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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

Adoption of CASH O., a Minor.	B292465
E.O., et al., Plaintiffs and Appellants, v. LOUIS G., Defendant and Respondent.	(Los Angeles County Super. Ct. No. BN05959)

APPEAL from an order of the Superior Court of Los Angeles County, Margaret S. Henry, Judge. Reversed with directions.

Law Office of Gradstein & Gorman, Jane A. Gorman and Seth F. Gorman, for Plaintiffs and Appellants.

Andre F.F. Toscano, under appointment by the Court of Appeal, for Defendant and Respondent.

Five-year-old Cash O. was born in 2014 to unmarried parents who separated before his birth. Cash's biological mother arranged to place Cash for adoption with the O.'s, who took Cash home from the hospital when he was three days old. Cash has lived with the O.'s ever since.

Cash's biological father, Louis G., opposed the adoption. In 2015, Louis obtained presumed father status and prevented the O.'s from proceeding with adoption. Louis has never succeeded in having Cash placed with him, however; instead, in 2015 Cash was placed in legal guardianship with the O.'s.

In 2018, the O.'s petitioned to terminate Louis's parental rights pursuant to Probate Code section 1516.5, which permits termination of parental rights if a child has been in the legal and physical custody of a guardian for at least two years, and the child would benefit from being adopted by the guardian. The trial court denied the petition, and the O.'s appealed.

We reverse. As we discuss, there is no constitutional impediment to terminating Louis's parental rights, and the record compels the conclusion that adoption by the O.'s is in Cash's best interest. Accordingly, we reverse with directions to the trial court to grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants E.O. and T.O. (collectively, the O.'s) are the legal guardians and prospective adoptive parents of Cash O., who was born in March 2014. Respondent Louis G. is Cash's biological father. Cash's biological mother, Lindsey D., is not a party to this appeal.

I.
Background

Louis and Lindsey dated for six months between February and August 2013. (*Louis G. v. Lindsey D.* (Oct. 6, 2016, B263239) [nonpub. opn.] 2016 WL 5845757, at p. *1 (*Cash I*).) In July 2013, Lindsey discovered she was pregnant; she told Louis about the pregnancy the same day. Lindsey broke up with Louis a few days later. (*Cash I*, at p. *1.)

In August 2013, Louis offered to pay half of Lindsey's abortion expenses. Lindsey responded that she had decided not to have an abortion, and she asked Louis to sign off on his parental rights so the baby could be adopted. (*Cash I*, *supra*, 2016 WL 5845757 at p. *1.) The two continued to text each other about abortion between August and October. In early October, Lindsey told Louis she had decided to proceed with adoption, and Louis responded that he was adamantly opposed to it. Lindsey responded she did not want the child to be raised in a broken home with two parents battling over him. The two did not have further contact about the issue for several months. (*Ibid.*)

Lindsey's mother texted Louis in November to set up a meeting. He responded that he was in San Jose for work but would contact her when he returned to San Diego. The two did not meet until early February 2014, at which time Lindsey's mother told Louis that Lindsey had selected adoptive parents. Two weeks later, Louis asked to meet them, indicating that he wanted to "vet" them and that meeting them would make him feel more comfortable. He met the O.'s on February 21, 2014, telling them he was "going to fight" for his child. (*Cash I*, *supra*, 2016 WL 5845757 at p. *2.)

Cash was born in early April 2014. The O.'s brought him home from the hospital, and he has lived with them ever since. (*Cash I*, *supra*, 2016 WL 5845757 at p. *2.)

II.

Paternity and Adoption Proceeding

A. Petitions

On February 11, 2014, about two months before Cash's birth, Louis filed a pro se petition in San Diego County to establish a parental relationship. He asserted in the petition that he "may be the father," and he sought to "[v]erify parenthood and stop any potential adoption." However, Louis did not seek custody or ask for a paternity test. (*Cash I*, *supra*, 2016 WL 5845757 at p. *2.) At the first hearing, the judge told Louis to file a new petition if he intended to seek custody, but Louis failed to do so.

Separately, three days after Cash's birth in April 2014, the O.'s filed a petition in Los Angeles County to determine Louis's parental rights and to determine the necessity of his consent to adoption. Days later, the O.'s filed an adoption petition. In July 2014, the Los Angeles Superior Court appointed counsel for Louis and ordered the San Diego case transferred to Los Angeles. (*Cash I*, *supra*, 2016 WL 5845757 at p. *2.)

In August 2014, Louis, now represented by counsel, filed an amended pleading in the San Diego action that requested DNA testing but did not seek full custody of Cash. Instead, Louis stated that if he were determined to be Cash's biological father, he would "seek[ ] the appropriate custody and visitation orders afforded to him under the various sections of the Family Code."

In late August 2014, all parties stipulated to the consolidation of the cases in Los Angeles. The San Diego case

was transferred to the Los Angeles Superior Court on October 29, 2014, when Cash was about six months old.

B. Trial

In August 2014, the court appointed Dr. Nancy Kaser-Boyd pursuant to Evidence Code section 730 to assess the bonding between Cash and the O.'s and to make a recommendation concerning Cash's best interests. In her September 2014 report, Dr. Kaser-Boyd opined that Cash was bonded to and felt secure and happy with the O.'s, and that he likely had not bonded with Louis. Dr. Kaser-Boyd described the potential negative consequences and emotional trauma of removing Cash from the O.'s, the positive aspects of the O.'s home life, and behavior by Louis that suggested instability. (*Cash I*, *supra*, 2016 WL 5845757 at p. *3.)

In trial briefs filed in the adoption action, Louis asserted that he was seeking "full custody of" Cash.

Trial in the adoption action was held in October and December 2014. In January 2015, the court filed a 28-page statement of decision, finding Louis to be a *Kelsey S.* presumed father[1] and denying the O.'s petition for adoption. (*Cash I*, *supra*, 2016 WL 5845757 at p. *2.)

III.
Guardianship Proceeding

On October 20, 2014, while the paternity and guardianship actions were pending, the O.'s petitioned for temporary and general guardianship of Cash. The court heard testimony in the guardianship action in February 2015, and it granted the O.'s petition for guardianship on February 27, 2015. Citing Family

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[1] *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*).

Code section 3041 and case law, the court stated that after nonparents establish they have assumed the role of a child's parents, the burden of proof shifts to the natural parents to show by a preponderance of the evidence that a change of custody would not be detrimental to the child and allowing the child to remain in the nonparents' custody would be contrary to the child's best interests. The court found it was uncontradicted that the O.'s had assumed the role of Cash's parents, and Louis had not met his burden of proof in response. The court therefore concluded it would be detrimental to remove Cash from the O.'s, granted the O.'s petition for guardianship, and ordered at least two hours per week of monitored visitation for Louis and Lindsey. (*Cash I*, *supra*, at 2016 WL 5845757 pp. *6—*7.)

IV.

First Appeal

The O.'s, Cash, and Lindsey appealed the denial of the adoption petition and the trial court's determination that Louis was a *Kelsey S.* father. Louis appealed the guardianship order. (*Cash I*, *supra*, 2016 WL 5845757 at p. *8.)

We affirmed the orders in full. With regard to the trial court's finding that Louis was a *Kelsey S.* father, we explained that under California law, an unmarried biological father has a right to withhold consent to adoption of a child only if he meets the definition of a "presumed father." (*Cash I*, *supra*, 2016 WL 5845757 at p. *9.) Section 7611 of the Family Code provides that a father may attain presumed father status if he receives a child into his home and holds the child out as his own. In *Kelsey S.*, *supra*, 1 Cal.4th 816, our Supreme Court held that a biological father who wanted to take the child into his home, care for the child, and hold the child out as his own, but who was prevented

from doing so by the mother's unilateral decisions, was entitled to the same rights as a statutory presumed father. (*Cash I*, at p. *4.)

For a biological father to qualify for *Kelsey S.* presumed father status, he must demonstrate that he promptly stepped forward to assume full parental responsibilities and demonstrated a willingness to assume full custody of the child. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) A "court should consider all factors relevant to that determination. The father's conduct both before and after the child's birth must be considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit." (*Id.* at p. 849, italics omitted.)

We concluded that substantial evidence supported the trial court's findings that Lindsey inhibited Louis's ability to assume parental responsibilities, but that Louis nonetheless publicly acknowledged paternity and attempted to demonstrate his commitment to his parental responsibilities. (*Cash I*, *supra*, 2016 WL 5845757 at pp. *4—*5.) We therefore held that substantial evidence supported the trial court's determination that Louis was a *Kelsey S.* father, and we affirmed the trial court's denial of the O.'s petition to adopt Cash. (*Cash I*, p. *7.)

We then turned to the guardianship order. We noted: "[Family Code] Section 3041 governs contested custody proceedings and provides that parents are first in the order of preference for a grant of custody, but a showing of de facto parent status by a nonparent creates a rebuttable presumption that it would be detrimental to place the child in the custody of a parent and the best interest of the child requires nonparental custody.

(Fam. Code, § 3041, subds. (a), (c), (d).) [Family Code s]ection 3041, subdivision (c) states, ' "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.' The Legislature specified that the removal of a child from a guardianship placement may be detrimental even if the child's parents are fit to care for the child. (Fam. Code, § 3041, subd. (c) ['A finding of detriment does not require any finding of unfitness of the parents.'] . . .

"The presumption against removal is established by section 3041, subdivision (d), which provides that 'if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), 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.' What constitutes the best interest of a child presents an inherently factual issue. (*Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1159–1161 [whether parental custody is detrimental to minor or whether award of custody to nonparent is required to serve child's best interests are factual questions].)" (*Cash I*, *supra*, 2016 WL 5845757 at p. *8.)

We concluded that substantial evidence supported the trial court determination that the O.'s had assumed a parental role in Cash's life, and that Louis had not met his burden of showing that it was in Cash's best interests to be removed from the O.'s custody and placed with Louis. (*Cash I*, *supra*, 2016 WL 5845757

at pp. *8—*10.) We therefore affirmed the order awarding permanent guardianship to the O.'s. (*Cash I*, at p. *10.)

V.

Petition to Terminate Louis's Parental Rights

On October 12, 2016, Louis filed a petition to terminate the guardianship, and on March 21, 2017, the O.'s filed a petition to terminate Louis's parental rights pursuant to Probate Code section 1516.5.[2] At that time, Cash had been in the O.'s custody for nearly three years, and in their guardianship for more than two years.

Trial on the petitions was bifurcated. The present appeal concerns only the petition to terminate parental rights.[3]

A. Expert Reports

1. Juvenile Probation Officer's Report

A juvenile probation officer submitted a report on May 22, 2017. The report concluded: "After careful consideration and thought involved it is believed that [it] will be detrimental to Cash's well-being to be given to his father. It is believed that it [will] emotional[ly] devastate the minor to be removed from the only parents he knows . . . . In the best interests of Cash it is recommended that . . . [the court] allow[ ] the [O.'s] to adopt Cash."

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[2] We discuss Probate Code section 1516.5 more fully below. All subsequent undesignated statutory references are to the Probate Code.

[3] On November 2, 2018, Louis filed a request to dismiss his petition to terminate the guardianship. The trial court dismissed the petition on December 7, 2018.

2. Dr. Kaser-Boyd's Report

The court reappointed Dr. Kaser-Boyd as the court's Evidence Code section 730 expert to prepare a psychological assessment regarding attachment, detriment, and whether granting the section 1516.5 petition would be in Cash's best interests. Dr. Kaser-Boyd observed Cash with the O.'s in her office, and with Louis during a visit at the park. She also conducted individual interviews with Cash, the O.'s, and Louis. On December 11, 2017, she filed a report recommending that it was in Cash's best interests to be adopted by the O.'s.

Dr. Kaser-Boyd observed three-and-a-half-year-old Cash to be very clingy with the O.'s and to have difficulty separating from them. When Dr. Kaser-Boyd asked Cash who Louis was, he replied, "I don't know." When asked how he liked visiting with Louis, Cash responded that Louis "wants to take me to his house to play." Cash said he did not want to go to Louis's house because "Louis said he was going to hurt mommy and daddy and make them cry." Dr. Kaser-Boyd observed Cash's affect to be very serious and anxious when he said this. He then went to Mrs. O. and climbed in her lap and told her he loved her.

Dr. Kaser-Boyd also observed a visit between Cash and Louis at the park. When Louis tried to pick up Cash, Cash said, "No! My daddy holds me!" Cash looked like he was going to cry, but Louis was able to distract him with a toy gun. After playing with one for a few minutes, Cash noticed a second toy gun in Louis's backpack and said, "Let's play together." Dr. Kaser-Boyd noted that this was the most welcoming statement Cash made toward Louis during her hour-and-a-half observation. As the play continued, Cash became more aggressive with Louis and began shooting projectiles at him. When Louis tried to distract

him, Cash began to pummel Louis with his fists and to wriggle out of Louis's grasp. Dr. Kaser-Boyd said she had not seen Cash display this kind of aggression with anyone else.

Dr. Kaser-Boyd interviewed Louis, who said he did not call Cash by his name because "He was stolen from me, however they want to dress it up, he was stolen from me and that's not the name his birth parents gave him." He said Lindsey "is probably so detached that she probably didn't bother naming him," but that *his* name for Cash is Titus Macci. Louis acknowledged that Cash behaved aggressively with him, but said Cash was equally aggressive with the O.'s. Louis did not try to put a stop to Cash's aggressive behavior because "I don't feel like I should spend time disciplining him when my time is so limited." Louis said his goal was to have full custody of Cash, but that he would transition to full custody gradually to give Cash time to adjust. Louis said he knew Cash would be fine with him because "[h]e does trust me. I know he has feelings for me, but it's hard when the people you trust are telling you not to go with them, that he's a monster."

Dr. Kaser-Boyd opined that Cash was very attached to the O.'s. Although he seemed to have grown accustomed to meeting Louis at the park and was interested in Louis's toys, Dr. Kaser-Boyd "did not observe anything that would indicate that Cash sees this as a father-son relationship. It was remarkable that he frequently said, 'My <u>daddy</u> holds me,' referring to Mr. [O]."

Dr. Kaser-Boyd opined that the O.'s were Cash's "psychological parents," i.e., the ones who had provided daily care and were attuned to his needs. She believed that "[t]he detriment to [Cash] of removal from them would be considerable. I described this in my original report, and my opinion is the

same. Actually, the evidence of his attachment to the [O.'s] is far stronger than in my original evaluation."

Dr. Kaser-Boyd expressed some concerns about Louis, namely that he had shown a pattern of instability, had had quite a few jobs for someone his age, and had not regularly provided financial support for Cash's care. She also had concerns about Louis's refusal to call Cash by his name, something she called "quite a serious matter. It denies the identity that the child is establishing where a first name is the most essential form of identification with relatives and schoolmates. . . . This plus [Louis's] comments about the [O.'s] 'stealing' his child cause me to fear that he would cut off ties with the [O.'s], allowing no visitation, and would change the minor's name. This means that this child of almost four, if returned to the father, would be in a completely new world with new adults and a new name. Louis said that he would only change the minor's world 'gradually' which is a good thought, but his ultimate goal is clearly [to] obtain full custody and change his world."

With regard to the relationship between Cash and Louis, Dr. Kaser-Boyd noted that "[a] relationship of sorts has developed," and Cash played enthusiastically with Louis. However, "there was a high level of aggression where Cash, with delight chased Louis and shot at him, pummeled him with fists, and screamed in his ear. This aggression may simply be due to the aggressive play that Louis initiates (i.e., bringing toy guns to the visit, wrestling), but it may also be this little boy's expression of anger at Louis for the confusion he has. As noted, he does not know the true nature of the relationship he has with Louis, and he is too young for this to be meaningfully explained. Also, he

told me that Louis has said he is going to hurt his mommy and daddy."

Based on the foregoing, Dr. Kaser-Boyd opined that Cash "should remain with the [O.'s] and that removing him would present a serious detriment to him." She did not recommend placing Cash in Louis's home, although she did support reasonable visitation. She also did not recommend increased visitation for Louis. She recommended adoption by the O.'s as being in Cash's best interests.

B. Trial

Trial on the petition was held in May and June 2018. The parties offered the following evidence:

1. Cash's Relationship With the O.'s

Since birth, Mr. and Mrs. O. have cared for Cash; when they are at work, Mrs. O.'s parents are his caregivers. Cash comes to the O.'s for comfort when he is sad or hurt. Mrs. O. said Cash is extremely affectionate with her and Mr. O.: "Every chance he gets, he's giving me hugs or kisses on the cheek. Out of the blue, he will . . . call me and say, I love you. He tells me how much he loves me and puts out his arms and says, I love you like this much, like the whole wide world. Or he comes up to my waist and hugs me." She described Cash as also very affectionate with his grandparents, his cousins, and his schoolmates.

Mr. O. testified that he and Mrs. O. hope to adopt Cash to provide him with stability and "to hopefully end this litigation, build a foundation so that we can . . . move forward . . . , have some type of relationship with Louis as we do with Lindsey, having everybody just kind of be part of Cash's story . . . ."

Cash's biological mother, Lindsey, testified that Cash was doing "exceptionally well" in the O.'s care: "He's healthy. He's

happy. He's flourishing." Cash has told Lindsey that he loves his mommy (Mrs. O.) and his daddy (Mr. O.). Lindsey believes adoption is in Cash's best interest because "[The O.'s] as his parents and family are all he knows. Anything else . . . would be turning his world upside down." If the O.'s guardianship were to be terminated, Lindsey testified she would seek custody of Cash.

Mr. O.'s father, Ernie O., Sr. (Ernie Sr.) testified that he sees Cash almost every day. If Cash wants to play with Ernie Sr., he will "get on my lap. If he wants to play, he will give me a hug, jump on my lap, squeezes me until I give up." Cash is extremely affectionate with the O.'s: "He clings to his daddy, arms around his neck. He wants his daddy [Mr. O.]. . . . [¶] . . . [¶] . . . The same thing [with Mrs. O.]. He embraces her. He's all over them. Telling her he loves his mommy."

2. Cash's Relationship With Louis

Louis has regularly attended court-ordered visits with Cash since he was placed in guardianship. In 2017, Louis twice gave the O.'s $400 towards Cash's support; he had not provided any support for Cash in 2018.

Louis does not know where Cash goes to school, does not know the name of Cash's teacher, and has never attended any of Cash's school performances or events. He does not know the name of Cash's friends. He does not know who Cash's pediatrician is and he has never attended a pediatrician visit with Cash. He has never attended any of Cash's t-ball or soccer games, and he does not know where Cash attends church.

Ernie Sr. testified that he was present for most of the visits between Cash and Louis in 2016 and 2017. He said Cash typically did not want to leave for visits without Mr. or Mrs. O. Once Cash arrived at a visit, he would warm up and start

playing. Cash appeared to be happy "at times" during visits with Louis; other times, "he . . . look[ed] for his mommy or daddy." Ernie Sr. has never observed Cash to be affectionate with Louis or to show any sign of attachment to him. If Louis asked Cash for a hug, Cash "just kind of looks at him, backs away." At the end of visits, Cash will give Louis a high five, but not a hug. Ernie Sr. also testified to seeing Cash behave aggressively with Louis, "swinging with a closed fist and kicking and jumping." Cash has never acted that way with Ernie Sr. Cash has occasionally asked to extend visits with Louis at Chuck E. Cheese because he was engaged with games, and he occasionally cried when pulled away from video games.

Mrs. O. testified that she had never seen Cash act affectionately with Louis. She said Cash has never asked for a visit with Louis, and he never asked to extend visits with Louis.

Louis testified that he and Cash have a "wonderful relationship." He said Cash has spontaneously hugged him and said he loves him. A handful of times, Cash cried at the end of visits and did not want to leave. Louis believes the O.'s are trying to brainwash Cash by telling him things that are not true, such as that Louis is not a good person, that Louis is trying to take Cash away, and that Cash should not go with Louis.

Louis said he does not call Cash by his name because "[t]hat's not the name his birth parents gave him." Instead, he calls Cash "my boy" or says "hey" to grab his attention. When Louis is out of Cash's presence, he refers to Cash as "Titus;" if he obtained custody of Cash, he would change his name.

Louis believes it is in Cash's best interest that the adoption request be denied "[b]ecause I have had to jump through so many hoops and hurdles to just retain my rights. And I feel like when

you really got to work for something, you've really got to put in time and effort. It makes it so much more special and I have a love for him that I probably would have never had . . . if things would have been just so easy."

3. Expert Testimony

Dr. Kaser-Boyd testified that the O.'s are Cash's "psychological parents"—the people who Cash perceives to meet his needs. She noted that Cash calls the O.'s mommy and daddy, expresses considerable love for them, has a hard time separating from them, and looks to them for comfort. In contrast, Dr. Kaser-Boyd saw no evidence that Louis had a parent-child relationship with Cash: "There has been visitation and there is some familiarity there and some playing that looks nice, but I couldn't establish whether he sees him as a parent." She noted that she had observed Louis trying to kiss or hug Cash, and Cash pushed him away. She believed Cash may be aggressive with Louis because he does not understand why he is being taken to visits and is upset about that. She explained: "Bear in mind that he's been really attached to [the O.'s] since he was a baby. When I first started seeing him, he had separation anxiety, and then he goes to visits that he does not know why. Theoretically, those visits should be fun for him, but then if the other person suggests, come to my house, and [we] know that he does not even like to stay overnight at his grandparents' house, there is a lot of reason there for a little person to have anxiety."

Dr. Kaser-Boyd said she was concerned about Louis's unwillingness to call Cash by his name, explaining that his name is an important part of a four-year-old's identity. She said: "It's hard to form a relationship with a child if you are not calling them by their name for someone that young. It's a primary

source of identity . . . [and] a denial of their experiences so far in life." She also noted that Louis was very angry at the O.'s, believing them to have stolen his child.

When Dr. Kaser-Boyd asked Cash to list the people he loved, he listed his mommy and daddy, his grandparents, and his cousins. He did not list Louis. When asked who Louis was, Cash said he did not know and that visits with Louis made him sad.

Dr. Kaser-Boyd explained that children develop attachments, and to break those attachments creates grief and longing that can result in depression, anger, difficulty reattaching to a new person, and a number of different psychological symptoms. She therefore opined that it is in Cash's best interest to be adopted by the O.'s. She testified: "He is very, very attached to them. He sees them as his parents. It seems clear he would be anxious if he would be separated from them. I think he's very well cared for and very loved." In contrast, Dr. Kaser-Boyd did not believe Cash would be harmed if Louis were removed from his life because "at this point in time he does not seem to be attached to his father."

Dr. Kaser-Boyd recommended that the parties enter a post-adoption contract so that Louis could remain a part of Cash's life, noting that children are "often very interested in their biological roots." Nonetheless, she said it would be in Cash's best interests to be adopted by the O.'s even if such a contract could not be entered into because the benefit Cash might receive from possibly forming a parent-child relationship with Louis if the adoption were denied would not outweigh the benefit he would receive from adoption. She also believed continuing litigation would be harmful to Cash because a child of his age would be aware "that there is stuff going on." Dr. Kaser-Boyd explained: "He's now

had to talk to me several times. I don't think he's that happy about it. I think that the parties in litigation are not nice to each other. . . . A child is going to notice that. So I think ongoing litigation would be stressful for him."

C. Statement of Decision

On July 27, 2018, the court issued a statement of decision denying the petition to terminate Louis's parental rights. Because the court's findings are central to our analysis, we quote them in full:

"1. In reviewing the cases on point with respect to the constitutionality of Probate Code section 1516.5, it appears there is no case where the contesting parent had never been found unfit, never was unfit, and never agreed to the legal guardianship. [Louis] may be less qualified to raise [Cash] than [the O.'s], but he was never unfit, and he has been capable of raising him. He certainly never agreed to the guardianship. He has fought for the custody of Cash since before the child was born.

"2. Judge Amy Pellman made the finding in the first trial on the issue of parental rights, that [Louis] accidentally checked the wrong box on a Family Law form when he filed his petition. It appears had he checked the correct box, he probably would have gotten custody, or at least shared with the mother, at an early stage. He has done nothing egregious since then to justify terminating his parental rights. While there is a legitimate and apparently open question of whether Section 1516.5 is constitutional as applied to this fact situation, this court does not reach that issue.

"3. The actions of [Louis] which [the O.'s] have pointed to as showing that it is in Cash's best interest to terminate parental

rights and permit adoption include his refusal to call the child Cash, his expressed hostility toward the [O.'s], and that he has not succeeded in having Cash attached to him. There is nothing that presents a danger to Cash or that could not be remedied.

"4. The [O.'s] are Cash's emotional parents, and parents to him in every way but birth. From the evidence presented it would be very detrimental to Cash to be removed from the care of the [O.'s]. However, in weighing the least detrimental alternative, the court is considering having [Louis] cut out of the life of Cash completely, because that is possible if [Louis's] parental rights are terminated and the [O.'s] adopt Cash. The court would have no authority to order that [Louis] have continued contact, and there is appellate court authority that a trial court cannot rely on prospective parents' promises to maintain such contact. The court is aware that the [O.'s] have said they would continue contact with the father, but with termination of parental rights, they would have absolute authority to set limits on the visits, or to discontinue them. To disregard that potential detriment would be to assume that the [O.'s] will continue appropriate visits for [Louis], which is not a proper or legal assumption for this court to make.

"5. Dr. Kaser-Boyd's opinion was that the best thing for Cash would be to have the [O.'s] adopt and [Louis] continue to visit. That may be true but it is not an order this court can make.

"6. Currently, cutting off [Louis's] visits, or severely limiting them, might not cause great harm to Cash. At the moment Cash understood that [Louis] is his biological father and that contact was cut off or limited, despite all of [Louis's] efforts, it would be detrimental. Cash would feel the loss. This is a

potential detriment that has to be weighed against the ongoing burden of tension between the parties and of litigation.

"7. The court therefore finds that the [O.'s] have not proven by clear and convincing evidence that it is in Cash's best interest to terminate the parental rights of Louis . . . in order to allow them to adopt Cash."[4]

The O.'s timely appealed from the order denying their petition to terminate Louis's parental rights.

DISCUSSION

The O.'s contend the trial court erred by denying the petition to terminate parental rights based on factors that are either unsupported by the record or are irrelevant to the statutory analysis—namely, the absence of egregious misconduct by Louis, the possibility of a future bond between Cash and Louis, and the unsupported conclusion that adopted children in contested cases suffer substantial harm when they learn of their past. The O.'s therefore contend the order denying the section 1516.5 petition should be reversed. They further urge that

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[4] The court also made two findings relevant to the O.'s claim that Louis had "abandoned" Cash within the meaning of Family Code section 7822. That section provides that a proceeding to free a child from a parent's custody and control may be brought if, among other things, the child "has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child." (Fam. Code, § 7822, subd. (a)(2).) The O.'s have elected not to pursue their Family Code section 7822 claim on appeal, and thus the trial court's abandonment findings are not relevant to our decision.

because no substantial evidence in the record supports a finding that Cash has a compelling parent-child relationship with Louis that outweighs the benefits of adoption, and based on the trial court's own conclusions regarding the lack of any substantial present detriment from termination of contact with Louis, this court should reverse with directions to the superior court to grant the petition and terminate Louis's parental rights.

Louis contends the trial court's reasons for denying the section 1516.5 petition are irrelevant to our analysis, and we must affirm the judgment if, as here, there is substantial evidence that terminating his parental rights was not in Cash's best interests. Louis further contends that if termination of his parental rights is required by the statute, the statute is unconstitutional as applied to him because there is no evidence that he is an unfit parent.

As we discuss, on the present record the trial court had no statutory discretion to deny the petition to terminate Louis's parental rights, and the statute is not unconstitutional as applied to him. We therefore reverse with directions to the trial court to grant the petition.

I.
Standard of Review

"[T]he decision to terminate parental rights lies in the first instance within the discretion of the trial court, 'and will not be disturbed on appeal absent an abuse of that discretion." (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1382.) " ' "The abuse of discretion standard . . . measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria." ' [Citation.] The scope of the trial court's discretion is limited by law governing the

subject of the action taken. [Citation.] An action that transgresses the bounds of the applicable legal principles is deemed an abuse of discretion. [Citation.] In applying the abuse of discretion standard, we determine whether the trial court's factual findings are supported by substantial evidence and independently review its legal conclusions. [Citation.]" (*In re Marriage of Drake* (2015) 241 Cal.App.4th 934, 939–940.)

While the abuse of discretion standard gives the court substantial latitude, " ' "[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action. . . .' " [Citation.] "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." [Citation.]' (*In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536.)" (*In re Noreen G.*, *supra*, 181 Cal.App.4th at pp. 1382—1383.) "Accordingly, we look to see whether the court abused its discretion in applying the law." (*Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1542.)[5]

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[5] Louis urges that the trial court's reasons for its decisions are not relevant to our analysis—that our focus must be on the trial court's ultimate decision, not how the court got there. Not so: Because a discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, it must be reversed unless the error was harmless. (See *In re M.W.* (2018) 26 Cal.App.5th 921, 930—931.)

II.
The Trial Court Abused Its Discretion by Denying the Petition to Terminate Louis's Parental Rights

A. The Legal Framework

1. Probate Guardianships

"Long before the advent of the dependency statutes, probate guardianships were instituted when 'conditions [were] shown to be such, by reason of the mental and moral limitations or delinquency of parents, that to allow the child to continue in their custody would be to endanger [the child's] permanent welfare.' [Citation.] [Fn. omitted.] In such cases, courts recognized that the 'right of the parent [to custody] must give way, its preservation being of less importance than the health, safety, morals, and general welfare of the child.' [Citation.]

"After the passage of the juvenile dependency statutes, probate guardianships have continued to provide an alternative placement for children who cannot safely remain with their parents. [Citation.] The differences between probate guardianships and dependency proceedings are significant. [Citation.] Probate guardianships are not initiated by the state, but by private parties, typically family members. They do not entail proof of specific statutory grounds demonstrating substantial risk of harm to the child, as is required in dependency proceedings. [Citations.] Unlike dependency cases, they are not regularly supervised by the court and a social services agency. No governmental entity is a party to the proceedings. It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter

whether parent and child will be reunited, or the guardianship continued, or an adoption sought . . . . [¶] . . . [¶]

"When the court appoints a guardian, the authority of the parent 'ceases.' (Fam. Code, § 7505, subd. (a).) The court has discretion to grant visitation [citation], but otherwise parental rights are completely suspended for the duration of a probate guardianship [citation]. The guardian assumes the care, custody, and control of the child. (Prob. Code, § 2351, subd. (a).) There is no periodic court review of the placement, as there is in dependency proceedings. [Citation.] Nor is the parent given the reunification services that the county provides to parents of dependent children. [Citation.]

"Unless ended by court order, the guardianship continues until the child 'attains majority or dies.' (Prob. Code, § 1600, subd. (a).) The court may terminate the guardianship on a petition by the guardian, a parent, or the child, based on the child's best interest." (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1121–1124.)

2. Probate Code Section 1516.5

Prior to the passage of section 1516.5, parental rights could be terminated without parental consent only if parents were found to be unfit. In 2003, the Legislature adopted section 1516.5 to broaden the circumstances under which parental rights could be terminated to free a child for adoption by a long-term guardian. An analysis prepared by the Senate Judiciary Committee explained: " '[T]he [bill's] sponsor believes that creating this new provision applicable only under the limited circumstances 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 (2003—2004 Reg. Sess.) as amended Mar. 26, 2003, pp. 8–9, quoted in *Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1124–1125.)

As amended, section 1516.5 provides that a proceeding to declare a child free from the custody and control of one or both parents—that is, to "terminate[ ] all parental rights and responsibilities with regard to the child" (Fam. Code, § 7803)—may be brought in a guardianship, adoption, or other proceeding if all of the following requirements are met:

"(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." (§ 1516.5, subd. (a)(1)—(3).)

In making a determination under this section, the probate court "shall appoint a court investigator or other qualified professional to investigate all factors enumerated in subdivision (a). The findings of the investigator or professional regarding those issues shall be included in the written report required pursuant to Section 7851 of the Family Code."[6] (§ 1516.5, subd. (b).)

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[6] Family Code section 7851 requires a clinical social worker, licensed marriage and family therapist, or other professional to "render to the court a written report of the investigation with a recommendation of the proper disposition to be made in the proceeding in the best interest of the child."

It is undisputed that Louis and Lindsey do not have legal custody of Cash, and that at the time the petition was filed, Cash had been in the O.'s physical custody for more than four years. Accordingly, only the third prong of the statutory analysis—whether Cash would benefit by being adopted by the O.'s—is before us.

3. The "Best Interest" Test

In determining whether a child would benefit from being adopted by his or her guardian, section 1516.5 requires the trial court to "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."
(§ 1516.5, subd. (a)(3), italics added.)

Section 1516.5 does not describe how a court considering a petition to terminate parental rights is to weigh the nature and extent of the birth-parent/child relationship against the nature and extent of the guardian/child relationship, and we are not aware of any cases that shed light on the inquiry. However, courts have examined an analogous question in the dependency context under Welfare and Institutions Code section 366.26. That section provides that even after the statutory reunification period has passed and parents have failed to reunify, parental rights should not be terminated if the court, considering the "best interests of the child," concludes that "the child would benefit from continuing the [parent-child] relationship." (Welf. & Inst.

Code, § 366.26, subd. (c)(1)(B)(i), (h)(1); *In re Caden C.* (2019) 34 Cal.App.5th 87, 105, review granted July 24, 2019, S255839.)

Courts applying Welfare and Institutions Code section 366.26 have explained that whether the child will benefit from maintaining a legal relationship with the biological parent must be decided "on a case-by-case basis," taking into account "the many variables which affect the parent-child bond." (*In re Caden C.*, *supra*, 34 Cal.App.5th at p. 104.) Relevant factors include the 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. (*Ibid.*) Further, courts must examine not simply the strength of the bond between the child and the birth parent, but whether that bond is "so significant and compelling in [the child's] life that the benefit of preserving it outweigh[s] the stability and benefits of adoption." (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 396.) As one court has explained: "The ' "benefit" ' necessary to trigger this [parental benefit] exception requires that ' "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. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement [i.e., a foster placement or guardianship] against the security and the sense of belonging a new family would confer." ' " (*Id.* at pp. 396–397; see also *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324 ["The type of parent-child relationship sufficient to derail the statutory preference for adoption is one in which 'regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' "].)

Applying this standard, the court in *In re Caden C.*, *supra*, 34 Cal.App.5th 87, concluded that although a child had a very strong emotional bond with his mother, who had been his primary caregiver for six out of his eight and a half years of life, the trial court erred in denying a petition to terminate the mother's parental rights. (*Id.* at pp. 107–108.) The court explained: "The juvenile court was required to balance 'the strength and quality of the natural parent/child relationship in a *tenuous* placement *against* the *security and the sense of belonging* a new family would confer.' [Citation.] The question is not, as the court's findings seem to imply, whether mother's parental bond trumped the bond Caden shared with his current caregiver. It is instead an inquiry into whether mother's bond with Caden was such a positive influence on his young life that an uncertain future is an acceptable price to pay for maintaining it." (*Id.* at p. 113.) On the record before it, the court held that "when the strength and quality of mother's relationship with Caden in a tenuous placement is properly balanced against the security and sense of belonging adoption by [the prospective adoptive parent] would confer, no reasonable court could have concluded that a compelling justification had been made for forgoing adoption." (*Id.* at p. 115.)

We recognize, of course, that the present petition is governed by the Probate and Family Codes, not the Welfare and Institutions Code, and it concerns a child who was voluntarily placed with his current guardians by a parent, not involuntarily placed by the state. Nonetheless, we find the framework developed by the courts in the dependency context to be a useful one in applying the best interest test the Legislature has adopted in section 1516.5 because it requires courts not only to evaluate

the strength and significance of the birth-parent/child relationship, but to *balance* the benefit of maintaining that legal relationship against the benefits of permanence provided by adoption. We therefore will rely on this framework in reviewing the trial court's decision and Cash's best interest.

B. The Trial Court Abused Its Discretion by Relying on Factors That Were Legally Irrelevant or Were Unsupported by the Evidence

In the present case, the trial court properly began by considering the strength of the bond between Cash and Louis. The court found Cash was not strongly bonded to Louis, noting that "[c]urrently, cutting off [Louis's] visits, or severely limiting them, might not cause great harm to Cash." This finding was supported by the weight of the evidence, and Louis does not challenge it on appeal.

Against the evidence of the weak bond between Cash and Louis, the court should have weighed the benefit to Cash of adoption by caregivers with whom he had lived since birth and whom he considered his parents. The trial court failed to do so. Instead, it found dispositive several factors that, as we now discuss, were either legally irrelevant to the section 1516.5 analysis or were unsupported by the evidence.

No finding of unfitness or egregious behavior. The court found persuasive the evidence that Louis was not unfit, was capable of raising Cash, and "has done nothing egregious . . . to justify terminating his parental rights." This was error. While we agree that Louis has never been found unfit and may be capable of raising Cash, a biological parent's unfitness manifestly is *not* an element of section 1516.5. Our Supreme Court has explained: "The statute specifies in unambiguous terms that the

court must find 'that the child would benefit from being adopted by his or her guardian.' (§ 1516.5, subd. (a)(3).) Evidence of parental unfitness or that terminating parental rights is the least detrimental alternative for the child *is not required* in a section 1516.5 proceeding. [Citations.]" (*In re Noreen G.*, *supra*, 181 Cal.App.4th at p. 1383.)

The legislative history of section 1516.5 makes clear that the omission of an unfitness requirement was a deliberate legislative choice, not an oversight. In *Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1124—1125, our Supreme Court noted that section 1516.5 was enacted to create " 'another avenue' " for a child to be adopted in cases where adoption is in a child's best interest but his or her parents " 'do not fall under one of the categories covered by existing law' "—that is, the parents have not neglected or abandoned the child. The court explained that the legislative analysis of section 1516.5 "summarized the intent of the proposed legislation as follows: 'to institute a new procedure for the court to terminate parental rights when a child has been in the custody of a guardian for at least two years *but there is no basis for the termination of parental rights except that it would be in the best interest of the child to be adopted by the guardian*.' (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 182, *supra*, at p. 4.)" (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1125—1126, italics added.)

Because a biological parent's fitness to raise his child is not legally relevant under section 1516.5, the trial court erred in relying on the absence of evidence of unfitness to deny the petition to terminate parental rights.

Possibility of strengthening Cash's attachment to Louis. The trial court found it significant that although Cash was not

presently attached to Louis, there was no evidence that the lack of attachment "presents a danger to Cash or could not be remedied." This, too, was error. As we have said, the sole statutory criterion for terminating parental rights is whether adoption by the guardian is in the best interests of the child. While it manifestly is not in a child's best interest to maintain a legal relationship with a parent who presents a danger to him or her, the converse need not be true—that is, it may be in a child's best interest to be released for adoption even if his or her parent does not present a danger. Moreover, no evidence in the record suggested that the present lack of attachment between Cash and Louis could be remedied in the future; and, in any event, a court has no authority to attempt to facilitate the return of a child in probate guardianship to his or her parent. (See *Guardianship of Kaylee J.* (1997) 55 Cal.App.4th 1425, 1432 [court acted beyond its authority in ordering parties to develop a reunification plan for child in probate guardianship].)

Detriment to Cash if contact with Louis were eliminated. The trial court concluded that if the O.'s adopted Cash, they would be free to cut off or limit contact between Cash and Louis, which would cause "potential detriment" "[a]t the moment Cash understood that [Louis] is his biological father." But the only issue before the court was the termination of the *legal relationship* between Cash and Louis—not the termination of *any relationship* between them. Manifestly, children can, and do, have relationships with many people who are not their parents, including grandparents, cousins, and friends. Thus, while terminating Louis's parental rights would eliminate the legal relationship of parent and child, it would not prevent a continuing relationship of another kind between Cash and Louis.

Further, the O.'s indicated both a desire and an intention to maintain a relationship with Louis if the adoption were permitted to proceed. Mr. O. testified that if he and his wife were permitted to adopt Cash, they planned to maintain a "relationship with Louis as we do with Lindsey, having everybody just kind of be a part of Cash's story . . . ." While the O.'s could not have been legally compelled to maintain such relationship following adoption, there is no evidence in the record that the O.'s intended to excise Louis from Cash's life. (See *In re Jose C.* (2010) 188 Cal.App.4th 147, 159 [adoption should not be assumed to result in the loss of a child's relationship with his biological family where parties were in the process of negotiating a post-adoption agreement].)

There is, finally, no evidence that Cash would be harmed if his contact with Louis were reduced or eliminated entirely. Speculation about a child's future reaction to adoption "is not evidence and cannot be considered in determining his adoptability." (*In re Jose C.*, *supra*, 188 Cal.App.4th at p. 159.) There was, moreover, evidence to the contrary: Dr. Kaser-Boyd opined that Cash would *not* be harmed if Louis were removed from his life because "[a]t this point in time he does not seem to be attached to his father." And, while Dr. Kaser-Boyd recommended a post-adoption contract[7] because children "[are]

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[7] Family Code section 8616.5 provides for post-adoption contracts "to ensure children of an achievable level of continuing contact when contact is beneficial to the children and the agreements are voluntarily executed by birth relatives . . . and adoptive parents." (Fam. Code, § 8616.5, subd. (a).) Post-adoption contracts executed under this section may provide for visitation between the child and a birth parent, for future contact

often very interested in their biological roots," she opined that it would be in Cash's best interests to be adopted even if such a contract could not be entered into because the benefit to Cash of adoption by the O.'s would far outweigh the likely benefit of maintaining a relationship with Louis.

C. Because the Trial Court Failed to Exercise Informed Discretion Under the Correct Legal Principles, Its Order Denying the Section 1516.5 Petition Must Be Reversed

As we have said, while the abuse of discretion standard gives the court substantial latitude, " ' "[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action. . . .' " ' " (*In re Noreen G.*, *supra*, 181 Cal.App.4th at pp. 1382–1383.) " ' "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." ' " (*Id.* at pp. 1382–1383.)

In the present case, the trial court based its order on factors that were irrelevant to the statutory analysis and were unsupported by the evidence. As such, the order denying the petition to terminate parental rights constituted an abuse of discretion and must be reversed. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436 ["an order based upon improper criteria or incorrect assumptions calls for reversal ' "even though there may be substantial evidence to support the court's order" ' "].)

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between a birth parent and the child, and for the sharing of information about the child. (*Id.*, subd. (b)(2).)

III.
The Trial Court Lacked Discretion to Deny the Petition to Terminate Louis's Parental Rights

Having concluded that the trial court applied the wrong legal standard, we must now consider "where to go from here." (*Guardianship of Kassandra H.* (1998) 64 Cal.App.4th 1228, 1240.) Where the record affirmatively shows that the trial court misunderstood the proper scope of its discretion, a remand to the trial court normally is required to permit the court to exercise informed discretion with awareness of the full scope of its discretion and applicable law. (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 16; *People v. Rodriguez* (1998) 17 Cal.4th 253, 257.) Remand for the trial court to exercise discretion is *not* appropriate, however, if the record would not support a finding in the respondent's favor—that is, if the undisputed facts before the trial court compel a conclusion that adoption by the guardian is in the child's best interest. (*Guardianship of Kassandra H.*, at p. 1240 [remand for trial court to exercise discretion is not appropriate where the Court of Appeal "can say with some confidence" that the record did not support a judgment for the respondent]; see also *In re Caden C.*, *supra*, 34 Cal.App.5th at p. 115 [reversing with directions to the trial court to enter an order terminating parental rights where "no reasonable court could have concluded that a compelling justification had been made for forgoing adoption"]; *Adoption of Michelle T.* (1975) 44 Cal.App.3d 699, 710 [reversing with directions to grant a petition for adoption where the trial court had relied on an impermissible factor, and the record was "replete with evidence that . . . petitioners met every requirement necessary for adoption"].)

Having reviewed all of the evidence before the trial court, we conclude that the record would not support a judgment for Louis because the undisputed facts before the trial court compel the conclusion that adoption by the O.'s is in Cash's best interest. Therefore, a remand for a further exercise of discretion by the trial court is not appropriate.

A. The Record Before the Trial Court Compelled the Conclusion That Adoption by the O.'s Is in Cash's Best Interest

The evidence before the trial court established that five-year-old Cash has lived with the O.'s since he was just a few days old, and they are the only parents he has ever known. Cash has an extremely close relationship with the O.'s and is deeply bonded to them. Cash goes to the O.'s for comfort when he is sad or hurt, calls them "mommy" and "daddy," and expresses considerable love for them. He clings to the O.'s and has difficulty separating from them. He has developed a close relationship with the O.'s parents, whom he considers his grandparents, and with the O.'s nieces and nephews, whom he views as his cousins.

Based on her observation of Cash and the O.'s, Dr. Kaser-Boyd opined that Cash is "very, very attached" to the O.'s and that they are his psychological parents. She testified: "He sees [the O.'s] as his parents. It seems clear he would be anxious if he would be separated from them. I think he's very well cared for and very loved." Dr. Kaser-Boyd characterized the likely detriment to Cash of separation from the O.'s as "considerable," noting that since her initial evaluation of the family "the evidence of his attachment to the [O.'s] is far stronger." She opined that if Cash were separated from the O.'s, he would likely suffer anxiety

and grief, which could result in depression, anger, difficulty reattaching to a new person, and other psychological symptoms.

In contrast, Cash evidences little attachment to Louis. Cash does not ask for visits with Louis, resists physical contact with Louis, and says he does not want to go to Louis's house. Cash does not identify Louis as one of the people he loves, and he told Dr. Kaser-Boyd that visits with Louis make him sad. Cash behaves aggressively with Louis, hitting him in the face with toys and pummeling him with his fists. And although Dr. Kaser-Boyd observed some familiarity and pleasant play between Cash and Louis, she saw no evidence of a parent-child relationship between them.[8]

In view of the strong bond between Cash and the O.'s, and the comparatively weak bond between Cash and Louis, Dr. Kaser-Boyd opined that adoption by the O.'s is in Cash's best interests. She noted that it would formalize his relationship with the O.'s, to whom he was extremely attached, and would further his sense of security. She specifically testified that the benefit Cash might receive from possibly strengthening his relationship with Louis in the future did not outweigh the benefit to Cash of

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[8] Louis does not dispute that Cash has a loving relationship with the O.'s and their extended family members and is bonded to them, but he points to evidence that Cash enjoyed playing with him, that Louis's parents had developed "some bond" with Cash, that Cash "willingly sat" with Louis's parents to eat a snack, and "Cash's current relationship with Louis was better than when Cash was younger." We acknowledge the presence of this evidence in the record but, like the trial court, we cannot conclude that it establishes a significant bond between Cash and Louis.

adoption. Dr. Kaser-Boyd also opined that continued litigation over parentage and custody was likely to cause Cash anxiety. She explained: "[O]f course, he's not here in the courtroom, but I think the children [his] age are aware that there is stuff going on. . . . I think that the parties in litigation are not nice to each other. . . . A child is going to notice that. So I think ongoing litigation would be stressful for him."

As we have said, even a child's strong emotional bond with a birth parent may be insufficient to overcome the statutory preference for adoption because of the security and sense of belonging adoption provides. (E.g., *In re Caden C.*, *supra*, 34 Cal.App.5th at p. 105.) In the present case, the undisputed evidence before the trial court established a *weak* bond between Cash and Louis, and an extremely *strong* bond between Cash and the O.'s. There is, moreover, no dispute that the O.'s provided for all of Cash's physical and emotional needs, and that he was thriving in their care. Given all of these circumstances, when the strength and quality of Louis's relationship with Cash in a tenuous placement is properly balanced against the security and sense of belonging adoption by the O.'s would confer, no reasonable court could conclude that a compelling justification has been made for forgoing adoption. (*Id.* at p. 115.)

B. Louis's Contrary Contentions Are Without Merit

Louis does not seriously contend that the benefits to Cash of adoption are outweighed by the benefits of maintaining a legal relationship with him. He urges, however, that our Supreme Court in *Guardianship of Ann S.* outlined *other* factors—namely "the circumstances leading to guardianship, the parent's efforts to maintain contact with the child, any exigencies that might hamper those efforts, and other evidence of commitment to

parental responsibilities" (45 Cal.4th at p. 1132)—that courts must consider before terminating parental rights. Louis contends that a consideration of these factors would support a denial of the petition to terminate his parental rights, and he therefore urges this case must be remanded to allow the trial court to exercise discretion.

Louis is correct that our Supreme Court in *Guardianship of Ann S.*[9] suggested that the factors identified in the quoted language could, in some cases, be relevant to a petition to terminate parental rights. But when that language is considered in context, it is clear that the *Ann S.* court was suggesting that these factors may be relevant *to* a child's best interest, not that they should be balanced *against* the child's best interest. In the relevant passage, the Supreme Court addressed the appellant's contention that section 1516.5 is facially unconstitutional because it could permit the termination of parental rights of a loving parent who is required to be away from a child for a lengthy period of time. The court rejected the contention, explaining as follows: "There are imaginable scenarios in which a fully responsible parent might find it necessary to place a child in guardianship and, despite maintaining a parental commitment as full as the circumstances permit, eventually face a termination proceeding under section 1516.5. Mother posits the plight of a single mother in the National Guard, called to duty overseas, and unable to reclaim custody for two years. However, 'we may not invalidate a statute simply because in some future hypothetical situation constitutional problems may arise.' [Citations.] We

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[9] We discuss *Guardianship of Ann S.* more fully in the section that follows.

note that section 1516.5 requires the court to consider 'all factors relating to the best interest of the child,' *which would include the circumstances leading to guardianship, the parent's efforts to maintain contact with the child, any exigencies that might hamper those efforts, and other evidence of commitment to parental responsibilities*." (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1132, italics added.)

Considered in context, it is clear that the factors identified by the court in the quoted language are relevant to a best interest analysis, not an exception to it. In the hypothetical case posited by the Supreme Court of a single parent called to National Guard duty overseas, we can imagine many scenarios in which the factors identified by the Supreme Court would compel a trier of fact to conclude that adoption was not in the child's best interest. For example, a child who had lived for many years with a parent, remained in close contact with the parent through phone calls and letters, and looked forward to reuniting with the parent when the parent's term of a service was over, likely would not be benefited by adoption. In that hypothetical case, the preexisting parental relationship between the biological parent and the child, the child's understanding of the need for a temporary guardianship, and the maintenance of a parent-child bond through regular contact with the parent, might well compel the conclusion that parental rights should not be terminated. Adoption would be denied in that case, however, not because it would be unfair to the parent, but because it would not be in the child's best interest.

In the present case, Louis points to evidence that he did not consent to the guardianship and has sought to terminate it, he has regularly visited Cash, his attempts to develop a relationship

with Cash were hampered by the O.'s, and he is very motivated to raise Cash. But Louis does not contend that these factors demonstrate that Cash is bonded to him and would suffer detriment if his parental rights were terminated—to the contrary, Louis concedes that Cash has not developed an attachment to him. He urges, however, that because his inability to foster a close relationship with Cash was not his fault, it should "not be used against him." In urging that his sincere but unsuccessful efforts to establish a relationship with Cash should prevail over Cash's best interest, Louis misapprehends the best interest analysis. In determining a child's best interest, courts must weigh the relevant factors and determine the child's best interests "*solely from the standpoint of the child*, and should not consider the feelings and desires of the contesting parties, except insofar as they affect the child's best interests." (*Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1264.) "A best-interests determination depends 'upon a true assessment of the emotional bonds between parent and child, upon an inquiry into "the heart of the parent-child relationship . . . the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond." [Citation.] It must reflect also a factual determination of how best to provide continuity of attention, nurturing, and care.' [Citation.] Thus, crucial to a best-interests determination is 'the importance of stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds.' [Citation.]" (*Ibid.*; see also *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 [" 'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the

conclusion that maintenance of the current arrangement would be in the best interests of that child.' "].)

In the case before us, we do not doubt Louis's love for Cash or his sincere desire to occupy a parental role in Cash's life. The analysis required by section 1516.5, however, depends entirely on what is best for the child, *not* what may be best for the many adults who love him. On the record before us, only one conclusion is possible—that being adopted by the O.'s and obtaining the stability and security they offer him is in Cash's best interest. The trial court erred in concluding otherwise.

IV.
Section 1516.5 Is Not Unconstitutional As Applied in the Present Case

Having concluded that the trial court erred in denying the petition to terminate Louis's parental rights, we turn to the final issue raised by this appeal—whether terminating Louis's parental rights would, as he suggests, violate his fundamental right to " ' "the companionship, care, and custody" ' " of his biological child. (*Santosky v. Kramer* (1982) 455 U.S. 745, 758 [102 S.Ct. 1388, 71 L.Ed.2d 599] (*Santosky*).) For the reasons that follow, it would not.

A. Facial Constitutionality—Guardianship of Ann S.

In *Guardianship of Ann S.*, *supra*, 45 Cal.4th 1110, our Supreme Court considered a constitutional challenge to section 1516.5. There, the child's parents, both drug users, agreed to place their 18-month-old daughter in a permanent guardianship with her paternal aunt and uncle. Subsequently, the father consented to allow the guardians to adopt the child; the mother refused to consent. The guardians petitioned to terminate the mother's parental rights pursuant to section 1516.5. The probate

court granted the petition to terminate, and the Court of Appeal affirmed. (*Guardianship of Ann S.*, at pp. 1119—1121.)

Our Supreme Court affirmed, rejecting the mother's contention that section 1516.5 was facially unconstitutional because it allowed parental rights to be terminated without a showing of parental unfitness. (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1118.) The court began by discussing *Quilloin v. Walcott* (1978) 434 U.S. 246 (*Quilloin*), which concerned a child born to unmarried parents. Although the child frequently visited with his father, he never lived with him. The mother remarried when the child was two years old; nine years later, the child's stepfather filed a petition to adopt him. The father opposed the adoption and sought visitation rights. The trial court concluded adoption was in the child's best interest, and it therefore granted the adoption petition. (*Id.* at p. 247.)

The Supreme Court unanimously concluded that applying a "best interests of the child" standard did not violate the father's constitutional right to due process. (*Quillion*, *supra*, 434 U.S. at pp. 247—254.) It explained: "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' [Citation.] But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except

appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.' " (*Id.* at p. 255.)

The *Ann S.* court explained that under *Quilloin*, "the best interest of the child is a constitutionally permissible basis for terminating parental rights in some circumstances"—namely, when a parent does not have custody of a child. Although the court agreed that " ' "some showing of unfitness" ' " is required when a *custodial* parent faces termination of his or her rights, it noted that section 1516.5 "has no application to custodial parents. It affects only parents whose rights have been suspended for an extended period of probate guardianship." (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1129—1130.) Thus, because section 1516.5 did not conflict with constitutional requirements in all cases, the court found it constitutional on its face. (*Guardianship of Ann S.*, at p. 1129.)

The court then discussed the application of its decision in *Adoption of Kelsey S.*, *supra*, 1 Cal.4th 816, to the mother's claim. In *Kelsey S.*, the court had reviewed a statutory scheme that permitted the termination of parental rights of an unwed biological father who was not a statutory presumed father—i.e., who had not "receive[d] the child into his home and openly [held] out the child as his natural child"—if doing so was in the child's best interests. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 825, italics omitted, quoting Fam. Code, former § 7004, subd. (a)(4) (now, Fam. Code, § 7611, subd. (d).) The *Kelsey S.* court concluded that the statute did not pass constitutional muster under the facts of the case before it. It explained: "[I]f an unwed father promptly comes forward and demonstrates a full commitment to his

parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent." (*Kelsey S.*, at p. 849.) The court emphasized, however, that terminating a father's parental rights violated the constitution "if (*but only if*) . . . [he] demonstrated the necessary commitment to his parental responsibilities." (*Id.* at p. 850.) Otherwise, the statutory best interest of the child standard would be "constitutionally sufficient." (*Id.* at p. 849.)

The *Ann S.* court explained that the principle articulated in *Kelsey S.* did not suggest that section 1516.5 was facially unconstitutional. It explained that under section 1516.5, termination of parental rights can occur only when the parent has surrendered custody to a guardian and has exercised no parental care and control for at least two years. A prolonged guardianship of this kind, the court said, generally is inconsistent with " 'a full commitment to . . . parental responsibilities—emotional, financial, and otherwise.' " (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1131—1132, quoting *Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

The *Ann S.* court concluded by noting that although section 1516.5 was not facially unconstitutional, it could be unconstitutional as applied in a particular case. It therefore left open the possibility of a constitutional challenge to section 1516.5 as applied to particular parents. (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1132.)

B. Constitutionality As Applied—In re Charlotte D.

The same day our Supreme Court issued its decision in *Guardianship of Ann S.*, it also issued a companion decision, *In re Charlotte D.* (2009) 45 Cal.4th 1140 (*Charlotte D.*), which

considered the constitutionality of section 1516.5 as applied to a particular father. In *Charlotte D.*, the child lived briefly with her unmarried parents, who had drug and alcohol problems; subsequently, the parents consented to guardianship of the child by her paternal grandparents. (*Charlotte D.*, at pp. 1143—1144.) When the child was nine years old, the grandparents petitioned to terminate the parents' rights under section 1516.5. (*Charlotte D.*, at p. 1145.) The trial court found adoption to be in the child's best interests and granted the petition, but the Court of Appeal reversed and remanded, holding that the father's rights could not be terminated unless he were given an opportunity to attempt to demonstrate that he had made a full commitment to his parental responsibilities. (*Id.* at p. 1146.)

The Supreme Court reversed the judgment of the Court of Appeal. (*Charlotte D.*, *supra*, 45 Cal.4th at p. 1150.) It reasoned that although factors similar to those set out in *Kelsey S.* might support a parent's claim that the best interest of the child standard is unconstitutional as applied to him or her, "[t]his is not such a case." It explained: "The undisputed facts in the record show that [father] fell far short of the level of parental commitment contemplated in *Kelsey S.* Father manifestly failed to fulfill his parental responsibilities and did not promptly defend his custodial rights." (*Charlotte D.*, at p. 1149.) Accordingly, it found no constitutional impediment to terminating the father's parental rights. (*Id.* at p. 1142.)

C. Application of Ann S. *and* Charlotte D. *to the Present Case*

Louis concedes section 1516.5 is not unconstitutional on its face, but he urges it is unconstitutional as applied to him because he "promptly came forward and demonstrated a full commitment

to his parental responsibilities—emotional, financial, and otherwise as to his son Cash." He contends his parental rights therefore cannot be terminated in the absence of a finding that he is unfit.

We do not agree that the circumstances of this case render section 1516.5 unconstitutional as applied. Our Supreme Court has said that a prolonged legal guardianship, during which all rights and custodial responsibilities are suspended, "is generally *inconsistent* with 'a full commitment to . . . parental responsibilities.' " (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1131—1132.) This general principle has particular resonance in the present case, in which five-year-old Cash has lived his entire life with the O.'s. Louis has never spent a full day with Cash, has never given him a bath or put him to bed, and has never cared for him when he is ill. Louis has never attended a doctor's appointment or school function, he does not know where Cash goes to school or who his teacher is, and he does not know the names of any of Cash's friends. He does not discipline Cash when they are together because "I don't feel like I should spend time disciplining him when my time is so limited." He has provided scant financial support for Cash: In the eighteen months prior to trial, Louis provided only $800 towards Cash's support because "things began to get a little tight." And, notwithstanding the fact that his son self-identifies as "Cash," Louis refuses to use that name because "[t]hat's not the name his birth parents gave him."

Further, although Louis has visited Cash regularly, he has not succeeded in fostering a parent-child relationship that would weigh against the termination of parental rights. The undisputed facts in the record show that the O.'s, not Louis, are

Cash's "psychological parents"—the people Cash perceives to meet his needs. Cash does not ask for visits with Louis, he resists physical contact with Louis, and he says he does not want to go to Louis's house. Cash is aggressive with Louis and regularly seeks out the O.'s or their extended family during visits. Based on her observation of a visit between Louis and Cash, Dr. Kaser-Boyd "couldn't see that" a parent-child relationship exists between them.

Notwithstanding Louis's extremely limited involvement in Cash's life and Cash's weak bond with him, Louis would have us conclude that his parental rights cannot constitutionally be terminated without a finding of parental unfitness because, like the father in *Kelsey S.*, he has attempted to obtain expanded visitation or custody of Cash and has been prevented from doing so. We do not agree. Nothing in *Kelsey S.* suggests that a parent's unsuccessful attempts to obtain custody of a child are sufficient to permit a parent to block adoption even after the child has been out of the parent's custody for an extended period of time. Indeed, *Guardianship of Ann S.* suggests to the contrary, noting that "the procedural standards governing proceedings to terminate parental rights are not invariable. The nature and stage of the proceeding, and the passage of time without parental custody, may make a difference." (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1135.) The *Ann S.* court noted, moreover, that "[a]fter years of guardianship, the child has a fully developed interest in a stable, continuing, and permanent placement with a fully committed care-giver" and "[t]he guardian, after fulfilling a parental role for an extended period, has also developed substantial interests that the law recognizes." (*Id.* at p. 1136.) Requiring a showing of unfitness before parental rights can be

terminated "fails to account for these competing interests, whereas the best interest of the child standard allows the court to appropriately balance all the relevant factors arising from the child's family relationships." (*Ibid.*)

For all of these reasons, we cannot conclude on the present record that Louis has demonstrated that section 1516.5 is unconstitutional as applied to him.

DISPOSITION

The order denying the petition to terminate parental rights is reversed with directions to the trial court to grant the petition. The O.'s are awarded their appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

I concur:

EGERTON, J.

DHANIDINA, J.