed evidence compelled a finding that the beneficial parent-child relationship exception applied in this case. She argues that the social worker's opinion, expressed in the section 366.26 report, that mother had *not* built a strong parental relationship with her daughter was inconsistent with the previous positive reports and was unsupported. She maintains that the social worker's opinion of her changed only after she withdrew her support of a plan of adoption.

The appellate record does not show that the court's decision turned on the social worker's opinion regarding whether mother had a parental relationship with P. The court recognized that "for four years it has been a consistent theme that in fact this Mother loves her daughter very dearly." It accepted as "true that [P.] does have an ongoing relationship with her mother."

Rather, the juvenile court based its decision to terminate mother's parental rights on its conclusion that P.'s needs for stability and permanency in adoption were not

outweighed by the benefits of continuing the parent-child relationship. On the record before us, we cannot conclude that the juvenile court order terminating parental rights constituted an abuse of discretion.

In deciding whether the parent-child beneficial relationship exception applies, "the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) The parent-child relationship must "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Ibid.*)

" 'Adoption is the Legislature's first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.' (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 . . . .) 'Guardianship, while a more stable placement than foster care, is not irrevocable and thus falls short of the secure and permanent future the Legislature had in mind for the dependent child.' (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344 . . . .)" (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) A parent claiming the applicability of the parent-child relationship exception has the burden of proof. (See *In re C.B.* (2010) 190 Cal.App.4th 102, 133-134.) "[I]t is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1350; see *In re Celine R., supra*, 31 Cal.4th at p. 53.)

The parent-child relationship "exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of

visitation with the parent." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) "[A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent." (*Id.* at p. 1350.) Even a "loving and happy relationship" with a parent does not necessarily establish the statutory exception. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.)

"The *Autumn H.* standard reflects the legislative intent that adoption should be ordered unless exceptional circumstances exist, one of those exceptional circumstances being the existence of such a strong and beneficial parent-child relationship that terminating parental rights would be detrimental to the child and outweighs the child's need for a stable and permanent home that would come with adoption." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) "[T]he *Autumn H.* language, while setting the hurdle high, does not set an impossible standard nor mandate day-to-day contact." (*Ibid.*) "Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship. A strong and beneficial parent-child relationship might exist such that termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction." (*Ibid.*)

In this case, although mother had previously made exemplary efforts to recover from a relapse into substance abuse, mother had nevertheless relapsed again and P. had been removed for the third time. At the time of the section 366.26 hearing in November 2011, P. had very recently turned five years old. P. had spent a significant portion of her life out of mother's custody. Mother presented no expert evidence, such as a bonding study, that termination of parental rights would be detrimental to P. Mother did not present any evidence that P. had any special needs that could be met by only her. We find no basis for reversing the juvenile court's order terminating mother's parental rights.

### B. Denial of Father's Request for a Continuance

At the November 7, 2011 hearing pursuant to section 366.26, father's counsel requested a continuance of the hearing. Counsel stated: "As the Court is aware [father] has been in the California Department of Corrections Avenal facility. He was transported here last week on November 3rd for settlement conference. He advises me that he has been attempting to get in touch with relatives of his, but that all letters while he was in custody have been returned or intercepted and he has not received communication or has been unable to communicate with his relatives, and he wanted to be able to make arrangements for [P.] to be placed with a paternal relative. [¶] . . . [Father] has a brother Keith who is in the military in Virginia who he believes would be able to take care of [P.], and he's not been able to communicate with him. [¶] . . . [He] believes that he would be able to make arrangements for paternal relatives to provide care for [P.] if he were given an opportunity for a continuance and to remain here in this county in order to communicate with the paternal relatives."

The juvenile court denied a continuance request, noting that that this was P.'s third removal and she had been through six different placements. The court stated that it believed father had "ample opportunity in the past" to make such arrangements with the brother and had "failed to do so." On appeal, father argues that the juvenile court abused its discretion, in violation of his right to due process, by denying his request for a continuance of the section 366.26 hearing to "allow him the opportunity to arrange a relative placement for [P.]"

"The juvenile court has broad discretion in determining whether to grant a continuance. (§ 352, subd. (a); *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1186–1187 . . . .) As a reviewing court, we can reverse an order denying a continuance 'only upon a showing of an abuse of discretion.' (*In re Gerald J., supra*, at p. 1187 . . . .)" (*In re V.V.* (2010) 188 Cal.App.4th 392, 399.)

Under section 352, subdivision (a), a juvenile court may continue a section 366.26 hearing "beyond the time limit within which the hearing is otherwise required to be held." But section 352, subdivision (a), prohibits any continuance that "is contrary to the interest of the minor" and requires the court to "give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." It allows a continuance to be granted "only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance." (§ 352, subd. (a).) "Whenever any continuance is granted, the facts proven which require the continuance shall be entered upon the minutes of the court." (*Ibid.*) Ordinarily, a motion for continuance must be in writing but the court may entertain an oral motion if there is good cause.<sup>4</sup> (*Ibid.*)

Here, the court acted within its discretion in denying a continuance to allow father to pursue an alternative placement for P. "Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "[T]he sole purpose of the section 366.26 hearing is to select and implement one of the listed permanent plans." (*Id.* at p. 304.) A section 366.26 hearing does not involve removal or placement of the child. Although modification of an existing placement order may be sought by petition (see § 388), no such petition was before the court. Removal of a dependent child from a current

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<sup>4</sup> Section 352, subdivision (a), states: "In order to obtain a motion for a continuance of the hearing, written notice shall be filed at least two court days prior to the date set for hearing, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance."

caretaker and placement with a parent's relative with whom the child is not presently residing is not one of the court's options at a section 366.26 hearing.<sup>5</sup>

The preference for relative placement that applies in earlier stages in dependency proceedings does not pertain to the section 366.26 hearing. (See § 361.3, subd. (a).)<sup>6</sup> A different preference applies once there is a permanent plan for adoption:

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

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<sup>5</sup> Section 366.26, subdivision (b), sets forth the following choices in order of preference: "(1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted. [¶] (2) Order, without termination of parental rights, the plan of tribal customary adoption . . . [¶] (3) Appoint a relative or relatives with whom the child is *currently residing* as legal guardian or guardians for the child, and order that letters of guardianship issue. [¶] (4) On making a finding under paragraph (3) of subdivision (c), identify adoption or tribal customary adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days. [¶] (5) Appoint a nonrelative legal guardian for the child and order that letters of guardianship issue. [¶] (6) Order that the child be placed in long-term foster care, subject to the periodic review of the juvenile court under Section 366.3." (Italics added.)

<sup>6</sup> Section 361.3, subdivision (a), provides in part: "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative" if the placement is appropriate. This relative placement preference may apply if "a new placement becomes necessary after reunification services are terminated but before parental rights are terminated and adoptive placement becomes an issue." (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.)

being." (§ 366.26, subd. (k).) Accordingly, the court did not abuse its discretion by refusing to continue the section 366.26 hearing to allow father to explore whether P. could be placed with paternal relatives who were not presently caring for P. (Cf. *In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811 [refusal to continue section 366.26 hearing was not an abuse of discretion since the sole reason for requesting a continuance was to obtain information regarding paternity, which was irrelevant to the pending proceeding, and delay would have interfered with prompt resolution of the child's custody status and her right to a permanent placement].)

#### DISPOSITION

The November 2011 order terminating parental rights and selecting adoption as the permanent plan is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.