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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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

SOLANO COUNTY HEALTH &
SOCIAL SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

C.V.,

Defendant and Appellant.

A145531

(Solano County
Super. Ct. No. J42612)

C.V. (mother) appeals from orders placing her youngest son K.J. with a nonrelative caregiver rather than his maternal aunt and terminating parental rights under Welfare and Institutions Code section 366.26.¹ Mother contends (1) the court should have appointed separate minor’s counsel for K.J. because a conflict of interest had developed between K.J. and his siblings, whom counsel also represented; (2) the court erred in failing to apply the relative placement preference under section 366.3; and (3) substantial evidence did not support the court’s finding K.J. was adoptable. Mother does not have standing to raise the first two issues and the third issue lacks merit.

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

I. BACKGROUND

A. *Family Background*

Mother's four oldest children (K.J.'s half-siblings) were made dependents of the juvenile court in May 2012 and removed from her custody due to findings of neglect, unresolved mental illness, and substance abuse. The oldest daughter (born in 2004), was placed with her father in Texas; the two oldest sons (born in 2006 and 2007) were ultimately placed in the Solano County licensed foster home of Maria M.; and the youngest, Christopher W. (born in 2012), was placed in the Solano County licensed foster home of Stacey N. The children's maternal aunt, J.M., had cared for the three oldest half-siblings before they were taken into protective custody, but her request to have them placed with her was denied because of her then-husband's criminal history and the couple's marital problems. Mother failed to reunify with K.J.'s half-siblings. Her parental rights to the three boys were terminated and the boys' respective foster parents were approved to adopt them.

B. *Jurisdiction and Disposition*

K.J. was born in July 2014, and the Solano County Health and Social Services Department (the Department) immediately filed a petition alleging he was a dependent child within the provisions of section 300, subdivisions (b) and (j). He was taken into protective custody and placed in the licensed foster home of Stacey N. with his half-brother Christopher (then two years old) two days after he was born. The dependency petition was sustained in a jurisdictional hearing held in September 2014. At the disposition hearing held on November 13, 2014, the court ordered that reunification services would not be provided to mother and set the case for a hearing under section 366.26. (§ 361.5, subds. (b)(10), (11) & (13).)² The dispositional order authorized the

² The alleged father had been dismissed from the case after a paternity test showed he was not the biological father. No other man has been identified as K.J.'s alleged father.

Department to place K.J. in the home of an approved relative, a nonrelative extended family member, or a foster home.

C. Placement Requests by Maternal Aunt and Foster Mother

Immediately after K.J. was taken into protective custody, the maternal aunt, J.M., asked to have him placed in her home in Texas. She was in the process of divorcing her husband, whose presence in the home had led to the disapproval of her earlier request to have K.J.'s half-siblings placed with her. The Department initiated an evaluation of the aunt's home under the Interstate Compact for the Placement of Children (ICPC) in October 2014, and received written approval in January 2015. The Department facilitated visits between the aunt and K.J. in January, March, April and May of 2015, including overnight visits and visits that included Christopher and K.J.'s two older half brothers.

K.J.'s foster mother, Stacey N., filed a JV-290 "Caregiver Information Form" on March 6, 2015. She indicated K.J. was showing three-to-four-month delays in his gross motor skills and his social and emotional development, and he had been evaluated through Child Haven. He had an appointment with a genetics specialist at University of California Davis to follow up on whether "café au lait" spots on his body were the result of a condition known as neurofibromatosis.³ The foster mother reported K.J. was strongly bonded with their family and was very close to his half-brother Christopher, as well as his two older half-brothers with whom he had regular contact. She stated: "As the

³ The Mayo Clinic describes neurofibromatosis as "a genetic disorder that causes tumors to form on nerve tissue. These tumors can develop anywhere in your nervous system, including your brain, spinal cord and nerves. Neurofibromatosis is usually diagnosed in childhood or early adulthood. [¶] The tumors are usually noncancerous (benign), but sometimes can become cancerous (malignant). Symptoms are often mild. However, complications of neurofibromatosis can include hearing loss, learning impairment, heart and blood vessel (cardiovascular) problems, loss of vision, and severe pain." (<http://www.mayoclinic.org/diseases-conditions/neurofibromatosis/home/ovc-20167893>, last viewed May 10, 2016.)

foster parents of [K.J.] we have had the pleasure of being able to keep his biological brother Christopher [W.] and him together, we feel that moving him at 7 1/2 months would be detrimental to not just [K.J.] but all three of his brothers who have become attached to him over the last 7 months. As a family we have worked hard with [the older brothers'] foster parent to keep the boys close and make sure that they can grow up together[.] [T]hey have a close relationship as we feel that being together is of u[t]most importance. [We] have an active relationship with the Bio aunt in Texas with texts numerous times a week back and [f]orth, Pictures, videos and gifts sent to her from the boys. We believe the boys need to know their family and have a relationship, and we have no intentions of stopping this communication. [¶] After a doctor's appointment last week, with a possible Neurofibromatosis diagnosis it is even more important that he is able to follow up with UC Davis Genetics and the NF clinic. At this time no one is sure what the future could or will hold for him."

D. Section 366.26 Report and Recommendation

On March 10, 2015, the Department submitted a report in anticipation of the section 366.26 hearing. It recommended the termination of mother's parental rights and indicated it would be moving K.J. to the home of his maternal aunt, who had been approved for placement through the ICPC and who was committed to adopting him. The report noted K.J. had done well in his foster home, and the foster parents were interested in keeping K.J. permanently in addition to his brother Christopher. However, visits with the maternal aunt had gone very well and the action plan developed for K.J. in September 2014 had been placement with a relative with the goal of adoption. The report described K.J. as "healthy," "well nourished" and "happy and social," albeit with some developmental delays that were being addressed with a therapist. He had been referred to a dermatologist and geneticist to examine the café au lait spots on his body (noted in the foster mother's Caregiver Information Form to be a possible sign of neurofibromatosis). In addition to living in the same foster home as his half-brother Christopher, who doted

on K.J., K.J. had regular visits with his older half-brothers as arranged through the children's foster parents and foster family agency events.

After receiving the section 366.26 report, minor's counsel requested a hearing on the issue of K.J.'s out-of-state placement with his aunt. She advised the court that while she had found the aunt "delightful," she was opposed to K.J.'s placement out of state away from his three half-brothers. Minor's counsel, who also represented those half-brothers, noted she had a "very significant consideration of whether or not I have a conflict in representing these children because the other three children have an interest in maintaining a sibling relationship." The court set the case for a combined placement/section 366.26 hearing. Minor's counsel continued to represent K.J. and the issue of a conflict was not raised again.

E. Placement Hearing

A contested hearing on the placement issue commenced on May 20, 2015. The Department took the position that K.J. should be moved to his aunt's home in Texas, as did mother, whereas minor's counsel urged the court to retain him in the home of his foster parents.

Susan Kiesz, the Supervisor of the Department's adoption unit, testified that while both homes were good placements, the Department was recommending the aunt because she could provide K.J. with an opportunity to grow up within his family and help him identify with his cultural and racial community.⁴ The aunt had been a mother figure to K.J.'s three oldest siblings when she cared for them before they were made dependents of the court, and she was committed to maintaining contact between them and K.J. Mother's oldest child, who lived with her father in Texas, visited the aunt during the

⁴ K.J. and his biological family are African American whereas the foster parents are not. Current law does not authorize state agencies to discriminate against a foster care placement based on the cultural, ethnic or racial background of a child. (Fam. Code, § 7950, subs. (a)(2) (A) & (B).)

summer so K.J. would have the chance to get to know his half-sister as well. The aunt had an 18-month-old daughter whom K.J. looked for during his visits with the aunt. Although the foster parents had said they would allow the aunt continued contact with K.J. if they adopted him, Kiesz was concerned this would not occur because there had been some tension between them.

Kate Liouh, the social worker assigned to the case, testified that K.J. had caught up on his developmental milestones. The aunt had communicated with his pediatrician and biological family members who had similar café au lait spots on their bodies, and the social worker believed it unlikely he would be diagnosed with neurofibromatosis given his lack of other symptoms. If, however, the aunt needed to obtain further medical treatment for K.J., she would be able to do so from her home in the Dallas, Texas area. Liouh recommended that K.J. be placed with his aunt and believed he would be able to transition successfully to her home, but she would not recommend removal from his foster home were it not for the aunt's availability.

K.J.'s maternal aunt J.M. testified she would like to have custody of all her nephews, but was advised only K.J. was available at this point. She was committed to providing him with a permanent home and access to his extended family, which included some positive male role models. She planned to maintain contact between K.J. and his half-siblings. She believed the foster parents were doing a great job, but K.J. would do better if raised within his biological family. She worried the foster parents would not allow her to have contact with K.J. because they had not allowed contact with Christopher for about two years.

K.J.'s foster mother Stacey N. testified she had a total of six children in her care including Christopher, K.J., her three biological daughters (ages 19, 14 and 9) and a 17-year-old pregnant foster daughter. She had fostered a total of eleven children. The foster mother believed the sibling bond between K.J. and Christopher was extremely important. She believed K.J. behaved differently after visiting his aunt, not as a reflection of the care

she provided him, but just because it was a change that caused him stress. The foster mother had been working with K.J. on his developmental delays and he was fully caught up. She was fully committed to adopting K.J. and caring for him if he was diagnosed with neurofibromatosis; one of her daughters had cerebral palsy and “[y]ou just deal with what life’s given you. These are my children, and I take them for who they are.”

Although there had been some tension with the aunt, she would welcome her into her home. She believed the aunt could provide K.J. with a good home, but was concerned about K.J. losing the daily contact with Christopher.

Maria M., the foster mother of K.J.’s two older half-brothers, was scheduled to adopt them later that month. She had worked as a “Court Appointed Special Advocate” for children and believed sibling relationships were extremely important. She had a close relationship with K.J.’s foster parents and her boys saw Christopher and K.J. frequently. She believed K.J.’s foster parents would facilitate a relationship between the aunt and K.J. and Christopher.

After hearing this testimony and the argument of counsel, the court ordered that the minor remain in the home of the foster parents. It noted there were “two good options, which means for the Court there’s no good option.” It found the aunt to be a “lovely person” who had a good job, was raising her own child, had raised K.J.’s siblings for awhile, and could provide some cultural and family history. The foster mother had raised several children, had dealt with special needs kids, and was the only mother K.J. had ever known. K.J. was attached to his half-brother Christopher and removal would cause him some trauma. He was facing a potentially serious medical diagnosis, and while there were undoubtedly good medical facilities in Texas, he was already working with a local facility that specializes in his possible condition.

“So[,] in balancing between separating him, the trauma that he would experience in separating him from his foster mother, separating him from his brother, taking him away from consistent medical care, balancing that against the—essentially the benefit of

having a family and cultural history, I can't say that subjecting the minor to the maybe short-term but still traumatic experience of removal is in his interest. I find that it's in his interest to stay where he is, so I'm going to order the Department to create a permanent plan of adoption for the minor to stay with the foster mother." The court declined to apply the relative placement preference under section 361.3 or the caregiver preference under section 366.26, subdivision (k).⁵

F. *Section 366.26 Hearing*

On June 11, 2015, the court held the section 366.26 hearing, at which time the parties submitted on the reports. The court found by clear and convincing evidence that K.J. was adoptable and terminated mother's parental rights.

II. DISCUSSION

A. *Mother Lacks Standing to Challenge Placement
or Assert a Conflict of Interest*

Two of the issues raised by mother on appeal pertain to the court's decision to continue K.J.'s placement in the home of his foster mother rather than moving him to the

⁵ Section 361.3, subdivision (a), provides: "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative, regardless of the relative's immigration status. . . ."

Section 366.26, subdivision (k), provides: "Notwithstanding any other 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 from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being." The court concluded this preference did not apply "because there wasn't any evidence before me that removal of the minor would create severe emotional detriment. . . . [¶] . . . there's no evidence on the opposite side of that showing me that there is some sort of significant detriment beyond what removal of an infant from a person he's known as his mother would be."

home of his maternal aunt. First, she argues the trial court made an error of law in failing to apply the relative placement preference of section 361.3. (Compare *In re R.T.* (2015) 232 Cal.App.4th 1284 with *In re Lauren R.* (2007) 148 Cal.App.4th 841, 856–857.) Second, she contends K.J.’s appointed counsel had an actual conflict of interest because she also represented K.J.’s half-siblings, whose interests were best served by keeping K.J. in the home of the foster mother even if K.J.’s interests were better served by moving him to his aunt’s home in Texas. (*In re T.C.* (2010) 191 Cal.App.4th 1387, 1390–1392.) Mother lacks standing to assert these claims.

“Not every party has standing to appeal every appealable order. Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citation.] An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision. [Citation.] These rules apply with full force to appeals from dependency proceedings. [Citation.]” (*In re K.C.* (2011) 52 Cal.4th 231, 236 (*K.C.*).

Mother’s standing to directly challenge the placement order is controlled by *K.C.*, *supra*, 52 Cal.4th at p. 238, in which the Supreme Court set forth the following rule: “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.” The court in *K.C.* concluded the father did not have standing to challenge an order denying the grandparents’ petition under section 388 to have the minor placed in their home because the father’s parental rights had been terminated after a bypass of reunification services and the father raised no challenge to the order terminating his parental rights. (See also *In re Jayden M.* (2014) 228 Cal.App.4th 1452, 1460 [once a parent’s reunification services have been terminated, the parent has no standing to appeal relative placement

preference issues]; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1034–1035 [same].)

The court in *K.C.* distinguished the decisions in *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1061–1062 (*Esperanza C.*) and *In re H.G.* (2006) 146 Cal.App.4th 1, 18 (*H.G.*), in which parents whose rights had been terminated did have standing to challenge pretermination placement orders “because the possibility existed that reversing those orders might lead the juvenile court not to terminate parental rights.” (*K.C.*, *supra*, 52 Cal.4th at p. 237.) In particular, placement with a relative in those cases could have triggered the relative caregiver exception under section 366.26, subdivision (c)(1)(A), which provides that the court need not terminate parental rights when “[t]he child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child. . . .” (See *Esperanza C.*, *supra*, 165 Cal.App.4th at pp. 1053–1054; *H.G.*, *supra*, 146 Cal.App.4th at pp. 9–10.) Similarly, a parent would have standing to challenge an order affecting her ability to raise the sibling relationship exception to the termination of parental rights under section 366.26, subdivision (c)(1)(B)(v), which applies when “[t]here would be a substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship. . . .” (See *In re Asia L.* (2003) 107 Cal.App.4th 498, 514.)

Mother argues she has standing to challenge the placement order because placement with the aunt would have allowed her to assert both the relative caregiver and sibling relationship exceptions to adoption at the time of the section 366.26 hearing. We disagree. The placement order was entered on June 3, 2015, and the section 366.26 hearing was held on June 11, 2015, just over a week later. Even if the minor had been

placed with his aunt, the relative caregiver exception under section 366.26, subdivision (c)(1)(A) would not have applied because (1) the aunt intended to adopt the minor, and (2) the minor had not been living with his aunt and had not developed a relationship with her that would make removal detrimental to K.J.'s emotional well-being. Nor would placement with the aunt have triggered the sibling relationship exception under section 366.26, subdivision (c)(1)(B)(v), where the aunt did not have custody of any of K.J.'s siblings and K.J. would have more frequent contact with his siblings if he remained in his foster home.

Mother's only challenge to the termination order on appeal is predicated on the alleged insufficiency of the evidence to show K.J. was adoptable. This argument is based exclusively on K.J.'s possible medical condition, and placement with his aunt rather than his foster mother would not have affected the court's ruling in this regard.

Mother similarly lacks standing to assert her claim new counsel should have been appointed for K.J. due to a conflict of interest. As noted, the asserted conflict was premised on the tension between K.J.'s interest in being placed with his maternal aunt in Texas and the interest of his half-siblings (whom counsel also represented) in having K.J. remain in the California home of his foster mother where they could have more frequent contact with him.

Under some circumstances, i.e., where the placement affects the parent's interest in the parent-child relationship, a parent has standing to raise the question of a minor's counsel's conflict of interest. (See *In re Patricia E.* (1985) 174 Cal.App.3d 1, 6 [conflict-free minor's counsel may not have advocated against placement with the father because the minor's brothers had already been safely returned to father's custody], overruled on other grounds in *In re Celine R.* (2003) 31 Cal.4th 45, 58.) However, when the underlying issue the parent seeks to assert is not so intertwined with the parent's interests, i.e., selection of an out-of-home placement or the minor's relationship with siblings or relatives, the parent lacks standing. (See *In re Frank L.* (2000) 81 Cal.App.4th 700, 703

[parent did not have standing to assert hybrid claim asserting sibling visitation rights and ineffective assistance of counsel with respect to minors' attorney]; *In re Daniel H.* (2002) 99 Cal.App.4th 804, 809 [mother did not have standing to assert minors' attorney had conflict of interest due to their different permanent plans]; *In re Gary P.* (1995) 40 Cal.App.4th 875, 877 [mother did not have standing to argue the termination of her parental rights would affect the minor's relationship with her grandmother].) Because the issue underlying the alleged conflict in this case is the ongoing relationship between K.J. and his siblings, rather than whether the evidence supported some exception to termination of appellant's parental rights to K.J., appellant lacks standing to assert the conflict.

*B. The Evidence was Sufficient to Support the
Finding of Adoptability*

The juvenile court may terminate parental rights only if it determines by clear and convincing evidence it is likely the child will be adopted within a reasonable time. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406; *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1060.) Although she did not object below, mother argues the order terminating her parental rights must be reversed because the evidence was insufficient to show K.J. was adoptable. (See *In re Brian P.* (2002) 99 Cal.App.4th 616, 623 [parent need not object to sufficiency of evidence of adoptability to raise challenge on appeal].) We disagree.

“Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low threshold: The court must merely determine that it is ‘likely’ that the child will be adopted within a reasonable time.” (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.) Relevant factors include the child's contact with members of his extended family since the time of placement; his medical, developmental, scholastic, mental and emotional status; the eligibility and commitment of any prospective adoptive parent or legal guardian and the relationship of the child to that person; and an analysis of the likelihood the child will be adopted if parental rights are terminated. (§ 366.21,

subd. (i).) A child’s placement with prospective adoptive parents is substantial evidence of *general* adoptability (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1313 (A.A.)) Even when a child is not generally adoptable due to special needs, “a finding of adoptability can nevertheless be upheld if a prospective adoptive family has been identified as willing to adopt the child and the evidence supports the conclusion that it is reasonably likely that the child will in fact be adopted within a reasonable time. [Citations.]” (*K.B.*, *supra*, at 1292.)

A number of factors support a general adoptability finding in this case. Both the foster mother and the aunt were willing to adopt K.J., which is itself evidence he was likely to be adopted. (*In re Marina S.* (2005) 132 Cal.App.4th 158, 165.) K.J. was described by the section 366.26 report as an “adorable” baby boy who was happy, social and able to bond with a parental figure. He had some delays when initially assessed, but by the time of the hearing he had caught up to his developmental milestones. Infants may be generally adoptable despite evidence of physical and developmental conditions, and the fact a child might have problems in the future does not preclude a finding of adoptability. (*In re R.C.* (2008) 169 Cal.App.4th 486, 492.)

It was still an open question as to whether the marks on K.J.’s skin were indicative of neurofibromatosis, or what that might mean in terms of possible disability. But the foster mother had accompanied K.J. to medical appointments, researched the condition, and discussed the possible outcomes with doctors. She had a daughter with cerebral palsy and was undeterred by K.J.’s potential diagnosis. “Nowhere in the statutes or case law is certainty of a child’s future medical condition required before a court can find adoptability.” (*In re Helen W.* (2007) 150 Cal.App.4th 71, 79.) The foster mother was a licensed foster parent who had already been screened on factors required in the adoption assessment report, and she had been approved as the adoptive parent for K.J.’s half-brother Christopher. (See *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 956; *In re Diana G.* (1992) 10 Cal.App.4th 1468, 1481–1482.) Assuming the court’s finding was

dependent on a particular caregiver's willingness to adopt in light of K.J.'s possible medical condition, substantial evidence supported the conclusion K.J. was adoptable.

Mother argues the evidence did not support an adoptability finding because the Department failed to prepare an adequate adoption assessment presenting information about K.J.'s possible genetic disorder or his foster mother's ability to care for him if he developed a disabling illness as a result. Having failed to make this argument in the juvenile court, she has forfeited the claim on appeal. (A.A., *supra*, 167 Cal.App.4th at p. 1317.)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A145531)