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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

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

KERN COUNTY DEPARTMENT OF HUMAN  
SERVICES,

Plaintiff and Respondent,

v.

L.F.,

Defendant and Appellant.

F064645

(Super. Ct. Nos. JD125504-00 &  
JD125504-01)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Jon E. Stuebbe,  
Judge.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Theresa A. Goldner, County Counsel, and Kelley D. Scott, Deputy County  
Counsel, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Cornell, J. and Kane, J.

L.F. (mother) appeals from the juvenile court's order terminating her parental rights. (Welf. & Inst. Code, § 366.26.)<sup>1</sup> Mother contends that there was insufficient evidence to support the court's finding that the minor was adoptable. We shall affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

A section 300 petition filed November 24, 2010, alleged that mother placed her eight month old son, D.M., at risk when she failed to seek medical attention for him. D.M. was admitted to the hospital on November 15, 2010, due to a urinary tract infection and failure to thrive. He was underweight, could not tolerate touch, could not sit up, could not eat food, was vomiting and was very dehydrated. He was diagnosed with Posterior Valve Syndrome and kidney damage. He was "extremely below the curve" in height and weight and was transported to Children's Hospital Central California for surgery on November 23, 2010.

#### ***November 2010 Detention Hearing***

The report prepared in anticipation of the detention hearing stated that a visit to mother's house revealed it to be clean and appropriate, with cans of formula, diapers, and clothes. While mother was not under the influence, there were concerns with her mental health. She was "vocally religious," with "constant references to God and Satan." Mother had had another child die in a car accident at the age of six, and mother believed her dead daughter would be "resurrected."

The report from a hospital nurse indicated that D.M.'s sodium levels indicated he had been malnourished for several months. A valve in D.M.'s urinary tract was not working, resulting in inflamed kidneys. Mother eventually agreed to consent to surgery for D.M. According to mother, D.M. had only been sick for about three days, that he was losing "a little bit" of weight, and that he was "greedy and lazy."

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

Mother's criminal record included two 2009 convictions for being under the influence of substances, and a 2007 conviction for battery. Child Protective Services history on mother included an allegation that she came to her older child's classroom under the influence. The minor was released to mother's sister while the incident was being investigated. The minor died due to an unrelated car accident, and the allegation of neglect was deemed inconclusive.

Mother was present at the November 29, 2010, hearing and D.M. was detained. Mother denied any Indian ancestry. She also reported that D.M.'s father is Alan M., whose whereabouts remained unknown. Mother was given supervised visits twice a week, and mother was to be involved in all medical appointments.

### ***January 2011 Jurisdiction Hearing***

The report prepared in anticipation of the jurisdiction hearing criticized mother for not taking responsibility for D.M.'s condition. According to mother, she was not at fault for D.M.'s condition because he was born with it. D.M. was below the fifth percentile in growth and development. Although mother had taken D.M. to the doctor's office on September 17, 2010, she left without him being seen.

The Emergency Room report at the time D.M. was admitted stated that mother had said the anti-Christ was talking to her. Although she claimed she could not read, she was reading a New Testament at the time. Mother claimed that the D.M.'s condition occurred over the course of one week, which the report refuted. Mother could not say how she usually mixed D.M.'s formula, adding a little more water or milk at times. At the time D.M. was discharged from the hospital, he was gaining weight appropriately.

According to mother, things had been difficult for her since the death of her older child, who was killed in an automobile accident along with mother's brother and grandfather. The social worker opined that mother was in an acute period of grief. Mother was reported to be appropriately attentive during visits with D.M.

Father was located and both he and mother attended the January 11, 2011, jurisdiction hearing. Father claimed no Indian heritage. The juvenile court found him to be the presumed father. Mother and father submitted on the basis of the social worker's report. The court took judicial notice of the dependency file of father's other children.<sup>2</sup> A psychologist was appointed to do an evaluation on mother.

The juvenile court took jurisdiction over D.M. and set a dispositional hearing for February 22, 2011. The court ordered mother to attend D.M.'s doctor visits to observe and learn, but not to make medical decisions for D.M.

#### ***April 2011 Disposition Hearing***

A psychological evaluation filed March 9, 2011, opined that mother showed little understanding of the nature or severity of D.M.'s condition. Mother was diagnosed with a mood disorder and mild mental retardation. It was recommended that mother be able to participate in reunification services, with a referral to a psychiatrist. Mental health counseling and parenting and neglect/abuse classes were to follow. Mother's prognosis for successful completion of such services was guarded and dependent on mother's participation in psychiatric services. Mother would likely require close monitoring if the minor was returned. A subsequent petition filed March 22, 2011, added the allegation that mother had failed to seek mental health treatment.

The report filed in anticipation of the disposition hearing stated that mother attended 10 of the 26 "individualized parenting" sessions and was reported to be cooperative with satisfactory participation. Mother visited D.M. consistently with no concerns. D.M. was placed with a paternal great-aunt in March 2011.

Mother's presence was waived at the dispositional hearing, which was held on April 5, 2011. The juvenile court found the supplemental petition true and ordered

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<sup>2</sup> Father had other children detained from him, but they were returned to their mother and dependency dismissed.

services for both parents. Father was to attend domestic violence, parenting, and substance abuse counseling; mother was to attend parenting and mental health counseling, obtain an assessment from the regional center, and comply with any recommendations of the assessment. Both parents were to submit to random drug testing. Both parents were advised that failure to avail themselves of services could result in termination of parental rights after six months. The six-month review was set for October 5, 2011.

### ***November 2011 Six-month Review Hearing***

The social worker's report filed in anticipation of the review hearing stated that mother's visits were very positive and affirming. Mother was observed to be very attentive and affectionate with D.M. and he responded well to her. Mother brought food and toys and changed D.M.'s diaper when needed, but at times, got tired during visits and fell asleep. Mother had not followed through with mental health counseling and she had consistently refused to drug test. Father was in prison and there had been no communication from him.

D.M. had been with his caretaker since March 9, 2011, and the caretaker was willing to adopt him. D.M. was receiving ongoing medical services from a pediatric nephrologist and a urologist, as he has a "multitude of medical issues related to Posterior Valve Syndrome and kidney failure." D.M. was described as thriving in the caretaker's home, and that he had a bond with the caretaker, who was loving and affectionate. Although mother's visits were very positive, the social worker described mother as nonchalant and noncompliant with her services.

Mother appeared at the review hearing and requested additional time to complete services. According to mother, she had begun a substance abuse class. Mother explained that she had not drug tested for the Kern County Department of Human Services because D.M. was not taken from her due to any drug use. She was now willing to drug test to get her son back. Mother also stated that she was not going to mental health counseling

because she did not have mental problems. At this point, mother had seen two doctors at the counseling center and needed to see one more.

The juvenile court found mother had only “minimally made acceptable efforts and minimally availed herself of the services provided.” It then terminated services, advised mother of her writ rights, and scheduled a section 366.26 permanency planning hearing for March 6, 2012.

### ***March 2012 Section 366.26 Permanency Planning Hearing***

The report filed in anticipation of the section 366.26 permanency planning hearing stated that mother had attended 44 out of 46 visits and that she did very well in visitation. At visits, mother was excited to see D.M., she took care of him, fed him, changed his diaper, and played with him. D.M. was comfortable in mother’s presence, but separated easily from her at the end of the visits. The social worker opined that D.M. likely viewed mother as a “friendly visitor,” and that the benefits of adoption outweighed maintaining the parent-child relationship.

According to the report, D.M.’s adoptability was limited only by the various medical conditions he had, which required continuous monitoring. Aside from his failure to thrive and Posterior Valve Syndrome, he was legally blind, wore corrective glasses, and received regular care from an ophthalmologist. He was also developmentally delayed, which could be, in part, genetic.

D.M., at 23 months, had been with his caregiver, his paternal great-aunt, for almost a year, and the caregiver was described as fully committed to D.M. and adoption. The caregiver, age 51, lived with her 25-year-old son in a three bedroom, two bathroom home. The two were co-owners of an entrepreneurial graphic design business with a combined gross income of \$35,000. The caregiver, who had an ongoing license to provide in-home support, now stayed at home to care for D.M. D.M. was also eligible for the Adoption Assistance Program due to his minority status, medical conditions, and adverse parental background. D.M. had met several developmental goals by beginning to

walk, to use utensils, and to socialize. D.M. was enrolled in school and attended twice weekly. He was described as a “very curious child” who continued to gain skills at a “healthy pace.”

Mother was not present at the section 366.26 hearing. According to counsel, mother had been there, but became upset and left after talking to counsel. The juvenile court denied counsel’s request for a continuance and terminated parental rights, finding clear and convincing evidence that D.M. was likely to be adopted. This appeal follows.

### **DISCUSSION**

Mother argues that the juvenile court’s adoptability finding was not supported by substantial evidence because D.M. has serious medical issues. According to mother, the failure to establish general adoptability meant that the court’s finding rested on a finding of specific adoptability, a finding not supported in the record because no home study of the caregiver was done, there was no showing that the caregiver could financially provide for D.M., and there was no evidence that adoption would take place within a reasonable time. We disagree and affirm.

A section 366.26 hearing proceeds on the premise that the efforts to reunify the parent and child are over, “and the focus of the hearing is on the long-term plan for care and custody.” (*In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1808.) “The court must proceed by section 366.26, subdivision (c)(1) and terminate parental rights if clear and convincing evidence shows that it is likely that the minor will be adopted.” (*Ibid.*) “The adoptability issue at a section 366.26 hearing focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt. [Citation.] It is not necessary that the child already be in a potential adoptive home or that there be a proposed adoptive parent ““waiting in the wings.”” [Citation.]” (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1311.)

A child is either “generally” or “specifically” adoptable. A child is generally adoptable if the child’s traits, e.g., age, physical condition, mental state, and other

relevant factors do not make it difficult to find a person who will adopt him or her. On the other hand, if a child is deemed adoptable only because of the caregiver's willingness to adopt, the child is specifically adoptable. (See *In re R.C.* (2008) 169 Cal.App.4th 486, 492-494; *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.) If a child is generally adoptable, "the suitability or availability of the caregiver to adopt is not a relevant inquiry. [Citations.] Rather, a caregiver's willingness to adopt serves as further evidence the minor is likely to be adopted within a reasonable time either by the caregiver 'or by some other family.' [Citation.]" (*In re R.C.*, *supra*, at pp. 493-494, fn. omitted; see also *In re Carl R.*, *supra*, at p. 1061.) "[T]he existence of a prospective adoptive parent, who has expressed interest in adopting a dependent child, constitutes evidence that the child's age, physical condition, mental state, and other relevant factors are not likely to dissuade individuals from adopting the child. In other words, a prospective adoptive parent's willingness to adopt generally indicates the child is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family." (*In re A.A.*, *supra*, 167 Cal.App.4th at p. 1312; see also *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.)

When the child is specifically adoptable because of a particular family's willingness to adopt the child, the trial court must determine whether there is a legal impediment to adoption. (*In re Carl R.*, *supra*, 128 Cal.App.4th at p. 1061.) *In re Carl R.* found that a "child who is specifically adoptable and who will need total care for life is at high risk of becoming a legal orphan if parental rights are terminated and the prospective adoptive family is later determined to be unsuitable." (*Id.* at p. 1062, fn. omitted.) Thus, the court must consider more than whether there is a legal impediment to adoption; the court must consider whether the prospective adoptive parents can meet the child's needs. (*Ibid.*)

We apply the substantial evidence test to the dependency court's finding the minor is adoptable. Our task is to determine whether there is substantial evidence from which a

reasonable trier of fact could find, by clear and convincing evidence, that the minor is adoptable. “The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order.” (*In re R C.*, *supra*, 169 Cal.App.4th at p. 491.)

Here, there was substantial evidence supporting the dependency court’s finding that D.M. was generally adoptable. D.M. had been “steadily improving in his development” in his current placement with the assistance of regular medical visits, schooling, and a devoted, prospective adoptive parent who understood his needs, was committed to him, and welcomed the opportunity to care for him. A significant amount of D.M.’s physical problems were caused by mother’s inability or unwillingness to seek medical attention for him, and were vastly improved when he received the proper medical care. These characteristics support a finding that D.M. was generally adoptable because the problems, while not necessarily minor, were in the process of being ameliorated and/or monitored.

Even if we were to find that D.M. was not generally adoptable, we disagree with mother’s assertions that there was insufficient evidence that D.M. was specifically adoptable by his relative caregiver. As already noted, when a child is adoptable only because a particular family is willing to adopt, the dependency court must consider whether there are any legal impediments to adoption by that family. (*In re Carl R.*, *supra*, 128 Cal.App.4th at p. 1061.) Mother claims first that the lack of a home study is a “legal impediment” to adoption, particularly because the caregiver had a past physical abuse allegation and that she did not have sufficient income to care for D.M. We disagree.

D.M. had been in the prospective adoptive home for almost a year at the time of the section 366.26 hearing. Furthermore, the preliminary assessment required by statute, including screening family members’ criminal records and prior referrals for abuse or

neglect,<sup>3</sup> as well as an assessment of their ability to meet the minor's needs, was contained in the social worker's report for the hearing. (§ 366.22, subd. (c)(1)(D).)

Mother next argues that there was no approved home study for D.M., a prerequisite before parental rights may be terminated for the child who is not generally adoptable. But, contrary to mother's assertion, where there is no evidence of any specific legal impediments to completing the adoption process, parental rights may be terminated to a specifically adoptable child regardless of whether a home study has been completed. (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1410.)<sup>4</sup>

Finally, mother maintains that there was no clear and convincing evidence that adoption would take place within a reasonable time. While it is true that a finding of

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<sup>3</sup> The report specifically stated that a 2002 physical abuse allegation against the prospective adoptive mother was concluded to be unfounded.

<sup>4</sup> Mother urges that, if this court finds that a home study is not required prior to the termination of parental rights of specifically adoptable children, we adopt a rule that the juvenile court must find that the person interested in adopting such a child "at least qualifies as a 'prospective adoptive parent' under section 366.26, subdivision (n)." This we will not do.

Section 366.26, subdivision (n) provides that, at or after a hearing under section 366.26, the juvenile court may designate the caregiver of a dependent child as a prospective adoptive parent if the child has lived with the caregiver for six months, and the caregiver has expressed a commitment to adopt the child and has taken at least one step to facilitate the adoption process. (*Id.*, subd. (n)(1).) A subsequent change of placement from the home of a prospective adoptive parent may then be made only after a noticed hearing in which the court finds removal is in the child's best interest. (*Id.*, subd. (n)(3)(B).) In enacting subdivision (n) of section 366.26, the Legislature provided standing to a designated adoptive parent to petition the court for a hearing on whether the child's best interest would be served by removing the child from the caregiver's home after termination of parental rights and before the petition for adoption has been granted. (*Wayne F. v. Superior Court* (2006) 145 Cal.App.4th 1331, 1337-1338.)

Nothing in the language of section 366.26, subdivision (n) indicates the Legislature intended to require that the juvenile court must designate the caregiver as a prospective adoptive parent prior to termination of parental rights if no home study has been completed, and we will not read into the rule the requirement that it do so.

adoptability requires “clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time” (*In re Zeth S.* (2003) 31 Cal.4th 396, 406), there is nothing in the record to suggest there were any obstacles to completing it in a routine manner. Nor did the parties at the section 366.26 hearing, including mother, question the existence of any such impediments.

Absent any evidentiary basis for questioning the feasibility of D.M.’s adoptive placement, we conclude the evidence sufficiently supports that he was specifically adoptable.

### **DISPOSITION**

The juvenile court’s order is affirmed.