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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RACHEL M., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ROSI M., Defendant and Appellant.	D041731 (Super. Ct. No. J514038)
RACHEL M., Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D042607 (Super. Ct. No. J514038)
SAN DIEGO COUNTY HEALTH & HUMAN SERVICES AGENCY and ROSI M., Real Parties in Interest.	

1 Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I.A. and I.B.1.

APPEAL from a judgment of the Superior Court of San Diego County and petition for writ of error *coram vobis*, Susan D. Huguenor, Judge. Judgment affirmed; petition denied.

Joseph J. Tavano, under appointment by the Court of Appeal, for Defendant, Appellant and Real Party in Interest.

John J. Sansone, County Counsel, Susan Strom and Janice J. Casillas, Deputy County Counsel, for Plaintiff, Respondent and Real Party in Interest.

Linda M. Fabian, under appointment by the Court of Appeal, for Petitioner and Minor.

In this consolidated proceeding Rosi M., the mother of Rachel M., appeals the termination of her parental rights pursuant to Welfare and Institutions Code section 366.26,[2] and Rachel, joined by Rosi, petitions this court for a writ of error *coram vobis* to vacate the judgment based on new evidence. In her appeal, Rosi contends there was insufficient evidence to support a finding that Rachel was likely to be adopted, and the juvenile court erred by not applying the beneficial relationship exception to adoption. (§ 366.26, subd. (c)(1)(A).) In her petition, Rachel urges us to vacate the judgment and remand for a new section 366.26 hearing to consider comments by Rachel's grandmother suggesting that her agreement to adopt Rachel was the result of coercion. We affirm the judgment and deny the petition.

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2 All statutory references are to the Welfare and Institutions Code unless otherwise specified.

PROCEDURAL AND FACTUAL BACKGROUND

Rachel, the daughter of Rosi and Michael L., was born in February 2001 with a positive toxicology screen for methamphetamine.[3] Rosi admitted she used methamphetamine during the pregnancy and did not obtain prenatal care. On February 8 Rosi and Michael signed a voluntary contract with the San Diego County Health and Human Services Agency (Agency) to participate in drug testing, substance abuse treatment, and the Healthy Infant Program. During the next six months, Rosi and Michael did not drug test, participate in substance abuse treatment or follow through with a public health nurse for well-baby checks.

On August 3 Agency filed a petition on behalf of Rachel under section 300, subdivision (b), alleging she was at risk because, among other things, her parents had not satisfactorily participated in their voluntary services plan. Rachel was detained at the paternal grandparents' home. Rosi and Michael were referred to Substance Abuse Recovery Management Systems (SARMS), the juvenile court's mandatory drug treatment case management program.

On August 27 the juvenile court found the allegations in the petition true by clear and convincing evidence, declared Rachel a dependant, placed her with a relative, and ordered Rosi and Michael to comply with the reunification plan and participate in SARMS.

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3 Michael is not a party to this appeal.

Rosi did not enroll in SARMS and a letter of noncompliance was sent to her last known address in October with no response. On November 7 Rosi pleaded guilty to one count of contempt for noncompliance with SARMS and served two days in jail. Rosi was noncompliant with SARMS in November and December. On February 6, 2002, Rosi pleaded guilty to one count of contempt for noncompliance with SARMS and was sentenced to three days in jail.

After Rosi was released from jail, she began participating in SARMS and convinced the social worker she was committed to reunifying with Rachel. On February 25 the court followed Agency's recommendation that reunification services continue. Rosi continued to comply with her services plan until she gave birth to another child on March 20.

In April Rosi ceased drug treatment. The social worker contacted Rosi and told her to enter a treatment program within 48 hours. Rosi did not comply with the social worker's direction and was ordered to move out of the maternal grandmother's residence. The social worker lost contact with Rosi, and her whereabouts were unknown until August. Agency recommended services be terminated and adoption or guardianship be selected as Rachel's permanent plan. Agency noted the maternal grandmother, who had been Rachel's caretaker for the past year, was willing and able to either adopt Rachel or serve as her guardian. On September 10 the court terminated reunification services and set a section 366.26 hearing.

The adoption assessment social worker was of the opinion that Rachel was likely to be adopted and there was no beneficial parent-child relationship with her parents. In

October, the social worker attempted to contact Rosi, but she did not respond to the worker's letters or telephone messages. In November the maternal grandmother told the social worker that Rosi had not stayed at or visited the residence for a month. Grandmother also related that typically when Rosi appeared at the residence she slept for a few days because she had been living on the streets. After she rested, Rosi helped with the laundry and meals and put Rachel to bed.

On December 10 the social worker observed Rosi and Rachel during a 45-minute visit. Rachel called Rosi "mom" and during the visit stayed by her side or sat on her lap. On January 3, 2003, the social worker observed Rosi and Rachel at a 30-minute visit during which Rachel sat on Rosi's lap the entire time. Both visits were shortened because Rachel was tired. In between these two visits, Rosi missed two scheduled supervised visits.

Agency identified the maternal grandmother, who was subject to a home study, as the prospective adoptive parent. Agency reported 42 approved families were also available to adopt a child like Rachel. In a subsequent report, Agency reported developmental testing showed Rachel's cognitive functioning was moderately delayed at the 18-month level. Rachel's condition was diagnosed as moderate expressive language delay and mild overall delays, both characterized as provisional. The evaluator recommended Rachel be referred to special education services and be re-evaluated in a year.

Rosi, who said she stopped using drugs in early December, began living with her sister on January 8, 2003, and visited Rachel every other day until entering a residential treatment program at the end of January.

On February 6, 2003, the court terminated Rosi's parental rights after finding, by clear and convincing evidence, that Rachel was likely to be adopted and none of the exceptions to adoption listed in section 366.26, subdivision (c)(1) had been established. The court further found, by clear and convincing evidence, that adoption was in the best interest of Rachel and selected adoption as her permanent plan.

Rosi filed a timely appeal. Rachel's appellate counsel visited the child in May 2003. Appellate counsel was told by the grandmother that she agreed to adopt her granddaughter because the social worker led her to believe that if she did not agree to do so Rachel would be placed with another family. Rachel's appellate counsel attempted to present the evidence to this court by a motion to augment the record on appeal. (See Code Civ. Proc., § 909.)[4] We denied the motion. (See *In re Zeth S.* (2003) 31 Cal.4th 396.) Subsequently, Rachel's appellate counsel filed this petition for writ of error *coram vobis*. Attached to the petition is the grandmother's declaration, which states in pertinent part:

> "Towards the end of the case, Rachel's social worker told me that my daughter's parental rights to Rachel would be terminated and the plan was to go with adoption for Rachel. I told her I wanted guardianship. In fact I told the social worker from the beginning that I wanted guardianship of Rachel. The social worker said there were

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4 Rachel's appellate counsel has supported Rosi's position in contrast to Rachel's trial counsel, who supported Agency's position.

> other families who would adopt Rachel. It was clear to me that if I did not say I would adopt, the social worker would place Rachel with another family who would adopt her. So I said I would adopt Rachel. I was never told that it would be possible for me to have guardianship of Rachel[.] [¶] . . . [¶]
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> ". . . I have signed the adoptive placement papers, but did so only because I did not want Rachel placed in another home. The social worker reminded me that adoption was still the plan. I knew that there were 42 other families who would adopt Rachel if I did not sign the papers."

We issued an order to show cause, Agency and Rosi[5] responded, and we heard oral argument on the petition, along with Rosi's appeal of the judgment, and reviewed the petition on its merits.

DISCUSSION

I. *Rosi's Appeal*

A. *Sufficiency of Evidence of Adoptability*

Rosi contends that because Rachel had prenatal exposure to drugs and was developmentally delayed, there was not clear and convincing evidence Rachel was likely to be adopted.

At the section 366.26 hearing, the juvenile court is required to select and implement a permanent plan. If the child is likely to be adopted, adoption is the preferred permanent plan. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.) The court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted. (§ 366.26, subd. (c)(1); see also *In re*

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5 Rosi supports the arguments made in Rachel's petition.

Tabatha G. (1996) 45 Cal.App.4th 1159, 1164.) The determination of whether a child is likely to be adopted focuses first on the characteristics of the child that could create difficulty in locating a family willing to adopt, including age, physical condition, and mental or emotional state. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)

Our review of the juvenile court's findings and orders is limited to considering whether they are supported by substantial evidence. (See *In re Derek W.* (1999) 73 Cal.App.4th 823, 825.) In making this determination, we view the record most favorably to the prevailing party. (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114.) We do not reweigh the evidence, but rather resolve all conflicts in favor of the prevailing party. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Substantial evidence supports the finding that Rachel was likely to be adopted within a reasonable time. Rachel was a two-year-old, happy, "sweet little" girl who was cooperative and well-behaved. Rachel was healthy and had nearly normal development. Recent testing showed she had mild or moderate developmental delays, but the evaluator believed that assessment was a "low estimate of Rachel's present functioning due to her anxiety" about the testing. Also, the evaluator did not believe the developmental delays were permanent. Notwithstanding her prenatal exposure to drugs, Rachel had not displayed any symptoms, including withdrawal, suggesting the exposure had affected her. Moreover, Rachel was bonded with her caregiver. Rachel's only characteristic that might dissuade people from adopting her was a developmental delay. However, the delay, if any, was minor and did not make it unlikely she would be adopted in a reasonable time.

Moreover, Rachel had traits that made her a desirable adoption candidate: her young age; pleasant personality; and ability to bond with a caregiver.

Furthermore, the caretaker was willing to adopt Rachel, knowing of the developmental delay, and Agency had approved 42 adoptive families who were willing to adopt a child like her, even with a slight developmental delay. Although the existence of a prospective adoptive family is not determinative by itself, it is a factor for the court to consider. (*In re David H.* (1995) 33 Cal.App.4th 368, 378.) "[I]t is not necessary that the [child] already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' " (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649.) However, evidence of "a prospective adoptive parent's willingness to adopt generally indicates the [child] is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*." (*Id.* at p. 1650.) A prospective adoptive parent's interest in adopting a child "is evidence that the [child's] age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the [child]." (*Id*. at pp. 1649-1650.) The willingness of the caregiver to adopt Rachel allows the court to infer that, in the event the adoption is not completed, there are other interested prospective adoptive parents and Rachel is likely to be adopted within a reasonable time. (*Ibid*.)

Agency met its burden to produce clear and convincing evidence that Rachel was likely to be adopted.

Rosi relies on this court's opinion in *In re Jerome D.* (2000) 84 Cal.App.4th 1200. In *In re Jerome D.*, the *only* basis for the juvenile court's finding the child was likely to

be adopted was the willingness of the mother's boyfriend to adopt him; the child protective agency had not considered the child's physical problems (prosthetic eye that required special care), the child's close relationship with his mother, and whether there were other families willing to adopt a nine-year-old child with special medical needs. (*Id*. at p. 1205.) Furthermore, we found a legal impediment to the adoption by the mother's boyfriend--his criminal record, which must be considered under section 366.26, subdivision (b)(4). (*In re Jerome D.,* at p. 1205.) The problems present in *In re Jerome D.* do not exist in this case.

B. *The Exceptions to Adoption*

1.

Rosi contends the court erred by not finding that the beneficial relationship exception to adoption (§ 366.26, subd. (c)(1)(A)) applied. Our standard of review is the substantial evidence test. (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 576.)

Adoption is the permanent plan preferred by the Legislature, and at the selection and implementation hearing the court must terminate parental rights if the child is likely to be adopted within a reasonable time unless a statutory exception applies. The parent bears the burden to establish by a preponderance of the evidence that an exception to the statutory preference for adoption applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345; § 366.26, subd. (c)(1); Evid. Code, § 115.)

The beneficial relationship exception is codified in section 366.26, subdivision (c)(1)(A), which provides that after the court finds the child is likely to be adopted the court shall not terminate parental rights if it finds termination would be detrimental to the

child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." Section 366.26, subdivision (c)(1)(A) applies only if the parent has maintained regular visitation and contact, and continuing the relationship between parent and child will benefit the child.

In *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575, this court explained that to come within the section 366.26, subdivision (c)(1)(A) exception, a parent must show the "relationship 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." (Italics added.) The court must balance "the strength and quality of the . . . parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*Ibid*.) In balancing these interests, relevant factors include "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs . . . ." (*Id*. at p. 576.) Further, the parent must show the benefit arises from a parental rather than caretaker or friendly visitor relationship. We reaffirmed this balancing test, explaining the standard "reflects the legislative intent that adoption should be ordered unless *exceptional circumstances* exist . . . ." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51, italics added; see also *In re Beatrice M*. (1994) 29 Cal.App.4th 1411, 1420 [exception does not apply when a parent "has frequent contact with [dependent child] but does not stand in a parental role to the child"]; *In re Elizabeth M*. (1997) 52 Cal.App.4th 318, 324 [frequently visiting mother occupied pleasant place in child's life, but did not have parental role].)

The record contains substantial evidence that neither prong of section 366.26, subdivision (c)(1)(A) was met. When Rachel was six months old, she became a dependent of the court and, for the first eight months of the dependency, lived with Rosi at the grandmother's residence. After Agency told her to leave the home in April 2002, Rosi did not regularly visit Rachel for lengthy periods of time, including periods when Rosi was living on the streets. Often, when Rosi did appear at the maternal grandmother's residence, she would sleep for a few days and then help with household chores and assist with Rachel's care. Rosi testified she regularly visited Rachel in December and January; however, the social worker reported that in December Rosi was either unavailable for supervised visits or had difficulty keeping appointments for supervised visits. Rosi's regular visitation during the one to two months preceding the section 366.26 hearing is insufficient to satisfy the first prong of section 366.26, subdivision (c)(1)(A). Irregular visitation by a parent throughout the dependency of the child does not constitute the "regular visitation" required by the statute.

Assuming arguendo the increased visitation after she started living at her sister's residence satisfied the first prong, Rosi has not met the second prong of the exception that the benefit from continuing the relationship between her and Rachel would outweigh the benefit Rachel would gain by being in a permanent adoptive home. Rachel's need for stability outweighed the benefit she would obtain from continuing her relationship with Rosi.

Rosi did not occupy a parental role in Rachel's life. Although Rachel was affectionate toward Rosi and called her "mom" when she visited, Rachel did not have a

primary attachment to Rosi. Rachel looked to the maternal grandmother to meet all of her daily needs and as the constant parental figure in her life. Rachel wanted to be near her grandmother and became anxious when she left the room. Rosi had not developed the type of parent-child bond with Rachel that would outweigh the legislative preference for adoption. The relationship between Rosi and Rachel did not satisfy the beneficial relationship requirement that section 366.26, subdivision (c)(1)(A) envisions.

The juvenile court applied the correct balancing analysis to conclude whatever benefit Rachel would gain from continuing her relationship with Rosi would be outweighed by the stability, security and sense of belonging that would be conveyed to her by a permanent adoptive home. Substantial evidence supports the court's finding.

2.

Rosi argues the court erred by not finding an exception to adoption under section 366.26, subdivision (c)(1)(D), which is applicable to a child living with a relative or foster parent who is unable or unwilling to adopt because of exceptional circumstances but who is willing and capable of providing the child with a stable and permanent home and removal of the child from the home would be detrimental to the child. Rosi did not raise this exception to adoption at the hearing below and thereby waived the right to raise the issue on appeal. The juvenile court does not have a sua sponte duty to determine whether an exception to adoption applies. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; see also *In re Erik P.* (2002) 104 Cal.App.4th 395, 402-403.) The party claiming an exception to adoption has the burden of proof to establish by a preponderance of

evidence that the exception applies. (*Melvin A.*, at p. 1252; Cal. Rules of Court, rule 1463(d)(3).)

II. *Rachel's Petition for Writ of Error Coram Vobis*

An appellate court can issue a writ of error *coram vobis* directing the trial court to reconsider its decision based on new evidence discovered after its decision that would have been grounds for granting reconsideration or a new trial. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) ¶ 5.191, p. 5-47.) "In effect, the writ *remands* the case to the trial court for the purpose of *reopening the judgment* . . . to consider the new evidence. [Citation.]" (*Ibid.*; see also Alexander et al., Cal. Appellate Practice Handbook (7th ed. 2001) ch. 5, §§ 5.20, 5.21, pp. 161, 162.)

A writ of error *coram vobis* is considered to be a drastic remedy that will be issued only if a number of requirements have been satisfied. Among the requirements are the following:

1. No other remedy, such as a motion for new trial or for reconsideration in the trial court, is available to consider the newly discovered evidence (*Monsan Homes, Inc. v. Pogrebneak* (1989) 210 Cal.App.3d 826, 831);

2. The proffered new evidence will either compel or make probable a different result in the trial court (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1092);

3. The proffered new evidence was not presented to the trial court for reasons other than the fault or negligence of the petitioner (*People v. Shipman* (1965) 62 Cal.2d

226, 230) and was unknown to the petitioner at any time substantially earlier than filing the petition for the writ (*In re Derek W.* (1999) 73 Cal.App.4th 828, 832);

4. The proffered new evidence is not presented on an issue adjudicated in the trial court because factual issues that have been adjudicated cannot be reopened except on motion for new trial or for reconsideration (*People v. Shipman*, *supra*, 62 Cal.2d at p. 230); and

5. The proffered new evidence was unavailable to the petitioner because of extrinsic fraud that prevented the petitioner from having a meaningful hearing on the issue in question (*Los Angeles Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 9; but see *Rollins v. City and County of San Francisco* (1974) 37 Cal.App.3d 145, 150).

The new evidence proffered by Rachel is the declaration of her grandmother that she was misled or coerced by the Agency to agree to adopt Rachel; if she did not adopt Rachel, Rachel would be adopted by others and removed from further contact with her biological family. The grandmother said she had informed the Agency that she wished to become Rachel's guardian. Rachel claims this new evidence was relevant because it supported the exception to termination of parental rights set forth in section 366.26, subdivision (c)(1)(D). That section provides that parental rights shall not be terminated if "[t]he child is living with a relative . . . who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of . . . the relative . . . would be detrimental to the emotional well-being

of the child." Rachel and Rosi argue that because of the Agency's misleading or coercive conduct, they and the grandmother were unaware of the applicability of the section 366.26, subdivision (c)(1)(D) exception and they received no meaningful hearing on that issue; that issue was not submitted to the trial court. The petition requests that the order terminating parental rights be vacated and the matter remanded for a hearing and consideration of the section 366.26, subdivision (c)(1)(D) exception to adoption as the permanent plan for Rachel.

Assuming Rachel's petition satisfies many of the *coram vobis* requirements, we conclude it does not meet the requirement of extrinsic fraud.

> "Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.' [Citation.] 'Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side[,]--these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.' (*United States v. Throckmorton* (1878) 98 U.S. 61, 65-66.)" (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471.)

There is nothing in the appellate record or in the documents filed in support of the petition that suggest Agency's actions constituted extrinsic fraud. Even were we to assign a nefarious motive to Agency's actions, Agency did not secrete the grandmother or

conceal that she was interested in a guardianship for Rachel.[6] Rosi and her trial counsel and Rachel's trial counsel had access to the grandmother and her wishes. Neither Rosi nor Rachel's trial counsel was prevented by any Agency act from learning the grandmother preferred guardianship and raising the section 366.26, subd. (c)(1)(D) exception at trial.

> "Even if we assume for the sake of argument that Chuidian deliberately concealed the tendered evidence or even lied about its existence, it cannot be said that such fraud amounted to extrinsic fraud preventing Philguarantee from having its day in court on the issue. To the contrary, we deal with intrinsic fraud at most, that fraud which weakens the opponent's case, as for example by perjury on the witness stand. Such fraud is not a ground to reopen a judgment. [Citations.]" (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian*, *supra*, 218 Cal.App.3d at p. 1091.)

Therefore, even though the new evidence was not germane to the merits of the issues tried—Rachel's adoptability and the section 366.26, subdivision (c)(1)(A) beneficial relationship exception to adoption—Rachel has not shown this case involved extrinsic fraud.

Although we conclude Rachel has not established the requisite elements for issuance of a writ of error *coram vobis*, we note that even were we to remand the case for consideration by the juvenile court of the section 366.26, subdivision (c)(1)(D) exception to adoption, we have not been provided with a sufficient offer of proof to justify

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6 Agency kept the court informed of the grandmother's wish to become Rachel's guardian. In its status report for the 12-month hearing, Agency advised the court and the parties that the grandmother would like either to adopt Rachel or become her legal guardian, making this point three times in the report. Agency also reported the grandmother's interest in a legal guardianship in its section 366.26 assessment report.

application of that section. Applicability of the subdivision (c)(1)(D) exception requires that the relative or foster parent be unable or unwilling to adopt because of exceptional circumstances. The only exceptional circumstance suggested by Rosi and Rachel in this case is that all members of the family prefer guardianship rather than adoption. Without attempting to delineate the factors that would constitute exceptional circumstances, we are convinced that mere family preference is insufficient.

DISPOSITION

The judgment is affirmed. The petition is denied.

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McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.