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

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

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

T.Q., et al.,

Defendants and Respondents.

CECILIA M.,

Appellant.

F065545

(Super. Ct. No. JD125331-01)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Louie L. Vega,
Commissioner.

Donna Wickham Furth, under appointment by the Court of Appeal, for Appellant.

Theresa A. Goldner, County Counsel, and Jennifer E. Feige, Deputy County
Counsel, for Plaintiff and Respondent.

* Before Levy, Acting P.J., Gomes, J. and Franson, J.

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Cecilia M. appeals from Welfare and Institutions Code section 366.26¹ orders terminating the parental rights of her mother, T.Q., and father, D.M., and selecting adoption as her permanent plan. In making these orders, the juvenile court rejected application of the section 366.26, subdivision (c)(1)(A) exception to termination of parental rights and adoption, which governs a child 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.” Cecilia contends the juvenile court erred in failing to apply the exception because it misconstrued the statute. As we shall explain, we agree with Cecilia and will reverse the orders terminating parental rights and selecting adoption as the permanent plan.

FACTUAL AND PROCEDURAL BACKGROUND

Cecilia first came to the attention of the Kern County Department of Human Services (Department) in April 2010, when she and mother both tested positive for methamphetamine at her birth. While investigating the referral it received, the Department learned that both mother and father regularly used methamphetamine, and father had five other children by four other women. One of father’s children was a dependent in foster care. Dependency proceedings were initiated over Cecilia but later dismissed when the Department released Cecilia to her maternal aunt, who agreed to seek legal guardianship.

The maternal aunt, however, did not apply for guardianship and instead returned Cecilia to mother. In October 2010, the Department again initiated dependency proceedings over Cecilia as mother and father continued to use drugs despite being offered voluntary family maintenance services, and the maternal grandparents’ home

¹ Undesignated statutory references are to the Welfare and Institutions Code.

where the family was living was unsafe, unclean, and an inappropriate place for a child to live. Cecilia was detained from her parents and placed in foster care.

The juvenile court found true allegations of a petition which alleged Cecilia came under section 300, subdivisions (b) and (j) due to her parents' continued drug use and the unsanitary condition of the home in which they were living, and because of the prior dependency case involving Cecilia's half-sibling. In November 2010, the juvenile court declared Cecilia a dependent of the court, removed her from her parents' custody, and offered mother and father reunification services.

Mother and father subsequently gave birth to a son, D.M., Jr. (the baby). In April 2011, after dependency jurisdiction was taken over the baby, both Cecilia and the baby were returned to their parents' custody with family maintenance services.

During the course of the dependency, father was diagnosed with depression, schizophrenia and bipolar disorder, and was prescribed psychotropic medications. After the children were returned to his custody, he stopped taking those medications, failed to drug test and admitted using methamphetamine and marijuana. In October 2011, the Department filed a section 342 subsequent petition alleging father's failure to take his psychotropic medications constituted an additional basis for jurisdiction over the children, and a section 387 supplemental petition to remove the children from father's custody. In November 2011, the juvenile court found the allegations of both petitions true, ordered the children removed from father's custody, and gave father reunification services. Mother and the children moved in with the maternal grandparents, while father lived elsewhere.

In February 2012, the Department filed a section 387 supplemental petition to remove the children from mother's custody because she allowed father to have unauthorized contact with the children. The children were detained and placed in a foster home. In March 2012, they were removed from that home due to allegations of physical abuse and placed in another foster home. After the children were detained, mother and

father once again lived together. The Department determined Cecilia was appropriate for adoption planning. While her foster parents did not want to pursue a permanent plan, maternal relatives were interested and awaiting approval for placement.

At the April 2012 hearing on the second section 387 supplemental petition, the juvenile court removed the children from mother's custody. As to Cecilia, the juvenile court terminated both parents' reunification services, set a section 366.26 hearing, and ordered an adoption assessment. As to the baby, the court ordered reunification services for mother, but terminated father's services. At the hearing, mother testified she and the children lived with her parents until January 2012, when the social worker told her to find somewhere else to stay because the home was not fit for the children. Mother and the children moved into a sober-living place. By the time of the hearing, the maternal grandparents' home had been cleaned up and approved for placement. After the Department took the children, father came to live with mother at the sober-living home. County counsel informed the court at the hearing that, at that time, the maternal grandparents indicated a desire to pursue legal guardianship for both children "and nothing beyond that."

In a social study prepared for the section 366.26 hearing, the Department recommended termination of parental rights and that two-year-old Cecilia be freed for adoption. An adoption assessment was completed in July 2012. The assessment reported that Cecilia had been placed with the maternal grandparents on April 16, 2012. Based on Cecilia's visits with mother and father, the assessor opined it would not be emotionally detrimental to her to terminate their parental rights. While Cecilia had a relationship with her parents, she did not depend on either of them for emotional, physical or financial support. The assessor recommended a plan of adoption based on Cecilia's age and lack of major medical problems. Cecilia had formed a relationship with her maternal grandparents who were providing for her daily needs. The social worker spoke with the maternal grandparents and they were committed to adopting Cecilia. The social worker

also opined it would not be detrimental to Cecilia's emotional well-being if parental rights were terminated and recommended a plan of adoption.

The maternal grandparents were identified as prospective adoptive parents. They lived in a three bedroom, three bath home with no health or safety hazards, along with their adult daughter and her two children. The maternal grandmother was a stay at home mother, while the maternal grandfather worked as a janitor. Both were in good health. The assessor reported the grandparents were committed to a permanent plan of adoption and stated "they want to adopt Cecilia so that they can keep her in the family." Cecilia had come to look at the grandparents as her parents and depended on them for her daily needs. The assessor believed Cecilia and the grandparents had bonded together in a primary relationship that should continue. The grandparents had demonstrated they were committed to and capable of taking care of Cecilia, and would continue to meet her needs into adulthood. On June 18, 2012, the grandparents were provided pamphlets on adoption and legal guardianship. They stated they understood the legal and financial rights and responsibilities of adoption, and were able and willing to assume full and permanent responsibility for Cecilia both now and in the future. They were committed to the permanent plan of adoption, expressed a desire to continue to provide the necessary care for Cecilia, and had the skills and resources necessary to provide a stable and loving home.

At the August 14, 2012, hearing, the juvenile court heard and denied a section 388 petition mother filed seeking to either have the children returned to her with family maintenance services, to reinstate reunification services, or to order a bonding study. Mother's attorney informed the court the maternal grandparents were interested in guardianship, not adoption. County counsel responded that the Department understood the maternal grandparents were interested in adoption, but if the maternal grandfather, who was present at the hearing, had changed his mind, he should be asked why. County counsel explained the Department was concerned because of other attorneys pressure

relatives to change their minds, but stated the Department “would be happy either way,” as it recognized there is a “cutout” if a relative prefers guardianship after understanding all of the options, which “would be fine.” County counsel was concerned because the maternal grandmother was not present to be asked what her desire was and the issue was just brought up that morning.

Cecilia’s attorney explained she contacted the maternal grandfather the night before and asked what his thoughts were and how he thought mother was doing. The maternal grandfather said he had seen a big change and thought she was doing much better. When Cecilia’s attorney asked him if his plan really was to adopt, he said they would adopt if there was no way for mother to ever get the kids back. That morning, Cecilia’s attorney gave him a copy of the guardianship pamphlet, and both she and mother’s attorney spoke to him about adoption versus guardianship.

County counsel asserted she wanted to make sure the maternal grandfather did not want to change his mind. Accordingly, maternal grandfather Jesus Q. was called to testify. On direct examination by County counsel, Jesus confirmed he talked to a social worker who gave him and his wife information regarding guardianship and adoption. After looking at the information, they made a decision about their plan for Cecilia, namely they “decided if she wasn’t gonna get them back, we would adopt. But if we just could take care of them until she gets better, then that’s how we were doing. That’s what we were gonna do.” Jesus understood that at the time of the hearing, Cecilia could not go home to mother, and agreed that knowing that, he still wanted to adopt her. To his knowledge, his wife had not changed her mind.

On cross-examination by Cecilia’s attorney, Jesus testified he knew mother was in a sober-living home and getting better. He acknowledged talking with Cecilia’s attorney that day about guardianship and she told him with guardianship, mother could, in the future, ask the court to have the child returned to her care, while that could never happen with adoption. When Cecilia’s attorney asked him if he wanted “her to have a chance in

the future to get her kids back,” Jesus responded, “Yes.” When asked if he wanted to take them now and get them out of the system, Jesus answered, “No. I want her to get her kids back. That’s what I want.” Jesus understood that if he adopted Cecilia, he would continue to receive the same amount of foster care funding, but if she was in a guardianship, he might receive less money as he would have to apply for welfare. When asked if the difference in assistance mattered, Jesus responded, “like I told them, if they help me, fine. If they don’t help me, it’s all right. I’ll take care of the kids as best as I can.” He thought it was in Cecilia’s best interest to have him be her guardian rather than her legal parent. He confirmed his wife wanted the same thing and their intent was always to allow mother to have her child back, if possible, which is what he tried to tell the social worker.

During questioning by father’s attorney, Jesus admitted understanding that mother could never get Cecilia back if he and his wife adopted her, but if he elected guardianship, he could keep Cecilia as long as necessary to keep her safe and protected and mother might be able to get her back when it became appropriate. Jesus understood these things when he was talking with the social worker, and having all of that in mind, both he and his wife wanted to have Cecilia in guardianship. County counsel asked Jesus why he changed his mind. Jesus answered that “[a]t the beginning, that’s what we wanted to take care for them until she gets back onto her feet so she can get them back.” No one suggested to him at court that day that he take guardianship. He would adopt Cecilia if he had to, but it had always been his intent to keep her only as long as necessary.

County counsel argued the Department’s recommendation of adoption remained appropriate, as it was “fairly obvious” that Jesus was being pressured, since he and his wife had made a decision before the hearing after being given all of the information, and he conveniently changed his mind on the morning of the hearing. County counsel stated it was fine with her if the court wished to find the “relative cutout” applied, but she

thought the child was adoptable and the grandparents had expressed a desire to adopt. Mother's attorney asserted there was no evidence Jesus had been pressured by anyone. Cecilia's attorney stated that Jesus had seen an improvement in mother and wanted to give her a chance, as things had changed since he talked to the social worker.

The court noted Cecilia had been in and out of care with her parents as many as three times and was obviously adoptable. The court also acknowledged there was a sibling involved. Cecilia's attorney asserted section 366.26, subdivision (c)(1)(A) covered this exact situation. County counsel stated that required the relative being "unwilling or unable to adopt," and she did not believe that was "what was elicited." The court responded, "Right. It's not that they are – it's not that they are unwilling. It's just that they are unable, for whatever reason." County counsel stated, "Well, the statute reads they have to be unwilling or unable." The court answered, "Right. Right." Mother's attorney explained Jesus' "whole desire has always been to allow his daughter to have an opportunity to get her kids back whether it's two years from now, six months from now." The court stated, "Well, that's how we got started in this to begin with. DHS has been giving her an opportunity to also show that she's able to resolve these issues. And, at this time, it's the court's determination that it would not be detrimental to the minor if parental rights were terminated." The court then found by clear and convincing evidence that Cecilia was likely to be adopted, terminated mother's and father's parental rights, and referred Cecilia to the county adoption agency for adoptive placement.

DISCUSSION

"At a section 366.26 hearing, the juvenile court determines a permanent plan of care for a dependent child – adoption, guardianship or long-term foster care. [Citations.] Adoption is the permanent plan preferred by the Legislature. [Citation.] If the juvenile court finds that a child is likely to be adopted, it must terminate parental rights and select adoption as the permanent plan unless (1) section 366.26, subdivision (c)(1)(A) (section 366.26(c)(1)(A) or the relative caregiver exception) applies, or (2) the court finds a

compelling reason for determining that termination would be detrimental to the child due to one of the six enumerated circumstances set forth in section 366.26, subdivision (c)(1)(B). (§ 366.26, subd. (c)(1)(A) & (B).)” (*In re K.H.* (2011) 201 Cal.App.4th 406, 414.)

Here, the juvenile court ordered adoption as Cecilia’s permanent plan. In so ordering, the juvenile court impliedly rejected a plan of legal guardianship with the maternal grandparents under section 366.26(c)(1)(A). That section provides, in pertinent part, as follows: “The 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. . . .” (§ 366.26(c)(1)(A).) Application of the relative caregiver exception requires three findings: (1) the relative caregiver is unwilling or unable to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child; (2) the relative caretaker is willing and capable of providing the child with a stable and permanent environment through legal guardianship; and (3) removing the child from the relative caretaker’s custody would be detrimental to the child’s emotional well-being. (*In re K.H.*, *supra*, 201 Cal.App.4th at p. 415.)

Here, the evidence established the maternal grandparents were willing and able to provide Cecilia with a stable and permanent home, and were willing to adopt her if necessary, but they preferred to serve as legal guardians in order to give mother a chance to get Cecilia back in the future. There was also evidence that removing Cecilia from her grandparents’ care would be detrimental to her emotional well-being, as Cecilia had lived with them periodically during her first two years of life and continuously since April 2012, she had come to look at them as her parents, she depended on them for her daily

needs, and she appeared to have bonded with them in a primary relationship. Moreover, the Department conceded at least the existence of detriment when its attorney stated it was fine with the Department if the court wished to find the relative caretaker exception applied.

In *In re K.H.*, we held that a relative caregiver's preference for legal guardianship over adoption is 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. (*In re K.H.*, *supra*, 201 Cal.App.4th at p. 418.) There, grandparents testified they were unwilling to adopt their daughter's children because they wanted to remain their grandparents, but they were willing to accept legal and financial responsibility for the children. (*Id.* at p. 419.) In affirming the juvenile court's decision to order legal guardianship for the children, we rejected the appellants' argument that a relative caregiver's stated preference for guardianship over adoption was insufficient in itself to establish an unwillingness to adopt. (*Id.* at p. 416.)

The juvenile court here declined to apply the relative caregiver exception, expressly stating that while the grandparents were willing to adopt, they were unable to do so for "whatever reason." After Cecilia's attorney explained the reason the grandparents did not want to adopt, i.e. they wanted to give mother an opportunity to get the child back in the future, the juvenile court responded that mother had been given ample opportunities to resolve her issues and it was in Cecilia's best interest, and would not be detrimental to her, to terminate parental rights.

Based on the juvenile court's statements, it appears the juvenile court rejected application of the relative caregiver exception because it found the grandfather's reason for preferring guardianship over adoption unacceptable. As we explained in *K.H.*, however, the exception applies when the evidence shows a circumstance exists which makes the relative unable or unwilling to adopt, and that the relative's inability or unwillingness is not due to a refusal to accept legal or financial responsibility for the

child. (*In re K.H., supra*, 201 Cal.App.4th at p. 416.) “The only limitation on the circumstances the juvenile court may consider as the cause of the relative’s inability or unwillingness to adopt is the relative’s unwillingness to accept legal or financial responsibility for the child.” (*Ibid.*)

Here, the juvenile court found a circumstance existed that made the maternal grandparents unwilling to adopt, which was not due to a refusal to accept legal or financial responsibility for the child, but then promptly rejected that circumstance as an appropriate basis for applying the exception. In doing so, the juvenile court abused its discretion, as it rejected the exception for a reason not contemplated within the statute. As Cecilia points out, section 366.26, subdivision (c)(1)(A) is an exception to the legislative preference for adoption, and is based on the Legislature’s desire to avoid removing dependent children from relatives in order to place them with strangers. (*In re K.H., supra*, 201 Cal.App.4th at p. 418.) Providing incentives for relatives to opt for legal guardianship is not inconsistent with public policy, “as ‘[k]eeping children in homes where they are well cared for and can maintain close familial relationships should take precedence over achieving the termination of parental rights, especially where the relative caregiver is the prospective adoptive parent.’” (*Id.* at pp. 418-419.) To support relative caregivers who opt for legal guardianship over adoption, legislation, including the exception, was enacted to “‘prevent caseworkers and judges, who may not fully appreciate why a relative caregiver may not want to adopt the child and may decide that such unwillingness shows a lack of commitment to the child, from pressuring the relative caregiver to adopt the child.’” (*Id.* at p. 418.)

“A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand” (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85) and, if the trial court decides the case by employing an incorrect legal analysis, reversal is required regardless of whether substantial evidence supports the judgment. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.) While the Department

contends the standard of review here is substantial evidence, we disagree since the juvenile court applied an incorrect legal analysis. Accordingly, we reverse the order terminating parental rights and remand for a new section 366.26 hearing. Although Cecilia asks us to order the juvenile court, absent a showing of changed circumstances, to select legal guardianship as Cecilia's permanent plan, appoint the maternal grandparents as Cecilia's legal guardians and dismiss dependency, we decline to do so. This is in part because the maternal grandmother did not testify as to her preference. Instead, we order the juvenile court to conduct a section 366.26 hearing to determine, at the current time, whether the section 366.26(c)(1)(A) relative caregiver exception applies. (See *In re S.D.* (2002) 99 Cal.App.4th 1068, 1083; *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1259, disapproved on another ground by *In re Zeth S.* (2003) 31 Cal.4th 396, 408; *In re Karen C.* (2002) 101 Cal.App.4th 932, 939.)

DISPOSITION

The orders terminating parental rights and selecting adoption as the permanent plan are reversed. The matter is remanded to the juvenile court with directions to vacate the order as to Cecilia and conduct a new section 366.26 hearing to determine a permanent plan for her.