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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

Guardianship of ANN S., a Minor.	
A.B. et al., Petitioners and Respondents, v. A.C., Objector and Appellant.	C049915 (Super. Ct. Nos. PG01254, SA0241)

APPEAL from a judgment of the Superior Court of Yolo County, Timothy L. Fall, Judge. Affirmed.

Law Office of Kimball J. P. Sargeant and Kimball J. P. Sargeant, under appointment by the Court of Appeal, for Objector and Appellant.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part IV.

Law Office of Karen Ehler and Karen Ehler; Ishikawa Law Office and Brendon Ishikawa for Petitioners and Respondents.

Gradstein & Gorman and Marc Gradstein for Academy of California Adoption Lawyers and the Academy of California Family Formation Lawyers as Amicus Curiae on behalf of Petitioners and Respondents.

Since September 26, 2001, when Ann S. (the minor) was 18 months old, her paternal aunt and the aunt's husband have been her guardians. After almost four years had passed, her mother's parental rights were terminated pursuant to Probate Code section 1516.5, which provides that a trial court may declare a child free from a parent's custody and control if (1) the parent does not have legal custody of the child, (2) the child has been in the custody of a legal guardian for at least two years, and (3) the child would benefit from being adopted by the guardian. (Prob. Code, § 1516.5, subd. (a).)

Mother appeals, claiming that Probate Code section 1516.5 is an unconstitutional infringement upon her fundamental rights as a parent because it allows the termination of parental rights without a "showing of current parental unfitness . . . ." In the alternative, she contends that the trial court erred in applying the statute retroactively and that, in any event, principles of res judicata preclude its application to the circumstances of this case. We shall affirm the judgment.

As we will explain in the published parts of this opinion, Probate Code section 1516.5 reflects valid legislative determinations that (1) where a parent has left his or her child in a guardianship for at least two years without rectifying the problem that required

the guardianship, there is a compelling state interest in protecting the child's need for stability, which takes precedence over parental rights, and that (2) where the guardian wants to adopt the child, and the trial court finds by clear and convincing evidence that the child will benefit from being adopted by the guardian, there is a rebuttable presumption that (a) the parent is unfit to have custody of the child, in the sense the parent is not presently capable of properly caring for the child due to the parent's situation, and (b) it would be detrimental to the child not to terminate parental rights in order to permit the adoption to take place. The presumption is rebutted if the parent demonstrates otherwise by a preponderance of the evidence.

We conclude that section 1516.5 is narrowly tailored to achieve the state's compelling interest in protecting the child, and that the statute does not impermissibly infringe upon the parent's liberty interest in the care, custody, and control of the child because the statutory scheme provides the parent with the requisite due process before parental rights can be terminated.

We also conclude that section 1516.5 is retroactive and applies after two years of the guardianship, regardless of whether any part of the two-year period occurred before the statute became law.

Here, the evidence supports the presumption that mother was presently unfit to properly care for the minor and that it would have been detrimental to the minor not to terminate mother's parental rights in order to permit the guardians to adopt the minor.

In the unpublished part of our opinion, we reject mother's other claim of error.

FACTS

Mother's relationship with R.S. (father) resulted in the minor's birth in March 2000. Mother has two other children, born in 1988 and 1998, as a result of her relationships with other men.

Mother has a long history of heroin addiction and has committed multiple criminal offenses, including assault with a deadly weapon. Father also was a drug user.

In early September 2001, father obtained custody of the minor after mother left a suicide message on his answering machine and law enforcement officers found known drug users around the children in mother's apartment. When father was unable to care for the minor, his sister and her husband (to whom we will refer as aunt and uncle, or as the guardians) filed a petition for temporary guardianship and gave notice of their intent to adopt the minor. The trial court issued letters of temporary guardianship on September 26, 2001.

In October 2001, mother and the minor's aunt and uncle met with a mediator, and mother agreed that the temporary guardianship should remain in effect. She also agreed that she would not have visitation until she could demonstrate to the trial court that she had enrolled in a drug rehabilitation program. The court entered an order adopting the mediation agreement.

In December 2001, mother consented to the aunt and uncle becoming the minor's permanent guardians, which they have been since that time. Because mother had not complied with the drug rehabilitation requirement, the trial court denied her visitation with the minor.

In early 2002, mother was charged with six criminal counts involving heroin. Because of her prior criminal history, she faced a possible life term under California's "three strikes law." Thus, she told the minor's aunt and uncle that she wanted them to adopt the minor. They filed a petition for independent adoption in May 2002. However, after mother entered into a plea agreement and was sentenced to only two years and eight months in state prison, she changed her mind and objected to the adoption.

In November 2002, father consented to the termination of his parental rights.

In January 2003, the minor's guardians filed a petition to terminate mother's parental rights on the grounds that mother had left the minor in their care for over six months, without any support or communication and with the intent to abandon the child (Fam. Code, § 7822) and the nature of her felony convictions showed her unfitness to have future custody and control of the minor (Fam. Code, § 7825).

The social worker reported in October 2003 that instead of completing a drug abuse treatment program, mother had relapsed into drug use, which resulted in a felony theft conviction. She was serving a 32-month sentence for the conviction, and her two older children were in a "long term guardianship" with mother's sister. According to the social worker, the minor was thriving in the nurturing environment provided by the aunt and uncle, who had been married for almost 20 years and had stable jobs. The social worker recommended that the court terminate mother's parental rights.

In February 2004, the trial court denied the petition to terminate mother's parental rights. Relying on *In re Jacklyn F.*

(2003) 114 Cal.App.4th 747, the court held that the judicial order establishing the permanent guardianship precluded a finding that mother had abandoned the minor within the meaning of Family Code section 7822, and that the nature of mother's felony convictions did not prove she was unfit to have future custody and control of the minor within the meaning of Family Code section 7825.

Mother was released from prison in February 2004. One week later, the guardians filed the petition at issue here, to declare the minor free from mother's care, custody, and control pursuant to Probate Code section 1516.5, which became effective on January 1, 2004. (Stats. 2003, ch. 251 (Sen. Bill No. 182), § 11.) As noted previously, Probate Code section 1516.5, subdivision (a) provides that in a guardianship proceeding, the trial court may declare a child free from a parent's custody and control if (1) the parent does not have legal custody of the child, (2) the child has been in the custody of a legal guardian for at least two years, and (3) the child would benefit from being adopted by the guardian.

Mother opposed the petition on the grounds that (1) Probate Code section 1516.5 is unconstitutional because it does not require a finding of parental unfitness, (2) the statute cannot be applied retroactively, and (3) the guardians were collaterally estopped from relitigating mother's fitness as a parent.

At the hearing on the petition to terminate her parental rights, mother introduced evidence that she was in a residential drug treatment program where she was taking classes involving parenting skills, drug education, relapse prevention, and anger management. She also submitted a letter from a recovery advocate with the Female

Offender Treatment & Employment Program (FOTEP), a program to help substance abusing female offenders reunify with their families. The letter stated that mother was in a FOTEP residential treatment program, was actively participating in group sessions, and was making "progress in her personal recovery . . . ."

According to mother, she originally agreed to the guardianship simply because she was going to be incarcerated and, thus, would be unable to care for the minor. In her words: "I chose to enter into a guardianship because I knew my parental rights would not be terminated in that type of relationship. Had Probate Code section 1516.5 existed at the time I was contemplating a guardianship, I probably would not have entered into one[.]" Claiming that the guardians had thwarted her efforts to have contact with the minor, and asserting that upon her release from prison she will be able to care for her, mother said she now opposes the guardians' adoption of the minor.

The social worker reported that the guardians "have clear criminal background checks and meet all requirements for adoption." They have a long-term marriage, stable jobs, and a large home. The minor, who had been in their custody since she was 18 months old, called her guardians "mama" and "papa," and was "extremely attached" to them. In contrast, the minor had no relationship with mother, who had not had any contact with her for two years. The social worker recommended that mother's parental rights be terminated so the guardians could adopt the minor. According to the social worker, the guardians were "open to visitation" between the minor and her half-siblings after the adoption is finalized.

The trial court also received a recommendation from therapist Carrie Schucker, Ph.D., who had been retained by the guardians to determine if adoption was in the minor's best interest. Schucker stated that the five-year-old minor was happy, relaxed, and bonded with her aunt and uncle, who as guardians had provided her with "a structured, consistent, child centered environment" for more than three and a half years. The minor does not remember visits that she had in 2001 and early 2002 with her now 16-year-old half-sister, and she "does not appear to . . . wish to see [the half-sister]." There apparently had been no visitation between the minor and her other half-sister. Schucker opined that although mother "does appear to be trying to turn her life around," adoption by the guardians was in the minor's best interest. Schucker explained: The minor "weathered a painful separation (rupture) from her birth mother at 17 months with the love and support of the [guardians]," whom she considers to be her parents and "feels secure and loved" with them. "A major change at this time in her primary attachments would cause her stress and emotional damage." Furthermore, "[i]ntroducing a birth mother and half siblings she doesn't appear to remember would be confusing and emotionally difficult for her, especially with the risk of inconsistent contact . . . . This little girl does not have the emotional stamina to weather another loss."

The trial court concluded the guardians met their burden of proving by clear and convincing evidence that the minor, who had been in their custody for more than two years, would benefit from being adopted by them, and adoption would be in her best interest. The court found that the minor had a parent-child relationship with

her guardians, but no relationship with her mother. The court also emphasized that mother was not presently in a position to take custody of the minor and that she could not say when she could do so. In fact, the court noted, mother was not seeking to terminate the guardianship; she just wanted to visit the minor. The court found that requiring visitation with mother and the half-siblings was not in the minor's best interests. Hence, the court denied mother's request for visitation and, pursuant to Probate Code section 1516.5, terminated her parental rights.

DISCUSSION

I

Before addressing mother's claims, it is helpful to set forth the relevant legal framework concerning guardianships.

Upon hearing a petition for guardianship, a trial court may appoint a guardian of the person of a minor "if it appears necessary or convenient . . . ." (Prob. Code, § 1514, subd. (a).) When the petition concerns the custody of a minor, the court is also governed by sections 3020 and 3041 of the Family Code. (Prob. Code, § 1514, subd. (b); *Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1155; *Guardianship of Jenna G.* (1998) 63 Cal.App.4th 387, 393-394.)

Family Code section 3020 declares "it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. . . ." (Fam. Code, § 3020, subd. (a).) Determining a child's best interest requires the trial court to consider various factors, including the child's health, safety,

and welfare; any history of abuse by a parent or other person seeking custody of the child, which was committed against the child, or a parent of the child, or a cohabitant; the nature and amount of the child's contact with the parents; and any habitual or continual use of controlled substances or alcohol by either parent. (Fam. Code, § 3011.)

Family Code section 3041 generally precludes an award of custody to a nonparent over a parent's objection unless the trial court finds by clear and convincing evidence that granting custody to the parent would be detrimental to the child and that granting custody to the nonparent is required by the child's best interest. (Fam. Code, § 3041, subds. (a) & (b).) "As used in this section, 'detriment to the child' includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents." (Fam. Code, § 3041, subd. (c).) If the court finds that the person to whom custody may be given already has assumed the day-to-day role of the parent of the minor, as described in subdivision (c), *ante*, "this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary." (Fam. Code, § 3041, subd. (d).)

Thus, there is no requirement in a guardianship proceeding that the parent be found "unfit" -- in the sense the person is unfit to parent any child -- before custody of a particular child is awarded to a nonparent; rather, the focus is on detriment to that child. (*In re B.G.* (1974) 11 Cal.3d 679, 695-699; *Guardianship of Phillip B.* (1983) 139 Cal.App.3d 407, 419.) Nonetheless, as a practical matter, a finding that it would be detrimental to a child to be in a parent's custody is ordinarily equivalent to a finding that the parent is unfit to have custody of the child. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 423; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 224, fn. 3; *In re Cody W.* (1994) 31 Cal.App.4th 221, 224-226.)

When the trial court appoints a nonparent as guardian of the person of a child, the authority of the parent ceases. (Fam. Code, § 7505, subd. (a).) It is the guardian, not the parent, who has the care, custody, and control of the child. (Prob. Code, §§ 2350, 2351.) Once established, either voluntarily or involuntarily, a permanent guardianship continues until it is terminated. (*Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, 61.)

A guardianship of a child terminates when the child attains majority, dies, is adopted, or becomes emancipated. (Prob. Code, § 1600.) In addition, upon petition of the guardian, a parent, or the child, the trial court may terminate the guardianship if the court determines it is in the child's best interest to do so. (Prob. Code, § 1601.)

A parent seeking to terminate a guardianship has the burden of proof and must demonstrate something more than that the parent is now ready to take back the child, i.e., the parent must show his

or her "'overall fitness'" and changed circumstances "'sufficient to overcome the inherent trauma'" of taking the child away from a guardian who is caring for and nurturing the child. (*Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 933 (hereafter *Simpson*).)

Before the enactment of Probate Code section 1516.5, via Senate Bill No. 182, a child could be in a guardianship indefinitely if (1) the parents did not seek to terminate the guardianship or were unable to do so, and (2) the guardians were unable to show the existence of any of the grounds specified in the Family Code for the termination of parental rights (see Fam. Code, § 7800 et seq.). As pointed out in a Senate Judiciary Committee analysis, Senate Bill No. 182 created an "avenue for a guardian where the child has been in the custody of the guardian for a long time and the parent or parents are not likely to reclaim the child but the parent or parents do not fall under one of the categories covered by existing law." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 182 (2003-2004 Reg. Sess.) as amended Mar. 26, 2003, p. 8.)

Senate Bill No. 182 was intended to cover situations such as where a parent has voluntarily given a child to the guardian "in a written guardianship agreement that may or may not have been entered in a formal court proceeding" and, years later, the child has bonded with the guardian as a parent but then-existing grounds to terminate parental rights of the child's birth parents would not apply. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 182, *supra*, at pp. 8-9.) For example, "a drug addicted mother gives the child in guardianship, hoping to get herself rehabilitated but repeatedly fail[s], creating a situation where the child is in the custody of the guardian for

years without being in the foster care system." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 182, *supra*, at p. 9.) The new provision enacted by Senate Bill No. 182 "would allow a child to remain in and be adopted into a loving home in which he or she has been living. Adoption would take away any fear that someday his or her birth parent or parents would come back to reclaim him or her." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 182, *supra*, at p. 9.)

Thus, Probate Code section 1516.5 states in pertinent part: "(a) A proceeding to have a child declared free from the custody and control of one or both parents may be brought in the guardianship proceeding pursuant to Part 4 (commencing with Section 7800) of Division 12 of the Family Code, if all of the following requirements are satisfied: [¶] (1) One or both parents do not have the legal custody of the child. [¶] (2) The child has been in the physical custody of the guardian for a period of not less than two years. [¶] (3) The court finds that the child would benefit from being adopted by his or her guardian. In making this determination, the court shall consider all factors relating to the best interest of the child, including but not limited to, the nature and extent of the relationship between all of the following: [¶] (A) The child and the birth parent. [¶] (B) The child and the guardian, including family members of the guardian. [¶] (C) The child and any siblings or half-siblings."

Section 1516.5, subdivision (b) requires the trial court to appoint a qualified professional to investigate the aforesaid factors and submit findings "regarding those issues" in a written

report required by Family Code section 7851. The court also must provide the child's parent with the procedural due process rights, including "notice and counsel," that are provided in proceedings to terminate parental rights pursuant to the Family Code. (Prob. Code, § 1516.5, subd. (c); see Fam. Code, § 7800 et seq.) However, this statute "does not apply to any child who is a dependent of the juvenile court." (Pen. Code, § 1516.5, subd. (d).)

II

Mother claims Probate Code section 1516.5 is unconstitutional because it permits termination of parental rights "without requiring proof by clear and convincing evidence." Not so.

The statute expressly states that "[t]he rights of the parent, including the rights to notice and counsel provided in Part 4 (commencing with Section 7800) of Division 12 of the Family Code, shall apply to actions brought pursuant to this section." (Prob. Code, § 1516.5, subds. (a) & (c).) Thus, Probate Code section 1516.5 incorporates provisions of Family Code section 7821, which states: "A finding pursuant to this chapter shall be supported by clear and convincing evidence." Here, the trial court expressly found that the burden of proof was by clear and convincing evidence, and that the guardians had met their burden.

In another constitutional attack on the statute, mother says it violates substantive due process by allowing the termination of her parental rights without a "showing of current parental unfitness . . . ." The contention fails for reasons that follow.

A

"Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) The deprivation of a fundamental right is permissible "only if the conduct from which the deprivation flows is prescribed by reasonable legislation that is reasonably applied; that is, the law must have a reasonable and substantial relation to the object sought to be attained" (*id.* at pp. 306-307) and "be narrowly drawn to express only the legitimate state interest." (*In re David B.* (1979) 91 Cal.App.3d 184, 193.)

Parents have a fundamental liberty interest in the care, custody, and management of their child. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753 [71 L.Ed.2d 599, 606]; *In re Marilyn H., supra,* 5 Cal.4th at p. 306.) Hence, there are substantive due process limitations on the power of government to sever parental rights. "[A] state cannot terminate a parental relationship based solely upon the 'best interests' of the child without some showing of parental unfitness . . . ." (*In re Heather B.* (1992) 9 Cal.App.4th 535, 556, fn. omitted; see *Quilloin v. Walcott* (1978) 434 U.S. 246, 255 [54 L.Ed.2d 511, 520].) In this sense, parental unfitness means that the child will suffer detriment if he or she remains in, or is returned to, the parent's custody. (*In re B.G., supra,* 11 Cal.3d at pp. 695-699; *In re Dakota H., supra,* 132 Cal.App.4th at p. 224, fn. 3; *In re Cody W., supra,* 31 Cal.App.4th at pp. 224-226.)

The United States Supreme Court "has not specifically defined what 'some showing' of parental unfitness entails. The terms

which the states have utilized to describe parental unfitness are linguistically variable and include parents who have failed, refused or neglected to provide proper or necessary care; children who are neglected, deprived, or abused; children who are in need of supervision; or parents who have failed to maintain contact with the child or to plan for his or her future. [Citation.]" (*In re Heather B., supra,* 9 Cal.App.4th at p. 556.) "A proceeding to terminate parental rights is not intended to punish a parent but parental conduct is a factor; likewise, the best interest of the child is not determinative but is an important consideration. [Citation.]" (*Ibid.*)

B

"[T]he welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307.) "Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." (*In re Jasmon O., supra,* 8 Cal.4th at p. 419.) Children "have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 306.)

Where the rights of children and parents conflict, the legal system traditionally protects the child's interest. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254 [where a child has been abused or neglected by a parent, "the child's interest must be given more weight"]; *In re Angelia P.* (1981) 28 Cal.3d 908, 917.)

For example, where a child has been in out-of-home placement under the jurisdiction of a dependency court for 18 months and the parent has failed to correct problems which caused the child to be removed from the home, a showing of a substantial likelihood that the child will suffer serious trauma if separated from the present caregiver is sufficient to establish the requisite detriment to the child. (*In re Jasmon O.*, *supra*, 8 Cal.4th at pp. 418-419, 426; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1504-1505.) This is so because the child's need for "stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child." (*In re Jasmon O.*, *supra*, 8 Cal.4th at pp. 419, 425.)

Proceedings to terminate parental rights under the Family Code also emphasize the importance of a stable environment for the child. "The purpose of [the statutes governing the termination of parental custody and control] is to serve the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life." (Fam. Code, § 7800.) Consequently, "the state's interest in the welfare of children justifies the termination of parental rights when a parent fails to communicate with his or her child for at least one year with the intent to abandon the child during that period [Fam. Code, § 7822], even though the parent desires to eventually reestablish the parent-child relationship. In other words, a child's need for a permanent and stable home cannot be postponed for an indefinite period merely because the absent parent may envision renewing contact with the child sometime in the distant future." (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 884.)

"Simply stated, a child cannot be abandoned and then put 'on hold' for a parent's whim to reunite. Children continue to develop, and the Legislature has appropriately determined a child needs a secure and stable home for that development." (*In re Daniel M., supra,* 16 Cal.App.4th at p. 885; cf. *In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038 ["The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it"].)

C

Consistent with the aforesaid principles and provisions of law, we conclude, as we will explain, that Probate Code section 1516.5 reflects valid legislative determinations that (1) where a parent has left his or her child in a guardianship for at least two years without rectifying the problems that required the guardianship, there is a compelling state interest in protecting the child's need for stability, which takes precedence over the parent's rights, and that (2) where the guardian wants to adopt the child, and the trial court finds by clear and convincing evidence that the child will benefit from being adopted by the guardian, there is a rebuttable presumption that (a) the parent is unfit to have custody of the child, in the sense the parent is not presently capable of properly caring for the child due to the parent's situation, and (b) it would be detrimental to the child not to terminate parental rights in order to permit the adoption to take place. The presumption is rebutted if the parent shows otherwise by a preponderance of the evidence. Section 1516.5

is narrowly tailored to achieve the state's compelling interest in protecting the child, and the statute does not impermissibly infringe upon the parent's liberty interest in the care, custody, and control of the child because the statutory scheme provides the parent with the requisite due process before parental rights can be terminated.

D

"[A] court must, whenever possible, construe a statute so as to preserve its constitutional validity." (*Kraus v. Trinity Management Services, Inc*. (2000) 23 Cal.4th 116, 129.) "If 'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.' [Citations.] Consequently, '[i]f feasible within bounds set by their words and purposes, statutes should be construed to preserve their constitutionality.' [Citation.]" (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 186.)

A "fair and reasonable interpretation" of Probate Code section 1516.5 demonstrates that it is constitutional.

Before a guardianship is established and the child is taken from the parent's custody over the parent's objection, the trial court must find by clear and convincing evidence that granting custody to the parent would be detrimental to the child and that granting custody to the nonparent guardian is in the child's best interest. (Fam. Code, § 3041, subds. (a) & (b).) If the court finds by a preponderance of the evidence that the person to whom custody is to be given is a "person who has assumed, on a day-to-day basis, the role of [the child's] parent, fulfilling both the child's

physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time" (Fam. Code, § 3041, subd. (c)), then this "shall constitute a finding that [said] custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary." (Fam. Code, § 3041, subd. (d).)

In other words, a nonparent guardianship will occur, over the parent's objection, only where there is either (1) clear and convincing evidence of detriment if the child were to remain in the parent's custody, or (2) the parent has relinquished custody of the child to the person seeking to become the child's guardian and has done so for such a substantial period of time that the person has become a surrogate parent and it is reasonably presumed that returning the child to the parent's custody will be detrimental to the child absent a preponderance of the evidence to the contrary.

In the first instance, there is an express finding of detriment by clear and convincing evidence. In the latter instance, there is a presumption of detriment, logically following from the parent's abandonment of parental responsibilities and custody of the child, which presumption the parent may rebut by a preponderance of the evidence.

Where the parent consents to a nonparent guardianship of the child, the parent effectively concedes that the parent is not capable of properly caring for the child due to whatever situation the parent is experiencing, and thus that it would be detrimental to the child to be in the parent's custody. A parent does not lightly place his

or her child in a guardianship, because doing so deprives the parent of the care, custody, and companionship of the child until the parent can show that it is in the child's best interest to be removed from the stable home provided by the guardian and returned to the parent's custody. To regain custody, a parent must show his or her "'overall fitness'" and changed circumstances "'sufficient to overcome the inherent trauma'" that may result from taking the child away from a guardian who is caring for and nurturing the child. (*Simpson, supra,* 67 Cal.App.4th at p. 933.)

In most cases of a voluntary guardianship, it will not be too difficult for a parent to establish that regaining custody is in the child's best interest. (*Simpson, supra*, 67 Cal.App.4th at p. 933, fn. 14.) "Guardianship termination cases typically revolve 'around a drama of parental trouble and reformation.' [Citation.] When the parent is out of trouble, out of the military, or out of a hospital, he or she will *usually* be sufficiently fit to resume parental responsibilities." (*Ibid.*, original italics.) Parents who place their child in a guardianship as the result of a military commitment or a transitory health or financial issue typically act quickly to regain custody when the "crisis" has passed, and they usually have maintained sufficient contact with their child in the interim, both of which demonstrate their ability to resume custody.

However, where a guardianship is involuntary, or is voluntary only in the sense that it is an attempt by the parents to avoid a dependency proceeding, it is not unusual for the child to be left in the guardian's care indefinitely while the parents repeatedly

and unsuccessfully try to rectify problems that gave rise to the guardianship.

In effect, the child is abandoned. But if the parent has maintained some contact with the child, and the guardianship is the result of a court order, the termination of parental rights on the ground of abandonment under Family Code section 7822 is extremely difficult to prove, if not impossible. (*In re Jacklyn F.*, *supra*, 114 Cal.App.4th at pp. 754-756.) Nevertheless, the detriment to the child remains the same; the child is deprived of the fundamental right to have a settled life in a stable, permanent home. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 306.)

For this reason, the Legislature enacted section 1516.5 of the Probate Code (hereafter section 1516.5).

The termination of parental rights via section 1516.5 is analogous to the termination of parental rights via the Family Code in that the Family Code's procedures are adopted in subdivisions (a) and (c) of section 1516.5. Parental rights may be terminated under the Family Code based on clear and convincing evidence (Fam. Code, § 7821) of various circumstances, including the parent has left the child in the care of another person for over six months, without any support or communication and with the intent to abandon the child (Fam. Code, § 7822, subd. (a)); the parent's habitual abuse of controlled substances or alcohol has rendered the parent unable to adequately care for and control the child, who has been a dependent of the juvenile court for one year (Fam. Code, § 7824); or the parent has failed, and is likely to fail in the future, to maintain an adequate parental relationship with the child while

the child has been in out-of-home placement for a one-year period, supervised by the juvenile court (Fam. Code, § 7828). The time limits set by these statutory provisions constitute a legislative recognition that a child has the right to a stable and permanent home and that it is detrimental to the child if the parent cannot provide such a home within a finite period of time.

Section 1516.5 similarly allows termination of parental rights under circumstances that are the functional equivalent of a showing that the parent is presently unfit to parent the child and that the child will suffer detriment if parental rights are not terminated. Those circumstances are (1) the parent's inability to care for the child, resulting in the child's placement in a guardianship; (2) the parent's failure to regain custody of the child after two years or more have elapsed; and (3) the existence of a stable adoptive home with the guardian, who has met the child's needs during this passage of time. (§ 1516.5, subd. (a).)

The statute reflects a rational determination that if after the passage of two years, the parent has not resolved the problem resulting in the guardianship and has not ended the guardianship, then the parent currently remains incapable of properly providing for the child's emotional and/or physical needs, and has abandoned the child to guardianship limbo. In other words, the Legislature has made a rational determination that, unless the parent can show otherwise by a preponderance of the evidence, the parent is presently unfit to parent the child, and it would be detrimental to the child to be kept in an indefinite state of guardianship when the guardian

is willing to adopt the child and provide a permanent and stable home.

Section 1516.5 also provides procedural due process by requiring that, before parental rights are terminated, the parent has notice and an opportunity to rebut the presumption of parental unfitness and detriment to the child that arises from a parent's inability, or failure, to regain custody of his or her child after two years or more have elapsed. (§ 1516.5, subd. (c).) If, after receiving such notice and opportunity to be heard, the parent is unable to rebut the presumption by a preponderance of the evidence, then parental rights can be terminated if it is in the best interest of the child to be adopted by the guardian. Of course, the trial court must consider the child's relationship with the parent, guardian, and siblings, if any, and whether these relationships demonstrate that adoption is not in the child's best interests; if so, parental rights will not be terminated. (§ 1516.5, subd. (a).)

In this respect, section 1516.5 is readily distinguishable from the circumstances in *Stanley v. Illinois* (1972) 405 U.S. 645 [31 L.Ed.2d 551], upon which mother relies. In that case, the state *conclusively presumed* an unmarried father was unfit to have custody of his children; therefore, upon the death of their mother, the state took custody of the children from their father *without permitting a hearing on parental fitness*. (*Id*. at pp. 646, 649-650, 658 [31 L.Ed.2d at pp. 555-556, 557-558, 562].) In contrast, parental rights may be terminated pursuant to section 1516.5 only after the child has been out of the parent's custody for two years, which will not have occurred unless (1) there was a hearing and

a court finding of detriment to the child (Prob. Code, §§ 1511, 1514, subd. (b); Fam. Code, § 3041) or (2) the parent voluntarily relinquished custody, thereby effectively conceding the parent was unable to properly care for the child and the child would suffer detriment if required to be in the parent's custody. Moreover, before parental rights are terminated, the parent receives notice and an opportunity to rebut the statutory presumption of parental unfitness and detriment to the child if parental rights are not terminated in order to permit the guardian to adopt the child.

E

In sum, although a parent has a fundamental liberty interest in the care, custody, and companionship of his or her child, this interest is not without limits. It does not entitle the parent to park the child in an indefinite guardianship -- with the guardian undertaking the difficult albeit rewarding work of parenthood -- while the parent takes an inordinate amount of time to resolve the parent's problems, secure in the knowledge that he or she can reclaim the child when the parent deems it convenient to do so. Whether a guardianship is voluntary or involuntary, a parent must work expeditiously to regain custody of the child. As declared by the Legislature in Probate Code section 1610, "it is in the best interest of children to be raised in a permanent, safe, stable, and loving environment."

When a parent is unable to provide this safe and stable environment, then the child's rights become paramount. The state has a compelling interest in the welfare of the child and has a duty to protect the child's right to a permanent home with a caregiver

who is willing to make a full emotional commitment to the child. (*In re Marilyn H., supra*, 5 Cal.4th at pp. 306-307.) Section 1516.5 effectuates this compelling state interest by allowing the child the opportunity to have a permanent home, by way of adoption, after the child's parents have failed to provide one for at least two years.

In order to do so, the statute creates a rebuttable presumption that where the guardian wants to adopt a child who has been in the guardian's custody for two years, and the trial court finds that the child would benefit from being adopted by the guardian, then the parent is unfit to have custody of the child and it would be detrimental to the child not to terminate parental rights in order to permit the adoption to take place.

Section 1516.5 is narrowly tailored to achieve this compelling state interest because its applicability depends on the availability of an adoptive home with the guardian. Parental rights will not be terminated unless (1) the guardian seeks to adopt the child, (2) the child would benefit from adoption, and (3) it is in the child's best interest to be adopted, considering the child's relationship with the guardians, the parents, and any siblings. (§ 1516.5, subd. (a).)

The statute does not impermissibly infringe upon the parent's liberty interest in the care, custody, and control of the child because the statutory scheme provides the parent with the requisite due process before parental rights can be terminated.

Here, the trial court found clear and convincing evidence that the minor had been in the guardians' custody for at least two years and would benefit from being adopted by them. The court also found

the evidence supported Dr. Schucker's conclusion the five-year-old minor would be harmed by the emotional trauma of being separated from her long-time guardians and placed with her mother. These findings were a sufficient determination of mother's present unfitness to parent the minor and of detriment to the minor if parental rights were not terminated so the minor could be adopted by her guardian.

For the reasons stated above, section 1516.5 is constitutional on its face and constitutional as applied in this case. Mother was not deprived of her right to due process of law.

III

Next, mother contends the trial court erred in applying section 1516.5 retroactively.

"'The retroactive application of a statute is one that affects rights, obligations or conditions that existed before the time of the statute's enactment, giving them an effect different from that which they had under the previously existing law. [Citations].' In other words, retroactive application of a recently enacted law applies 'the new law of today to the conduct of yesterday.' [Citation.]" (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 469, fn. 5.) But a statute does not necessarily operate retrospectively "merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." (*Sitzman v. City Board of Education* (1964) 61 Cal.2d 88, 89; *In re Joshua M.*, *supra*, 66 Cal.App.4th at p. 469.)

Section 1516.5 became effective on January 1, 2004, before the guardians filed their petition to terminate mother's parental rights. Mother posits that to meet the statute's two-year custody

requirement, the trial court necessarily relied on the more than two years the minor was in the guardians' custody prior to the effective date of section 1516.5. In her view, the court erred in doing so because legislative enactments generally are presumed to operate prospectively, not retroactively, unless the Legislature plainly intended otherwise. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587.)

The Legislature's intention to make section 1516.5 retroactive and apply after two years of a guardianship of a child, regardless of whether any portion of the two-year period occurred before the statute became law, is expressed plainly in section 3 of the Probate Code, which provides in pertinent part: "(b) This section governs the application of a new law [in the Probate Code] except to the extent otherwise expressly provided in the new law. [¶] (c) Subject to the limitations provided in this section [limitations that are not applicable in this case], a new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date . . . ." The Legislature is presumed to have been aware of this retroactivity statute when it enacted section 1516.5 and, thus, is presumed to have intended section 1516.5 to be retroactive. (*People v. Davis* (2005) 126 Cal.App.4th 1416, 1427; *Reidy v. City and County of San Francisco* (2004) 123 Cal.App.4th 580, 591-592.)

Not only does the plain language of Probate Code section 3 and the lack of contrary language in section 1516.5 demonstrate an intent to make section 1516.5 apply retroactively, this result comports with

the Legislature's expressed intent to protect the welfare of a child described in section 1516.5 by establishing a process whereby the child can live in a permanent, safe, stable, and loving environment provided by an adoptive parent who has been the child's guardian. (See *In re Marriage of Bouquet, supra,* 16 Cal.3d at pp. 587-588 [in determining whether the Legislature's intent is to have a statute be applied retroactively, we consider "'all pertinent factors'" that "may illuminate the legislative design, 'such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction.' [Citations.]"].) Where a child described in section 1516.5 has been in long-term guardianship prior to the effective date of the statute, it would be contrary to the public policy expressed by the Legislature to require the child to remain in the guardianship for another two years before obtaining the benefit of the public policy set forth in Probate Code section 1610 and section 1516.5.

Relying on *In re Cindy B.* (1987) 192 Cal.App.3d 771 (hereafter *Cindy B.*), mother contends that even if the Legislature intended that 1516.5 be applied retroactively, doing so violates her right to due process of law because she was not timely informed that her consent to a guardianship of the minor could ultimately result in termination of her parental rights. According to her, if she had known of this potential consequence, she "probably would not have entered into [a guardianship]" for the minor. We are not persuaded.

Cindy B. addressed the retroactivity of an amendment to Civil Code section 232, which provided for the first time that parental rights could be terminated one year after a child was declared a

dependent of the juvenile court for any reason set forth in Welfare and Institutions Code section 300, and not just if the child was declared a dependent under section 300, former subdivision (d). (*Cindy B., supra,* 192 Cal.App.3d at p. 776.) This court held the amendment was not retroactive because there was no evidence of such an intent by the Legislature (*id*. at pp. 779-781), and retroactive application of the statute would contravene the notice requirement of the amendment, which provided, for the first time, that when a child is taken from parental custody, the parents must be warned that their parental rights could be terminated if they are unable to resume custody within one year (*id*. at pp. 781-782).

Cindy B. also stated that "a strong case for a substantive due process violation would be tendered by a retroactive application of the statute" (*Cindy B., supra*, 192 Cal.App.3d at p. 783) because the father did not know that the termination of his parental rights was a possibility at the time his children were declared dependents of the juvenile court. (*Id.* at pp. 783-784.) However, because the court declined to "reach the question of the constitutionality of the retroactive application of the amended statute," having already determined that the Legislature did not intend it to be applied retroactively (*id*. at p. 784), the comments concerning substantive due process were dictum and are not binding in this case.

"In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that

reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (*In re Marriage of Bouquet, supra*, 16 Cal.3d at p. 592.)

Mother's claim that she "probably" would not have consented to the guardianship but for her belief that it would not result in the termination of her parental rights is unpersuasive. Mother's chronic heroin addiction made her unable to care for the minor, whom mother had virtually abandoned to the guardians' care. A finding that it would be detrimental to return the minor to mother's custody was the inevitable conclusion if mother had contested the guardianship. The fact that the placement undoubtedly would have occurred regardless of mother's consent undermines any suggestion, based on her equivocal statement, that she detrimentally relied on the old probate law in giving consent to the guardianship.

Although at the time she consented to the guardianship, mother's parental rights could not be terminated except for reasons stated in the Family Code or via dependency proceedings, the law provided that she could not regain custody of the minor unless she established her fitness and demonstrated it was in the minor's best interest to be reunited with mother. (*Simpson, supra,* 67 Cal.App.4th at p. 933.) The law also provided that, at any time, the guardians could have sought assistance from the juvenile court, dependency proceedings could have been initiated and, then, mother would have "a limited time period to get her act together" to avoid a permanent plan of adoption. (*In re Jacklyn F., supra*, 114 Cal.App.4th at p. 756.) We presume mother knew of these laws. (*Estate of Dye* (2001) 92

Cal.App.4th 966, 973.) Nonetheless, despite being told repeatedly that she needed to cure her illicit drug habit, mother did not do so.

Simply stated, mother could not have reasonably believed that consenting to a guardianship of the minor would give mother an indefinite amount of time to resolve her parental inadequacies at the minor's expense. "The law of guardianship necessarily entails higher standards than those applicable to a pawnshop. The idea that children may be temporarily deposited in the hands of some bailee to be recovered at will -- like an old lamp that one doesn't know what to do with, so one puts it in storage -- is contradicted by the cases and common experience." (*Guardianship of Kassandra H.* (1998) 64 Cal.App.4th 1228, 1239.) As time passes, the paramount concern becomes the stability of the child, who has a fundamental interest in a safe and permanent home; indeed, there is a compelling state interest in protecting this need. (Prob. Code, § 1610; Fam. Code, § 7800; *In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 306-307.)

It is true that until section 1516.5 was enacted, mother did not know that her parental rights could be terminated if she failed to regain custody of the minor for two years. However, mother had the opportunity to establish that the retroactive application of section 1516.5 impermissibly interfered with her due process rights. (Prob. Code, § 3, subd. (h) ["If a party shows, and the court determines, that application of a particular provision of the new law . . . would substantially interfere with . . . the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative

date, the court may . . . apply . . . the old law to the extent reasonably necessary to mitigate the substantial interference"].)

Mother made no showing that an injustice would occur if she were not given additional time from the effective date of section 1516.5 before her parental rights could be terminated. In fact, when judgment was entered terminating mother's parental rights, one year and six months had elapsed since section 1516.5 became effective, and the minor had been in the guardians' custody for almost four years. And, as the trial court observed, mother did not seek to regain custody of the minor, was not in a position to take custody of the minor, and "could not say when she would be in a position to take custody." In other words, mother could not even say that it was possible, let alone likely, she would be in a position to regain custody of the minor within the next six months, at which point the application of section 1516.5 would not be retroactive.

Furthermore, waiting another six months to apply the statute only would have delayed the inevitable outcome. The minor already had been in a guardianship for almost four years and was firmly bonded with her guardians. Overwhelming evidence showed that mother was unable to properly care for the minor and that the minor would have suffered severe emotional detriment if the guardianship were terminated and she were returned to mother's custody. Under the circumstances, there was no likelihood that six months later mother could have established that reunification with mother, a virtual stranger to the minor, would be in the minor's best interest.

Considering (1) the importance of the state interest in creating a stable and permanent home for the minor, (2) the importance of the retroactive application of section 1516.5 in order to effectuate that interest, (3) mother's questionable reliance on the former law, and (4) her failure to demonstrate a substantial likelihood that she would be in a position to regain custody before a prospective two-year period expired, mother has failed to show that retroactive application of section 1516.5 resulted in a substantial interference with her right to due process of law.

IV*

In the trial court, mother argued that the guardians were barred by the doctrine of collateral estoppel from pursuing the section 1516.5 action because the guardians had been unsuccessful in attempting to terminate her parental rights via Family Code sections 7822 and 7825.

The doctrine of collateral estoppel provides that a party to an action, or one in privity with a party, is barred from subsequently relitigating issues actually litigated and finally decided in a prior proceeding. (*United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 615.) The issue decided in the prior proceeding must be identical with the one sought to be precluded. (*Id.* at p. 616.) "Only issues actually litigated in the first action may be precluded by collateral estoppel. An issue is actually litigated when it is properly raised by the pleadings or otherwise, is submitted for determination and is actually determined." (*Younan v. Caruso* (1996) 51 Cal.App.4th 401, 407.)

The appellate record provided by mother does not reflect the trial court's ruling on her collateral estoppel argument. This is of no moment, however, because mother has abandoned her collateral estoppel claim, conceding the issues involved in the two actions are not identical.

For the first time on appeal, mother asserts that she is not relying on the collateral estoppel or issue preclusion aspect of res judicata, but on the claim preclusion aspect of res judicata. She contends the guardians' failure to join their section 1516.5 petition with their Family Code petition to terminate her parental rights bars them from pursuing the section 1516.5 petition because the two actions involved the same primary right. In her view, the primary right possessed by the guardians in both actions was their entitlement to adopt the child entrusted to their care.

Mother acknowledges that section 1516.5 did not become effective until January 1, 2004, one year after the guardians filed the Family Code petition to terminate mother's parental rights. However, she argues they could have amended the petition to add the section 1516.5 allegations during the one month before the hearing in early February 2004, at which the Family Law petition was denied.

In the trial court, mother relied solely on collateral estoppel, without even a hint she also believed the claim preclusion aspect of res judicata applied. Because she failed to raise the latter theory in the trial court, we need not decide whether it has any merit. This is so because it is an established rule of appellate procedure that issues not raised in the trial court cannot be raised for the first time on appeal. (*Honig v. San Francisco Planning Dept.* (2005)

127 Cal.App.4th 520, 529-530.) Furthermore, "[u]nlike collateral estoppel, an objection based on the doctrine of res judicata must be specially pleaded or it is waived. [Citation.] The reason for this distinction is that res judicata results in a complete defense whereas collateral estoppel 'merely involves conclusive evidence of a fact in issue.' [Citation.]" (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1158; *David v. Hermann* (2005) 129 Cal.App.4th 672, 683 ["'Res judicata is not a jurisdictional defense, and may be waived by failure to raise it in the trial court'"]; *Parker v. Walker* (1992) 5 Cal.App.4th 1173, 1191 [the defense of res judicata must be pleaded and proved at trial by the party asserting it, or it is waived].)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

NICHOLSON, J.

BUTZ, J.