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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re MICAH T. et al., Persons  
Coming Under the Juvenile  
Court Law.

B292222  
(Los Angeles County  
Super. Ct. No. DK02508A-B)

LOS ANGELES COUNTY  
DEPARTMENT OF  
CHILDREN AND FAMILY  
SERVICES,

Plaintiff and Respondent,

v.

L.C. et al.,

Objectors and Appellants.

APPEAL from an order of the Superior Court of Los  
Angeles County, Michael E. Whitaker, Judge. Dismissed.  
L.C., in pro. per., for Objector and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, Peter Ferrera, Principal Deputy County Counsel, for Plaintiff and Respondent.

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D.C. and L.C., former prospective adoptive parents (PAPs), appeal an order under Welfare and Institutions Code section 366.26, subdivision (n),<sup>1</sup> removing minors Micah T. and Marcel T. from their custody. L.C.<sup>2</sup> contends it was an abuse of discretion for the court to remove the children from her custody. L.C. further contends the court abused its discretion when it summarily denied her petition under section 388. The Los Angeles County Department of Children and Family Services (Department) contends the appeal must be dismissed because the PAPs did not meet the requirements of section 366.28, subdivision (b), by seeking writ relief before appealing. It further contends that the PAPs' attempt to appeal the denial of their section 388 petition must also be dismissed because the notice was filed before the court denied the petition. The Department

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Appellant's Opening Brief and Reply Brief were filed by L.C. alone. As explained in footnote 1 of Appellant's Opening Brief, D.C. "was named as an appellant in the jointly filed Notice of Appeal . . . but has not participated in this Opening Brief. [D.]C.'s position on the issues herein is, at this time, unknown."

alternatively contends that if we were to consider the substance of L.C.'s arguments on appeal, the court's orders should be affirmed because there was no abuse of discretion. We dismiss the appeal. We also dismiss as untimely the portion of the appeal relating to the PAPs' section 388 petition.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Micah was born August 2010, and Marcel was born August 2013. Based on their parents' drug use and domestic violence, the two were removed from parental custody and declared dependents under section 300 in January 2014. Micah and Marcel were placed with D.C. and L.C. in March 2014. The juvenile court terminated the parents' reunification services in 2015, and terminated parental rights in January 2017, identifying D.C. and L.C. as the children's PAPs.

### **Department's concern and investigation**

In January 2018, while speaking to a Department social worker, four-year-old Marcel made reference to a domestic violence incident, and also reported being "whooped." A follow-up investigation revealed that the PAPs had made at least eight calls to law enforcement for domestic violence incidents. When the social worker (CSW Alexis Mathis) inquired, the PAPs accused Mathis of discriminating

against them because they were a same-sex couple, and requested a new social worker. The new social worker (CSW Eileen Ching) reported that while the children had been placed with the PAPs for four years, the PAPs had a history of refusing to allow unannounced home visits by social workers.

When Ching tried to visit the PAPs' home on a Friday in February 2018, the gates were locked. D.C. told Ching over the phone that she could come on Wednesday at 5:00 p.m. when the children would be home. Ching returned on Wednesday and asked D.C. about domestic violence and the calls to law enforcement. D.C. responded, "There's no DV. All of that is false, and the last [social] worker was the one who reported it, this is why I asked for a new worker. She knows that Marcel was joking and she took it seriously. I don't know why it's taking so long for us to just adopt our kids. I've had them for 4 years already but the last worker and the adoptions worker . . . are the ones who are discriminating because we are a same sex couple." Ching described the home as being in disarray, with plastic bags of clothing on top of the bed. The children seemed to be unsure which bed belonged to them and which bed they had slept in the night before. Ching expressed concern about a strong marijuana odor masked by incense, but D.C. denied any marijuana use. Ching later claimed she asked the PAPs to drug test, but they refused.

On March 7, 2018, counsel for Micah and Marcel (minor's counsel) emailed Ching that D.C. reported she was

no longer in a relationship with L.C. and planned to adopt Micah and Marcel alone. D.C. said she moved into a three-bedroom apartment but did not provide an address to minor's counsel. Ching contacted D.C., who confirmed she had moved into a new apartment. D.C. reported she had been evicted from the old place for not paying rent on time.

When Ching and ACSW Fenella Williams<sup>3</sup> tried to visit the home on April 6, 2018, D.C. was uncooperative and accused Williams of holding up the adoption. D.C. refused to allow Williams to complete the home assessment and home study, and asked Williams to leave and return with her supervisor.

Ching interviewed the children at their schools on April 27, 2018. Both children reported that they were staying with someone else while the PAPs were out of town. Marcel's preschool confirmed that a third party had been bringing Marcel to and from school since early April, and they assumed the Department was aware. The third party's name is redacted from the report.

### Lead-up to removal

On May 24, 2018, the Department filed a notice of intent to remove Micah and Marcel from the PAPs' custody. The Department sought a court order to remove the children

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<sup>3</sup> The report does not specify the meaning of the acronym "ACSW." From the context, we infer that it refers to an adoption case social worker.

based on statements and actions by the PAPs, including denying suspected domestic violence, conflicting statements regarding the state of their relationship, leaving the children with unapproved caregivers, and refusing to cooperate or give the Department unannounced access to the family home.

On May 28, 2018, D.C. acknowledged receiving the notice, and told Ching, “You have only been our worker for about a month and you are trying to take my kids away. I already told you the domestic violence is nothing between me and my wife. Marcel was just playing too many video games. I’m so sick and tired of all of this, you are not welcome to come visit my place, your supervisor can come for the visits.” D.C. then hung up the phone.

On May 30, 2018, the landlord of the apartment confirmed that D.C. received the keys to the apartment on March 6, 2018, and that D.C. said it would just be her and her two sons. He had concerns because D.C. was already late on rent and brought pets even though he said no pets.

Ching interviewed the children at school on May 31, 2018. Separately, they both revealed that they were being told to say that everything is fine and that L.C. is living with them.

On June 12, 2018, an unnamed caller expressed concern at not seeing the children for a while, saying it seemed like they might be living elsewhere. According to the caller, the children would come for a few days when someone was coming to see them, but then would disappear, as if they

were living somewhere else. The caller also said there were broken windows and a broken screen from when relatives tried to break into the home.

On June 14, 2018, L.C.<sup>4</sup> filed a handwritten “Objection to removal” on Judicial Council form JV-325, denying any domestic violence between the PAPs, but acknowledging an incident between L.C.’s relatives and D.C. L.C. asserted the problems had been resolved and denied the children were ever exposed to domestic violence, stating they were in “a nice, clean, loving environment.” She also denied leaving the children with an unapproved caretaker, stating D.C.’s sister—who was already fingerprinted—was caring for the children. L.C.’s objection stated, “I would like for the court to reconsider the removal from our home.”

It appears that on June 14, 2018, the court held a hearing at which it ordered a forensic interview of the children. The record on appeal does not include any minute order or reporter’s transcript from that hearing.

When D.C. was interviewed for child care services on June 20, 2018, the interviewer noted a strong marijuana odor.

In a status review report filed July 9, 2018, the Department continued to express concerns about the children’s placement with D.C. and L.C., stating: “The

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<sup>4</sup> The pre-printed form contains lines at the end for the objector to print and sign his or her name under penalty of perjury. The form lists the names of both PAPs, but is only signed by L.C.

children do have a bond and relationship with caregivers, however, the children's medical and dental needs continue to be unmet by the caregivers. The caregivers have not followed up with Micah's impacted earwax built up [*sic*], nor have they picked up the prescription from [the doctor]'s office as advised. Marcel's annual physical examination is overdue. There is great concern of the lack of responsibility on the caregivers' behalf." Although the court had given the PAPs discretion to permit monthly visits for Marcel and Micah with their biological mother, they had not permitted mother to visit. The Department additionally reported that the PAPs "continue to display behaviors of aggression and hostility around the children. Communication does not appear to be effective, and there are ongoing concerns of domestic violence and marijuana use by the caregivers in the home." The Department had not been able to verify D.C.'s employment and had no information about whether L.C. was currently employed.

The children participated in a forensic interview on July 19, 2018. They made statements during the interview that gave the evaluator concerns about possible physical abuse, neglect, and domestic violence. The children also expressed fear about the fact that the interviews were being recorded and fear that the evaluator might share their disclosures with the PAPs, leading to negative consequences for the children.

A last minute report dated July 20, 2018, summarized some of the concerns raised during the forensic interview.



The report also noted that when the evaluator asked the children whether they had ever resided at a studio, one child responded “It is a real studio, like you record music. [D.C.] has another person that’s a girl.” The children reported going to an auntie’s house when mom has to go to work. With respect to Micah’s ear wax problems, the PAPs were told on June 15, 2018, to pick up a referral to a specialist, but they did not pick up the referral until July 9, 2018, and the appointment with the specialist would be on August 4, 2018. Ching also expressed concern about who was living at the children’s home, after observing blankets and pillows in the living room on June 18, 2018. When Ching saw someone sleeping in the passenger seat of a car in front of the house on July 19, 2018, the children reported that it was their uncle’s car, their uncle had been sleeping at the house and they didn’t know why he was sleeping in his car. The children also reported being transported to L.C.’s home for a visit.

#### Removal and post-removal reports

The children were placed in a new foster home on July 20, 2018. They both adjusted to the new family very easily, interacting with them affectionately as family members, and calling the parents mommy and daddy. Marcel told Ching, “I never want to go back. Can I stay here forever?” The new foster parents observed Micah to be well-behaved. Marcel was very active and had some issues with anger and

aggression. The PAPs called Ching numerous times to get information about the new placement and to request visitation. They obtained the new caregivers' contact information on July 23, 2018.

On July 24, 2018, the new caregiver said D.C. had called and texted numerous times, early in the morning while the children were asleep. Before allowing phone contact with the children, the new caregiver reminded the PAPs not to discuss case issues with the children. Nevertheless, the PAPs taunted Micah, causing him to cry, telling him it was taco Tuesday and he would not be able to get tacos with them.

After confirming that the court had ordered visitation with the former PAPs, Ching arranged for supervised visitation to take place on July 27, 2018. Both children were very reluctant to leave their new home to visit the PAPs. During the drive to the visit, both children were crying, and Marcel said he was scared the PAPs were "gonna give me a whooping." Micah was also scared he would get in trouble and did not want to hurt the PAPs feelings by telling them about the new house and the new family. During the visit, the children played with the PAPs and each other. Towards the end of the visit, Marcel stated he was ready to go back to his family, presumably referring to his new placement, because the PAPs responded by saying "They not your family." The children acted out immediately after the visit, but adjusted well after returning to their new placement.

The new caregiver informed Ching that Micah had some ear wax removed during his initial medical exam, but needed to follow up in two weeks because not all of it could be removed. On July 29, 2018, Micah complained of ear pain, was taken to urgent care, and the impacted ear wax was finally removed after multiple attempts. The children were reported to display some sexualized behavior, and Marcel reported seeing a video when living with the PAPs depicting “girls and boys being gay.”

On July 30, 2018, the PAPs filed a “Supplemental Information” packet with the court, including a statement summarizing their history and relationship with the boys, and asserting that despite having more than five social workers, Ching was the first to accuse them of negligence. The statement also emphasized that they have learned to parent along the way, with no guidance from the Department. The PAPs lamented that they have only been allowed to speak with the boys twice and had a single one-hour monitored visit. The statement concluded by asking the court to reconsider reuniting them with the children, and asking why—if the social worker had concerns about the children—the Department had not made any unannounced visit between June 18 and July 20, 2018. The packet also included character reference letters praising the PAPs for their accomplishments and their caring relationship with the boys.

Contested section 366.26, subdivision (n) hearing

On August 1, 2018, the court held a contested hearing under section 366.26, subdivision (n). After briefly reviewing governing legal authority and the relevant facts from the exhibits admitted into evidence, the court explained that it found the reports by the Department and the children to be more credible than the denials and explanations given by the PAPs. Two key factors underlying its decision were the PAPs' delay in addressing Micah's ear wax problem and the children's expressions of distress at the prospect of returning to live with the PAPs. The court also noted that at its prior hearing, it had given the PAPs the benefit of the doubt, but at the same time ordered forensic interviews to move forward. It acknowledged that the children had lived with the PAPs for a significant period of time, and noted there was no doubt that the PAPs loved the children, but based on the totality of the information before the court, it was not in the children's best interests for the PAPs to retain custody of the children.

The court gave the PAPs the opportunity to explain why they thought the court's tentative ruling was wrong, and engaged in an exchange with D.C. about their argument that they were not provided adequate support while they were caring for the children. The court noted the PAPs were not entitled to reunification services as a biological parent

would be. The court ordered the children removed from the PAPs' custody and denied the PAPs' requests for visitation.

On August 22, 2018, the PAPs filed a notice of appeal from the juvenile court's ruling at the section 366.26, subdivision (n) hearing.

### Section 388 Petition

Concurrent with their notice of appeal, the PAPs also filed a petition to change court orders under section 388, seeking to modify the removal order and obtain "reunification-type" services and de facto parent status. The record does not include any order ruling on the section 388 petition.

## **DISCUSSION**

### **L.C.'s failure to seek writ relief warrants dismissing the current appeal**

We first examine whether the court's order removing Marcel and Micah from the PAPs' custody is an appealable order. An order by the court issued after a hearing pursuant to section 366.26, subdivision (n), is not appealable except as provided in subdivision (b) of section 366.28. (§ 366.26, subd. (n)(5).) After parental rights have been terminated, an order by the court that a dependent child is to be removed from a specific placement is not appealable "unless all of the

following apply: [¶] (A) A petition for extraordinary writ review was filed in a timely manner. [¶] (B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record. [¶] (C) The petition was summarily denied or otherwise not decided on the merits.” (§ 366.28, subd. (b)(1).) The restrictions on appealability set forth in section 366.28, subdivision (b), were prompted in part by the case of *In re Harry N.* (2001) 93 Cal.App.4th 1378, where the appeal took 18 months to resolve, at the end of which the child was removed from foster parents and placed with relatives, denying the child the security of a permanent placement for over a year. (*A.M. v. Superior Court* (2015) 237 Cal.App.4th 506, 513 (*A.M.*), citing Assem. Com. on Judiciary, analysis of Sen. Bill No. 59 (2003–2004 Reg. Sess.) as amended June 11, 2003, p. 1.)

A party seeking writ relief must file a notice of intent to file a writ petition within seven days after the posttermination placement order. (Cal. Rules of Court, rule 8.454(e)(4).) Because L.C. did not seek writ review within the period specified by the rules of court, she is precluded from appealing the order removing the children. (§ 366.28, subd. (b)(2).)

We do have limited discretion to treat an unauthorized appeal as an extraordinary writ. (*A.M., supra*, 237 Cal.App.4th at p. 515, citing *Olson v. Cory* (1983) 35 Cal.3d 390, 401.) “Where all the conditions necessary for issuing a writ of mandate are present, and a refusal to decide the issues raised by an improvident appeal would result in

unnecessarily dilatory and circuitous litigation, the court has the power to treat the appeal as a petition for writ of mandate. (*Olson v. Cory* (1983) 35 Cal.3d 390, 401.)” (*In re Albert B.* (1989) 215 Cal.App.3d 361, 372–373; see also *In re Ricky H.* (1992) 10 Cal.App.4th 552, 564 [declining to treat defective appeal as a writ petition].) In *A.M., supra*, 237 Cal.App.4th at pages 515–516, the reviewing court noted that the notice of appeal under consideration had been filed within the time limit for filing a notice of intent to file a writ petition, that the record was adequate for purposes of writ review, and the social services agency had responded on the merits without arguing for dismissal of the appeal. Thus, timely filing of the notice of appeal and acquiescence by the agency were factors taken into consideration.

Here, however, all of the conditions necessary for issuing a writ of mandate are not present. The PAPs were both present at the hearing under section 366.26, subdivision (n), so the time to file their notice of intent to file a writ petition was limited to seven days. (Cal. Rules of Court, rule 8.454(e)(4).) Instead, the notice of appeal was filed 22 days after the court made its removal order. Also, rather than acquiescing to have the appeal treated as a petition for writ relief, the Department has argued in both its December 17, 2018 letter brief and its respondent’s brief that the appeal should be dismissed because it seeks to challenge a non-appealable order. The Department further argues that although L.C. is self-represented, permitting her appeal to proceed as a writ petition would contradict the

Legislature’s purpose of ensuring expedited review. (*A.M., supra*, 237 Cal.App.4th at pp. 513–514.) Because L.C. has not shown extraordinary circumstances warranting treating her purported appeal as a petition for writ relief, her appeal must be dismissed.

**Even considering the merits of L.C.’s brief, there was no abuse of discretion**

Even if we were to reach the merits of L.C.’s arguments on appeal, she has not shown the court’s decision to remove Micah and Marcel from the PAPs’ custody was an abuse of discretion.

Section 366.26, subdivision (n), “provides for a hearing to review an agency’s decision to remove a child from the home of a prospective adoptive parent.” (*State Dept. of Social Services v. Superior Court* (2008) 162 Cal.App.4th 273, 284.) If the removal is undertaken under emergency circumstances, to alleviate an immediate risk of physical or emotional harm, the agency may remove the children prior to holding the hearing. (§ 366.26, subd. (n)(4).) “The juvenile court has the authority and responsibility to determine whether removal from the home of a prospective adoptive parent is in the child’s best interests. (§ 366.26, subd. (n)(3)(B).) If a prospective adoptive parent objects to the child’s removal from the home, the [Department] must prove by a preponderance of the evidence that removal from the prospective adoptive parent is in the child’s best



interests. This standard applies whether the [Department] has filed a notice of intent to remove the child under section 366.26, subdivision (n)(3), and the child is still in the home of the prospective adoptive parent, or the [Department] has removed the child from the home on an emergency basis under 366.26, subdivision (n)(4), as here. Under either circumstance, the juvenile court determines whether the proposed removal of the child from the home is in the child's best interests, and *the child may not be removed from the home unless the court makes that finding.* (§ 366.26, subd. (n)(3)(B).)" (*T.W. v. Superior Court* (2012) 203 Cal.App.4th 30, 45.) We review the juvenile court's determination of the children's best interests for abuse of discretion, meaning we will not disturb the court's ruling unless its decision is arbitrary or capricious. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319.)

Here, the juvenile court made an express finding based on the totality of the information that it was not in the children's best interests to remain in the custody of the PAPs. L.C. initially argues that it was an abuse of discretion to remove the children from the PAPs' care because they were loved and well-cared for by a couple that had acted as their parents for four years. She contends the court improperly attributed the resolution of Micah's ear wax issue to the new caregivers, even though the appointment had been made by the prospective adoptive parents. However, the record evidence contradicts L.C.'s point. The PAPs scheduled an appointment for Micah to see an ear specialist

on August 4, 2018. The new caregiver took Micah for an initial medical appointment at which some ear wax was removed, and then the rest was removed after multiple attempts at urgent care on July 29, 2018, after Micah was complaining of ear pain. In addition, there is nothing to rebut the evidence that the PAPs waited 18 days—between June 15, 2018, and July 9, 2018—to pick up the referral for Micah to see a specialist.

More importantly, L.C. not only fails to address the evidence concerning possible domestic violence, she ultimately argues in her reply brief that the evidence supports a reasonable inference that she was the victim of domestic violence.<sup>5</sup> At the hearing, the court credited the children’s assertions regarding domestic violence, and found the PAPs’ denials to be non-credible.

The totality of the circumstances before the court included evidence beyond the delay in obtaining treatment

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<sup>5</sup> Together with her reply brief, L.C. filed a request for judicial notice, asking this court to take judicial notice of a petition for dissolution of marriage filed by L.C., seeking divorce from D.C., filed on July 5, 2019, and served on July 7, 2019. L.C.’s request acknowledges that the documents presented were not available to the trial court and post-date the trial court’s decision, but she argues they are relevant to show she “has taken legitimate steps to remove herself from her relationship with [D.]C. and that such steps will eliminate the children’s exposure to domestic violence should the court reverse the lower court’s ruling . . . .” We deny the request for judicial notice.

for Micah's ear wax issue and the acknowledged domestic violence between the former caregivers. The court also had evidence that the PAPs had coached the children to lie about the status of the relationship between the PAPs and their living situation, and evidence that the children were scared at the prospect of even visiting the PAPs, much less returning to their custody. On this record, if we were not dismissing the appeal, we would affirm because the court's removal order was not an abuse of discretion.

**This court lacks jurisdiction to consider the denial of L.C.'s section 388 petition.**

L.C. argues in her opening brief that the juvenile court abused its discretion when it summarily denied the PAPs' section 388 petition, which was filed on the same day as their notice of appeal. We dismiss as untimely this portion of the appeal because the notice of appeal does not purport to appeal from any denial of a section 388 petition and because there is no evidence in the record the juvenile court had ruled on the petition at the time the notice of appeal was filed. (*Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 691 [notice of appeal filed before ruling on a motion is untimely].)

## **DISPOSITION**

The appeal is dismissed.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.