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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re M.C., a Person Coming Under the  
Juvenile Court Law.

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.S.,

Defendant and Appellant.

E055541

(Super.Ct.No. J232320)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A.

Buchholz, Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Jeffrey L. Bryson, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minor.

M.C. (minor) (born December 2009) came to the attention of plaintiff and respondent San Bernardino County Department of Children and Family Services (the department) on April 13, 2010, after defendant and appellant C.J. (mother) was arrested for possession and transportation of five pounds of methamphetamine. Minor was improperly secured in a car seat in the same car with mother at the time of her arrest. The juvenile court detained minor on April 16, 2010. On May 27, 2010, the juvenile court sustained the department's juvenile dependency petition and found jurisdiction over minor; however, it transferred the matter to San Diego County because that was where mother had been residing and minor had been placed with relatives in that county.

Mother was subsequently deported. The department placed minor with his maternal aunt and uncle on or around May 20, 2010.<sup>1</sup> San Diego County refused the transfer, so San Bernardino County accepted transfer of the case back on August 10, 2010. Mother was now living with minor's father in Tijuana, Mexico.<sup>2</sup> On November 3, 2010, the court removed minor from mother's custody and offered six months of reunification services. On June 28, 2011, the juvenile court terminated mother's reunification services and ordered a hearing pursuant to section 366.26.<sup>3, 4</sup> On January

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<sup>1</sup> The record discloses several different dates for the department's placement of minor with the relative caretakers, minor's maternal aunt and uncle, including May 14, 2010, May 20, 2010, and May 21, 2010.

<sup>2</sup> Father never made an appearance below and is not a party to this appeal.

<sup>3</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

26, 2012, the juvenile court terminated mother's parental rights and ordered adoption as minor's permanent plan. On appeal, mother contends the juvenile court erred in determining minor was adoptable because the prospective adoptive parents (PAPs) were never informed regarding the possibility of becoming minor's long-term guardians instead. We affirm the judgment.

### **FACTUAL AND PROCEDURAL HISTORY**

A police officer arrested mother in Rancho Cucamonga after pulling over a car in which she was a passenger. The officer asked if he could search mother; she acquiesced; the officer found five, one-pound bags of methamphetamine in her purse. Mother conceded she knew the drugs were in her purse; she said they belonged to a friend and had been picked up in Ontario to be delivered to Corona; mother expected to be paid for transporting them. Mother was in the country illegally. She did not know where minor's father was located. Minor was also in the car with mother; he was improperly secured in a car seat.

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*[footnote continued from previous page]*

<sup>4</sup> On July 7, 2011, Mother filed a notice of intent to file a petition for extraordinary writ from that order. We dismissed the petition on September 1, 2011, after receiving a no issue letter pursuant to California Rules of Court, rule 8.450(f) on August 29, 2011.

The department filed a section 300 petition alleging mother failed to protect minor and left no provision for his support since her arrest. After minor's placement with his maternal aunt and uncle, the PAPs stated "they are happy with [minor] in the home and are willing to keep caring for him as long as needed. The [PAPs] also stated they were open to possible adoption if [minor] needed to be adopted in the future." The social worker reported the PAPs' "home is clean, organized and no safety hazards were noted. The [PAPs] and their children were seen to interact with [minor] who was seen to be comfortable and bonded to the family."

On August 25, 2010, the maternal aunt reported taking care of three of mother's minor children for a period of one and a half to two years until approximately eight months earlier; she did so because mother had been deported on drug related charges. An interview with mother's oldest child disclosed that he would drive his mother to the homes of various people so she could sell marijuana. He also reported mother had been deported a few years earlier when the vehicle she was in was stopped by the Border Patrol and drugs were found in the car. The social worker concluded "placement of [minor] remains appropriate. The caregivers are nurturing and accepting of the child's personality. The caregivers have verbalized a commitment to care for the child as long as is needed and have indicated they are willing to provide a permanent home for the child, if necessary."

In a status review report filed April 21, 2011, after minor had been removed from mother's custody, the social worker recommended setting the section 366.26 hearing to establish a permanent plan of adoption or guardianship. The social worker observed

“[minor] appears to have adjusted to the placement very well. It is evident that he has bonded to the caretakers and the two biological daughters by the way he wants to be held and enjoys regular interaction with them. The caretakers provide an adequate home for the child by providing for his medical, physical[,] and emotional needs. The caretakers have stated they are willing and able to provide[] for the child on a long term basis or as long as he is a dependent.” Mother refused services proffered by social services in Mexico and failed to return repeated phone messages. Mother wanted the department to offer her services in San Diego. When mother was told the department was recommending termination of her parental rights and adoption as the permanent plan, mother objected saying she did not want minor adopted.

Mother returned to the United States on April 2, 2011. She gave birth to twins on April 3, 2011, in San Diego. Minor visited mother in the hospital on April 4, 2010, but did not recognize her. At that point it had been over 10 months since mother had seen minor.

In an addendum report filed June 17, 2011, the social worker again recommended minor remain in the PAPA's home and a hearing be set to establish a permanent plan of adoption or long-term guardianship. Mother began attending community services on May 6, 2011; clients in the program typically drug tested on a weekly basis starting on the day they signed up; mother had not tested since she started the program; she asserted she does not use drugs, but was merely arrested for possessing them. Moreover, mother said she was unable to provide a urine sample for testing because she urinated only once daily. Mother had also failed to attend a support group provided by the program or

Narcotics Anonymous, both of which were required if mother were to graduate from the program. Mother was told she would be terminated from the program if she continued to be unable to drug test.

On June 28, 2011, the juvenile court held the six-month review hearing. Mother had been taken into custody on a warrant. The juvenile court terminated mother's reunification services and set the section 366.26 hearing.

In the October 13, 2011, section 366.26 report, the social worker recommended mother's parental rights be terminated and the court select adoption as the permanent plan. The social worker noted that while mother had not seen minor for the 10 months prior to April 4, 2011, she visited with him weekly for an hour until June 10, 2011, when she then missed two visits. Mother was incarcerated on June 28, 2011. The social worker opined "[minor] is an adoptable child due to his age and the fact that his current relative caretakers are willing and able to adopt him. If for some reason his current caretakers would be unable to adopt him, there are families available who have been approved to adopt and would be able to meet his needs." She concluded "[minor], is an appropriate child for adoption. He is placed with a prospective adoptive family who is committed to his long term care. The child has been placed with the family for over 16 months, and both the child and the family have developed a mutual attachment. [The PAPS] are dedicated to [minor] and committed to raising him to adulthood. It is recommended that the child be freed from his birth parents in order to be placed for adoption with [the PAPS]."

At the section 366.26 hearing on January 26, 2012, mother's counsel indicated mother did not agree with either of the social worker's recommendations that her parental rights be terminated or that adoption become the permanent plan. Mother's counsel argued mother would be released from custody sometime between August and September 2012, and would then be able to resume any programs necessary to regain custody of minor if minor was not adopted. The department requested "the court follow the recommendation; find this child to be adoptable. Although not required, the child is placed in concurrent home and is also with a relative. I don't believe any exceptions to adoption have been shown. We'd ask the court to terminate parental rights at this time." The juvenile court found minor adoptable, terminated mother's parental rights, and ordered adoption as the permanent plan.

### **DISCUSSION**

Mother notes that under section 366.26, subdivision (c)(1)(A), an exception to the preference for adoption as a permanent plan exists where the relative caregiver is unwilling to adopt the child, but is willing to provide for the child through a long-term guardianship. She contends this places the burden on the department to prove it informed the relative caregivers of their option to either adopt minor or become his long-term guardian before the juvenile court can order adoption as the permanent plan. We find it unnecessary to address the broad issue raised by mother because the evidence in this record is sufficient to demonstrate the department did inform the relative caretakers of their option to enter into long-term guardianship of minor.

Section 366.26, subdivision (c)(1)(A) provides, in pertinent part, that the juvenile court shall terminate the parental rights of the parents unless “[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.” “A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.” (§ 366.21, subd. (i)(2)(B).)

The department first maintains mother forfeited the issue by failing to object below. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1158-1159.) We disagree. In the status review report dated April 21, 2011, when informed the department was recommending termination of parental rights and adoption as the permanent plan for minor, mother objected stating she did not want minor adopted. At the section 366.26 hearing, mother’s counsel objected to both termination of parental rights and adoption as the permanent plan. Mother asserted that if the juvenile court refrained from terminating her parental rights and allowing minor’s adoption, mother could resume progress toward reunification with minor once she was released from incarceration. These objections were sufficient to preserve the issue on appeal.

Despite the change in legislation regarding an exception for long-term guardianship, adoption remains “the Legislature’s first choice for a permanent plan for a dependent minor child who has not been returned to the custody of his or her parents and who is found by the dependency court to be adoptable. [Citations.] To avoid termination of parental rights and adoption, a parent must demonstrate that one or more of the . . . exceptions to termination of parental rights applies to his or her child. The parent has the burden of proof on the issue. [Citation.]” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) The determination of whether such an exception has been met can be reviewed for substantial evidence. (*Id.* at pp. 469-470.)

Here, substantial evidence supports a conclusion that the department had, in fact, informed the relative caregivers of their option to either adopt minor or become his long-term guardians. First, at the earliest stage at which the PAPs were interviewed they appeared to spontaneously indicate they wished to adopt minor should the need arise. Second, at least two status reports compiled by the social worker indicated the department was considering either adoption *or long-term guardianship* as the permanent plan. Thus, it was not as if the department was solely focused on compelling the relative caregivers to adopt minor. Third, the PAPs stated that “they see themselves as [minor’s] parents, and cannot imagine their lives without him.” The PAPs were “dedicated to [minor] and *committed to raising him to adulthood.*” (Italics added.) The social worker noted the “[minor] appears to seek [the PAPs] as a child would seek a parent in their lives.” Thus, the relationship between the PAPs and minor appears to have been one

more appropriate and consistent with a desire for adoption than one of long-term guardianship.

Fourth, the PAPs stated that they were “open to contact with the birth mother, as long as she is not involved in any illegal activity, and *is respectful of their role as adoptive parents in [minor’s] life.*” (Italics added.) Thus, the PAPs did not appear to ever see themselves as anything other than potential adoptive parents. Finally, and most dispositively, the social worker noted the PAPs had “signed the Guardianship/Adoption Age Based Benefits Disclosure form on July 25, 2011.” The form itself, which we deemed part of the record on appeal by order dated May 21, 2012, expressly provides a relative caretaker with an explanation of the relative benefits of opting for adoption or long-term guardianship of a child. Indeed, the form reads, in pertinent part, “I have discussed the advantages and disadvantages of guardianship or adoption of the child/ren . . . with my social worker . . . .”<sup>5</sup> Thus, the record definitively establishes the PAPs were informed of their options to adopt or become long-term guardians of minor before the juvenile court ordered adoptability as the permanent plan. Therefore, sufficient evidence supports the court’s order terminating mother’s parental rights and ordering adoption as the long-term plan.

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<sup>5</sup> The clerk’s affidavit dated May 16, 2012, to which the blank form was attached reflects that the supervising clerk was unable to locate the signed, filled out form. The superior court would do well to ensure the original, signed “Guardianship/Adoption Age Based Benefits Disclosure” form is included in the superior court file in future cases.

Mother expositis *In re Fernando M.* (2006) 138 Cal.App.4th 529 and *In re K.H.* (2011) 201 Cal.App.4th 406 for the apparent proposition that the juvenile court erred in not considering or ordering long-term guardianship instead of adoption as the permanent plan. Both cases are distinguishable. *In re Fernando M.* predates the change in the legislation which permits an exception to termination of parental rights and adoption as the preferred long-term plan when the relative caretakers are unwilling to adopt, but willing to provide long-term care to the minor.

Nevertheless, the juvenile court in *In re Fernando M.* held that “the juvenile court should have selected legal guardianship as [the minor’s] permanent plan instead of adoption because, notwithstanding the strong presumption in favor of adoption, the peculiar facts of this case demonstrate a compelling reason for finding that termination of parental rights would be detrimental to [minor] and exceptional circumstances warrant selecting legal guardianship as his permanent plan.” (*In re Fernando M., supra*, 138 Cal.App.4th at p. 532.) The “exceptional circumstances” included that, although the relative caretaker had requested long-term guardianship, her husband was not willing to adopt and any adoption would have required a spousal waiver. (*Id.* at p. 533.) The relative caretaker testified the social worker coerced her into agreeing to adoption by threatening to place the minor with someone else if she did not agree to adoption; the relative caretaker did not wish to adopt the minor because she believed the mother would someday resolve her issues and regain custody of the minor. (*Ibid.*) The appellate court also reasoned the juvenile court had failed to consider the emotional upheaval the minor

would suffer from being removed from the relative caretaker's home. (*Id.* at pp. 536-537.)

In *In re K.H.*, the appellate court upheld the juvenile court's order of long-term guardianship on appeal by the department. (*In re K.H.*, *supra*, 201 Cal.App.4th at p. 419.) The relative caregivers were unwilling to adopt minor, but were willing to commit to a permanent plan of legal guardianship. The relative caregivers did not want to adopt because they wanted to remain the minors' grandparents, not become their parents. Moreover, the maternal grandmother's husband was not the mother's father and was simply unwilling to adopt the minors. (*Id.* at pp. 411-412.) Both an adoption specialist and the juvenile court determined that removing minors from the relative caretakers' custody would be detrimental to their emotional well-being. (*Id.* at pp. 412-413, 415.) The appellate court decided: "It is apparent from the legislative history the Legislature intended that a relative caregiver's preference for legal guardianship over adoption be a sufficient circumstance for application of the relative caregiver exception as long as that preference is not due to an unwillingness to accept legal or financial responsibility for the child." (*Id.* at p. 418.)

Here, unlike the situations in either *In re Fernando M.* or *In re K.H.*, the relative caretakers never indicated a preference for long-term guardianship. Quite the contrary, as discussed above, the PAPs indicated at every opportunity their willingness and desire to adopt minor and become his parents. Likewise, neither of the PAPs objected to adoption. Moreover, there is no evidence in this record that the PAPs were "bullied" into agreeing to adoption. Furthermore, the evidence sufficiently demonstrates they were informed of

their option to become minor's long-term guardians, but they simply preferred to adopt him. Substantial evidence supports the juvenile court's determination that adoption was the best permanent plan for minor.

**DISPOSITION**

The judgment is affirmed.

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MILLER  
J.

We concur:

RAMIREZ  
P. J.

CODRINGTON  
J.