Filed 12/28/04 In re J.M. CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re J.M., a Person Coming Under the Juvenile Court Law.	
BUTTE COUNTY CHILDREN'S SERVICES DIVISION, Plaintiff and Respondent, v. PEGGY T., Defendant and Appellant.	C046581 (Super. Ct. No. J-29730)

Peggy T. (appellant), the mother of J.M., appeals from the juvenile court's orders denying her petition for modification and terminating her parental rights. (Welf. & Inst. Code, §§ 388, 366.26, 395.)[1]

Appellant raises numerous claims relating to the trial court's denial of her petition for modification, finding of adoptability, rejection of the sibling relationship exception,

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[1] Further undesignated section references are to the Welfare and Institutions Code.

and compliance with the Indian Child Welfare Act of 1978 (ICWA). Rejecting each of appellant's claims, we shall affirm.

FACTS AND PROCEDURAL HISTORY

In June 2001, the Yuba County Children's Protective Services (Yuba CPS) filed a juvenile dependency petition alleging that five-year-old J.M., along with his four siblings (the minors) ranging in age from three to 10 years old, came within the provisions of section 300, subdivisions (a) (serious physical harm) and (b) (failure to protect), because his father had inflicted serious physical harm on J.M. and one of his brothers and had not provided appropriate medical care for their injuries. At the time the petitions were filed, the minors lived with their father. An amended petition was sustained at the jurisdictional hearing held on June 28, 2001.

The dispositional social study report recommended that reunification services be denied appellant under section 361.5, subdivision (b)(10), as reunification services for appellant had been terminated in a previous dependency and appellant had not made reasonable efforts to treat the problems that led to the removal of the minors from her. Appellant refused to admit she had either alcohol or mental health problems. Not only did appellant not reunify in the last dependency, she was denied visitation.

At a November 14, 2001, dispositional hearing, the Yuba County juvenile court adjudged the minors, including J.M., to be dependent children and ordered them removed from father's

custody. The court granted reunification services to father, but denied reunification services to appellant.

J.M. was evaluated by a clinical psychologist who noted that J.M. was experiencing Post Traumatic Stress Disorder, including nightmares and apprehension about future mistreatment. When J.M. did not get the attention that he wanted in his foster care home, he would repeatedly call himself "stupid" and bang his head against the wall. J.M.'s behavioral problems escalated after his brother Jake was moved into the foster home with J.M. When all five siblings were placed together in a foster home, J.M. became so out of control that he had to be moved. J.M. was moved into and out of seven foster homes by the time of the status review hearing in May 2002. According to various foster parents, J.M. would be an "angel" for several weeks, but would then "blow up." He would hit, spit, steal, set fires, throw rocks at animals, and curse at his foster parents.

At school, J.M. was disruptive and defiant. This persistent behavior resulted in an Individual Education Program (IEP) being adopted for him. His behavior was indicative of oppositional defiant acting out and having anger control problems.

Father reported two fights between J.M. and his brother Jake during father's visits with them. J.M.'s behavior was so difficult that father on one occasion called the police.

In May 2002, all of the minors and father were living in homes in Butte County. On May 13, 2002, the Yuba County

juvenile court ordered the continuation of services to father and a transfer of the case to Butte County.

On October 21, 2002, the Butte County juvenile court ordered three of J.M.'s siblings to be placed back with father. The court continued a plan of reunification with father for J.M. and the remaining sibling. Appellant was allowed supervised visitation after her release from custody,[2] but the juvenile court stated that her mental health issues needed to be addressed before further services could be offered to her.

In a December 2002 report, the Butte County Children's Services Division (Butte CSD) recommended placement of the fourth sibling with father and the scheduling of a section 366.26 hearing regarding J.M. The report summarized J.M. as "a very damaged child who may require specialized services for many years to come." By this time J.M. had been in 11 placement homes due to his behavior and was being referred to a special education program, which included therapeutic services within the educational curriculum. In late October, Butte CSD received a report that J.M. had been "beat up" by his brother Craig during a weekend visit, sustaining an injury to his ear that required medical attention. Weekend visits were curtailed, but Butte CSD continued to try to arrange monthly visits between the children.

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[2] Appellant was convicted on June 27, 2001, of driving under the influence. On July 13, 2001, she was arrested for "at least her eighth DUI."

Appellant was able to visit her children twice after she got out of prison in September 2002. The visits did not go well. Appellant was back in prison at the time of the December report and at the time of the January, February, and March 2003 hearings.

At the status review hearing held on March 19, 2003, the juvenile court found that J.M. had "special needs that his father is unable to provide for at this time" and appellant "has mental health issues that prevent her from being a suitable placement." The court terminated reunification services for father and set a section 366.26 hearing.

By August 2003, then eight-year-old J.M. had been in 15 foster care placements. There had been no contact between father and J.M. for over a year and only one phone contact between J.M. and appellant. J.M. did regularly visit his maternal grandmother. He would occasionally see his siblings there. He also saw two of his siblings at school. Contact with his siblings was sometimes positive, but at other times cruel, creating additional stress for J.M. According to the section 366.26 report, J.M. was "ostracized and abandoned by his father and siblings." Adoption by J.M.'s maternal grandmother and his maternal uncle fell through.

Finally a foster home was found for J.M. where he was comfortable and his needs were met. J.M. settled into this placement and his behavior significantly improved as a result. A very strong emotional bond developed between J.M. and this foster mother. The 64-year-old foster mother was highly trained

in working with difficult children. She has a doctorate in psychology, has worked in the past for Developmental Services for Children, has been an adoptive and foster parent for many years, and has adopted a number of special needs children. Her desire to adopt J.M. was supported by J.M.'s court-appointed special advocate, the Butte CSD, and the California Department of Social Services Adoption Services Bureau (Adoption Services).

According to the adoption assessment filed in August 2003 by Adoption Services, J.M. is adoptable and termination of parental rights would not be detrimental to him. Termination of parental rights would not cause substantial interference with J.M.'s sibling relationships, in part because the other children were hostile to the idea of J.M. joining them at home and in part because J.M. would still see his siblings from time to time at the home of his maternal grandmother. J.M.'s foster mother was willing to enter into a postadoption contact agreement with the maternal grandmother, maternal aunts and with the siblings. J.M.'s foster mother was committed to the adoption of J.M.

Butte CSD recommended termination of parental rights and a permanent plan of adoption.

The juvenile court continued the section 366.26 hearing from August 25, 2003, to October 9, 2003, for a contested hearing. The length of the continuance allowed the court to be sure J.M.'s placement was successful prior to termination of parental rights.

The juvenile court denied appellant visitation with J.M. at a specially held visitation review hearing in September 2003. The court authorized appellant to write to J.M.

At the continued section 366.26 hearing held on October 9, 2003, the juvenile court denied appellant's motion for modification pursuant to section 388 seeking six months of reunification services or placement of the minor with her. The court concluded there was an insufficient showing of best interest to the child to grant an evidentiary hearing. The court continued the section 366.26 hearing to review additional documents submitted by appellant. The hearing was again continued on October 22, 2003, to December 15, 2003, for appellant to file an additional declaration and submit further information regarding compliance with ICWA. (25 U.S.C. § 1901 et seq.)[3]

At the December 15, 2003, hearing, the juvenile court reviewed the file, but could not determine whether adequate notice under ICWA had been given. Butte CSD was directed to ascertain whether appropriate notice was sent. If appropriate

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[3] Appellant appealed the orders denying her visitation with J.M. and denying her petition for modification. This court rejected appellant's claims of error regarding the trial court's summary denial of her petition for modification and denial of visitation, but because we concluded the record did not show ICWA notice was sufficient, the order denying the petition for modification was reversed and remanded for a further hearing in compliance with ICWA. The order regarding visitation was affirmed. (*In re J.M.* (Nov. 23, 2004, C045456, pp. 1-2, 22-23 [nonpub. opn.].)

notice was not sent, father was to provide additional information to allow for renoticing.

At the continued hearing on January 26, 2004, the juvenile court ordered Butte CSD to send out new notices under ICWA after new forms SOC 318, Request for Confirmation of Child's Status as Indian, and 319, Notice of Involuntary Child Custody Proceeding Involving an Indian Child, were prepared and forwarded to appellant for her to add any information. The court found it unlikely that any further information could be obtained from father. New notices were sent to 16 Apache and Wintu tribes, plus the Bureau of Indian Affairs (BIA) in Sacramento, on February 17, 2004. A letter correcting J.M.'s birthplace was sent to the same tribes.

On March 9, 2004, the day before the continued section 366.26 hearing, appellant submitted another petition for modification pursuant to section 388 seeking visits and reunification services or placement of J.M. and further notice to well over 150 more Indian tribes. Appellant alleged father had placed J.M.'s siblings with her in January 2004 and she wanted J.M. to be returned to her family. She alleged that she has a suitable home, does not work, and has the time to care for J.M. The requested modifications were in J.M.'s best interests, according to appellant, because being reunited with appellant and his siblings would "instill in him a higher level of self confidence and a sense of purpose which was severely damaged at the hands of his father." J.M. would know that he "is loved and cared for by his mother and siblings." Appellant contended that

the new ICWA notices were necessary because appellant's research showed that many Apache Indian tribes had broken up and were assimilated into other tribes throughout California, Arizona, New Mexico, Oklahoma, and Nevada. Appellant wanted all Indian tribes in those states noticed.

On March 10, 2004, the juvenile court reviewed and considered the new ICWA notices sent by Butte CSD. Counsel for Butte CSD confirmed that return receipts, fax confirmations, and responses had been provided to the court for all of the noticed tribes except for the Mescalero Apache and Round Valley tribes. As to those two tribes, counsel confirmed that the Mescalero Apache tribe received notice on February 20, 2004, and the Round Valley tribe received notice on February 23, 2004. Responses had been received from most of the tribes indicating that J.M. was not an Indian child or eligible for membership in their tribe. The court found ICWA notice was given as required by law and J.M. was not an Indian child under ICWA.

The juvenile court then considered and summarily denied appellant's petition for modification under section 388. The court found no significant change of circumstance warranting a change of placement and that there was absolutely no evidence such a change would be in J.M.'s best interest.

Proceeding with the section 366.26 hearing, the juvenile court accepted the August 2003 section 366.26 report and adoption assessment into evidence subject to cross-examination. The court noted there was no update for the report and that it had earlier considered appellant's argument that an update was

required. The adoptions worker had represented that J.M. was in the same placement and his situation had only continued to improve. The court proceeded on the existing report.

Appellant called the social worker, adoptions worker and J.M.'s preadoptive foster mother to testify.

The social worker confirmed that almost all of J.M.'s behavior problems have disappeared in his current placement. He is ready to be mainstreamed into regular classes at school. The foster mother has a live-in attendant, as well as part-time help, who assist in caring for the 10 or 11 children in her home. The alternative caregiver functions as an older brother-father figure for the kids. The social worker testified J.M.'s relationship with his siblings has been problematic. In a recent incident, J.M. was very disturbed when he observed his older brother attacking his younger brother. He said he did not feel he was part of the family anymore.

The adoptions worker testified that J.M. is happy much of the time, currently has a good emotional state, and wants to be adopted by his current foster mother.

J.M.'s foster mother testified that J.M. last saw his siblings at a visit to his maternal grandmother's house in December 2003. J.M. was upset that his siblings would not talk to him very much. He has not indicated any desire to see them since. The foster mother continues to support J.M. seeing his grandmother and siblings. She would be open to contact with appellant in the future if things were different and appellant's life was stable. J.M. has a good relationship with the other

children and adults in the foster mother's house. J.M. tells his foster mother all the time that he wants to be adopted.

J.M.'s foster mother indicated her health is very good, but she does have a plan for future care of her children if anything happens to her. The young man who helps her take care of the children full-time will become their guardian. The house and her property are in a trust, so the children will be able to stay in the house together. Her daughter will also come to care for the children.

Answering a question from the court, the foster mother said J.M. has not received any cards or letters from appellant.

The court found by clear and convincing evidence that it is likely J.M. will be adopted, and terminated parental rights. The court emphasized it was "absolutely convinced" that J.M. is adoptable. "The further away that the child gets from his parents and siblings the more adoptable he becomes." The court found there was no exception, including the sibling relationship exception, to adoption.

DISCUSSION

I. *Petition for Modification*

Arguing this court should apply a de novo standard of review to the juvenile court's summary denial of her petition for modification pursuant to section 388, appellant claims her petition stated a prima facie showing of changed circumstances. Although appellant does not agree she was required to show additionally that her proposed modification is in the best

interests of J.M., she contends the modification was in fact in J.M.'s best interests.

On appellant's previous appeal of her earlier petition for modification, this court summarized the relevant legal principles applicable to petitions for modification pursuant to section 388. (*In re J.M., supra,* C045456, pp. 12-14 [nonpub. opn.].) We specifically rejected appellant's claim to de novo review. (*Id.* at pp. 14-15.) For the same reasons, we reject it here, repeating only briefly the requirements for a petition for modification.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new evidence or a showing of changed circumstances. "The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of proof is a preponderance of the evidence. [Citation.]" (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

To establish the right to an evidentiary hearing, the petition must include facts which make a prima facie showing that there is a change in circumstances and "the best interests of the child may be promoted by the proposed change of order." (§ 388; see *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672-673;

In re Zachary G. (1999) 77 Cal.App.4th 799, 806; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414; Cal. Rules of Court, rule 1432(b).)[4] More than general conclusory allegations are required to make this showing even when the petition is liberally construed. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence . . . would sustain a favorable decision on the petition." (*In re Zachary G., supra*, 77 Cal.App.4th at p. 806.)

The trial court did not abuse its discretion in concluding appellant had not shown a prima facie case of either changed circumstances or best interest.

The only real change in circumstances from appellant's last petition for modification was father's inexplicable placement of J.M.'s siblings with appellant after he was given sole physical and legal custody of them. Although the children had apparently not yet been redetained, there was no indication that any court or child protective agency had approved the placement of the minors with appellant. The fact that J.M.'s siblings were unofficially, physically back with appellant was certainly not the kind of change of circumstance that would require a change in the juvenile court's previous orders relating to J.M. As to J.M., the court had denied reunification services to appellant, denied appellant visitation, and specifically found appellant

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[4] Further undesignated rule references are to the California Rules of Court.

"has mental health issues that prevent her from being a suitable placement." Appellant's petition fails to show any change in the circumstances that led to these conclusions and decisions.

Appellant had only a handful of visits with J.M. over the almost three-year course of this dependency. In September 2003, appellant was denied further visitation with J.M. but was authorized to write to him. Appellant never wrote to J.M. or even sent him a card to express the love she now claims J.M. needs to know. In these circumstances, there is no basis for believing it would be in J.M.'s best interests after all this time to have appellant forcibly reintroduced into his life.

Moreover, the record is clear J.M.'s siblings were hostile to J.M. and did not want him in their home. J.M. was upset by their rejection of him. His behavior substantially deteriorated when he was placed with them. Away from his parents and siblings, J.M. was happy and settled. He was being mainstreamed back into regular school classes. He was receiving the attention he needed and was improving month by month.

The juvenile court properly summarily denied appellant's petition for modification.

II. *ICWA*

Appellant claims noncompliance throughout this dependency with the ICWA notice requirements. She contends the attempts to provide notice prior to February 2004 were invalid, as well as the new notices sent in February 2004.

We agreed with appellant in her prior appeal, and agree again, that the record up to the end of 2003 did not show the

ICWA notice was sufficient. (*In re J.M., supra,* C045456, pp. 18-22 [nonpub. opn.].) In the prior appeal, we conditionally reversed the order denying appellant's petition for modification and directed the juvenile court to determine if all potentially applicable tribes or the BIA were properly noticed with all known, relevant information. (*Id.* at p. 22.)

Apparently, even without the benefit of our prior opinion, the juvenile court in December 2003 and January 2004 also concluded the record did not show adequate notice under ICWA. The juvenile court ordered Butte CSD to send out new notices under ICWA after new SOC 318 and 319 forms were prepared and forwarded to appellant for her to add any information. Butte CSD did so, sending new notices to 16 Apache and Wintu tribes, plus the BIA in Sacramento, on February 17, 2004. A letter correcting J.M.'s birthplace was sent to the same tribes.

Appellant claims the new notices were also deficient.

First, appellant asserts the notices should not have been addressed to "ICWA Representative," but to the tribe's chairperson unless the tribe designated another agent for service of process. (Rule 1439(f)(2).) Appellant is correct. As she notes, a list of designated tribal agents for service of notice under the ICWA is published. (See, e.g., 68 Fed.Reg. 68408 (Dec. 8, 2003).) However, appellant has not shown that addressing the notices to the "ICWA Representative" did not direct those notices to the "appropriate tribal entity," thereby requiring reversal on appeal. (See *In re Louis S.* (2004) 117 Cal.App.4th 622, 633, citing *In re H.A.* (2002)

103 Cal.App.4th 1206, 1213.) Although the notices should have been addressed to the tribal chairperson or agent for service of process, we discern no prejudice to appellant in this case by the failure to do so. (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1426.)

ICWA notice must include the following information, *if known*: the name of the child; the child's birth date and birthplace; the name of the tribe(s) in which the child is enrolled or may be eligible for enrollment; names of the child's mother, father, grandparents and great-grandparents or Indian custodians, including maiden, married and former names or aliases, as well as their birth dates, places of birth and death, tribal enrollment numbers, and current and former addresses; and a copy of the petition. (25 C.F.R. § 23.11(a) & (d); 25 U.S.C. § 1952.)

In this case, the new SOC 318 form sent out in February 2004 contained J.M.'s name, birth date and birthplace. A letter was subsequently sent correcting the birthplace. The new 318 form listed the names of both appellant and father, along with their birth dates and birthplaces. No tribal affiliation was claimed through appellant. The form listed father's tribal affiliation as Apache or Wintu. The names of J.M.'s paternal grandmother and grandfather, along with their birthdates and birthplaces were listed. The name of J.M.'s paternal great-grandfather was listed. Further information about father living on a reservation and about possible alternate birthplaces for the paternal grandparents was given in the space for remarks on

the new 318 form. The latter information was given based on information supplied by appellant.

Appellant complains the information was still incomplete, but does not suggest any *known* information was left out. Appellant simply argues further investigation was required. The record demonstrates, however, both the court and Butte CSD made diligent efforts to discover all possible information for the ICWA notice. Father was directed to provide information but was uncooperative. Although appellant argues the court should have enforced father's compliance, there is nothing to suggest that father knew any more information than appellant was able to discover through her conversations with father's mother before her death and appellant's other investigations. The section 366.26 hearing was continued a number of times to allow appellant to provide information from her research to Butte CSD. The 318 and 319 forms themselves were sent to appellant for review, and information provided by appellant was incorporated in the new forms sent out in February 2004. We conclude the juvenile court and Butte CSD made an adequate inquiry for the information required for the ICWA notice. A comprehensive genealogical investigation is not required.

Finally, appellant claims the juvenile court was required to apply the higher evidentiary standards of the ICWA to the termination of parental rights proceedings because no response had been received from four of the noticed tribes by the time of the section 366.26 hearing.

"Aside from its notice provisions, the ICWA applies only to Indian children. (25 U.S.C. § 1901 et seq.; see rule 1439(b) & (g)(5).) Only when information before the juvenile court is sufficient to show that the child is a member of a tribe, or is eligible for membership and is the child of a member, does rule 1439(e) require compliance with all of the provisions of the ICWA. On the other hand, when no response is received from the tribes after proper inquiry and notice, this is 'tantamount to [a] determination[] that the minor [i]s not an "Indian child" within the meaning of the [ICWA].' (*In re Levi U.*[2000] 78 Cal.App.4th [191,] 198.) Under such circumstance, 'neither the court nor [the social services agency] ha[s] any further obligations under the [ICWA].' (*Id.* at p. 199.)" (*In re L.B., supra,* 110 Cal.App.4th at p. 1427.)

III. *Termination of Parental Rights*

A. *Staleness of Adoption Assessment*

Section 366.22, subdivision (b), provides that whenever a juvenile court orders a hearing pursuant to section 366.26, it must direct preparation of an adoption assessment. The juvenile court must review the social worker's report and the adoption assessment and at the section 366.26 hearing indicate that it has read and considered them. (§ 366.26, subd. (b).)

These requirements were followed by the juvenile court in this case. A social worker's report, including an adoption assessment, was ordered, prepared and filed before the date on which the section 366.26 hearing was first set on August 25, 2003. The section 366.26 hearing was then continued five times

to allow time for a contested hearing, to review additional documents submitted by appellant, to allow appellant to provide even further documentation to the court, and to address the adequacy of the ICWA notice. At the March 2004 hearing, the court indicated it had read and considered the report and assessment.

As a result of the continuances, most of which were requested by appellant, the section 366.26 report and adoption assessment prepared in August were almost seven months old by the time of the March 2004 hearing. Appellant brought this to the attention of the juvenile court. The court asked the adoptions worker whether anything had significantly changed in J.M.'s placement or adoptability. The adoptions worker responded, "It's only improved." The court then asked the social worker if there was anything significant that would be included in an updated report. The social worker said "[J.M.'s] placement is more secure and established, and he's thriving in the current situation." Appellant replied that it was "difficult to respond to a review when it's not done in writing" and requested a continuance. The trial court denied the request for a continuance and decided not to require an updated report.[5]

Appellant claims on appeal the juvenile court erred in proceeding on stale reports because the dependency scheme as a

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[5] Contrary to the assertion by appellant, the juvenile court did not subsequently find an updated report was required because J.M.'s siblings were no longer living with their father, it only noted such argument had been made earlier.

whole shows the report must be updated at least every six months. (§ 366, subd. (a)(1).) We disagree.

The dependency scheme requires a review of the child's status every six months. (§ 366, subd. (a)(1).) The social worker must file a written report at least 10 days prior to a status hearing. (§ 366.21, subd. (c).) No statute or rule, however, requires the juvenile court to automatically order a filed report or assessment to be updated upon the passage of any specified amount of time. (See § 365--court *may* require reports it deems necessary or desirable.) When representations were made to the court that nothing in J.M.'s situation had significantly changed, things had only continued to improve, the court reasonably concluded in its discretion that a continuance for an updated report was not required.

The juvenile court did not err by failing to require an updated report, but even if we were to conclude there was error, appellant cannot show she suffered any prejudice as a result. Appellant called both the social worker and the adoptions worker to testify at the section 366.26 hearing and was able to fully question them about any and all changes that had occurred since their filed report and assessment. At no point during the testimony of these witnesses did appellant ever request a recess or continuance in order to adequately address any allegedly new, or allegedly inconsistent, or allegedly inadequate, information offered by the testimony of these witnesses.

B. *Finding of Adoptability*

Appellant claims the evidence was insufficient that J.M. was adoptable. She is wrong.

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . The permanent plan preferred by the Legislature is adoption. [Citation.]' [Citation.]" (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, italics omitted.) "In order for the court to select and implement adoption as the permanent plan, it must find, by clear and convincing evidence, the minor will likely be adopted if parental rights are terminated." (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; § 366.26, subd. (c)(1).)

"The issue of adoptability posed in a section 366.26 hearing focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.] Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) On the other hand, "the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to

adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family." (*Id.* at pp. 1649-1650, italics omitted.)

We review an order terminating parental rights for substantial evidence. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

In this case, J.M. was placed with a foster mother who was committed to adopting J.M. J.M. wanted to be adopted by her. The foster mother was 64 years old at the time of the hearing, but her health was very good. She had plenty of help in caring for J.M. and her other children, including a full-time assistant who acted as an older brother/father figure to the children. She had a plan in place to take care of the children if anything happened to her. There was no reason to believe adoption of J.M. by this foster mother would not be able to take place.

Moreover, the evidence was strong that the year J.M. spent in the care of this foster mother had ameliorated his emotional and behavioral problems. J.M. was happy and no longer needed special education. He was being mainstreamed back into regular classes. He was thriving. Therefore, even if this prospective adoption could not take place, there was evidence that J.M. had

become adoptable. Indeed, as the juvenile court expressed it: "The further away that the child gets from his parents and siblings the more adoptable he becomes."

Substantial evidence supports the finding of adoptability by the juvenile court.

C. *Sibling Relationship Exception*

If the court finds by clear and convincing evidence that a child is likely to be adopted, the court must terminate parental rights and order the minor placed for adoption "absent circumstances under which it would be detrimental to the child." (*In re Ronell A., supra,* 44 Cal.App.4th at p. 1368.) There are only limited circumstances that permit the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1).) It is the parent's burden to establish an exception to termination of parental rights. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; *In re Zachary G., supra,* 77 Cal.App.4th at p. 809; rule 1463(d)(3); Evid. Code, § 500.)

On appeal, the juvenile court's ruling declining to find an exception to termination of parental rights must be affirmed if it is supported by substantial evidence. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576; *In re Zachary G., supra*, 77 Cal.App.4th at p. 809; *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953; cf. *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1342, 1351 [applying abuse of discretion standard].)

One of the exceptions to adoption is the sibling relationship exception. (§ 366.26, subd. (c)(1)(E).)

The exception applies if, as a result of the termination of parental rights, "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (*Ibid.*)

The first step for the juvenile court in evaluating whether this exception applies is to consider whether terminating parental rights would cause interference with a sibling relationship. (*In re L. Y. L., supra,* 101 Cal.App.4th at pp. 951-952.) "To show a substantial interference with a sibling relationship the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child." (*Id.* at p. 952.)

No such showing was made in this case. In fact, the evidence quite strongly reflects J.M. has benefited from being separated from his siblings. His behavior problems escalated when he was placed together with his siblings. His behavior improved when he no longer shared a home with them. J.M. became involved in physical fights with his brothers when they were together at visits. Even at school, the interaction between J.M. and his sibling was sometimes "cruel." J.M. was upset by

his last visit with his siblings and felt he was no longer part of the family.

The trial court did not err in failing to find the sibling relationship exception to adoption.

D. *Duty to Develop and Maintain Sibling Relationships*

Appellant contends that if she was unable to establish the sibling relationship exception, it was because she was prejudiced by the failure of the juvenile court and Butte CSD to develop and maintain the sibling relationships as required by section 16002, subdivision (b). In a related claim, appellant contends J.M.'s constitutional right to his sibling relationships was violated by the failure of the court and Butte CSD to "facilitate sibling contact and visitation." We disagree.

The record reflects that the Yuba County and Butte County juvenile courts and the children's services agencies in this case tried to keep the siblings together until it became obvious that J.M. required a separate placement. When J.M. was placed apart from his siblings, the courts and agencies continued to maintain visitation between the siblings. Even when weekend visits had to be curtailed because of the physical fights breaking out between the brothers, Butte CSD continued to try to maintain monthly visitation. The interaction, however, was not positive. J.M.'s siblings were hostile to him and made it clear that they did not want J.M. to be home with them. Obviously such attitude was hurtful to J.M., but it was not the fault of the court or Butte CSD.

Nor can appellant now argue on this appeal from the section 366.26 hearing and order terminating parental rights that Butte CSD erred in failing to offer a specific "'therapeutic environment'" for J.M. and his siblings to work through their problems when appellant did not ask for such services at any of the review hearings.

"In dependency litigation, nonjurisdictional issues must be the subject of objection or appropriate motions in the juvenile court; otherwise those arguments have been waived and may not be raised for the first time on appeal." (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) "[I]t would be inappropriate to allow a party not to object to an error of which the party is or should be aware, '"thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." [Citation.]' [Citation.]" (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501.) This rule includes constitutional issues not raised at trial, which are also forfeited on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

DISPOSITION

The judgment is affirmed.

DAVIS, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.