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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

<p>In re A.N., a Person Coming Under the Juvenile Court Law.</p>	<p>H037533 (Santa Clara County Super. Ct. No. JD20577)</p>
<p>SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN’S SERVICES,</p> <p>Plaintiff and Respondent,</p> <p>v.</p> <p>A.N.,</p> <p>Appellant.</p>	
<p>In re A.N., a Person Coming Under the Juvenile Court Law.</p>	<p>H037993</p>
<p>SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN’S SERVICES,</p> <p>Plaintiff and Respondent,</p> <p>v.</p> <p>A.N.,</p> <p>Defendant and Appellant.</p>	

Minor, A.N. (minor) was orphaned in December 2010 when she was nine years old. Soon thereafter, reports of physical and verbal abuse by relatives brought her into

the juvenile dependency system. Ultimately, the juvenile court appointed minor's paternal first cousin L.L. and L.L.'s husband S.L. as her legal guardians. Minor had always preferred to be placed with her long-term, nonrelative caretaker, M.N. Minor appeals from the juvenile court's orders denying her motions for presumed parent status and placement with M.N. and the court's selection of legal guardianship as her permanent placement plan. We shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Introduction

Minor was born in October 2001. Her mother died of cancer a few days later. Minor had medical problems related to her premature birth and required extended hospital care as a result. Minor's father (father) arranged for M.N., a family friend, to care for minor upon her discharge from the hospital. M.N. had cared for father's older child, minor's half brother D.N., and minor's mother had wanted M.N. to look after minor as well. M.N. took minor into her home directly from the hospital and minor continued to live with M.N. for the next nine years. Father paid M.N. for her service just as he had paid her to care for D.N.

B. The Dependency

Father died suddenly in December 2010. Thereafter, other family members continued to pay M.N. to care for minor. The family planned to transition minor to the care of an aunt, H.D., who lived nearby. In furtherance of that plan, minor began spending time with H.D. and her family. On March 23, 2011, the Santa Clara County Department of Family and Children's Services (Department) received a report alleging that minor had been physically abused while in the care of H.D. Another report alleged verbal abuse. Minor corroborated the reports. In the course of its investigation, the Department learned that minor had been sharing a bed with M.N. in her home. M.N. had two men renting rooms at her house and did know about their backgrounds, and M.N.'s former husband was an alcoholic who often visited the home. The Department took

minor into protective custody and filed a petition pursuant to Welfare and Institutions Code section 300, subdivision (g).¹ Minor was placed in foster care.

The Department assessed various placement options. The Department was concerned that the 68-year-old M.N. would be unable to protect minor or keep up with her in the future. On the other hand, M.N. had cared for minor since she was an infant and there was a strong emotional bond between the two. B.T., who had care of minor's half-siblings on minor's mother's side, claimed to have a relationship with minor. B.T. shared a home with the two children in her care, her own brother, and her parents. Her brother would have to move out to accommodate minor. The L. family in Pennsylvania was related to minor through father. L.L. was minor's first cousin. (L.L.'s mother was father's sister.) When minor's mother died, L.L. asked to have minor placed with her but father declined because L.L. lived so far away from him. Minor had developed a relationship with the L. family through previous yearly visits to Pennsylvania with father. The L.'s were an intact, two parent family with two children around minor's age. They had room in their home for minor and many other family members lived not far away. The Department concluded that the L.'s were the best placement option and recommended placing minor with the L. family once their home was approved. Minor wanted to stay with M.N.

The juvenile court sustained the petition, declaring minor a dependent child of the court. Since minor had no living parents, reunification was not an issue and the court moved directly to selection and implementation of a permanent placement plan (§ 366.26), setting the hearing for August 15, 2011. There followed a flurry of motions related to minor's placement. B.T. sought to have minor placed with her. M.N. petitioned for status as the de facto parent. Minor filed a section 388 motion, which the

¹ Further unspecified section references are to the Welfare and Institutions Code.

court treated as a petition seeking presumed parent status for M.N.² Minor also asked to be placed with M.N.

The Department opposed all these requests except M.N.'s petition to be named de facto parent. The Department offered the L. family as the best placement option. The juvenile court took the section 366.26 hearing off calendar and allowed it to trail these other proceedings.

C. The Presumed Parent and De Facto Parent Proceedings

The court first heard the matters relating to M.N.'s status. All parties agreed that M.N. qualified as a de facto parent. Minor and M.N. urged the court to find M.N. to be minor's presumed parent, as well. As a presumed parent, M.N. would be entitled to appointed counsel, custody (if there is no finding of detriment) and reunification services. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.)

Minor testified that, as to M.N., "She's my mom." Minor turned to M.N. when she was happy, sad, or sick. She wanted to be with M.N. because "I love her. She took care of me . . . through my whole life."

M.N. testified that she presented minor to others, "as my daughter because she always calls me mom." M.N. also agreed that she had been "[minor's] nanny for the last nine years." Although father had paid M.N. to care for minor, M.N. paid for some things out of her own pocket. She helped minor with her homework for her first few years in school but more recently she had to get father to help as the homework went beyond M.N.'s ability to explain. M.N.'s native language is Vietnamese and she testified in Vietnamese through an interpreter. When queried about the Vietnamese word she was using for daughter, M.N. explained that the word meant "youngest daughter."

² Minor had standing under Family Code section 7630, subdivision (b), which provides, "(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the [parent] and child relationship presumed under subdivision (d) or (f) of [Family Code] Section 7611."

Father had paid M.N. \$1,200 per month to care for minor for the first two years of her life, during which time M.N. was also responsible for picking up D.N. after school. Thereafter, father reduced his monthly payments to \$800, then to \$600 when D.N. no longer required M.N.'s attention. Father never missed a payment. Even when he was unemployed for three months he continued to pay M.N., although it was less than usual. When father died, the family continued to pay her. M.N. was told that the family intended to transition minor to the family within a year and M.N. asked for two years because, she said, "I wanted to keep her forever." M.N. acknowledged that in her motion seeking de facto parent status she had identified herself as minor's "nanny." She was also identified as the "nanny" on minor's school emergency contact card.

M.N.'s daughter C.N. referred to minor as her little sister. C.N. was aware her mother was paid to care for minor. C.N.'s friend had observed minor in M.N.'s home and noted that C.N. and M.N. helped minor with her homework and that M.N. referred to minor in public as her daughter. Minor called M.N. "mamon." The friend was aware that M.N. was being paid to care for minor.

Minor's paternal aunt, K.S. (L.L.'s mother) had been very close to father. She said that father had referred to M.N. as "vavu," which is the Vietnamese word for the person hired to care for your child. K.S. knew that father paid M.N. to care for minor. Prior to his death, father had submitted a request to his employer for transfer to the east coast so that he and minor could move back there to be near the L. family and minor's paternal grandmother. He expected the transfer to take a couple of years. In the meantime, father planned to move minor in with him in a new home in California. When father died, the family planned to have M.N. continue to care for minor and slowly move her in with the family. K.S. had supported M.N.'s request for an increase in the childcare payments. She had supported placement with M.N. until she learned that L.L. wanted to take her into her home.

D.N. was 20 years old when he testified at the hearing. He explained that M.N. had been his nanny from about the age of nine until he was about 15 years old. He did not think of M.N. as minor's mother; he thought of her as a family friend.

The juvenile court issued a written order filed August 31, 2011, identifying two questions to be decided. First, did receipt of compensation for childcare services preclude a person from achieving presumed parent status? Second, if M.N. was not precluded from presumed parent status by virtue of having been paid for her services, did she meet the requirements of Family Code section 7611, subdivision (d) by receiving minor into her home and holding her out as her own natural child?

The juvenile court concluded that a paid caregiver cannot be a presumed parent and, in the alternative, that the evidence did not show that M.N. had held minor out as her natural child. As to the latter conclusion, the court noted that the analysis is "fact driven" and in most cases, the presumed parent relationship arises in connection with a marital, dating, or domestic partner relationship between the alleged presumed parent and the child's legal parent. In this case, there was no relationship between M.N. and father "other than an agreement for childcare services." And, indeed, M.N. had identified herself as minor's "Nanny" in her motion to be named the de facto parent. Minor's paternal family members referred to M.N. as "the nanny." Minor's teachers knew her as minor's caretaker. Although M.N. referred to minor as her daughter, the court viewed that as "evidence of the love and affection they have for each other and not as fitting the legal requirement contemplated by [Family Code section 7611, subdivision (d)]." The court concluded that M.N. "most accurately fits the role of a de facto parent and not that of a presumed mother."

D. The Placement Motions

On October 12, 2011, the juvenile court held a hearing on the issue of placement. At this point minor had been in foster care for around six months, where she was doing well. The school had assessed her as being below grade level in some areas. She was

taking music, dance, and gymnastics classes and had experienced many new things in her foster home and during her summer visit to the L. family in Pennsylvania. She talked about how she liked the structure and expectations of the L.'s and was open to living with them but she continued to express her preference for living with M.N. The Department continued to recommend placement with the L.'s.

Nathan Thomas, an expert in risk assessment, placement, and attachment, testified on behalf of minor. Thomas stated that all of the people seeking to have minor placed with them were "quite adequate" but that minor was most securely attached to M.N. Thomas felt that the attachment between minor and M.N. should not be disrupted. Minor had used "very strong, affectionate language" when referring to M.N. and stated that her wish was to be with her. M.N. was very dedicated and committed to minor. Thomas acknowledged that M.N. had not intervened when concerns about minor's safety in the care of H.D. arose. He opined that M.N. had had some anxiety about minor's possibly moving, which might have prevented her from interfering with H.D. Thomas believed that, if the court gave her the authority, M.N. would intervene if anything similar occurred in the future. He agreed that M.N. might have difficulty with advocating for minor within the school. But, as Thomas said, there are "ways around that."

D.N. described his experience in M.N.'s care. He noted that there was little structure and no regular bedtime when he lived in her home. Dinner could be anytime; M.N. did not monitor or assist with his homework and did not discipline him; he did whatever he wanted.

The Department's social worker testified that M.N.'s home had not been approved for placement. M.N. was then living with her daughter's boyfriend. The home was in the process of being renovated, the daughter had a 2010 conviction for driving under the influence, and the boyfriend had yet to complete the paperwork necessary for a background check.

The L.'s home in Pennsylvania had been approved under the ICPC process, which is a rigorous assessment.³ The social worker had observed minor's interaction with the L. family when she accompanied her to Pennsylvania for her summer visit. She observed minor to have blended into the family and felt very comfortable there. The L. home was a single family home in upscale suburbs where many professionals working at Pennsylvania State University lived. The social worker believed that L.L. was conscientious and wanted what was best for minor. She believed L.L. would be able to help minor develop her academic skills, which were still below grade level in some areas.

L.L. testified that she had been very close to father, who was her uncle. She had lived in the same home with him until she was 18 years old. They stayed in touch by telephone after that. Father and minor visited her family in Pennsylvania every year or so for about a week. Prior to father's death, the L.'s had been planning to help him purchase a home in California where he was going to live with minor. Father's ultimate goal, she said, was to move to Pennsylvania so that he and minor would be near her family and L.L. could help care for minor. L.L. was committed to minor and wanted either to adopt her or to be appointed her legal guardian. She had already talked to the principal of the local school and looked into extracurricular resources for minor. L.L. was willing to maintain minor's existing relationships. She would not "cut her off from anyone that loves her."

M.N. stated that she, too, was willing to adopt minor. She had not intervened when concerns about minor's safety in the care of H.D. had arisen because she felt she had no right to keep minor from seeing her family. But she had been worried and had told minor to tell the school about how she was being treated.

Minor again testified that she wanted to be with M.N. She was not unwilling to be placed with L.L. or with B.T., but M.N. was her first choice by far.

³ Interstate Compact for Placement of Children.

On October 17, 2011, at the close of the hearing, the juvenile court denied both placement motions. The court stated that it was considering “the best home for her [to] thrive in, to prepare her for the rest of her life.” Thus, the court considered minor’s educational needs, which the court believed could be best met by the L.’s. The court also acknowledged that the L.’s were minor’s family members, noting that father had planned to move with minor to Pennsylvania within the next couple of years to be near them. “There was a strong family connection. And so that I consider a lot” The court stated its intent to place minor with the L.’s but to find some way to make an enforceable order that would allow her to have regular visits with M.N. and minor’s other family in California. The court asked the parties to brief the feasibility of such a plan. The court did not want “to depend on [the L.’s] good intentions to allow visitation.” The court ordered the parties to mediate and set the section 366.26 hearing for December 19, 2011.

E. The Section 366.26 Hearing

On November 9, 2011, the parties reported that they had agreed upon a plan to transition minor to the L. family home in Pennsylvania. Minor left California on December 9, 2011. The section 366.26 hearing was held 10 days later on December 19, 2011. The Department recommended that L.L. and S.L. be appointed minor’s legal guardians and that the case be dismissed. The L.’s were willing to adopt minor but agreed that guardianship was more appropriate “at this time.” Minor did not want to be adopted by the L.’s but she was “okay” with guardianship. She wanted guardianship to be shared between the L.’s and M.N. The Department recommended that minor be allowed to visit M.N. two or three weeks during the summer and one week in winter.

The juvenile court rejected the joint guardianship suggestion finding that the distance between the coguardians would pose too many obstacles. The court concluded that, “after considering all of the evidence . . . the following is the court’s decision: [¶] The best permanent plan for [minor] is a legal guardianship with her paternal relatives, [L.L. and S.L.], in Pennsylvania with visitation to the de facto parent, [M.N.] also with

her relatives here [B.T.] and other friends and important people in her life here in California.

“In most cases the Court’s preference would be to order an adoption versus legal guardianship in that it is a more permanent plan.” The court acknowledged, however, that minor had “made it clear that adoption is not what she prefers. [¶] And while that is not the deciding factor for me, nevertheless, I did give it great consideration.” The court also ordered that the minor be allowed to telephone M.N. and her San Jose relatives as often as she wished. In addition, the minor was to be allowed to visit San Jose for half her summer vacation and alternate winter breaks, travel costs to be shared by the L.’s, M.N. and B.T. M.N. stated, with regard to the court’s oral ruling, “All of that would be fine with me just as long as [minor] is happy where she is. And I certainly hope that she’s happy over there.”

There was some disagreement concerning whether minor would benefit from continuing therapy and whether or not the dependency case should be dismissed. The court concluded, “I’m going to put this case over for the therapy piece to have more information.” The court then asked the Department’s counsel, “As far as the recommendations, there will be a new order after hearing?” Counsel agreed to “submit that” and the court clarified, “You’ll just submit the whole thing?” Counsel responded that she would. The court concluded: “Very well. So at this time all prior orders will remain in effect.”

The written order after hearing was filed on January 25, 2012, incorporating all the rulings made orally at the December 19, 2011 hearing and omitting dismissal of the case.

II. THE APPEALS

No. H037533: M.N. filed a timely notice of appeal from the August 31, 2011 order denying her presumed parent status and from the October 17, 2011 order refusing to place minor with her. Minor also appeals from both these orders. M.N. has since abandoned her appeal and this court has dismissed the cause as to her only.

No. H037993: On February 23, 2012, minor filed a notice of appeal from the juvenile court's written order filed January 25, 2012, selecting guardianship as the permanent placement plan and appointing the L.'s as her legal guardians. This court has previously ordered the two appeals considered together for purposes of briefing, argument, and decision.

The Department asks us to dismiss the appeal in No. H037993, arguing that minor's notice of appeal was untimely. Since the court made an oral ruling at the hearing on December 19, 2011, the Department argues that the time for filing a notice of appeal ran from that date so that any notice filed after February 17, 2012, would be untimely.

The general rule in civil cases is that the time for filing an appeal is the earlier of 60 days after the clerk mails notice of entry of the judgment, 60 days after an opposing party serves notice of entry of judgment, or 180 days after judgment is entered. (Cal. Rules of Court, rule 8.104.) In dependency matters, however, the rule is that contained in California Rules of Court, rule 8.406(a)(1), which states: "Except as provided in (2) and (3) [which are not applicable here], a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed." Under this rule, if an appealable judgment or order is pronounced in open court, the time for taking an appeal from it begins to run when the judgment or order is pronounced. (*In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337.)

In light of a child's need for finality in dependency proceedings (see, e.g., *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254), the deadlines for appeal must be firmly applied (*In re Ryan R.* (2004) 122 Cal.App.4th 595, 598). Here, however, it does not appear that the juvenile court expected its oral announcement to be its final order. Although the court announced its ruling at the beginning of the hearing, the court backtracked at the end, asking counsel to prepare "a new order after hearing" and clarifying that counsel would "just submit the whole thing." The court also did not give the required advisement of the right to appeal (see Cal. Rules of Court, rule 5.735), a

further indication that the oral pronouncement was not intended to be the court's final order. We conclude that the trial court's final order is that contained in the January 25, 2012 written order after hearing. Minor's appeal filed February 23, 2012, was, therefore, timely and we deny the Department's request for dismissal.

III. DISCUSSION--NO. H037533

A. The Presumed Parent Decision

Dependency law recognizes four types of parents: alleged, de facto, biological, and presumed. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801, review granted May 1, 2002, S104863, opn. ordered published June 6, 2002.) Only a presumed parent is entitled to appointed counsel, custody (if there is no finding of detriment) and reunification services. (*In re T.R., supra*, 132 Cal.App.4th 1202, 1209.) To be a statutorily presumed parent, a person need not be the child's biological parent but he or she must meet the requirements of Family Code section 7611.⁴

Under Family Code section 7611, a person is presumed to be the parent under a variety of circumstances relating mostly to the person's relationship with the biological mother. Family Code section 7611, subdivision (d) is different. It provides for presumed parent status if the person "receives the child into his [or her] home and openly holds out the child as his [or her] natural child." (Fam. Code, § 7611, subd. (d).) The person advancing the presumed parent claim has the burden of establishing by a preponderance of the evidence the facts supporting the claim. (*E.C. v. J.V.* (2012) 202 Cal.App.4th 1076, 1084-1085.)

The juvenile court rejected the presumed parent motion for two alternative reasons. The court first held that M.N. could not be a presumed parent since her

⁴ The code sections applicable to determining father-child relationships are used to determine mother-child relationships as well, "[i]nsofar as practicable." (Fam. Code, § 7650, subd. (a); see also *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119-120.)

relationship with father was an employment relationship. In effect, the court held that one cannot be a presumed parent under Family Code section 7611, subdivision (d), as a matter of law, if one has accepted money for the care of a child. Minor challenges this conclusion but we need not reach it because the juvenile court's alternate basis for denying presumed parent status is sound.

The juvenile court's alternative basis for rejecting the presumed parent claim was its conclusion that minor had not proved that M.N. held her out as her natural child. This was a factual conclusion, which we usually evaluate under the substantial evidence standard of review. But classic substantial evidence review is implicated "when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence. In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) "[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *Caron v. Andrew* (1955) 133 Cal.App.2d 402, 409.) Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' (*Roesch v. De Mota, supra*, at p. 571.)" (*Ibid.*)

As this court has recognized, it is common in dependency cases for the juvenile court to be called upon "to make highly subjective evaluations about competing, not necessarily conflicting, evidence." (*In re I.W., supra*, 180 Cal.App.4th at p. 1528.) In such a case, we need not recount the evidence that supports the appellant's position, as minor does here. "It is not our function to retry the case." (*Ibid.*) The juvenile court considered the competing evidence and interpreted that advanced by minor as showing an

affectionate bond between minor and M.N. but not as showing that M.N. held minor out as her natural child. Other evidence showed that people familiar with minor knew that M.N. was being paid to care for her and most thought of M.N. as minor's nanny. Thus, the facts leave ample room for the conclusion that M.N. had not held minor out as her natural child. Accordingly, we do not disturb the ruling of the juvenile court.

B. The Placement Decision

Minor argues that the juvenile court abused its discretion when it denied her request to be placed with M.N. Minor maintains that the court incorrectly applied section 361.3, which requires the court to give family members preferential consideration when making a decision about temporary placement, rather than applying the caretaker preference of section 366.26, subdivision (k), which applies to the permanent placement plan. Minor also argues that the juvenile court failed to properly consider her wishes and best interests in making its placement decision. According to minor, "placement with M.N. was unquestionably in her best interests."

Minor had requested placement with M.N. by way of a section 388 petition. Section 388 permits any person having an interest in the child to petition for a hearing to change, modify, or set aside any order of court previously made on grounds of change of circumstance or new evidence. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) Such a motion requires the petitioner to demonstrate by a preponderance of the evidence that new or changed circumstances warrant a change in the prior order to promote the best interest of the child. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959.) "We review the grant or denial of a petition for modification under section 388 for an abuse of discretion." (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

We agree with minor that the relative placement preference of section 361.3 does not apply here. Section 361.3 gives "preferential consideration" to a request for placement by a relative of a child who has been removed from parental custody. " 'Preferential consideration' means that the relative seeking placement shall be the first

placement to be considered and investigated.” (§ 361.3, subd. (c)(1).) The preference applies at the dispositional hearing and thereafter “whenever a new placement of the child must be made” (*Id.* subd. (d).) The placement question in this case was always inextricably linked to the ultimate goal of deciding where minor’s permanent home should be. Reunification was not an issue once the court concluded that M.N. could not be deemed a presumed parent. Thus, when the juvenile court ruled upon minor’s section 388 motion for placement with M.N., the court was looking down the road to the section 366.26 hearing that was trailing the other proceedings. There was not, then, any need to find a new placement for minor. Minor was in foster care and doing well. The section 366.26 hearing was to be held within a matter of weeks. Thus, there was no point in temporarily changing minor’s placement. The real concern was where she would be placed permanently. It follows that section 366.26 provides the more appropriate analysis.

Minor maintains that the juvenile court should have applied the relative caretaker preference of section 366.26, subdivision (k). That subdivision provides:

“Notwithstanding any other provision of law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent and removal from the relative caretaker or foster parent would be seriously detrimental to the child’s emotional well-being. [¶] As used in this subdivision, ‘preference’ means that the application shall be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child.”

We do not agree that section 366.26, subdivision (k) required the court to give M.N. preferential consideration. The reference in section 366.26, subdivision (k) to

“removal” of the child from the relative caretaker or foster parent implies that the relative caretaker or foster parent receiving preference is the child’s then-current caretaker. (Cf., *In re Megan S.* (2002) 104 Cal.App.4th 247, 254, fn. 7 [appellant not entitled to preference to adopt “because she is not the child’s current caretaker”].) M.N. was neither a relative nor a foster parent and she did not have current custody of minor; minor had been living in a foster home for six months by then.

Minor relies upon *In re Lauren R.* (2007) 148 Cal.App.4th 841, in which a 10-year-old girl who had spent approximately 15 months with a nonrelative extended family member (see § 362.7) expressed a clear desire to stay with the caretaker for adoption purposes rather than go to her maternal aunt in Oregon. The child had considerable ties to the community; her therapist opined she would feel a “real loss” if removed; and her attorney supported continued placement for adoption purposes with the caretaker. Nevertheless, the juvenile court adopted the recommendation of the child welfare agency, which was to place the child with an aunt, relying upon the relative placement preference of section 361.3. The appellate court reversed, concluding that section 361.3 was inapplicable.

Lauren R. is distinguishable, principally because the juvenile court in *Lauren R.* had expressly, and improperly, relied upon section 361.3 whereas here the court did not cite section 361.3 or any other improper consideration. It is true that the juvenile court found the family relationship to be an important factor but, as a general matter, the law favors placement of children with capable family members. (See, e.g., § 16000, subd. (a) [“If the child is removed from his or her own family, it is the purpose of this chapter [foster care] to secure as nearly as possible for the child the custody, care, and discipline equivalent to that which should have been given to the child by his or her parents.”]; Fam. Code, § 7950, subd. (a)(1) [foster care “[p]lacement shall, if possible, be made in the home of a relative”].) Contrary to the implication contained in minor’s argument, considering family ties as a factor in making a placement decision is not off limits. In

any event, the juvenile court did not rely solely upon the fact that minor was related to the L.'s. The court considered minor's educational needs and the fact that father had been planning to move with minor to Pennsylvania so that the court's decision reflected, as near as possible, father's own preference. We recognize that M.N. and minor had a close emotional bond and that M.N. took good care of the minor during the first nine years of her life. Minor was fortunate to have more than one capable and loving adult seeking to provide a permanent home for her. But we find nothing in the record to support minor's contention that the juvenile court did not consider her wishes. Quite the opposite. The court was well aware of minor's desire to be with M.N., which is why the court wanted to find a way to ensure that minor could have continuing contact with her.

Although minor asserts that placement with M.N. was unquestionably in her best interest, the record raises several questions on that point. M.N. was unable to help minor with her academics; she was dependent upon her daughter's boyfriend for housing; the boyfriend had not yet had background clearance; the daughter had a recent conviction for driving under the influence; and minor had been living with M.N. when she suffered physical and verbal abuse during her visits with H.D.'s family. In short, we detect no abuse of discretion in the juvenile court's preferring the L.'s over M.N. to provide a permanent home for minor.

IV. DISCUSSION--NO. H037993--THE GUARDIANSHIP DECISION

In No. H037993, minor challenges the juvenile court's order selecting legal guardianship as the permanent placement plan. Minor maintains that the court erred by disregarding the legislative preference for adoption and foreclosing the possibility of M.N. adopting her. The Department argues that minor waived her objection to the selection of guardianship by expressly preferring that result herself. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) We decline to apply the waiver doctrine here. Minor made it clear that her preference was for placement with M.N. Her argument on appeal is based upon the assumption that the L.'s were not committed to adopting her and, therefore, had the

court adhered to the legislative preference for adoption, the Department would have been bound to evaluate (and approve) M.N. as a prospective adoptive parent. We detect no waiver; but we do reject the argument on its merits because minor's assumption is not supported by the record.

The record shows that the L.'s were willing to adopt. They agreed that guardianship was more appropriate "at that time" because that was minor's preference. Indeed, selection of legal guardianship was an advantage to minor in that it reserved in the juvenile court some power to enforce orders requiring regular visitation with M.N. (See § 366.4, subd. (a) ["Any minor for whom a guardianship has been established resulting from the selection or implementation of a permanency plan pursuant to Section 366.26 . . . is within the jurisdiction of the juvenile court."].)

In any event, the Legislature has given the juvenile courts some leeway in selecting legal guardianship in cases where 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, subd. (c)(1)(A).) Indeed, the juvenile court's written findings tracked the language of this subdivision and minor does not challenge those findings. Consequently, minor has failed to demonstrate any error in the court's order for guardianship.

V. DISPOSITION

In No. H037533, the orders of the juvenile court refusing to grant presumed parent status to M.N. and denying minor's motion for placement with M.N. are affirmed.

In No. H037993, the order of the juvenile court selecting legal guardianship as the permanent placement plan is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.