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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re J.N., a Person Coming Under the  
Juvenile Court Law.

SAN MATEO COUNTY HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

Lionel N.,

Defendant and Appellant,

L.B.,

Defendant and Appellant,

L.T.,

Intervener and Appellant,

Shauna M.,

Appellant,

J.N.,

Appellant.

A129824

(San Mateo County  
Super. Ct. No. JV79610)

This unusual dependency involves the following parties who appear before us:  
(1) the San Mateo County Human Services Agency (Agency); (2) the dependent minor,

J.N.; (3) Lionel N., who is J.N.'s father; (4) L.B., who is J.N.'s mother; (5) L.T., who is L.N.'s adult daughter and J.N.'s half sister; and (6) Shauna M., who during the dependency was J.N.'s foster parent and who was recognized by the juvenile court first as a de facto parent and then as the prospective adoptive parent. At issue here are two orders: The first, made on August 6, 2010, terminated the parental rights of the mother and the father; the second, made on September 15, 2010, rejected the Agency's recommendation that the minor should be placed with her half sister in anticipation of adoption, and ordered the minor's placement to remain with the de facto parent.

Every individual—that is, every party except the Agency—filed a notice of appeal, although the minor and the de facto parent advise that their appeals are “protective” only, and will be moot if the appeals of the mother, the father, and the half sister do not succeed. Most of the appeals deal with issues allegedly stemming from the unusual procedure adopted by the juvenile court. At the time it terminated the parents' rights on August 6, the court ruled that custody would be transferred from the local de facto parent to the half sister in Louisiana, but only after a “transition period” of at least 30 days. However, by September 15, matters had changed so materially that the court in effect reversed itself and changed its indicated decision on placement. In essence, the court treated its placement decision of August 6 as interlocutory, not final.

Given the distinct circumstances of the minor's evolving situation at the time of both orders, we conclude that the court's approach was sensitive to the quickly changing context of a very young and vulnerable child. Accordingly, we reject the various objections made by the mother, the father, and the half sister against the procedure. We also conclude that the failure to make a timely determination of whether the father had Indian ancestry under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)), has been shown to be harmless. We thus affirm.

## **BACKGROUND**

Much of the considerable record on appeal is neither contested nor germane to the issues that must be resolved. We reiterate only the salient details and events.

In June 2009, the Agency filed a petition in which it alleged that the newborn minor came within the provisions of Welfare and Institutions Code<sup>1</sup> section 300, subdivision (b), in that the mother had failed to protect . The particulars were that the mother “has a long history of illegal drug use,” and “has given birth to a total of nine children.” Like the minor here, “at least four of the children were exposed in utero to controlled substances.” Two of the other children were placed with their father (not the father to the minor here); one is “in long-term foster care under the San Francisco Juvenile Court”; and two were adopted after the mother’s parental rights were terminated. The minor was immediately detained.

The allegations of the petition were sustained, and paternity testing ordered, at the jurisdictional hearing held in July 2009. At the dispositional hearing held the following month, the juvenile court ruled as follows: “I am going to declare dependency. I will make the ICWA finding that [the minor] may be a member of a tribe and that notice has been filed. [¶] I will make the other orders [as recommended by the Agency] in their entirety. [¶] . . . [¶] The case plan is approved. [¶] . . . [¶] This is a fost/adopt case. That’s the current plan for this child. Visitation is terminated. [¶] We are setting a .26 hearing.” No reunification services were ordered provided for either the mother or the father—she, because of her history (§ 361.5, subs. (b)(10), (b)(11), (b)(13))—and he because he waived them. As recommended by the Agency, the court declared Lionel N. to be the alleged father.

In November 2009, the court also learned that the Father—whom the court now recognized from paternity testing as the minor’s biological father—had changed his mind and now wished to receive reunification services, which the Agency opposed. The Agency also opposed the father’s request to be elevated to presumed parent status.

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<sup>1</sup> Subsequent statutory references are to the Welfare and Institutions Code unless otherwise indicated.

It was about this time that the mother and the father began indicating to the Agency “their desire to have the paternal half sister . . . assessed for placement,” although the Agency favored the existing placement with a maternal aunt.

In its December 2009 “366.16 WIC Report,” the Agency recommended that the court terminate the parental rights of the mother and the father, and select adoption as the permanent plan for the minor. The Agency identified a maternal great aunt as likely to adopt the minor.

In February 2010, the father filed a “Waiver of Reunification Services.” Later that month the court found that he qualified as a presumed parent.

In April 2010, foster parent Shauna M. was granted de facto parent status. But by July the Agency was recommending that the court place the minor with her half sister, the father’s adult daughter, in Louisiana. The attorney for the minor opposed this change, arguing that “a change in placement would be detrimental to the minor and contrary to the minor’s best interests.”

The actual termination hearing was finally concluded on August 6, 2010. The court terminated the parental rights of both the mother and the father, and then ruled that, following appropriate transition measures, the minor would be placed with the half sister in Louisiana. The court directed the Agency to prepare and submit a “transition plan” which the court would review in 30 days, during which period no change in the minor’s placement would occur without the court’s express permission. Because the minor was being moved from the de facto parent, the court denied her motion to be named the prospective adoptive parent.

The de facto parent did not let it go at that. She filed another “Request for Prospective Adoptive Parent Designation,” by which she informed the court that she had already “had her home approved as an adoptive home (since October, 2009)” and that she “has been the sole caretaker of this child since 1/21/10.” Days later, the minor filed a motion for reconsideration of the placement decision to move her out of the de facto parent’s home. When the half sister filed opposition to the minor’s motion, the de facto parent argued that she—the half sister—had no standing or right to participate in “these

proceedings.” The de facto parent also filed a motion pursuant to section 388, again requesting the court to grant her prospective adoptive parent status, which would in turn “give me preference as the child’s current caregiver” by operation of subdivision (k) of section 366.26.

After hearing extensive argument, the court decided that the half sister would be allowed to participate, and that *counsel* for the mother and the father, notwithstanding the termination of the parental rights, would be “re-invited back to the table” at the next hearing. The de facto parent dropped her opposition to the half sister’s participation.

The mother responded to the court’s invitation with a trial brief in which she took the position that, following the termination of parental rights and selection of adoption as the permanent placement, “[a]t this time the court has no jurisdiction over the placement of [the minor] and can only review the [Agency’s] decision regarding placement for abuse of discretion.”

On September 14 and 15, 2010, the juvenile court held what it and the parties termed a “subdivision (k)” hearing to determine whether the minor’s custody should be changed to the de facto parent or left with the half sister.<sup>2</sup> Neither parent was present. At the outset of the hearing, counsel for the minor objected to the presence of counsel for the mother and the father: “Unless Your Honor has decided that she is reversing her decision . . . and reinstating parental rights, or if they are here to make a motion requesting that you reinstate parental rights, otherwise they have no standing to participate in these proceedings. And in fact, the law is quite clear they are confidential. And parents’

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<sup>2</sup> This is a reference to subdivision (k) of section 366.26, which provides: “Notwithstanding any other provision of law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent and removal to the relative caretaker or foster parent would be seriously detrimental to the child’s emotional well-being.”

counsel is not to be present in these proceedings unless . . . their rights [*sic*] have been reinstated or perhaps if they were making a request that their rights be reinstated.”

The court then ascertained that neither counsel was seeking reinstatement of parental rights. Over the minor’s objection, the court made it clear that each counsel would not be allowed to argue, cross-examine witness, or make motions, but would be permitted to remain at the hearing merely “as an observer.”

Over the course of two days the court then heard testimony from: Deborah Torres, the director of Child Protective Services; Lori Durand, a mental health specialist; Agency case worker Dagoberto Gavidia; Dr. David Brodzinsky, a psychologist accepted by the court “as an expert in the area of adoptions, developmental psychology, mental health of children, the effects of foster care and systematic trauma on children, and in all other areas that he was previously designated in at the last hearing”<sup>3</sup>; Agency employees Pravin Patel and Victoria Smith; and, finally, the half sister.

After hearing considerable impassioned and learned argument, the juvenile court (the Honorable Elizabeth K. Lee) announced its ruling. It was detailed, and it is sensitive, and deserves quotation at length:

“At the time that the court made the ruling to order placement to [the half sister] subject to the court’s final approval after 30 days [of] observing things in the transition plan—and I did not order care, custody and control, to [the half sister]—at the time I made that decision, I knew that [the minor] had developed an emerging attachment to [the de facto parent], but the experts were very clear that it was fragile, . . . she [the minor] had not been securely attached, there was still evidence of a disorganized attachment, indiscriminate relationships with others. They hedged and said her attachment to [the de facto parent] was not necessarily guaranteed.

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<sup>3</sup> At the termination hearing the previous month, Dr. Brodzinsky had testified as “an expert in the area of developmental psychology, psychology attachment, the psychological aspects of adoption and the psychological aspects of children in foster care.”

“I think . . . at the time she [the minor] came to [the de facto parent] that she was—I don’t think any of the experts called her a broken child, but certainly she had very serious issues. She suffered from multiple traumas, exposure to in utero drugs, multiple placements, posttraumatic stress disorder from being placed in the maternal aunt’s home, . . . potential cerebral palsy, a whole host of things that put her at risk for never attaching. And at the time the experts were all hopeful that she would attach to [the de facto parent], that it looked like she was going to, maybe, there was an emerging attachment, very fragile, but she had not yet attached.

“I also reviewed the evidence that they presented that a child under the age of two years and I believe nine months would be able to make a transition from one placement to another given the plasticity of the brain, in the literature, and that resilient children could make those kinds of moves, and also it would depend on the quality of the care giver.

“And Dr. Brodzinsky, the child expert, did testify that he was unable to quantify the risk of moving her to [the half sister], although he clarified his position on that point today.

“I took into account the benefits of having [the minor] placed with [the half sister] at that time . . . who showed a commitment and dedication to raising her sister in her own home. She [the half sister] had a track record of a person able to effectively cope with handling two children who had special needs. She presented as having a very loving and nurturing nature. Her willingness to bring home a child whose prospects of a complete recovery from multiple displacements and from multiple traumas and to love her no matter what, really struck me as a commitment to the child. And also the fact that she had relatives standing by to love and welcome [the minor] at the appropriate time and provide her with an environment of a large extended family that met frequently. Also, the sense that [the half sister] comes from a family of strong family values with a strong sense that those kinds of values should be imparted to her children and any children living with her.

“So I felt at that time it would be in the best interest of [the minor] to be placed with [the half sister] given the fact that nobody was sure what the recovery would look

like for [the minor] and that a displacement and the disruption of her current placement would be very tough on her but that the experts felt that she would have some trauma but she could be moved safely over time, or that she could be moved without serious detriment.

“Since that time, I do agree there has been a significant change in circumstances. That really troubled me. The first new piece of information that I received is that [the minor] has now developed a secure attachment to [the de facto parent], and I think this is a huge change from what we had heard before.

“I think . . . this suggests that all hope is not lost for this child. She has made great strides to overcome some of her multiple traumas and . . . attachment issues by finally securing for the first time to somebody. Because that secure attachment is so critical to her development in her future and because she has made that attachment, I think that causes me to rethink my earlier decision as to what is in the best interest of [the minor].

“The second thing that is new information that came from the transition plan and how [the minor] interacted was, first of all, that I believe she became very familiar with [the half sister]. I think that that’s to credit [the half sister’s] nurturing nature, her patience, and . . . her ability to mother children. But I also recognize that an attachment by the child to [the half sister] can’t take place in 30 days, would need more time. But she was familiar with [the half sister], and the symptoms were gradually reducing. But what struck me as a concern was Dr. Brodzinsky’s testimony and the testimony of the social worker that [the minor’s] response initially to the visits were not in the normative range and that she returned to some behaviors that were very troubling: The voracious eating, the vomiting, the inconsolable crying. These would not necessarily be normally seen in a child who was resilient and able to withstand a move and that the shadows of her past trauma were still with her and that she would revert to them . . . if she did not believe that [the de facto parent] was going to return.

“The other thing that I think now that she [the minor] has a secure attachment, I think that her willingness to be familiar and allow [the half sister] to take care of her was

in part because she felt that she could return to [the de facto parent]. Without that secure attachment, we might have seen . . . even more disorganized behavior on her part.

“What concerns me is that what we are seeing here is a baby who thinks she is going back to her secure base, not a baby who has lost her secure base, her secure attachment. And so I have to listen to . . . the unrefuted testimony of all the mental health experts in this case that a move at this time in [the minor’s] life, given her secure attachment, that she would suffer and experience trauma; and the short and long term effects of being separated from her secure attachment to [the de facto parent] would be devastating to her internal sense of trust and confidence. And we can quibble about whether there’s a serious detriment or not in the eyes of the law, but that language from the experts is fairly strong.

“And that the damage—they also say that the damage done to her . . . sense of trust and to her psyche would most likely be irreversible. And they also expressed, although not in these words, but they are very concerned about [the minor’s] capacity to bounce back from yet another disruptive attachment, especially now that she has finally been able to form a secure attachment to the only care giver that she has been able to have a good outcome with.

“So to disrupt that I think is even more disruptive than to disrupt . . . a child from a placement where the child has not attached.

“I think in my rulings before when I ordered placement to [the half sister], I did distinguish . . . *In re Stephanie M.* [(1994) 7 Cal.4th 295] as this case was not a case where a secure attachment had been made.

“So I do not think for those reasons—it doesn’t change my evaluation of [the half sister]. I do think that she would be an excellent parent to [the minor], but I think the mental health experts here, I have to heed their warning that if we don’t need to move her, there is no mental health reason to move her, then why are we moving her? And that if we move her to [the half sister], who I think would be an excellent parent, we give to [the half sister] a child who will have serious issues that [the half sister] I believe would be willing to keep [the minor]. I don’t think—and I am just speculating here, but based

on a hunch and I can't—I am just saying this for [the half sister's] benefit. I do think we would not be seeing a disruptive adoption because of her extended family and her strong sense of family values. But I think the mental health experts all agree that [the minor] would be damaged by the move.

“So when we hand her over to [the de facto parent], what we are doing is changing this child's life and her prognosis for a good future forever.

“So because of that, I think that I have to change my prior order ordering placement with [the half sister], and that's not in any way a reflection of anything negative about [the half sister]

“I do find credible Dr. Brodzinsky, even though I know he might be seen as a hired gun by many, but his views are supported by the [Agency's] hired experts, by Dr. Kaser-Boyd, by Ms. Durand—although she didn't say it in a strong language—and by Dr. Packer in terms of their concerns.

“So I think that . . . there has been a change of circumstances. And in light of her secure attachment now to [the de facto parent] and the finding by the mental health experts that that attachment is not due to her resilience as a child who can bounce back from trauma and move on to another placement easily but due more to the high quality of child care that [the de facto parent] has given to the baby and that also her willingness to take the [Agency's] high level of support and follow all of the mental health practitioner's advice, that is the reason why the child is recovering.

“So because all the literature is saying that children are resilient and once they form a secure attachment they may go on to another, I think [what] Dr. Packer thought was wishful thinking, I have more evidence now that [the minor] . . . still is not a resilient child. She is still a very fragile child, and the fact that she has finally made a secure attachment gives me great hope that she can have a full recovery despite her multiple placements and her traumas that were inflicted upon her at a very young age.

“I am also hopeful that the transition plan has given [the half sister] an opportunity to get to know her sister and will provide her with an incentive, although I know it might be difficult given . . . how she feels about how the court has ruled, but would open the

door to having the open adoption that I think [the de facto parent] is hopeful for. And certainly for [the minor's] sake, I think it would be very helpful to her in being able to understand where she comes from and that her family has always wanted her, at least [the half sister's] family, and that there is a cultural identity that is important for the child that the [the half sister] and her family can provide to the child.

“I think given all of the circumstances, that in this particular case that is best done through the open adoption that [the de facto parent] indicates she is willing to do. Because I do take very seriously the sense of family that I think those in support of having the baby moved to [the half sister] have been talking about.

“In terms of the 388 motion, I am granting [the de facto parent's] motion<sup>4</sup> for the reasons that I stated previously. [¶] Because I am not changing placement, I am granting her application for prospective adoptive parent [status,] finding that she meets all the criteria.

“And then on the 366.26(k) issue, because I have granted the 388 motion, . . . I think the 366.26(k) matter is . . . moot. But in the event the Agency wants to appeal the 388 petition, I do want to make some findings on the record on the 366.26(k).

“I do think that . . . the child would suffer substantial detriment if moved from her current caretaker, and that is based on the new evidence that I received that she has a secure attachment to her psychological mother, [the de facto parent], and . . . that's really due to the high quality of care she received from this particular unique caregiver and also the services the [Agency] has offered her.

“I think there is support in the record to find that it might be an abuse of discretion. I think that all the mental health experts have agreed that a change of placement in their view is not necessary given the trauma that would be inflicted on this child from that move. There were other issues being considered by the Agency which I am aware of. [¶] . . . [¶] Again, I recognize the Agency didn't have all the information—

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<sup>4</sup> The court may also have been intending to address the de facto's parent's motion for reconsideration.

was looking at it the way the court was looking at it a month or two ago. But today the court has to make a decision based on the evidence it knows today on the 366.26(k) motion.

“So that is my order . . . .”

As noted, every individual appealed from one or both of the orders.<sup>5</sup>

## REVIEW

### Compliance With ICWA Was, Belatedly, Established

The mother, the father, and the minor’s half sister unite in pressing a claim that, because of its fundamental importance, we choose to address at the outset. They contend that we have here a failure to comply with ICWA that requires reversal of everything since the detention order.

The juvenile court satisfied itself that, the mother’s claim to the contrary notwithstanding, she had no tribal ancestry that brought the minor within the ambit of ICWA. No party disputes that finding. It is the matter of whether the father has any Indian ancestry that now demands attention.

ICWA was enacted in 1978 to address the “rising concern . . . over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) It grants an Indian tribe exclusive jurisdiction over custody proceedings involving an Indian

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<sup>5</sup> The mother and the father appeal from both orders. The half sister appealed only from the second order. The minor and the de facto parent each filed what they term “a protective cross-appeal” from the first order but we allowed each to amend their respective notice of appeal to include both orders. The minor and the de facto parent had earlier filed notices of appeal, also from the first order alone, which were designated as A129475. Once the current appeal was up and running, the minor and de facto parent moved to dismiss their appeals in A129475. We denied that motion, but stayed proceedings in A129475 “pending determination of the appeal and cross-appeal in A129824.” Concurrent with the filing of this opinion, we also file an order in A129475 dissolving the stay and dismissing the appeals by the minor and the de facto parent.

child who resides or is domiciled within a reservation (25 U.S.C. § 1911(a)), and the right to intervene in a state custody proceeding involving an Indian child. (25 U.S.C. § 1911(c).)

Strict notice requirements are a fundamental component of ICWA. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421 [“Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families.”].) They require that when a social services agency—such as the Agency here—has reason to know that a child involved in a dependency proceeding might be an Indian child, which requires only the suggestion of Indian ancestry, notice of the proceeding must be provided to the child’s potential tribe, or to the Bureau of Indian Affairs (BIA) if the tribal affiliation is unknown. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 702-703; 25 U.S.C. § 1912(a).) The ICWA and California authority impose on judicial and administrative officials the continuing duty to ascertain whether a child in dependency proceedings may have Indian ancestry. (25 U.S.C. § 1912(a); § 224.3; Cal. Rules of Court, rule 5.482(a); *In re J.N.* (2006) 138 Cal.App.4th 450, 461.)

Our review of the record has not disclosed that either the court or the Agency fulfilled its continuing duty to enquire whether the father claimed any Indian ancestry. The Agency concedes in its brief that its efforts fell short,<sup>6</sup> but it states that “during the pendency of this appeal, the Agency has [sent] out new ICWA notices that it believes will bring it into compliance with the notice requirements. . . . [¶] . . . [¶] [T]he Agency is confident that it can cure the ICWA irregularities . . . and, therefore, requests a limited remand to the juvenile court for the purpose of perfecting the requirements of the ICWA. If the juvenile court concludes the tribes were properly notified under the ICWA and that no tribe indicated that [the minor] is an Indian child within the meaning of the ICWA, then [the Agency] further requests that the juvenile court be authorized to reinstate its orders.” The Agency represented that “if the Agency is able to perfect the ICWA notice

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<sup>6</sup> However, in fairness to the Agency, we do note that it apparently included the father’s name, along with the mother’s and the minor’s, in correspondence with tribes that the mother identified as possibly being on her side.

and no Indian tribe has indicated that [the minor] is an Indian child with[in] the meaning of the ICWA, the Agency will bring that development and its consequences to the attention of this court and all parties through their respective appellate counsel.”

The de facto parent argues no remedial action is needed because the claim of ICWA non-compliance was “forfeited” because: (1) the father appeared at numerous hearings and never mentioned any possible Indian ancestry; and (2) “acquiesced” in the order terminating his parental rights without seeking timely review. Thus, she argues, “further inquiry . . . is not required.” These arguments must be rejected because, as this court has held, the duty to inquire is laid upon the court and the Agency is a continuing one that is not dependent on a parent’s failure to protest the failure to perform that duty, which may be unknown to the parent. In addition, ICWA is intended to safeguard the interest of the tribe that may wish to claim the child as a member. That interest may not be waived, forfeited, or lost by reason of any omission or failure by an individual. (See *In re Z.N.* (2009) 181 Cal.App.4th 282, 296-297 [“failure to give tribal notice is not an issue forfeited by a parent’s failure to object”]; *In re Robert A.* (2007) 147 Cal.App.4th 982, 989 [“The notice requirements of ICWA are mandatory and cannot be waived by the parties”]; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849 [“the issue of ICWA notice is not waived by a parent’s failure to first raise it in the trial court . . . at the earliest opportunity”]; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1522, fn. 26 [ICWA tribal right to notice applies “regardless of any estoppel which might operate against the parents”].)

Ordinarily, a limited remand would be appropriate in order to provide the Agency with an opportunity to demonstrate compliance with ICWA. (E.g., *In re J.D.* (2010) 189 Cal.App.4th 118, 124; *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1389-1390.) However, as the Agency anticipated, the issue was settled during the pendency of these appeals. But it was not the Agency, but counsel for the minor, who requests that we take judicial notice of various documents establishing that on January 26, 2012, the juvenile court found that the minor had no paternal Indian ancestry. Having received no opposition to the request, we grant it. The materials so noticed establish that the failure

to make a full investigation of any potential Indian ancestry proved harmless. (See *In re Z.N.*, *supra*, 181 Cal.App.4th 282, 301-302.)

### **The Mother's And The Father's Contentions Regarding The September Hearing**

The mother and the father each contend that it was prejudicial error to exclude them and their respective counsel from participating at the September hearing. Both rely on this language in section 366.3, subdivision (f): “Unless their parental rights have been permanently terminated, the parent or parents of the child are entitled to receive notice of, and participate in, those [dependency] hearings.” For them, the word “permanently” means only a judgment terminating parental rights that has become final. We are not persuaded.

First, neither parent points to a reported decision endorsing their reading of this statutory language. Second, we cannot construe that language without taking account of other related provisions and the consequences of whatever construction we adopt. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.) Specifically, we must consider this language: “Following a termination of parental rights, the parent or parents shall not be a party to, or receive notice of, any subsequent proceedings regarding the child.” (§ 366.3, subd. (a).) The same provision also specifies that once dependency is established “[t]he status of the child shall be reviewed every six months to ensure that the adoption or legal guardianship is completed as expeditiously as possible.” (*Ibid.*)

We view the parents’ argument in light of the purpose of the dependency scheme. “While the overarching goal of the dependency law is to safeguard the welfare of dependent children and to promote their best interests [citations], the law’s first priority when dependency proceedings are commenced is to preserve family relationships, if possible. [Citation.] To this end, the law requires the juvenile court to provide reunification services unless a statutory exception applies. [Citations.] In contrast, after reunification services are terminated or bypassed (as in this case), ‘the parents’ interest in the care, custody and companionship of the child [is] no longer paramount. Rather, at

this point “the focus shifts to the needs of the child for permanency and stability . . . .” ’ [Citation.]” (*In re K.C.* (2011) 52 Cal.4th 231, 236.)

Once parental rights have been terminated, the dependent minor’s need for “permanency and stability” cannot be suspended for 60 days while the former parent decides whether to appeal. Even less defensible would be to have the minor’s situation put into suspension for however long completing the appeal may take. Such a delay cannot be squared with the statutory command to “ensure that the adoption . . . is completed as expeditiously as possible.” Other statutory language looks to the termination order being immediately effective. (See § 366.26, subd. (i)(1) [“After making the order, the juvenile court shall have no power to set aside, change, or modify it”]; accord, Cal. Rules of Court, rule 5.725(e)(2).) “When the court enters an order terminating parental rights . . . the relationship between parent and child ceases to exist, and parent and child are divested of all legal rights and powers with respect to each other.” (*In re Miguel A.* (2007) 156 Cal.App.4th 389, 394.) Such an understanding was undoubtedly in the minds of counsel for both the mother and the father and accounts for their failing to protest at their client’s exclusion from the September hearing.

We can reach the same result by a slightly different approach that is somewhat closer in angle to the mother’s and the father’s contention. Although both have appealed from the August and the September orders (see fn. 5, *ante*), the only flaw they detect in the August hearing is the ICWA issue we have already addressed. At the August hearing, neither the mother nor the father appears to have contested the termination of parental rights; the only matter they argued to the court was whether the minor should be placed with the half sister (which the mother and the father preferred) or remain with the de facto parent. An examination of their briefs shows that the real object of their arguments is the court’s decision not to place the minor with his half sister in Louisiana. In other words, neither the mother nor the father has truly altered the position expressed by their respective counsel at the September hearing, specifically, that no attempt to reinstate parental rights was contemplated. Thus, both come within the following rule concerning a terminated parent’s standing challenging on appeal the placement decision made by a

juvenile court: “A parent’s appeal from a judgment terminating parental rights confers standing to appeal an order concerning the dependent child’s placement only if the placement order’s reversal advances the parent’s argument against terminating parental rights.” (*In re K.C.*, *supra*, 52 Cal.4th 231, 238.)

That the mother and the father lack the requisite standing to challenge the minor’s placement is demonstrated by an extensive line of authority. (E.g., *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1035 [father lacked standing to challenge not placing minor with grandparent]; *In re Frank L.* (2000) 81 Cal.App.4th 700, 703 [mother lacked standing to challenge placement with aunt as rupture of sibling relationship]; *In re Devin M.* (1997) 58 Cal.App.4th 1538, 1541 [mother lacked standing to raise issue of severance of relationship between the child and the foster family]; *In re Jessie G.* (1997) 58 Cal.App.4th 1, 9, fn. 3 [mother lacks standing to assert sibling visitation]; *In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1807 [father lacks standing to raise issues regarding siblings interests in each other]; *In re Nachelle S.* (1996) 41 Cal.App.4th 1557, 1560-1562 [mother lacked standing to raise issue of sibling visitation]; *In re Gary P.* (1995) 40 Cal.App.4th 875, 877 [mother lacked standing to appeal issue of severance of relationship between minor and maternal grandmother]; *In re Daniel D.* (1994) 24 Cal.App.4th 1823, 1835-1836 [mother lacked standing to assert grandmother’s status as de facto parent]; *In re Vanessa Z.* (1994) 23 Cal.App.4th 258, 260-261 [father lacked standing to challenge relatives’ de facto parent status].)

### **The Half Sister’s Contentions Regarding the September Hearing**

As the person with whom the minor was ultimately not placed, the half sister has standing (see, e.g., *In re Harmony B.* (2005) 125 Cal.App.4th 831, 837-838; *Cesar V. v. Superior Court*, *supra*, 91 Cal.App.4th 1023, 1034-1035) to press the following claims:

With respect to the August placement, the half sister submits that “all parties understood the court to have made a final, appealable order,” so “it was a legal fiction to hold a further hearing on placement,” with the consequence that the September order was “in excess of the court’s jurisdiction and contrary to the structure of the statutory

scheme,” which does not provide for modification of a placement order in these circumstances.

Concerning the September hearing, the half sister argues: (1) that “the court erred by applying ‘independent judgment’ rather than reviewing the Agency [recommendation] for abuse of . . . discretion, and its determination is not supported by substantial evidence,” and (2) that it was an abuse of discretion and fundamentally unfair for the court to “consider and grant the late-filed section 388 petition” of the de facto parent.

The premise of the half sister’s entire position is that the decision at the August hearing to place the minor with her constituted a final decision that could not thereafter be modified or changed. The status of the August decision may be apparent to the half sister, but the matter admitted of sufficient uncertainty that a substantial portion of the hearing held on September 7 was devoted to whether the decision was or was not final. Opinions among counsel, including appellate counsel who were consulted by the parties, came down on both sides of the question.<sup>7</sup>

Of course, ultimately it was the court’s opinion that mattered, and the court read its opinion as not the final word on the subject of the minor’s placement. There is

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<sup>7</sup> When the court “reviewed the transcript” of the August hearing, it stated that it had intended to “continue [its] jurisdiction to see how the transitional plan was going,” and that if “the Court of Appeal is going to look at that transcript, they are not going to be able to find a final order.” Counsel for the minor then observed that “that is significant, which means that there was no final order changing custody at that hearing.” When counsel submitted that “Your Honor, clearly contemplated that some period of review was going to be needed before a final order could be made,” the court responded, “yes . . . that’s what I meant.” At a later point in the hearing, counsel for the minor stated that the August 6th placement decision “was not a final order.”

Counsel for the Agency told the court that he understood that there “was a final order in August,” but that “appellate counsel [for the minor and the de facto parent] believed that it wasn’t.” However, he conceded, “Only the Court . . . can say what the Court was doing.” Counsel for the half sister conceded that the “word custody can be a nebulous word . . . . [¶] So what we really need is for the Court to make a statement of what the Court’s intention was by using the simple word ‘custody.’ ” And counsel for the de facto parent spoke about “the equivocal nature of the Court’s order on August 6th . . . as to whether or not it was a final order.”

nothing intrinsically prohibitive of a juvenile court making a tentative, deferred, or interlocutory decision that can be revisited in light of newly acquired information. (See *In re Q.D.* (2007) 155 Cal.App.4th 272 [juvenile court which trailed termination hearing had authority to reconsider or modify ruling].) Moreover, a juvenile court may, following the decision to terminate parental rights, entertain a petition under section 388, so long as the petition does not amount to an attempt to challenge the actual termination. (See *In re Ronald V.* (1993) 13 Cal.App.4th 1803, 1806.)

The half sister's reliance on section 361.3 is misplaced. The preferential consideration that statute gives to relatives means only "that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) "Preferential consideration 'does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining which placement is in the child's best interests.'" (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 376, quoting *In re Sarah S.* (1996) 43 Cal.App.4th 274, 286; see also *In re Stephanie M, supra*, 7 Cal.4th 295, 320-321.) In situations where the statute applies, the juvenile court must exercise its independent judgment on the social services agency's recommendation for placement. (*Cesar V. v. Superior Court, supra*, 91 Cal.App.4th 1023, 1033.)

The extended argument presented by counsel for the half sister concerning the nature of sections 387 and 388, and whether the statutory scheme governing dependencies "does not provide for a post-trial motion for reconsideration," does credit to counsel's ingenuity and learning, but it ultimately fails to convince. If, as we have concluded, the trial court had a legitimate basis for treating the August order as not final, and particularly because no appeal had yet been commenced, the court had the power to entertain the de facto's parent motion. Even with a contrary conclusion, the court would still possess the inherent power to reconsider its ruling on its own initiative. (See § 385; *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107; *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 111-115.)

In any event, “regardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected.” (*In re Stephanie M.*, *supra*, 7 Cal. 4th 295, 321; accord, *In re Lauren R.* (2007) 148 Cal.App.4th 841, 855.) Section 361.3 requires consideration of a myriad of factors,<sup>8</sup> subject to that paramount consideration. (See *In re Antonio G.*, *supra*, 159 Cal.App.4th 369, 378.) Placement decisions are reviewed for abuse of discretion. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.) So are rulings on section 388 petitions. (*In re Stephanie M.*, *supra*, 7 Cal.4th 295, 318-319; *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087.)

The ruling made by the juvenile court at the conclusion of the September hearing was quoted at length to demonstrate that the court was observing a scrupulous attention to these statutory factors. That ruling is more than amply supported by substantial evidence in the form of testimony from witnesses at the September hearing, and written material

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<sup>8</sup> Which are: “(1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs. [¶] (2) The wishes of the parent, the relative, and child, if appropriate. [¶] (3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement [strong legislative preference for relative placement and prohibition against discrimination in that process]. [¶] (4) Placement of siblings and half siblings in the same home . . . . [¶] (5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect. [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative’s desire to care for, and to provide legal permanency for, the child . . . . [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] (E) Facilitate court-ordered reunification efforts with the parents. [¶] (F) Facilitate visitation with the child’s other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) Provide legal permanence for the child if reunification fails. [¶] . . . [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8) The safety of the relative’s home. For a relative to be considered appropriate to receive placement of a child under this section, the relative’s home shall first be approved pursuant to the process and standards described in subdivision (d) of Section 309 . . . .” (§ 361.3, subd. (a).)

properly accepted in evidence by the court at the hearing, that separating the minor from her current situation with the de facto parent posed a clear and present danger of harm to the minor. There was consequently no abuse of the court's discretion in deciding to have the minor's placement remain with the de facto parent. (*In re Stephanie M.*, *supra*, 7 Cal.4th 295, 317-319, 321; *Alicia B. v. Superior Court*, *supra*, 116 Cal.App.4th 856, 863; *Cesar V. v. Superior Court*, *supra*, 91 Cal.App.4th 1023, 1033.) Our conclusion would be the same regardless of whether the court was proceeding according to section 361.3 or section 366.26, subdivision (k).

In light of our conclusion that the placement decision made by the trial court at the September hearing was a valid and proper exercise of the court's power, there is no need to consider the protective cross-appeals for the minor and the de facto parent.

#### **DISPOSITION**

The orders are affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.