IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

In re Xavior B. A Person Coming Under Juvenile Court Law	Court of Appeal No. E050999
San Bernardino Children and Family Services, Petitioner and Respondent, v. Rodney H., Objector and Appellant.	Superior Court No. J219104

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO
Hon. Barbara Buchholz, Judge

APPELLANT'S OPENING BRIEF

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assisted case system

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STATEMENT OF APPEALABILITY

On May 27, 2010, father filed a notice of appeal to the order terminating parental rights, entered on the same date. (C.T. pp. 453-454.) This appeal is authorized under section 395.[1]

INTRODUCTION

This is a case about a presumed father whose parental relationship with his son, Xavior, was terminated solely due to his developmental disability. The department did not plead, prove, or

1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

investigate this disability.

Father complied with every aspect of his case plan. Father lived with his mother, who attended every dependency hearing. Father participated in overnight, unsupervised visitation. At one point, father cared for Xavior five days a week. Citing father's "disabilities," the department recommended legal guardianship with the paternal grandmother, in father's home.

The plan of legal guardianship unraveled. Minors' counsel argued it would be detrimental to separate Xavior from his older sibling, the foster parents were granted de facto parent status, and the department switched their recommendation. The juvenile court found father's relationship insufficient to meet the child benefit exception. The social worker stated father did nothing inherently wrong. His parental rights were terminated.

The termination order violated father's federal due process rights where no evidence showed he was an unfit parent. The order also denied Xavior his right to independent counsel and the juvenile court failed to apply the child benefit exception. For all of these reasons, this Court should restore a parental relationship which should never have been severed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Sabrina B. ("mother") and Xavior tested positive for methamphetamines at Xavior's birth. (C.T. p. 7.) Mother admitted she used drugs on New Year's Eve, about 48 hours before going into labor. (C.T. p. 7.) Two days later, the San Bernardino County Department of Children and Family Services ("department") removed Xavior and Joshua[2] from mother's care. (C.T. pp. 9-10.) Mother informed the social worker she had been transient during the nine months of her pregnancy. (C.T. p. 8.) She did not know where she would go until Rodney H. ("father") came to the hospital and told her she and the baby could stay in his home. (C.T. p. 8.) Father lived with Estella, his mother and the paternal grandmother of Xavior. (C.T. p. 43.) However, at the time, mother believed Xavior's father could have been another man. (C.T. p. 9.)

On January 8, 2008, the department filed a section 300 petition alleging mother had a substance abuse problem. (C.T. p. 3.) Additionally, the department filed two allegations against father under subdivision (b): (1) Father's ability to provide daily basic needs and financial care for the child was insufficient and placed the child at risk

2 Appellant is not the father of Joshua.

and (2) father reasonably knew or should have known the child would be at risk if left in the care of the mother. (C.T. p. 3.)

At the detention hearing held January 9, 2008, the juvenile court found a prima facie basis to detain Xavior in foster care. (R.T. p. 2; C.T. p. 22.) The juvenile court ordered a paternity test for father and supervised visitation, twice weekly. (R.T. pp. 3, 5; C.T. p. 23.) The paternity test established appellant as Xavior's biological father and the juvenile court declared him Xavior's presumed father. (R.T. p. 13; C.T. pp. 27, 86-87, 104.)

Jurisdiction and Disposition

Mother told the social worker father was not with her on New Year's Eve, the last time she used drugs. (C.T. p. 34.) Father told the social worker he broke up with mother, and explained that mother would go back and forth between his house and her parents' house. (C.T. p. 35.) Father reported he did not know mother was using drugs. (C.T. pp. 35-36.) Father stated he had supplies for the baby and that he knew how to care for the baby, as he helped Estella with his siblings. (C.T. p. 36.)

Estella was present during father's interview to assist him in understanding the questions. (C.T. p. 35.) Estella told the social

worker father received Social Security Insurance (SSI) and services from Inland Regional Services (IRC). (C.T. p. 36.) The social worker's inquiry with IRC revealed that father only received help with job inquiries and referrals. (C.T. p. 36.)

It appeared to the social worker that father had difficulty understanding the legal system and "the policy" of the department. (C.T. p. 51.) The social worker recommended reunification services for father. (C.T. p. 51.)

At the jurisdiction and disposition hearing, father's counsel raised the concern that father could not read the waiver form. (R.T. p. 7.) As a result, father's counsel proceeded by argument. (R.T. p. 11.) The juvenile court sustained allegations b-2 and b-4 against father. (R.T. 12; C.T. p. 105.)

The juvenile court proceeded immediately to disposition where it removed Xavior from parental custody under section 361. (R.T. p. 14; C.T. p. 103.) The court ordered reunification services for both parents. (R.T. p. 17.) Father's reunification plan called for him to attend general counseling, a parent education program, and Al-Anon support group meetings. (C.T. p. 60.)

The Six-Month Review Hearing

Six months later, the juvenile court congratulated both parents for making progress in their case plans, describing father's progress as "substantial." (R.T. pp. 22, 26.) The six-month review report indicated father completed a parent education program, consistently visited Xavior, and began attending Al-Anon meetings. (C.T. pp. 117, 120.) The social worker recommended the parents have overnight visits. (C.T. p. 123.) The juvenile court ordered further reunification services and unsupervised visitation for both parents. (R.T. p. 24; C.T. p. 154.)

The 12-Month Review Hearing

In early October 2008, the department approved overnight visitation in father's home. (C.T. p. 173.) Father had extended visits with Xavior for the two months prior to the 12-month review hearing, from Saturday through Wednesday afternoon. (C.T. p. 173.)

The social worker's report for the 12-month review hearing recommended placing Xavior with father. (C.T. p. 163.) The report noted father attended Al-Anon meetings on a regular basis, although he had not attended general counseling. (C.T. p. 168.) The report indicated father was illiterate. (C.T. p. 168.) Estella could read and write and was supportive of father. (C.T. p. 168.) The department

expressed concern that father was “learning disabled” and could not process certain concepts. (C.T. p. 169.)

During the 12-month review hearing held January 30, 2009, the department changed its recommendation, and asked the court not to place Xavior with father. (R.T. pp. 28-29.) Father's counsel requested placement, as originally recommended. (R.T. p. 33.) The juvenile court set the matter for mediation, then a contested hearing. (R.T. pp. 33, 36; C.T. pp. 204, 227.)

At the 12-month contested review hearing held March 5, 2009, father's counsel submitted the matter on the reports without argument. (R.T. p. 39.) The court found it detrimental to place Xavior with father and found that father made moderate to substantive progress in alleviating the cause necessitating placement. (R.T. p. 40.)

The juvenile court, at the department's request, also ordered overnight weekend visitation supervised by Estella. (R.T. p. 45; C.T. pp. 230-231.)

The 18-Month Review Hearing

The department recommended terminating father's reunification services at the 18-month review hearing held July 6, 2009. (R.T. p. 48; C.T. p. 238.) The social worker's report described

father's full compliance with his case plan. Father attended individual counseling and several Al-Anon meetings. (C.T. p. 245.) Father consistently participated in week-end visits with Xavior, including extended holiday visits. (C.T. p. 246.) An attached letter from father's counselor reported that father explored ways he would practice creating a safe environment for his child. (C.T. p. 263.) The letter also stated father was provided material on child development issues and noted father appeared to struggle with clearly understanding the material. (C.T. p. 263.) Father reported he had social support that helped him in reading and applying the concepts. (C.T. p. 263.)

The social worker did not recommend placing Xavior with father "due to his disabilities," and stated that father has not done anything inherently wrong in regards to his child. (C.T. p. 247.) Father requested a contested hearing. (R.T. pp. 48-49.)

The 18-month review hearing was continued on July 21, 2009, and again on July 27, 2009. (R.T. pp. 51-61; C.T. pp. 287-288.) At the latter hearing, the department stated it would be recommending legal guardianship for Xavior with Estella. (R.T. p. 57; C.T. p. 288.) Minors' counsel, Mr. Stern, who represented Xavior and his older brother, Joshua, was opposed to this plan on the grounds it would be

detrimental to separate the siblings. (R.T. pp. 57-58.) At Mr. Stern's request, the juvenile court ordered Xavior not to be removed from foster care pending the trial. (R.T. p. 50; C.T. p. 282.)

In an August 2009 report, the social worker stated it appeared it would not create a detriment to the children's emotional well-being to be separated, as they did not desire to interact. (C.T. p. 294.)

At the 18-month review hearing held August 6, 2009, the juvenile court announced there had been an in-chambers meeting where the consensus was that a section 366.26 hearing was going to take place inevitably. (R.T. p. 63.) The juvenile court terminated father's reunification services and set a hearing under section 366.26. (R.T. pp. 63-64, 72; C.T. p. 303.) The court found father participated regularly in his reunification plan, although, failed to make substantive progress. (R.T. p. 70.)

Mr. Stern told the juvenile court that if the recommendation (of legal guardianship) stayed the same, he would probably have to declare a conflict. (R.T. p. 64.) The juvenile court ordered that father could continue to have overnight visits, but they had to be supervised by Estella. (R.T. pp. 72, 74; C.T. p. 304.)

The Section 366.26 Hearings

The first of five section 366.26 hearings began December 4, 2009. (R.T. p. 343; C.T. p. 77.) The department continued to recommend legal guardianship with Estella. (C.T. p. 343.) The section 366.26 report stated Xavior spent significant time with father and the two maintained a positive relationship since birth. (C.T. pp. 348, 350.) Xavior's paternal aunt and uncle also lived in the home. (C.T. p. 349.) According to the social worker, removing Xavior from the current home did not appear seriously detrimental since Xavior had a positive relationship with Estella and other paternal family members, including father. (C.T. p. 409.)

The plan of legal guardianship began to unravel. On December 23, 2009, the juvenile court granted an application for de facto parent status in favor of Xavior's foster parents. (R.T. p. 82; C.T. p. 386.) Mr. Stern told the juvenile court the foster parents were now committed to adopting Xavior and Joshua.[3] (R.T. p. 83.) At Mr. Stern's request, the juvenile court appointed counsel for the foster parents. (R.T. p. 84.)

At the section 366.26 hearing held January 21, 2010, the department continued to recommend legal guardianship with Estella,

3 The department earlier reported the foster parents wanted to adopt only Xavior, then decided not to adopt either child. (C.T. p. 291.)

who was approved for placement. (C.T. pp. 385, 398.) The juvenile court set the matter for a contest at the request of Mr. Stern, who continued to assert that separating the siblings would be detrimental. (R.T. pp. 87, 90; C.T. p. 402.)

Three pre-trial conferences followed. In a February 2010 addendum report, the social worker stated: "There appears to be no logical reason to prevent this child from being raised within the natural structure of his birth family under the guardianship of his paternal grandmother." (C.T. p. 407.) The social worker added, "father has inherently done nothing wrong. He loves and cares for his child and he wishes to be a part of his life." (C.T. p. 409.)

At the pre-trial conference held February 22, 2010, the department indicated it learned Estella moved and requested a continuance to investigate the new residence. (R.T. p. 96.)

On March 25, 2010, the department changed its recommendation. The department was now asking the court to terminate father's parental rights so Xavior could be adopted by the foster parents. (R.T. p. 102; C.T. p. 415.) The March 25, 2010 report stated Joshua was becoming more attached to his younger brother by the day and would start to cry when he left the home. (C.T. p. 419.) In

light of the new recommendation, father's counsel requested a contested hearing. (R.T. p. 103.)

At the contested section 366.26 hearing held May 20, 2010, the department introduced the social worker reports. (R.T. pp. 107, 108; C.T. p. 446.) The social worker testified that since father and Estella moved, they were participating in week-end day visits. (R.T. pp. 109, 112.) The social worker testified the housing situation was not a big factor in the department's change in recommendation, as it was an issue that could have been resolved. (R.T. p. 121.)

The social worker testified that by March 8, 2010, she formed a new opinion, recommending the termination of father's parental rights. (R.T. p. 115.) The social worker explained that, over the approximately one-month period after her contrary recommendation, the bond between Xavior and Joshua became stronger. (R.T. p. 115.) At the same time, the social worker believed the bond between Xavior and father decreased. (R.T. p. 116.) The social worker admitted she had not observed any interaction between Xavior and father since changing her recommendation. (R.T. p. 138.)

Estella also testified. (R.T. pp. 144-150.) When asked if father had some disabilities, Estella responded, “he doesn't know how to read

– he does know how to read a little bit." (R.T. p. 145.) Estella testified her family was living in a four-bedroom house with her sister. (R.T. p. 145.) Estella testified she and father continued to visit Xavior every weekend, despite their move. (R.T. p. 145.) She further testified that, during visits, father played with Xavior, fed him, and changed his diapers. (R.T. p. 148.) Xavior called father "dad." (R.T. p. 148.)

The juvenile court took the case under submission, indicating it wished to review case law. (R.T. pp. 157-158.)

On May 27, 2010, the juvenile court found the child-benefit exception under section 366.26, subdivision (c)(1)(B)(i) did not apply. (R.T. pp. 161-162; C.T. p. 448.) The court found clear and convincing evidence Xavior was adoptable and terminated father's parental rights. (R.T. p. 162; C.T. p. 448.)

ARGUMENT

> "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind … Three generations of imbeciles are enough."
>
> – Justice Oliver Wendell Holmes (*Buck v. Bell* (1927) 274 U.S. 200, 207.)

I. THE ORDER TERMINATING PARENTAL RIGHTS DENIED FATHER HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHERE NO EVIDENCE SUPPORTED PARENTAL UNFITNESS.

Parents have a fundamental interest in the care, companionship, and custody of their children. (*Santosky v. Kramer* (1982) 455 U.S. 745 [102 S.Ct. 1388, 71 L.Ed. 2d 599].) Substantive due process requires the state to initially prove parental unfitness by clear and convincing evidence before parental rights may be terminated. (U.S. Const., 14th amend; *Id.* at pp. 768-770.) The California Supreme Court has held that California's dependency scheme satisfies federal due process requirements because, by the time parental rights are terminated, the juvenile court must have made prior findings of detriment and parental unfitness. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.)

In this case, the juvenile court terminated father's parental rights without evidence – at any stage of the proceedings – that he was an unfit parent. The sole basis supporting the termination order was father's developmental disability. Like poverty or any other stigmatized human condition, a developmental disability alone cannot support an order terminating parental rights.

A. Prior detriment findings were not supported by substantial evidence.

Previous findings of detriment, if supported by substantial evidence, may be sufficient to support an order terminating parental rights. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1212.) Substantial evidence means evidence that is "reasonable, credible and of solid value; it must actually be substantial proof of the essentials that the law requires in a particular case." (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1401.)

In *In re G.S.R.* (2008) 159 Cal.App.4th 1202, the Court of Appeal for the Second District reversed an order terminating a father's parental rights because previous detriment findings were not supported by substantial evidence. The trial court sustained a section 300 petition against the mother after she was arrested for sexual

contact with a minor. (*Id.* at p. 1206.) The father, Gerardo, was non-offending under the petition but was unable to assume custody at the time of disposition because he rented a room that could not accommodate his children. (*Id.* at p. 1207.) During the reunification period, Gerardo attended some of the AA meetings he was ordered into, but remained unable to afford suitable housing. (*Id.* at pp. 1207-1208.)

In finding the detriment findings lacked evidentiary support, the Court of Appeal noted that a lack of housing or poverty would not have been a legitimate ground for removing the children in the first place. (*Id.* at p. 1213.) With respect to the AA meetings, the Court of Appeal found there was never evidence Gerardo's sobriety was an issue during the case. (*Ibid.*)

Similarly, in *In re P.C.* (2008) 165 Cal.App.4th 98, the Court of Appeal for the Fourth District reversed an order terminating a mother's parental rights where the only evidence supporting current detriment was the mother's inability to find suitable housing. The *In re P.C.* Court went further than *In re G.S.R*. Unlike Gerardo, the mother was an offending parent. (*Id.* at p. 105.) However, the agency conceded the mother corrected all problems leading to dependency jurisdiction. (*Ibid.*) Later detriment findings were therefore based

solely on the mother's inability to find suitable housing. (*Id.* at p. 106.) The Court of Appeal concluded that poverty alone was not a sufficient basis to terminate parental rights. (*Id.* at pp. 99-100.)

Here, as in *In re G.S.R.* and *In re P.C.*, the juvenile court's detriment findings were not supported by substantial evidence.

Detriment at the Jurisdiction and Disposition Hearing

At the jurisdiction hearing held January 31, 2008, the juvenile court sustained two allegations against father under section 300, subdivision (b). (R.T. p. 12; C.T. p. 105.)

The juvenile court found true that "father's ability to provide daily basic needs and financial care for the child was insufficient and placed the child at risk of harm." (R.T. p. 12; C.T. p. 3.) This allegation does not appear to state a basis for jurisdiction in the first place, as required under section 332, subdivision (f). (See *In re Janet T.* (2001) 93 Cal.App.4th 377 [allegation mother failed to ensure school attendance was not facially adequate].) Section 300, subdivision (b), requires a showing the child has suffered, or there is a substantial risk the child will suffer serious physical harm or illness. Alleging that father's ability to provide was insufficient, with no facts explaining why, would appear to fall far short of stating father exposes the child to a

substantial risk of serious physical harm or illness.

At any rate, the allegation as plead, lacked evidentiary support. Uncontradicted evidence showed father went to the hospital and told mother she and the baby could come to his home. (C.T. p. 8.) Father had an income as he received Supplemental Social Security Insurance (SSI). (C.T. p. 36.) More importantly, he lived with, and had the support of his mother, Estella. (C.T. p. 43.) Father told the social worker he had supplies for Xavior and knew how to care for the baby. (C.T. p. 36.)

There was some evidence father had some type of developmental disability.[4] Father received SSI benefits, met with a worker from the Inland Regional Center once every three months for job referrals, and the social worker observed that father had some difficulty "in understanding the legal system" and "the policy" of the department. (C.T. pp. 43, 51.) However, the department neither plead nor attempted to prove father's developmental disability affected his ability to parent Xavior. (C.T. pp. 1-4.) No professional diagnosis of father's

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4 "developmental disability" means a substantial disability that originates before an individual reaches 18 years and continues thereafter. It may include mental retardation or a closely related condition, cerebral palsy, epilepsy, or autism. (§ 4512, subd. (a); see also Penal Code § 1001.20, subd. (a); Probate Code § 1420.)

disability appears in the jurisdiction and disposition report, its attachments, or anywhere else in the record. (C.T. pp. 27-96.) Therefore, the inability-to-provide allegation was not supported by substantial evidence.

The juvenile court also found true that "father reasonably knew or should have known the child would be at risk if left in the care of the mother." (R.T. p. 12; C.T. p. 3.) Under the circumstances, this allegation did not make sense. Xavior was removed from mother's care at the hospital days after birth. (C.T. p. 7.) Xavior was not old enough to be left in anyone's care, other than in the care of hospital staff. To avoid this allegation, father would have had to unlawfully carry Xavior out of the hospital.

Moreover, there was no evidence father knew about mother's prenatal drug use. Father denied knowing about mother's drug use. (C.T. pp. 35-36.) Mother reported she had been transient during the nine months of her pregnancy. (C.T. p. 8.) Additionally, mother had broken up with father and dated another man. (C.T. pp. 8-9.) Mother reported to last using drugs on New Year's Eve, and reported father was not present. (C.T. p. 34.)

Nor could one make a reasonable inference that father knew

about mother's prenatal drug use. Although there was evidence mother occasionally stayed with father in Estella's home, there was no evidence she used drugs there. (C.T. p. 35.) Mother was unlikely to announce her drug habit during her visits in the home. Therefore, neither sustained allegation was supported by substantial evidence. Father should have been adjudicated a non-offending parent.[5]

Detriment at the Six-Month Review Hearing

On July 31, 2008, the juvenile court found custody with father continued to be detrimental. (R.T. p. 21; C.T. p. 153.) The court stated father made substantial progress. (R.T. pp. 22, 26.) However at county counsel's request, the court found father failed to complete the case plan. (R.T. p. 21.)

This detriment finding was not supported by substantial evidence. Father completed a parent education program, consistently visited Xavior, and began attending Al-Anon meetings. (C.T. pp. 117, 120.) The social worker recommended overnight visitation. (R.T. p. 24; C.T. pp. 123, 154.) Father's failure to "complete" Al-Anon meetings and

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5 The juvenile court found clear and convincing evidence that placement with father would be detrimental under section 361. (R.T. p. 14; C.T. p. 103.) However, this finding was supported by no more evidence than what was introduced for jurisdictional purposes. (R.T. pp. 13-14.)

general counseling did not expose Xavior to a risk of harm because no evidence suggested he needed those services in the first place. Father never harmed or acted negligently toward Xavior and he was no longer in a relationship with someone with a drug problem.[6] (C.T. p. 35.)

Detriment at the 12-Month Review Hearing

On March 5, 2009, the juvenile court found it would be detrimental to place Xavior with father. (R.T. p. 40.) The court stated father made moderate to substantive progress in alleviating the cause necessitating placement. (R.T. p. 40.) Again, at county counsel's request, the court found father failed to complete the case plan. (R.T. p. 41.)

This detriment finding was not supported by substantial evidence. By the 12-month review hearing, father participated in overnight visitation with Xavior. (C.T. p. 173.) Father had extended visits with Xavior for the two months prior to the 12-month review hearing, from Saturday through Wednesday afternoon. (C.T. p. 173.) There had been no major problems associated with these visits. (C.T. p. 173.) The 12-month review report indicated father was illiterate, although, Estella could read and write and was supportive of father in

6 "Al-Anon" is a group comprised of spouses or relatives of alcoholics. (*In re Brittany M.* (1993) 19 Cal.App.4th 1396, 1401.)

many ways. (C.T. p. 168.) Father continued attending Al-Anon meetings, but had not attended counseling. (C.T. p. 168.) The department originally recommended Xavior be placed with father. (C.T. p. 163.) It is not clear from the record why the department was not recommending Xavior be placed with father, except that it coincided with a mediation agreement dated February 26, 2009. (C.T. p. 209.)

In light of father's extended and unsupervised visitation during the months leading up to the 12-month review hearing, it is unclear how the juvenile court could find, by a preponderance of the evidence, that placement with father continued to be detrimental to Xavior. (R.T. p. 40.) Whether Xavior was spending five or seven days a week in father's care would not appear to measurably affect the risk level.

Detriment at the 18-Month Review Hearing

On August 6, 2009, the juvenile court found that custody with father continued to be detrimental to Xavior. (R.T. p. 70.) The court stated, "even though the father Mr. [H.] did participate regularly in his reunification plan, he did not make substantive progress in the court ordered treatment plan." (R.T. p. 70.)

This detriment finding was not supported by substantial evidence. By the 18-month review hearing, father was in complete

compliance with court orders. Father attended individual counseling, the only component he previously failed to participate in. (C.T. p. 245.) Father consistently participated in week-end visits with Xavior, including extended holiday visits. (C.T. p. 246.) Father's counselor reported father explored ways he would practice creating a safe environment for his child. (C.T. p. 263.) His counselor also stated father was provided material on child development issues and noted father appeared to struggle with clearly understanding the material. (C.T. p. 263.) Father reported he had social support to help him in reading and applying the concepts. (C.T. p. 263.)

The social worker did not recommend placing Xavior with father "due to his disabilities." (C.T. p. 247.) The social worker stated father relied on others to have many of his own needs met and did not appear to recognize the many demands and needs of a growing child. (C.T. p. 242.) The social worker admitted father did nothing wrong in regards to his child, and also stated, "father has demonstrated the ability to parent appropriately with assistance by family members." (C.T. pp. 247, 250.)

There was no basis to conclude the social worker was qualified to diagnose and assess father's "disabilities." Further, the social worker

failed to point to any ways in which father's condition affected his ability to care for and supervise Xavior. (C.T. pp. 238-256.) Consequently, the social worker's assumptions about father's ability to parent did not constitute evidence that is "reasonable, credible and of solid value." (*In re Yvonne W., supra,* 165 Cal.App.4th at p. 401.) In any event, the social worker admitted father could parent appropriately with the assistance of family members, whom he resided with. (C.T. p. 250.)

Thus, substantial evidence failed to support a finding it would be detrimental to place Xavior with father at any point during the proceedings. In addition, the record contains warning signs that the detriment findings did not match the facts. At the 6-month and 12-month review hearings, the juvenile court commented positively on father's progress. (R.T. pp. 22, 26, 40.) In both instances, county counsel successfully requested a finding that father had not completed his case plan – an apparent attempt at supplying a basis for the detriment finding where none really existed. (R.T. pp. 21, 41.)

It should be noted that to establish the instant due process violation, father need only show he corrected any problems leading to dependency jurisdiction. (See *In re P.C., supra,* 165 Cal.App.4th at p.

105.) A jurisdictional finding is not an adequate finding of parental unfitness because it is made by a preponderance of the evidence. (*In re P.A., supra,* 155 Cal.App.4th at p. 1212.) Thus, even if this Court finds that father was properly adjudicated an offending parent, as in *In re P.C.*, father completed every component of his case plan and demonstrated the ability to safely care for Xavior during extended unsupervised visitation. (C.T. pp. 173, 245.) The only possible basis for a detriment finding was father's developmental disability.

This case is easily distinguishable from cases where substantial evidence supported previous detriment findings. In *In re P.A., supra,* 155 Cal.App.4th 1197, 1213, the father was denied reunification services because his whereabouts were unknown. The father had not maintained any involvement in his child's life, had not provided support for his child, and had not seen the child for two and a half years. (*Ibid.*) In *In re A.S.* (2009) 180 Cal.App.4th 351, 363, the father refused to participate in dependency proceedings, his whereabouts were also unknown for a substantial period, and he did not visit his children for more than six months.

Finally, the juvenile court and the department appeared to assume placement would be detrimental based upon father's inability

to care for Xavior without assistance. The 18-month review report stated that father's disabilities prevented him caring for the child without assistance. (C.T. p. 250.) The same report also stated that father has demonstrated the ability to parent appropriately with the assistance of family members. (C.T. p. 247.)

Even if the evidence showed father could not care for Xavior on his own, this does not mean placement would be detrimental to Xavior's safety. In *In re Marilyn H.* (1993) 5 Cal.4th 295, 302, the California Supreme Court noted that amendments to section 366, "changed the emphasis from removal of children from the home to attempts to keep at-risk children within the home by requiring welfare departments to provide in-home services." In *In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1320, the Court of Appeal for the Fifth District held that a developmentally disabled parent is entitled to services which are responsive to the family's special needs in light of the parent's particular disabilities.[7] In *In re Misako R.* (1991) 2 Cal.App.4th 538, 547, the department offered a developmentally

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7 Although *Victoria M.* was decided under a former statutory scheme, former Civil Code section 232, subdivision (a)(7), also required the department to provide reasonable reunification services before parental rights may be terminated. (*In re Victoria M., supra,* 207 Cal.App.3d at p. 1320.)

disabled mother an array of services including assistance by church members, a public health nurse, regional center in-home services, counseling by the Union of Pan Asian Communities, and a psychologist.

In this case, father already received in-home assistance from Estella. (C.T. p. 168.) If the department believed father required further in-home services, it should have provided them. If the parental rights of the developmentally disabled are to be given more than lip service, the state should have to consider whether the disabled parent can parent with reliable assistance. Instead, the department provided father with a generic reunification plan of general counseling, parent education, and Al-Anon meetings. (C.T. p. 60.) The assumption father could not parent Xavior independently did not support a detriment finding.

Therefore, prior detriment findings in this case were not supported by substantial evidence. Because the juvenile court could not have found that father was an unfit parent, the order terminating his parental rights must be reversed.

B. A developmental disability cannot be the sole basis for terminating parental rights.

In *In re P.C., supra,* 165 Cal.App.4th 98, 99-100, the Court of Appeal for the Fourth District held that poverty alone is not a sufficient ground to terminate parental rights. The Court explained, "...judges [and] social workers...have an obligation to guard against the influence of class and life style biases." (*Id.* at p. 104; citing *In re G.S.R., supra*, 159 Cal.App.4th at p. 1210.)

Here, the record plainly demonstrates that the sole basis for terminating father's parental rights was his developmental disability.[8] Like poverty, a developmental disability is a stigmatized condition, often triggering irrational bias. This irrational bias is evidenced by numerous state and federal laws and judicial decisions, beginning with the holding of *Buck v. Bell* (1927) 274 U.S. 200 [47 S.Ct. 584, 71 L.Ed. 1000; overruled on equal protection grounds by *Skinner v. Oklahoma*

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8 Although no evidence in the record actually defined father's disability, under California law, it appears father had some variation of a developmental disability. A "developmental disability" means a substantial disability that originates before an individual reaches 18 years and continues thereafter. It may include mental retardation or a closely related condition, cerebral palsy, epilepsy, or autism. (§ 4512, subd. (a); see also Penal Code § 1001.20, subd. (a); Probate Code § 1420.) By contrast, a "mental disorder" includes conditions such as schizophrenia, bipolar disorder, or post-traumatic stress disorder. (See § 5600.3, subd. (b)(2).)

(1942) 316 U.S. 535 [62 S.Ct. 1110, 86 L.Ed. 1655].) In *Buck v. Bell*, the United States Supreme Court upheld a state statute permitting the forced sterilization of certain "mental defectives." (*Id.* at pp. 205-207.) The *Buck* Court had little faith in the parenting abilities of developmentally disabled people:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

(*Id.* at p. 207.)

Justice Holmes was not alone in his views toward developmentally disabled people. In *Tennessee v. Lane* (2004) 541 U.S. 509 [124 S.Ct. 1978, 158 L.Ed. 2d 820], the United States Supreme Court, in upholding certain provisions of the Americans with Disabilities Act, described the law's background:

> Congress enacted Title II against a backdrop of pervasive unequal treatment … including systematic deprivations of fundamental rights … As of 1979, most states … categorically disqualified "idiots" from voting, without regard to individual capacity...a number of States have prohibited and continue to prohibit persons with

> disabilities from engaging in activities such as marrying and serving as jurors.

(*Id.* at p. 525.)

In 1977, the California Legislature was compelled to enact the Lanterman Developmental Disabilities Services Act (Lanterman Act). *(§§ 4500-4519.7.) The Lanterman Act established a wide-array of statwide services, "to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (§ 4501.)

The Lanterman Act also declared that developmentally disabled people shall have the same legal rights and responsibilities guaranteed to all other individuals under the United States and California Constitutions. (§ 4502.) Further, developmentally disabled people are guaranteed the right to dignity, privacy, and the right to make choices in their own lives. (§ 4502, subds. (b), (j).)

These statutes and judicial decisions are part of a large body of law addressing discrimination and bias against developmentally disabled people. Put simply – as Justice Holmes did in 1927 – many people do not believe developmentally disabled people should be parents. A 2003 Whittier Law Journal noted, "Courts have assumed

that the children of mentally disabled parents are better off if they are removed from their parent's care and have failed to consider the value the child places on the relationship. The results of one study have shown that children who have been freed from parental custody and control have a profound sense of loss." (*Note and Comment, A Challenge of California Family Code Section 7827: Application of this Statute Violates the Fundamental Rights of Parents Who Have Been Labeled Mentally Disabled* (2003) 3 Whittier J. Child. & Fam. Advoc. 131, 142.) Dependency courts should be vigilant to ensure such bias does not infect their decisions.

This is not to say developmental disability can never form a basis for terminating parental rights. One basis for dependency jurisdiction under section 300, subdivision (b), is a parent's inability to provide regular care for the child due to a developmental disability. In addition, a "mentally disabled" parent may be denied reunification services altogether upon a showing, by at least two competent mental health professionals, that the parent is incapable of utilizing the services. (§ 361.5, subd. (b)(2); Fam. Code § 7827, subd. (c).) However, due process (as well as section 300) requires a connection between a developmental disability and parental fitness. (See *In re David M.*

(2005) 134 Cal.App.4th 822, 829 [no basis for dependency jurisdiction where the mother's mental and substance abuse problems were never tied to any actual harm to the children].)

In this case, the department neither plead, nor attempted to prove father had a developmental disability which rendered him an unfit parent. (C.T. pp. 1-4.) No professional diagnosis of father's developmental disability appears in the jurisdiction and disposition report, its attachments, or anywhere else in the record. (C.T. pp. 27-96.)

The department's failure to plead, prove, or investigate its admitted basis for terminating parental rights also denied father the individualized consideration due process requires. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1205 [due process requires that a parole board decision reflect an individualized consideration of the specified criteria].) As the United States Supreme Court observed, those who are developmentally disabled are not all "cut from the same pattern … they range from those whose disability is not immediately evident to those who must be constantly cared for." (*City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 442 [105 S.Ct. 3249, 87 L.Ed. 2d 313; overturning a state zoning law, on equal protection grounds,

which discriminated against mentally handicapped people].)

As a 1995 California Law Review comment explains:

> [Even] if we accept mental retardation or its younger cousin developmental disability as a valid classifying label, we still must account for the tremendous variance within the class in terms of functional ability … Yet parental rights termination statutes and adjudications rarely take this diversity into account. Legislatures and judges, as well as many clinical psychologists, tend to view the mentally retarded or developmentally disabled as monolithic. As inappropriate as it is to use IQ to predict or explain behavior, when enacting and implementing restrictive laws based on group characteristics, it is equally inappropriate not to distinguish, at a group level, between people with widely varying cognitive abilities.

(*Comment, Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded* 83 (1995) Cal. L.Rev. 1415, 1448-1449.)

Throughout this case, father attracted many labels, including from his own trial counsel. He was called "a regional center client," "somewhat disabled," "a little retarded," "learning disabled," and "illiterate." (R.T. pp. 7, 55, 84; C.T. pp. 168-169.) However, no effort was made to determine where, on the broad spectrum of developmental disability, father fell. In short, no effort was made to treat father as an individual.

Due process requires clear and convincing evidence of parental

unfitness, not irrational bias or assumption. A developmental disability, without more, cannot support an order terminating parental rights.

C. The claim should not be subject to the forfeiture rule where the termination order conflicts with due process and involves an important issue of law.

A reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been, but was not, made in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) However, application of the forfeiture rule is not automatic. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

In *In re Gladys L.* (2006) 141 Cal.App.4th 845, 847, the Court of Appeal for the Second District reversed an order terminating a father's parental rights, on due process grounds, because the department neither alleged, nor proved parental unfitness. The Court of Appeal declined to apply the forfeiture rule, explaining:

> Although the reversal of the juvenile court's order undermines the important goal of rapidly concluding dependency proceedings, it is the only way to safeguard Alex's rights as Gladys's presumed father and ensure that he is afforded due process.

(*Id.* at p. 849.)

In *In re S.B., supra,* 32 Cal.4th 1287, 1293-1294, the California Supreme Court declined to apply the forfeiture rule where the appeal presented an important issue of law. The Supreme Court noted that the issue, whether a juvenile court may delegate to a legal guardian the authority to decide if a parent may visit the child, had divided the Courts of Appeal. (*Id.* at p. 1294.)

This Court should not apply the forfeiture rule for the reasons stated in *Gladys L.* and *In re S.B*. As in in *Gladys L.*, addressing the claim is the only way to safeguard father's rights as Xavior's presumed father and ensure he is afforded due process. As in *In re S.B.*, the claim involves an important issue of law: whether a developmental disability, without more, can form the basis for terminating parental rights. This issue, which is likely to recur, involves the fundamental rights of developmentally disabled parents. This Court should address the issue and reverse the order terminating parental rights.

II. THE JUVENILE COURT ERRED IN FAILING TO APPOINT INDEPENDENT COUNSEL FOR XAVIOR WHERE HIS INTERESTS CONFLICTED WITH JOSHUA'S INTERESTS.

Children have a statutory right to independent and competent counsel in dependency cases. (§§ 317, 317.5; *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1252.) A parent has standing to assert his child's right to independent counsel because independent representation of the children's interests impacts the parent's interest in the parent-child relationship. (*In re Patricia E.* (1985) 174 Cal.App.3d 1, 6.)

In the dependency context, the juvenile court must relieve minors' counsel from multiple representation if an actual conflict of interest arises. (*In re Celine R.* (2003) 31 Cal.4th 45, 58.) A conflict arises when minors' counsel seeks a course of action for one child with adverse consequences to the other. (*In re Barbara R.* (2006) 40 Cal.App.4th 941, 953.) Reversal is warranted if the reviewing court finds it reasonably probable the result would have been more favorable to the appealing party but for the error. (*In re Celine R., supra,* 31 Cal.4th at p. 60.)

In this case, an actual conflict of interest arose between Xavior and Joshua where, during the permanent plan hearings, Xavior had an

appropriate family to reside with and Joshua did not. It was in Xavior's best interests to live with his family. At the very least, minors' counsel's duty of loyalty owed to Joshua precluded an independent assessment of Xavior's best interests. Absent minors' counsel's persistent advocacy in favor of adoption, it is reasonably probable father's parental rights would not have been terminated.

A. An actual conflict of interest arose between Xavior and Joshua where only Xavior had an appropriate family to reside with.

During the section 366.26 hearings, Xavior and Joshua's interests diverged. Terminating father's parental rights for a plan of adoption did not further Xavior's best interests. Xavior's interests were better served, after the reunification period, by a permanent plan of legal guardianship in father's home. Section 202, subdivision (a), states the purpose of the dependency statutes are to provide for the protection and safety of the minor, preserving and strengthening the minor's family ties whenever possible. Section 202, subdivision (a), further states that reunification of the minor with his or her family shall be a primary objective.

The plan of legal guardianship would have preserved and

strengthened Xavior's family ties. Xavior would have been placed in the home of his father, grandmother, aunt, and uncle. (C.T. p. 349.) Throughout the case, Xavior spent substantial time in this home with these paternal relatives. In December 2008 and January 2009, Xavior spent five days a week in this home, staying overnight. (C.T. p. 173.) Even in the months leading up the termination hearing, Xavior spent weekends with father and his paternal relatives. (R.T. pp. 109, 112, 148.)

The plan of legal guardianship also would have protected Xavior's safety. Even assuming that father's developmental disability interfered with his parenting, the plan of legal guardianship would have placed primary care-taking responsibility with Estella, a relative approved to supervise visits throughout the case. (R.T. pp. 45, 72; C.T. pp. 230-231, 304.)

In fact, from July 2009 to March 2010, the department believed, without reservation, that this plan of legal guardianship was in Xavior's best interests. (R.T. pp. 57, 102; C.T. pp. 288, 415.) In a February 2010 addendum report, the social worker stated father and the other paternal relatives in the home developed a mutually beneficial bond with Xavior. (C.T. p. 407.) The social worker added,

"there appears to be no logical reason to prevent this child from being raised within the natural structure of his birth family under the guardianship of his paternal grandmother." (C.T. p. 409.)

On the other hand, terminating father's parental rights was in Joshua's best interests as this would ensure that he and Xavior would be adopted together, preserving the sibling relationship. (R.T. p. 102; C.T. p. 415.) Unlike Xavior, Joshua had no appropriate parents or relatives to live with. In March 2010, Joshua's plan to be adopted by his paternal grandfather from Texas fell through, as the ICPC[9] request was denied. (C.T. pp. 406, 418.) Joshua's paternal grandfather informed the social worker that no other relatives wanted to adopt Joshua. (C.T. p. 399.) Therefore, it was unquestionably in Joshua's best interests to be adopted by the foster parents. Consequently, Joshua had a vested interest in keeping his brother in the same home through the termination of father's parental rights.

Moreover, Joshua was unlikely to be adopted without Xavior. At one point, the foster parents only wanted to adopt Xavior, then they decided not to adopt either child. (C.T. p. 291.) During a hearing in February 2010, county counsel informed the court, "it's our

9 "ICPC" refers to the Interstate Compact on Placement of Children. (Fam. Code § 7900 et seq.)

understanding that they [foster parents] want to adopt both but not just one separately." (R.T. p. 97.) County counsel indicated this position appeared strange and was of deep concern to the department. (R.T. p. 98.)

Thus, Joshua's interest in preserving his sibling relationship with Xavior and his interest in a permanent home conflicted with Xavior's interest, as outlined in section 202, in preserving family ties whenever possible. Mr. Stern chose to advance Joshua's interests to the detriment of Xavior. Mr. Stern sought "a course of action for one child with adverse consequences to the other." (*In re Barbara, supra,* 137 Cal.App.4th at p. 953.)

Even if this Court is unable, as a matter of law, to find that the plan of legal guardianship was in Xavior's best interests, an actual conflict of interest still existed. The attorney representing a dependent child is under a duty to advocate for what they believe to be the child's best interests, even if the child disagrees. (§ 317; *In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1265.) In *In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1542, the Court of Appeal for the Fourth District found that a minor's attorney performed her duties even where she advocated against her client's recantation of a sexual abuse allegation.

"[A]ppointed counsel for minors routinely serve in a dual role, as both the child's legal counsel and the child's guardian ad litem under the federal Child Abuse Prevention and Treatment Act (CAPTA)." (*Id.* at pp. 1541-1542.)

Minors' counsel must make an independent assessment of what steps in the litigation will serve the interests of the minor. (*In re Patricia E.* (1985) 174 Cal.App.3d 1, 7-8 [finding a presumptive conflict of interest in the county counsel's duel representation of the agency and the child].) The role of counsel for the child is not merely to act as a mouthpiece for the child, but neither is counsel to act as a mouthpiece for the governmental agency. (*Id.* at p. 8.)

In *Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423, 1428, the Court of Appeal for the Fourth District found that an actual conflict of interest arose between siblings after the section 366.26 hearing was set. The public defender represented all seven children. (*Id.* at p. 1425.) The agency's recommendation was adoption for some of the children and legal guardianship for others. (*Id.* at pp. 1425-1426.) The public defender filed a motion to be relieved, asserting it was not possible to independently evaluate each child's best interests. (*Id.* at p. 1427.) The public defender reasoned that an attorney

representing the children who might be adopted should analyze the relative benefits to them independently from confidences received from, or any duty owed to, the children not being adopted. (*Id.* at p. 1428.)

The Court of Appeal agreed with this analysis, noting that the same attorney representing Francisco (not subject to a possible adoption) could not pursue his interest in opposing adoption for his sibling, and at the same time, independently evaluate that sibling's best interests. (*Id.* at p. 1428.)

As in *Carroll*, Mr. Stern's duty of loyalty owed to Joshua precluded an independent assessment of Xavior's best interests. Advocating for adoption was the only position that furthered the best interests of Joshua. Mr. Stern was not free to advocate for a plan of legal guardianship without violating his duty of loyalty owed to Joshua. As in *Carroll*, the divergent circumstances of Xavior and Joshua made independent and competent representation of their best interests impossible. Thus, Mr. Stern's dual representation presented an actual conflict of interest even if the type of permanent plan best suited for Xavior was arguable.

Moreover, prior to the contested section 366.26 hearings, the

record suggests Mr. Stern lost sight of his duty to make an independent assessment of Xavior's best interests. In August 2009, the department recommended relative placements for both children. (C.T. p. 294.) Estella would become Xavior's legal guardian and a paternal grandfather would adopt Joshua. (C.T. p. 294.) Mr. Stern told the juvenile court, "if the recommendation stays the same, I believe I'll probably have to declare a conflict. But, I'd just as soon wait until that becomes imminent. If that's alright with the court." (R.T. p. 64.) Mr. Stern apparently believed a conflict of interest would arise only if, at the contested section 366.26 hearing, his position conflicted with the department's position. However, a minor's attorney should be free to assess their client's best interests independent of the agency. (*In re Patricia E., supra,* 174 Cal.App.3d at p. 8.)

This case is distinguishable from *In re Barbara R., supra*, 137 Cal.App.4th 941, 953, where the Court of Appeal for the Fourth District found two children represented by the same attorney did not have adverse interests. In *Barbara R.*, the child, Jade, unlike her younger sister, was a member of an Indian tribe which was opposed to Jade being adopted. (*Id.* at pp. 945, 947.) Jade's mother experienced several drug relapses. (*Id.* at pp. 946-947.) Jade testified she wanted to

be adopted by her grandparents. (*Id.* at p. 948.)

The Court of Appeal rejected the mother's argument that Jade's interests were adverse to her sisters' because the adoption could terminate Jade's tribal benefits. (*Id.* at p. 953.) The Court of Appeal noted there was no evidence the tribe would dis-enroll Jade once she was adopted, nor had there been evidence supporting an exception to the termination of parental rights. (*Id.* at pp. 954-955.) The Court stated, "there is no general best interest exception to termination of parental rights under section 366.26." (*Id.* at p. 955.)

In this case, whether it was in Xavior's best interests to be adopted was far from clear, as Xavior was too young to take a position. (C.T. p. 423.) Unlike the tribal benefits issue, Xavior had a far more compelling reason to oppose adoption – to live with his father and paternal relatives. (See § 202, subd. (a).) Moreover, in this case, unlike in *Barbara R.*, ample evidence supported the child-benefit exception. (R.T. pp. 115-162; see claim III at p. 50.) In opposing adoption for Xavior, Mr. Stern would not have had to take an untenable legal position. An actual conflict of interest existed between Xavior and Joshua.

B. The failure to appoint independent counsel for Xavior was prejudicial in light of Mr. Stern's persistent advocacy in favor of terminating parental rights.

Had the juvenile court appointed independent counsel for Xavior in this case, it is reasonably probable father's parental rights would not have been terminated. Mr. Stern was the driving force in undermining the plan of legal guardianship with Estella. Before father's reunification services were terminated, the juvenile court characterized Mr. Stern's opposition to the plan of legal guardianship as him against the world. (R.T. p. 61.)

At the section 366.26 hearing held July 6, 2009, Mr. Stern successfully requested an order from the juvenile court that Xavior not be placed with Estella pending the trial. (R.T. p. 50; C.T. p. 282.) At the first section 366.26 hearing, Mr. Stern's stand-in attorney asked the court not to place Xavior with Estella without an "approval packet" which the court so ordered. (R.T. pp. 79-80, C.T. p. 377.)

At the following hearing, Mr. Stern announced the foster parents wanted to adopt both children, and argued they should be appointed counsel. (R.T. p. 83.) Mr. Stern stated, "this is actually going to probably be a contested hearing. They have substantial rights

involved." (R.T. p. 83.) A persuaded juvenile court granted the de facto application and exercised discretion to appoint counsel for the foster parents.[10] (R.T. pp. 82, 84; C.T. p. 386.)

Then, on March 25, 2010, the department switched course and recommended terminating father's parental rights. (R.T. p. 102; C.T. p. 415.) The social worker's description of the sibling relationship directly contradicted her earlier observations, and echoed Mr. Stern's arguments.[11] It was no longer Mr. Stern against the world.

At the contested section 366.26 hearing, Mr. Stern urged the juvenile court to terminate father's parental rights. (R.T. pp. 152-153) Mr. Stern noted that Xavior had never been placed with a relative, pointing to his own successful request for an order preventing such placement July 6, 2009. (R.T. pp. 155-156.) Mr. Stern argued it was very important to keep the siblings together because "this is really all that they have in the world." (R.T. p. 152.)

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10 Indigent de facto parents are not entitled to court-appointed counsel. (*In re Joel H.* (1993) 19 Cal.App.4th 1185, 1199.)

11 An August 2009 addendum report stated, "the children do not appear [to] have strong emotional ties or have a desire to interact. They do not display physical affection, act protective or supportive of one another." (C.T. p. 294.) The March 25, 2010 addendum report stated, "it appears that separating the children form [*sic*] each other and or from the DeFacto [*sic*] parents would likely have a significant emotional impact on the children." (C.T. p. 419.)

Mr. Stern's persistent advocacy, and successful requests for Xavior to remain in foster care, likely changed the outcome of the section 366.26 hearing. The juvenile court faced a close decision with respect to the child-benefit exception. The evidence showed father's extensive visitation with Xavior throughout the case, at one point, spending five days a week with his son. (C.T. p. 173.) From July 2009 to March 2010, the department believed preserving Xavior's relationship with father was a compelling reason not to terminate parental rights. (R.T. pp. 57, 102; C.T. pp. 288, 415.) After hearing evidence, the juvenile court took the matter under submission and indicated it needed to review case law. (R.T. pp. 157-158.)

Therefore, father's parental rights likely would have remained intact but for Mr. Stern's advocacy. Because the juvenile court's failure to appoint independent counsel for Xavior was prejudicial, the order terminating parental rights should be reversed.

C. The independent counsel claim was not forfeited where minors' counsel brought the issue to the court's attention.

In the criminal law context, the California Supreme Court has held that no objection is required to raise the issue of an attorney's

conflict of interest on appeal. (*In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 564; citing *People v. Bonin* (1989) 47 Cal.3d 808, 839.) "So long as the trial court knew, or reasonably should have known, of the possibility of a conflict of interest, it is immaterial whether or not the defendant made an objection." (*People v. Bonin, supra,* 47 Cal.3d at p. 839.)

In *In re Elizabeth M., supra,* 232 Cal.App.3d at p. 564, a dependency case, the Court of Appeal for the Fourth District held the father's issue of independent counsel for his children was cognizable on appeal, notwithstanding his trial attorney's failure to raise the issue. The Court of Appeal noted that three of his children raised the same issue in their appeal. (*Id.* at p. 564.)

In this case, the juvenile court reasonably should have known about the conflict of interest stemming from Mr. Stern's dual representation of Xavior and Joshua because Mr. Stern brought the issue to the court's attention. At the section 366.26 hearing held August 6, 2009, Mr. Stern told the court, "if the recommendation stays the same, I believe I'll probably have to declare a conflict. But, I'd just as soon wait until that becomes imminent. If that's all right with the court." (R.T. p. 64.)

Thus, even if Mr. Stern's analysis was unsound, the juvenile court was alerted to the issue more than nine months ahead of the contested section 366.26 hearings. (R.T. pp. 64, 106.) Moreover, whenever a minors' attorney has one client with a parent asserting the child-benefit exception and another client without a parent asserting the exception, the potential for conflict should be apparent (especially when the plan is for both clients to be adopted together). Therefore, the juvenile court reasonably should have known about the actual conflict of interest.

An actual conflict of interest arose in this case where Xavior had an appropriate family to live with and Joshua did not. The failure to appoint independent counsel for Xavior was prejudicial and the issue is reviewable on appeal. Therefore, this Court should reverse the order terminating parental rights.

III. THE JUVENILE COURT ERRED IN FAILING TO APPLY THE CHILD BENEFIT EXCEPTION.

Once the juvenile court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330.) Section 366.26, subdivision (c)(1)(B)(i), provides an exception to terminating parental rights when "the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." A beneficial relationship is one that "promotes 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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The reviewing court must determine whether there is substantial evidence to support the juvenile court's ruling by reviewing the evidence most favorable to the prevailing party and indulging in all reasonable inferences to uphold the court's ruling. (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.) Substantial evidence means evidence that is "reasonable, credible, and of solid value; it must actually be

substantial proof of the essentials that the law requires in a particular case." (*In re Yvonne W., supra,* 165 Cal.App.4th at p. 1401.)

In this case, father easily established the first requirement for the child benefit exception where he maintained regular visitation with Xavior. (C.T. pp. 120, 173, 246; R.T. p. 145.) The issue at trial was whether the father-son relationship promoted Xavior's well-being to such a degree as to outweigh the benefits of adoption. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) The juvenile court recognized there existed a relationship between Xavior and father, however, did not conclude this relationship was sufficient to trigger the exception. (R.T. p. 162.)

This finding was not supported by substantial evidence. Ample evidence showed father assumed a parental role. The evidence about Xavior's relationship with Joshua was irrelevant, and the social worker's modified opinion about Xavior's bond with father was not reasonable or credible evidence.

A. Evidence at trial showed father developed a beneficial bond with Xavior and assumed a parental role.

The evidence showed Xavior formed a positive attachment with

father, and father assumed a parental role. This evidence was very similar to the evidence in *In re S.B.*, *supra,*164 Cal.App.4th 289, where the Court of Appeal for the Fourth District found the juvenile court erred in failing to apply the child-benefit exception.

In *In re S.B.*, the father, a Vietnam veteran, complied with every aspect of his case plan, although his physical and emotional health prevented reunification. (*Id.* at p. 294.) The father had been diagnosed with post-taumantic stress disorder. (*Ibid.*) Three days a week, the father visited his daughter, who became upset when the visits ended. (*Ibid.*) The social worker observed the child had a consistent and positive relationship, but the grandmother assumed the more parental role. (*Id.* at p. 295.) A bonding study revealed the father's relationship vacillated between parental in nature and peer-like. (*Id.* at p. 296.)

In reversing the order terminating parental rights, the Court of Appeal found there was no evidence there was not some type of parental relationship. (*Id.* at p. 298.) The Court noted the father complied with every aspect of his case plan, the father was sensitive to his daughter's needs, and his daughter whispered to her father, “I love you.” (*Ibid.*)

In this case, father also completed every aspect of his case plan,

demonstrating a commitment to Xavior's well-being. (C.T. p. 245; see also *In re Amber M.* (2002) 103 Cal.App.4th 681, 690 [trial court erred in failing to apply the child benefit exception where the mother did virtually all that was asked of her to regain custody].) Despite the fact Xavior was detained due to mother's actions, father completed a parenting program, attended Al-Anon meetings, and participated in counseling. (C.T. pp. 117, 168, 245.)

During visits with Xavior, father also assumed a parental role and showed sensitivity toward Xavior's needs. At the start of the case, father visited Xavior consistently twice a week. (C.T. p. 120.) Father was appropriate with Xavior, feeding and holding him. (C.T. p. 120.) Additionally, father, along with mother, brought Xavior gifts, clothes, and snacks. (C.T. p. 120.) In early October 2008, the department approved overnight visitation in father's home. (C.T. p. 173.) Father had extended visits with Xavior for the two months prior to the 12-month review hearing, from Saturday through Wednesday afternoon. (C.T. p. 173.) There were no major problems associated with these visits. (C.T. p. 173.) The social worker observed father to interact well with Xavior, feeding and holding him. (C.T. p. 174.)

From the 12-month review hearing to the termination hearing –

a period of about one year and three months – father continued to spend weekends with Xavior. (R.T. pp. 45, 109, 112; C.T. pp. 230-231, 246, 347.) For much of this period, these were overnight visits.[12] In December 2009, the social worker stated Xavior spent significant time with father and the two maintined a positive relationship since birth. (C.T. pp. 348, 350.) In February 2010, the social worker stated father and the other paternal relatives in the home developed a mutually benefiticial bond with Xavior. (C.T. p. 407.) The social worker also stated father, "loves and cares for his child and he wishes to be a part of his life." (C.T. p. 409.)

The social worker stopped observing father's interaction with Xavior after she recommended terminating his parental rights in March 2010. (R.T. p. 138.) However, Estella's testimony showed father's parental role with Xavior continued. Estella testified father played with Xavior, fed him, and changed his diapers. (R.T. p. 148.) Xavior called father, "dad." (R.T. p. 148.)

Thus, as in *In re S.B.*, ample evidence showed Xavior's positive attachment to father and a parental relationship between the two. The

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12 The social worker testified that after father and Estella moved in February 2010, the weekend visits were no longer overnight due to the paternal aunt not being live-scanned. (R.T. pp. 109, 112.)

record may not contain the overt indications of affection found in *In re S.B.*, such as the daughter whispering, "I love you." (*In re S.B., supra,* 164 Cal.App.4th at p. 298.) However, this is to be expected as Xavior was detained days after birth and was non-verbal for most of the case. (C.T. pp. 9-10.)

This case is distinguishable from cases affirming the juvenile court's decision not to apply the child benefit exception. For example, in *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418, the mother's two daughters were detained due her drug use, a problem the mother failed to correct during the reunification period. During the first six months, the mother visited consistently, but was in drug rehabilitation. (*Id.* at p. 1414.) Prior to the 18-month review hearing, the mother began missing visits or appearing under the influence during visits. (*Id.* at p. 1414.) Although the mother later moved into the apartment below her children and visited more frequently, the social worker testified the relationship was more like one would have with an aunt. (*Id.* at pp. 1417, 1419-1420.)

In this case, unlike in *Beatrice M.,* father consistently acted like a father to Xavior to the furthest extent permitted by juvenile court orders. Father did every program he was asked to do and never acted

against Xavior's best interests. (C.T. pp. 117, 168, 245.) Whether the visitation order permitted him to care for Xavior five days a week, or just weekends, father took full advantage, using the time to develop the relationship. (R.T. pp. 45, 109, 112; C.T. pp. 173, 230-231, 246, 347) This case is much closer to *In re S.B.* than *Beatrice M.*

Thus, the evidence showed father developed a beneficial bond with Xavior, and this bond was a compelling reason not to terminate parental rights.

B. Evidence of Xavior's relationship with Joshua was irrelevant to the child benefit issue.

A major theme at the contested section 366.26 hearings was Xavior's relationship with Joshua. In closing argument, county counsel argued there was a sibling bond between Joshua and Xavior. (R.T. p. 151.) Similarly, minors' counsel argued the social worker report outlined a very good case for keeping the siblings together. (R.T. p. 152.) In a March 2010 report, the social worker stated (contrary to statements in an August 2009 report) it appeared that separating the children would likely have a significant emotional impact on the children. (C.T. pp. 294, 419.) In May 2010, the social worker testified

the bond between Xavior and Joshua became stronger. (R.T. p. 115.)

The evidence of Xavior's bond with Joshua was irrelevant to the issue of whether father established the child benefit exception. The juvenile court must decide whether continuing the parent-child relationship would outweigh "the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) The issue of whether Xavior should be removed from Joshua was a separate placement issue. Even if the juvenile court found that father established the child benefit exception, it could have ordered Xavior to remain with Joshua under an alternative plan of legal guardianship or long-term foster care. (See § 366.26, subds. (b)(5), (b)(6).) In *In re Jerome D.* (2000) 84 Cal.App.4th 1200, the Court of Appeal for the Fourth District found the juvenile court erred in failing to apply the child benefit exception. In so doing, the Court of Appeal stated, "a permanent plan of guardianship or long-term foster care would have allowed Jerome to remain in that home yet maintain his relationship with Mother." (*Id.* at p. 1208.)

Thus, whether Xavior's relationship with Joshua was sufficiently strong to preclude placement with father and Estella was not the issue before the juvenile court, and should have been decided separately.

Evidence about the sibling relationship was not substantial evidence supporting the juvenile court's ruling.

C. The social worker's modified opinion about the father-son relationship was not substantial evidence.

Substantial evidence is evidence that is reasonable, credible, and of solid value. (*In re Yvonne W., supra,* 165 Cal.App.4th at p. 1401.) At the section 366.26 hearing, the juvenile court must consider the social worker's report. (§ 366.26, subd. (b).) In *In re Malinda S.* (1990) 51 Cal.3d 368, 378-379, the California Supreme Court held social worker reports admissible, in part, because they are prepared by disinterested parties in the regular course of their professional duties. Yet, before a witness may testify about a matter, they must have personal knowledge of that matter. (Evid. Code § 702, subd. (a).) If testifying as an expert witness, the opinion must be based on a matter personally known or made known to the expert at or before the hearing. (Evid. Code § 801, subd. (b).)

In this case, the social worker testified that father's relationship with Xavior changed in a very short amount of time, without personal knowledge of the matter. In a February 2010 report, the social worker

stated father developed a mutually beneficial bond with Xavior, and that legal guardianship would foster the child's connection with father. (C.T. p. 407.) In her March 2010 report, just one month later, the social worker simply stated father maintained a relationship with Xavior. (C.T. p. 419.) In May 2010, the social worker testified she believed the bond between Xavior and father decreased because Estella was picking up Xavior (for visits) without father and father was not contacting her about the child. (R.T. p. 116.) The social worker admitted she had not observed any interaction between Xavior and father since changing her recommendation in March 2010. (R.T. p. 138.)

It was not reasonable to infer a change in father's relationship with Xavior simply because father was not with Estella when she picked Xavior up for week-end visits. Even if true,[13] father's absence from the vehicle tells almost nothing about the current father-son relationship. The same can be said about father not contacting the social worker. If father needed information about Xavior, a more appropriate party to contact would appear to be the foster parents. The fact the social worker had not observed father's interaction with Xavior since March 2010 showed she had no personal knowledge from

13 Estella testified that father did come with her to pick up Xavior. (R.T. p. 147.)

which to conclude the bond had decreased. Moreover, there was no indication the social worker based her modified opinion upon observations from anyone else with personal knowledge of the matter. (R.T. p. 130.)

Therefore, the social worker's modified opinion about father's bond with Xavior was not reasonable, credible, or of solid value. It was not substantial evidence. The remaining evidence – observations by the social worker of father feeding and holding Xavior, overnight-extended visits, testimony from Estella – all showed father's beneficial relationship with Xavior outweighed the benefits of adoption. (C.T. pp. 120, 173, 246, 348, 350, 407; R.T. pp. 145-148.)

Thus, the juvenile court erred in failing to apply the child benefit exception. The only evidence appearing to support the ruling was either irrelevant or not based upon personal knowledge. Accordingly, this Court should reverse the order terminating father's parental rights.

CONCLUSION

A developmental disability cannot be the sole basis for terminating a presumed father's parental rights. This result offends federal due process protections and irrationally deprives a child from having a relationship with his father.

This Court should reverse the order terminating parental rights and remand the matter back to the juvenile court with directions to return Xavior to father's care unless independent grounds exist which would make placement detrimental. (See *In re G.S.R., supra*, 159 Cal.App.4th at p. 1216.) If the juvenile court determines detriment exists, it should take the necessary steps to return Xavior to father's care. (See *Ibid.*) Alternatively, this Court should reverse the termination order on grounds that Xavior was deprived of his right to independent counsel, or on grounds the juvenile court failed to apply the child benefit exception. This Court should restore a parental relationship which should never have been severed.

Dated: August 18, 2010 Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I certify that the forgoing brief complies with California Rules of Court, rule 8.412 and 8.360 and contains 12,184 words, including footnotes, according to the word count feature of OpenOffice.org Writer 3.2, the computer program used to prepare this brief.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Manhattan Beach, California on August 18, 2010.

_____

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