IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re K. C., A Person Coming Under The Juvenile Court Law. KINGS COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. J.C., Defendant and Appellant.	SUPREME COURT NO. S183-320 COURT OF APPEAL NO. F058395 JUVENILE NO. 08JD0075

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
FOR THE COUNTY OF KINGS

HONORABLE GEORGE L. ORNDOFF, JUDGE

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

What is the proper scope of the showing that a father's interests have been injuriously affected in order for the father to have appellate standing to challenge the denial of the paternal grandparents' Welfare and Institutions Code section 388 modification petition which sought relative

placement in the paternal grandparents' home, where the permanency hearing is pending?[1]

The Court of Appeal, Fifth Appellate District [Fifth Appellate District], in this opinion, holds that the parent must show that his interests *are* injuriously affected by the court's decision, not that the parent's interest theoretically might be affected and declines "an on-the-merits review of the trial court's ruling on the relative placement request." (Slip Opn. p. 10.)

INTRODUCTION

J.C.. and A.M. are the parents of seven boys, however, only K. is the subject of this appeal. One-month old K. was removed from his mother's custody after his oldest brother, Johnny C., aged 15, jumped from his mother's moving car- - Johnny C. died within days from massive head injuries sustained in the jump.

A section 300 petition on behalf of K. was filed. At the time of the filing, the older boys were dependents of the Tulare County juvenile court and all but Johnny were placed with the paternal grandparents, Mary and Leo C. , with a permanent plan of adoption. The grandmother appeared at K.'s detention hearing and requested that K. be placed in her home with

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[1] Hereinafter all statutory references are to the California Welfare and Institutions Code unless otherwise stated.

K.'s full siblings. The Agency assessed the grandparents' home as meeting the standards for relative placement, but nonetheless declined to place K. with his grandparents; the grandparents filed a grievance notice within days of learning about the denial. Unbeknownst to J.C. or his parents, days after receiving the grandparent's grievance notice, the Agency placed K. into another foster home which planned to adopt K.

The grandparents filed a section 388 modification petition, joined by J.C., requesting placement of K. However, the court denied the modification petition and terminated parental rights.

J .C. contends that he has standing to challenge the trial court's denial of his parent's section 388 modification petition requesting that K., his son, be placed with the paternal grandparents because he is a party of record and the Code of Civil Procedure, section 902 is a remedial statute which should be liberally construed in favor of the right to appeal.

Secondly, J.C. has standing to challenge the trial court's denial of the section 388 modification petition requesting that K. be placed with the paternal grandparents because he will retain a significant legal relationship to his son, i.e., that of a legal sibling, if K. is placed with the paternal grandparents under a permanent plan of adoption. This interest is neither nominal, remote, nor speculative, if K. is placed with the paternal

grandparents.

Thirdly, J.C. has standing to challenge the trial court's denial of the section 388 modification petition requesting that K. be placed with the paternal grandparents because the cases which hold that a father does not have a significant interest in the placement of his infant son ignore the well-documented importance of extended family and relative placements to the child, the siblings and the family as a whole. Since the father remains a part of the family, albeit as a legal brother, and not a father, his direct and personal interest is adversely affected.

And lastly, as a separate and distinct ground to assert standing to challenge the juvenile court's denial of the paternal grandparents' section 388 modification petition requesting relative placement, J.C. asserts that his counsel's active participation in the evidentiary hearing on the petition; joinder in the grandparents' argument in support of the section 388 modification petition; and his own argument in support of the petition constitutes a joinder of the petition, thereby conferring standing.

STATEMENT OF THE CASE AND THE FACTS

Jurisdiction/Disposition

On October 30, 2008, one-month old, K. C., was taken into protective custody because on October 25, 2008, K.'s older brother,

Johnny, aged 15, had jumped from A.'s moving vehicle and suffered fatal head injuries- - K. was in the vehicle at the time. (1 C.T. 12-14.) The Protective Custody Warrant affidavit alleged that A. had a long drug abuse history and that K.'s six older sibling were dependents of the Tulare County Juvenile Court based upon that drug use. (1 C.T. 8-9.)

On October 30, 2008, the Agency filed a petition alleging under Welfare and Institutions Code section 300, subdivision (b) that K. was at risk because A. abused methamphetamine and alcohol which rendered her incapable of providing regular care for K. (1 C.T. 3.) A. was alleged to have failed court-ordered drug treatment and had been arrested 12 times for drug or alcohol related charges- - the last was June 2008. (1 C.T. 3.) The petition also alleged under subdivision (j) that K.'s six older sibling are dependents of the Tulare County Juvenile Court in 2007 and that A. has failed to reunify with them. (1 C.T. 4.)

On October 30, 2008, the Tulare County Sheriff's deputies responded to an "attempted suicide" call which resulted from Johnny jumping from A.'s moving car. (1 C.T. 12.) A., the sole witness to the events told the deputy that she had not seen or spoken to Johnny in one-and one-half years, when he called and asked her to pick him up as he had run away from his residential treatment program. (1 C.T. 12.)

A. gave different versions of the subsequent events - - first she told the deputy that for unknown reasons, Johnny had begun to make statements about wanting to die and that he was going to jump from the car to kill himself. (1 C.T. 12.) A. slowed the car to 45 miles per hour when Johnny opened the door and jumped out. (1 C.T. 12.) Johnny hit the asphalt and landed on the shoulder of the road and A. made a u-turn and waited with Johnny until rescue personnel appeared. (1 C.T. 12.) A. reported that Johnny had a history of suicide attempts and had previously ingested pills in a suicide attempt. (1 C.T. 12.)

In the second version, A. reported that she and Johnny had gotten into a "heated argument" and that Johnny jumped out of the car and was struck by another car. (1 C.T. 13.) Then she denied that mother and son had argued, and reported that when Johnny jumped from the car, she was only going 15 miles per hour and he was not struck by another car. (1 C.T. 13.) A. was uncooperative during the investigation and authorities became concerned because K. was in the car at the time. (1 C.T. 13.) A. was also uncooperative with child protective workers - - she also had an outstanding warrant for $60,000. (1 C.T. 15-16.)

In the meantime, Johnny injuries were determined to be "not survivable" and he was ultimately taken off life support on October 29,

2008. (1 C.T. 14-15.)

Johnny and K.'s other siblings were taken into Tulare County Human Services Agency' s [THSA] custody in October 2007, as A. was allegedly dealing drugs, and J.C. had a warrant- - the children were not attending school regularly and were not fed or adequately supervised. (1 C.T. 46.) The parents were offered reunification services, but neither complied and as a result, the Agency recommended that services be terminated and adoption with the paternal grandparents selected as the children's permanent plan. (1 C.T. 46.)

The Agency also reported that the parents had a long child protective history dating back to 1999 based upon drug abuse. (1 C.T. 45.) While J.C. did initially comply with services and ultimately reunified during the first case, the children were subsequently placed with the paternal grandparents. (1 C.T. 45.) Both parents failed to participate successfully in reunification services and their parental rights to the older children were terminated on September 12, 2008. (1 C.T. 99.)

Both J.C. and his mother, Mary C., appeared at the detention hearing and Mary requested placement of K. (1 R.T. 8.)

In its jurisdictional report dated December 10, 2008, the Agency reported that K. was placed into a licensed foster home which was willing

to adopt K. (1 C.T. 81.)

In August and September of 2008, each parent had been convicted of one count of possession of pseudoephedrine- - A. was in violation of her probation and subject to a $60, 000 felony warrant, while J.C. was released early due to Johnny's death and awaited a bed at the Salvation Army drug treatment program. (1 C.T. 89.) J.C. had appeared at the detention hearing and had spoken to the Agency, but the Agency reported that it had no contact with A. to date. (1 C.T. 94.)

The Agency reported that Mary and Leonard C., the paternal grandparents, desired custody of K. (1 C.T. 96.) The Agency called the grandparents on November 13, 2008, and the grandparents were directed to come to Kings County to provide Livescan fingerprint specimens. (1 C.T. 96.) The grandparents could not come that day because K.'s wake and funeral were scheduled for that day and November 14, 2008, but the grandparents came to the Kings County Sheriff's Department and submitted the necessary fingerprints. (1 C.T. 96.) The Livescan results were received on December 2, 2008, and the Child Abuse Registry results followed- - Mary had no criminal record, but Leonard had a criminal history dating back to 1961 which required Agency waivers. (1 C.T. 96.)

The Agency worker called the grandparents on December 4, 2008,

and left a message to arrange the completion of paperwork necessary for placement assessment. (1 C.T. 96.) That same day, the grandparents returned the call and the relative assessment appointment was scheduled. (1 C.T. 97.)

The Agency recommended that no reunification services be offered to the parents based upon the failure of reunification in the siblings case. (1 C.T. 101.) The Agency recommended further that a selection and implementation hearing be set and that the most likely permanent plan for K. would be adoption. (1 C.T. 101.)

At the jurisdictional/ dispositional hearing, the Agency moved the court to judicially notice the dependency proceedings regarding K.'s older siblings in Tulare County Juvenile Court. (1 C.T. 122-300; 2 C.T. 301-467.)

Those records reflected that on October 15 and 16, 2007, the six brothers, Johnny , J.C. Jr., Adrian, Carlos, David and Gilbert were split between two foster homes. (1 C.T. 278.) But Johnny ran away from the placement that same day and was returned several days later, but he ran away from another foster care placement on April 23, 2008, and remained on runaway status until his death. (1 C.T. 278, 2 C.T. 413.)

Although A. reported the paternal grandparents' address as her

planned post-release address, the grandparents unequivocally stated that neither J.C. nor A. were welcome in their home. (2 C.T. 331.) The Tulare County HSA reported that the grandparents were grateful for custody of their grandchildren and expressed concern that the parents would complete the "minimum amount of services" to regain custody of the children but would then revert to their previous bad acts. (2 C.T. 327.) The children in the paternal grandparents' home consistently reported that they had no contact with either the parents or Johnny, who remained on runaway status. (2 C.T. 327.)

The grandparents were "fully committed" to the plan for adopting their grandchildren. (2 C.T. 388.) The Tulare County HSA Adoption worker observed the children with their grandparents and reported that the children appeared relaxed and close to their grandparents. (2 C.T. 388.) Johnny was assessed as unadoptable at that time- Johnny had run away from his foster home and his whereabouts were unknown- - the Tulare County workers have had no contact with Johnny since that time. (2 C.T. 414.)

J.C.'s counsel indicating that J.C. wished to reunify with K. and would be entering a one-year treatment program. (2 R.T. 103.) J.C. stipulated to the jurisdictional findings and the court found the petition true.

(2 R.T. 104.) The court also ordered that no reunification services be provided to the parents and scheduled a selection and implementation hearing for April 8, 2009. (2 C.T. 469.)

Selection and implementation hearing

Pending the selection and implementation hearing, the Agency scheduled a hearing on March 18, 2009, to appoint counsel for A., as she had been located. (3 R.T. 301.) The grandparents appeared at the March 18, 2009, hearing and requested the court to accept their letter requesting the Agency to reconsider the denial of placement with them. (3 R.T. 304-305.) The grandparents were first told, following a visit between the grandparents, K. and his brothers, on March 5, 2009, that the Agency had denied placement of K. in their home. (2 C.T. 597.) The court stated the only purpose of the hearing was to appoint A. a lawyer, and informed the grandparents another hearing was scheduled for April 8, 2009. (3 R.T. 304.) Subsequently, the grandparents were informed regarding the denial of their grievance in a letter dated March 24, 2009. (3 C.T. 690.)

On April 8, 2009, the Agency recommended that parental rights be terminated and that the permanent plan of adoption be selected for K.. (2 C.T. 544.) The Agency opined that no beneficial relationship existed between the parents and K. based upon the lack of any visits during the

dependency case. (2 C.T. 551.)

The Agency reported that K. had been placed into a "fost-adopt" family on March 19, 2009. (2 C.T. 548.) The adoptive parent is a single mother, aged 42, who has an adopted child- - she has an approved adoptive home study on file. (2 C.T. 549.) The Agency opined that even if the adoptive placement failed, it could easily find another adoptive family for K. (2 C.T. 549.)

The Agency reported that the paternal grandparents requested custody of K., but were denied placement even though the older five boys were placed with them with a permanent plan of adoption. (2 C.T. 551.)

Concurrently with the 366.26 WIC report, the Agency's Program Manager filed a supplemental report detailing that the grandparents had filed a letter on March 16, 2009, protesting the denial of placement in their home, as well as issuing a grievance and requesting review of the denial of placement in their home. (2 C.T. 557.) The Agency determined that the grandparents were not entitled to grievance process as the grievance procedure applied only to decisions that the home was deemed not to meet applicable licensing standards or decisions which denied an exception request for CPS or criminal offenses. (2 C.T. 558.)

But the paternal grandparents' home *was* approved for placement as

of December 17, 2008, as the worker who had evaluated the home certified"that the above named caregiver meets the standards for relative or non-relative extended family member home approval as of 12/17/2008." (3 C.T. 643.) And the Agency had granted the requested waiver for Leonard C.'s drunk driving convictions dating from 1961, as a minor, to 1967, and two convictions for driving while his license was suspended in 1968 and 1969. (3 C.T. 628- 630.)

The Agency denied placement with the grandparents based upon (1) "Failure to Disclose Location of Mother and Minor"; (2) "Failure to Disclose All Adults Living on Property"; "Grandparents Cannot Meet K.'s Needs"; "Placement Would Exceed their Abilities to Care and Supervise"; "History of Neglecting Children with Special Needs"; "Grandparents Demonstrated an Inability to Protect from Obvious Threats"; "Lack of Diligence in Developing a Relationship"; and "Inadequate Space". (2 C.T. 562, 563, 565, 568, 569, 572, 573.) The Agency opined that it was not in K.'s best interests to be placed with his paternal grandparents and his full siblings. (2 C.T. 577.)

During the April 8, 2009, the Agency attorney opined the grandparents lacked standing to address the court , and the court agreed, and directed the grandparents to file a section 388 modification petition and a

hearing would be held. (4 R.T. 403, 408.)

The paternal grandparents file a section 388 modification petition

On April 16, 2009, the paternal grandparents filed a section 388 modification petition requesting that the court modify the foster care placement order and order that K. be placed in their home, with his five siblings. (3 C.T. 729.) The grandparents addressed the grounds proffered by the Agency for denial of their request to place K. in their home. (3 C.T. 731-734.)

On April 22, 2009, the juvenile court found that K.'s best interests may be promoted by the request and granted hearing to be held May 22, 2009. (3 C.T. 751.) On that date, the matter was set for contested hearing on July 9, 2009, but the Tulare records were not produced and the matter was continued again. (5 R.T. 514; 6 R.T. 602.)

The caregiver filed a "Caregiver Information Sheet" asking the court to terminate rights with no "further visits to the biological family." (3 C.T. 755-756.)

At the contested hearing, held August 20, 2009, and concluding August 21, 2009, the grandparents, joined by J.C., presented evidence in support of their petition. (4 C.T. 1020-1030.)

Elizabeth Mason is a Tulare County Adoption Agency social worker

assigned to K.'s five siblings. (7 R.T. 808-809.) She has conducted fairly regular home visits to the paternal grandparents home and has met with school officials, medical professionals, and therapists; she is charged with investigating the appropriateness of adoption by the grandparents. (7 R.T. 810.) She disagreed with the assertion that the grandparents had neglected th e children's special needs, that the grandparents have failed to protect from obvious threats, that the grandparents home lacked space for an infant and believed, based on her observations, that the grandparents could meet the needs of an infant. (7 R.T. 811-814.) She would place K. in the grandparents home if he were under the control of the Tulare County. (7 R.T. 815.)

Felicity Moreno is the Tulare County adoptions social worker assigned to conduct the home study for the paternal grandparents; she concurred that the paternal grandparents could meet the needs of a sixth child, an infant, placed in their home- - she had no reservations. (7 R.T. 824-837.)

Andrew Galvan is Leonard's first cousin and lives on the grandparent's property in a separate RV; he participated in a records check for the Federal Bureau of Investigations and is approved to transport hazardous material and participated in another records check for Tulare

County and is approved to live on the property. (7 R.T. 839-844.)

Thomas Giampietro is the superintendent of the school that K.'s siblings attend; he has known the paternal grandparents for 10 or 11 years. (7 R.T. 847.) The children's attendance and school progress has improved since the children were placed with their grandparents; the grandparents also attend parent-teacher conferences and special school events without fail- - "they didn't miss any of those." (7 R.T. 748-749.)

The older boys' teacher, Janice Rush confirmed that the paternal grandparents are very supportive of the boys and she noted an improvement in the children when they were placed with the grandparents. (7 R.T. 859-863.)

Both Leonard and Mary also testified on their own behalf. (7 R.T. 864-910.)

The Agency presented the author of the Addedum report dated April 8, 2009. (8 R.T. 1003.) She testified, among other things, that K. was in two foster home placements; the first from detention until March 19, 2009, and the second from March 19, 2009 until present. (8 R.T. 1037.)

The Agency worker, Simon Puente testified that he told the grandparents that "we only offer once per month visits for grandparents and parents" and those visits are for "one hour." (8 R.T. 1057.)

At the close of evidence and argument of counsel, the court denied the section 388 modification petition and ordered that responsibility for "placement, care and control of K[.] C[.] should remain vested with the Kings County Human Services Agency." (8 R.T. 1112-1113.)

The matter then proceeded to the section 366.26 contested hearing; at its conclusion, the court found by clear and convincing evidence that K. was adoptable, selected adoption as K.'s permanent plan and terminated parental rights. (8 R.T. 1130-1131.)

J.C. and his parents filed notices of appeal- - J.C. timely appealed on August 27, 2009, but the Court of Appeal, Fifth Appellate District dismissed the grandparents' appeal as untimely. (4 C.T. 1045-10 46; Slip Opn. p. 4.)

On June 4, 2010, J.C. petitioned for Review and on July 14, 2010, J.C.'s Petition for Review was granted.

ARGUMENT I.

J.C. HAS STANDING TO CHALLENGE THE TRIAL COURT'S DENIAL OF THE SECTION 388 MODIFICATION PETITION REQUESTING THAT K. BE PLACED WITH THE PATERNAL GRANDPARENTS BECAUSE HE IS A PARTY OF RECORD AND THE CODE OF CIVIL PROCEDURE, SECTION 902 IS A REMEDIAL STATUTE WHICH SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF THE RIGHT TO APPEAL

J .C. contends that he has standing to challenge the trial court's

denial of his parent's section 388 modification petition requesting that K., his son, be placed with the paternal grandparents because he is a party of record and the Code of Civil Procedure, section 902 is a remedial statute which should be liberally construed in favor of the right to appeal.

Any party aggrieved may appeal. (Code Civ. Proc. § 902.) But "only parties of record may appeal." (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.) A party of record must either be named as a party to the proceedings or take "appropriate steps to become a party of record in the proceedings." (*Ibid.*) J.C. is a party of record, in that on November 4, 2008, the court found that J.C. is K.'s presumed father. (1 C.T. 61.) Thus J.C. is a "party of record" in the appeal as K.'s presumed father, as opposed to "[a]n alleged father in dependency or permanency proceedings [who] does not have a known current interest because his paternity has not yet been established." (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1352.)

The general rule is that a parent who is an aggrieved party may appeal a judgment in a juvenile dependency matter, and to be aggrieved, "a party must have a legally cognizable immediate and substantial interest which is injuriously affected by the court's decision" which is more than a "nominal interest or remote consequence of the ruling." (*In re Carissa G.* (1999) 76 Cal.App.4th 731, 734.) "Standing to appeal is jurisdictional."

(*In re Frank L.* (2000) 81 Cal.App.4th 700, 703.) "It is a well established policy that, since the right of appeal is remedial in character, our law favors hearings on the merits when such can be accomplished without doing violence to applicable rules. Accordingly in doubtful cases the right to appeal should be granted." (*Lee v. Brown* (1976) 18 Cal.3d 110, 113.)

The Code of Civil Procedure, "section 902 is a remedial statute, which should be 'liberally construed,' with 'any doubts resolved in favor of the right to appeal.'" *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 540) This concept has been repeatedly applied in dependency cases, as well. (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1053; *In re Valerie A.* (2007) 152 Cal. App. 4th 987, 999; *In re H.G.* (2006) 146 Cal.App.4th 1, 9.)

However, the Fifth Appellate District ruled that J.C., while a party of record, is not an aggrieved party, and dismissed his appeal for want of standing. But the analysis of standing should be governed by "the well-established policy, based upon the remedial character of the right of appeal, of according that right in doubtful cases 'when such can be accomplished without doing violence to applicable rules.'" (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal. 4th 894, 901.)

That a presumed father, a party of record, has an interest in the

placement of his infant son with the paternal grandparents, is a concept which does "no violence" to established rules and is consistent with the "abiding" and over-arching principle in all child dependency cases, including permanency planning hearings, which is the welfare and best interests of the child. (*In re Jason E.* (1997) 53 Cal.App.4th 1540, 1548; *In re Kerry O.* (1989) 210 Cal.App.3d 326, 333; § 366.26, subd. (h).)

The applicable rules governing this question of standing to contest the denial of relative placement reflect the legislative intent "to strengthen the relative placement preference, not to weaken it." (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 796.) In fact, the California Legislature has declared its intention that a child's family ties should be preserved and strengthened by giving preferential consideration, whenever possible, to the placement of said child with a relative where the child is removed from the physical custody of his or her parents. (§ 16000, subd. (a).) This declaration of legislative intent is consistent with the modifications which began as early as 1993, when "the Legislature added subdivision (d) to section 361.3 in a package of amendments designed in part to "strengthen[] the preferential consideration for placement given to relatives of a dependent child who has been removed from his or her home" (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 426 (1993–1994 Reg. Sess.), as

amended July 15, 1993, p. 1) and in part to "'clarify current law regarding the preference for placement of dependent children with relatives.'" (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 426 (1993–1994 Reg. Sess.), as amended April 20, 1993, p. 5, quoting from a letter in support of Sen. Bill No. 426 from the Cal. State Assn. of Counties.)" (*In re Joseph T., supra,* 163 Cal.App.4th. at p. 795.)

And further, in a section entitled "Mandatory Placement Recommendations" the legislature has decreed that: "If a probation officer determines to recommend to the court that a minor alleged to come within Section 300, 601, or 602, or adjudged to come within Section 300, 601, or 602 should be removed from the physical custody of his parent or guardian, the probation officer shall give primary consideration to recommending to the court that the minor be placed with a relative of the minor, if such placement is in the best interests of the minor and will be conducive to reunification of the family." (§ 281.5.)

The preference applies at the dispositional hearing and thereafter "whenever a new placement of the child must be made … ." (§ 361.3, subd. (d).)" (*In re Lauren C.* (2007) 148 Cal.App.4th 841, 854.) "Placement with a suitable relative is presumptively in the child's best interest. (§§ 309, 319, 361.3, subd. (a), 16000, subd. (a), 16501.1, subd. (c)(1).)" (*In re*

Esperanza C, supra, 165 Cal.App.4th at p. 1060.)

And as section 361.3, subdivision (a)(2), obligates the juvenile court to consider the wishes of the parent when determining whether relative placement is appropriate, the liberal application of the right to appeal, by allowing the father standing to be heard regarding the denial of his parents' placement petition, which he joined, likewise does no "violence to applicable rules." And since the Legislature has mandated that J.C.'s wishes regarding the relative placement are of sufficient weight that the court must consider those wishes, any ruling adverse to the parents' explicit wishes constitute the requisite "legally cognizable immediate and substantial interest which is injuriously affected by the court's decision" which is more than a "nominal interest or remote consequence of the ruling." (*In re Carissa G., supra*, 76 Cal.App.4th at p. 734.)

J.C. had a right to appear and to be heard on the merits of his parents' section 388 modification petition. And logically "[o]nce the right to appear is established, the right to appeal an adverse decision should follow. 'The right of appeal should be recognized unless the statute provides otherwise, and it should not be denied upon technical grounds if the appellant is acting in good faith.'" (*Guardianship of Pankey* (1974) 38 Cal. App. 3d 919, 927.)

ARGUMENT II.

J.C. HAS STANDING TO CHALLENGE THE TRIAL COURT'S DENIAL OF THE SECTION 388 MODIFICATION PETITION REQUESTING THAT K. BE PLACED WITH THE PATERNAL GRANDPARENTS BECAUSE HE WILL RETAIN A SIGNIFICANT LEGAL RELATIONSHIP TO HIS SON, I.E., THAT OF A LEGAL SIBLING, IF K. IS PLACED WITH THE PATERNAL GRANDPARENTS UNDER A PERMANENT PLAN OF ADOPTION

J.C. has standing to challenge the trial court's denial of the section 388 modification petition requesting that K. be placed with the paternal grandparents because he will retain a significant legal relationship to his son, i.e., that of a legal sibling, if K. is placed with the paternal grandparents under a permanent plan of adoption. This interest is neither nominal, remote, nor speculative, if K. is placed with the paternal grandparents.

First, the very strong likelihood is that K. will be adopted by the paternal grandparents if their section 388 modification petition is granted. The paternal grandparents timely requested placement- at the detention hearing, and again on December 10, 2008, at which the juvenile court removed K. from his parents and placed K.'s care, custody and control is placed under the supervision of the Respondent Agency. (2 C.T. 473.) During that hearing, the paternal grandparents, who had requested placement at the detention hearing, again, made it clear that they wished to

have K. placed with them, and that they were in the process of adopting the older full siblings. (1 R.T. 8; 2 R.T. 107-108.) The Agency's counsel represented, in response to the court's inquiry regarding placement with the paternal grandparents, that "it is just whether the home is going to be adequate for licensing purposes." (2 R.T. 112.)

At the time of the December 10, 2008, court order, the paternal relatives' out-of-county home evaluation had not taken place, even though the Agency knew that the grandparents had passed muster in Tulare County, such that adoption with the grandparents was selected as the five older boy's permanent plan. (2 C.T. 374.)

The paternal grandparents' home *was* approved for placement by the Respondent Agency, as of December 17, 2008, as the worker who had evaluated the home certified"that the above named caregiver meets the standards for relative or non-relative extended family member home approval as of 12/17/2008." (3 C.T. 643.) Further the Respondent Agency had granted the requested waiver for Leonard C.'s drunk driving convictions dating from 1961, when he was a minor, to 1967, and two convictions for driving while his license was suspended in 1968 and 1969. (3 C.T. 628- 630.)

Nevertheless, the Respondent Agency decided against placement with the grandparents, although the paternal grandparents have been

approved for placement and adoption of the siblings and by all accounts of the social service agency providers which actually has contact with them and the children, the placements are going well. The grandparents were "fully committed" to the plan for adopting their grandchildren. (2 C.T. 388.) The Tulare County HSA Adoption worker observed the children with their grandparents and reported that the children appeared relaxed and close to their grandparents. (2 C.T. 388.)

In fact, both Tulare County Adoption Agency social workers assigned to K.'s five siblings and the grandparents have conducted regular home visits to the paternal grandparents home, met with school officials, medical professionals, and therapists. (7 R.T. 810, 824-837.) Neither worker had any doubt, based on their observations, that the grandparents could meet the needs of an infant. (7 R.T. 811-814; 824-837.) The adoption worker, Elizabeth Mason, disagreed with the Agency's assertion that the grandparents had neglected the children's special needs, that the grandparents have failed to protect from obvious threats, or that the grandparents home lacked space for an infant and would place K. in the grandparents home if he were under the control of the Tulare County. (7 R.T. 815.)

The testimony from the school official and teacher is likewise compelling in that the children's attendance and school progress has

improved since the children were placed with their grandparents; the grandparents also attend parent-teacher conferences and special school events without fail- - "they didn't miss any of those." (7 R.T. 748-749.) And the paternal grandparents are very supportive of the boys. (7 R.T. 859-863.)

Thus, J.C. has demonstrated that the likelihood of his parents being approved for adoption in the neighboring county and therefore, that the paternal grandparents would adopt K. is not a"nominal interest or remote consequence of the ruling." (*In re Carissa G., supra*, 76 Cal.App.4th at p. 734.) And further, adoption with the paternal grandparents furthers and promotes J.C.'s interests in a portion of the "companionship, custody, management and care" held to be a fundamental interest. (*In re H.G., supra*, 146 Cal. App. 4th at p. 9.)

But the Fifth Appellate District focused too narrowly on only one aspect of J.C.'s fundamental interest in the child's companionship, custody, management and care in determining that J.C. lacked standing. The court noted that "father confuses his fundamental interest, which would have been extinguished in any event, with the possibility that he might visit K. at some future point if the grandparents saw fit." (Slip Opn. 10.) The Fifth Appellate Court is correct that termination of parental rights would temporarily extinguish J.C.'s legal relationship with his son.

But the Fifth Appellate District ignores the reality that adoption by the paternal grandparents creates a new set of legal relationships. First, the paternal grandparents and K. "shall sustain towards each other the legal relationship of parent and child and have all the rights and are subject to all the duties of that relationship." (Fam. Code §8616.) And since J.C. is the legal child of the paternal grandparents, J.C. and K., will also have a new legal relationship, namely the sibling relationship. They will be legal brothers, in addition to their biological link.

The sibling relationship carries with it a panoply of legal rights. For instance, should either of the paternal grandparents die, J.C. would have the statutory right to petition the court for reasonable visitation with K. during his minority "upon a finding that the visitation would be in the best interest of the minor child." (Cal. Fam. Code 3102(a).) A similar right is extended to siblings in Louisiana, where a parent has died. (La. Rev. Stat. Ann. 9:344, subdivision C.)

Interestingly, a sibling may petition the court court for sibling visitation, even where the parents are not deceased in Arkansas, Illinois, Maryland, New Jersey and New York. (Ark. Code Ann. 9-13-102; 750 Ill. Comp. Stat. Ann. 5/607(b)(1); Md. Code. Ann., Fam. Law 5-525.2; N.J. Stat. Ann. 9:2-7.1(a); N.Y. Dom. Rel. Law 71.) And in New York, a mother, whose parental rights were terminated upon adoption of her son by

the maternal grandparents, "did assume the role of a full sibling and may commence a proceeding seeking visitation with her adoptive brother", pursuant to Domestic Relations Law § 71. (*Jeanette H. v Angelo V.* (1990) 562 N.Y.S.2d 368, 369.)

And although not likely, should K. enter the foster care system again, J.C. would have the same rights to preferential placement consideration as defined by both federal and state law. (42 USCS §§ 671, subd. (a)(19); Fam. Code § 7950; §281.5; §309; §319; §361.3, subds. (a) & (d);§16000, subd. (a); §16501.1, subd (c)(1).) And under section 388, subdivision (b)

J.C. would be entitled to notice of any guardianship proceedings under the Probate Code and must be named in any petition filed therein. (Prob. Code § 1511; 1510, subd. (c)(3).) And "the fact that the Legislature has directed the court to exercise its discretion to give notice to relatives of the minor residing in the state (§ 1441, fn. 2 above), indicates that those relatives may have some interest in the matter." (*Guardianship of Pankey, supra,* 38 Cal. App. 3d at p. 927.)

J.C. and K. would be co-equal in intestate succession (Probate Code Section 6400-6414.) And they would share equal decision-making for interment of the family members upon their death, under Health and Safety Code section 7100, subdivision (a)(5).

In short, the sibling relationship has concrete legal ramifications, obligations, and benefits- - J.C.'s fundamental interest in the parent-child relationship will emerge Phoenix-like from the ashes in the form of a legal bond between brothers and a new legal interest worthy of protection.

ARGUMENT III.

J.C. HAS STANDING TO CHALLENGE THE TRIAL COURT'S DENIAL OF THE SECTION 388 MODIFICATION PETITION REQUESTING THAT K. BE PLACED WITH THE PATERNAL GRANDPARENTS BECAUSE THE CASES WHICH HOLD THAT A FATHER DOES NOT HAVE A SIGNIFICANT INTEREST IN THE PLACEMENT OF HIS INFANT SON IGNORE THE WELL-DOCUMENTED IMPORTANCE OF EXTENDED FAMILY AND RELATIVE PLACEMENTS TO THE CHILD, THE SIBLINGS AND THE FAMILY AS A WHOLE. SINCE THE FATHER REMAINS A PART OF THE EXTENDED FAMILY, HIS DIRECT AND PERSONAL INTEREST IS ADVERSELY AFFECTED

J.C. has standing to challenge the trial court's denial of the section 388 modification petition requesting that K. be placed with the paternal grandparents because the cases which hold that a father does not have a significant interest in the placement of his infant son ignore the well-documented importance of extended family and relative placements to the child, the siblings and the family as a whole. Since the father remains a part of the family, albeit as a legal brother, and not a father, his direct and personal interest is adversely affected.

Recent published decisions rendered in the Court of Appeal, Fourth Appellate District, Division One, in *In re H.G.,supra*, 146 Cal.App.4th 1,

10 (*H.G.*) and *In re Esperanza C., supra,* 165 Cal.App.4th 1042, 1054 (*Esperanza C.*) recognized that placement of a child with a relative has the potential to alter the juvenile court's determination of the child's best interests and the appropriate permanency plan for that child, and may affect a parent's interest in his or her legal status with respect to the child, therefore the parent has standing to challenge the order denying relative placement.

In *H.G.*, the parental rights were not terminated at the time of the relative placement decision; thus despite the fact that reunification was no longer a goal of the dependency proceedings, the parents retained a fundamental interest in the companionship, custody, management and care of the child. (*In re H.G., supra,* 146 Cal.App.4th at p. 9.) This interest is reflected in the language of section 361.3, subdivision (a)(2), which obligates the juvenile court to consider the wishes of the parent when determining whether relative placement is appropriate, as well as section 388 , which allows for the return of the child to parental custody upon a showing of changed circumstances after reunification services are terminated, and section 366.21, subdivision (h), which allows for parental visitation even after the termination of reunification services. (*Id.* at pp.9-10.)

Courts have "recognized that placement of a child with a relative

has the potential to alter the juvenile court's determination of the child's best interests and the appropriate permanency plan for that child, and may affect a parent's interest in his or her legal status with respect to the child," thereby conferring standing. (*In re Esperanza C., supra,* 165 Cal.App.4th at p. 1054.) And even if "an alternative permanency plan to adoption may be unlikely on this record, it remains a statutory option for the juvenile court." (*Ibid.*)

However, this "broader view" was not always the case. J.C. concedes that some appellate courts of this state have limited the right of a parent to challenge the denial of relative placement requests for want of standing, holding that the only possible interest a parent can have in a dependency case is in reunification with the child. (*Cesar V. v. Superior Court* (2001) 91 Cal. App. 4th 1023, 1035; *In re Vanessa Z.* (1994) 23 Cal. App. 4th 258, 261; *In re Daniel D.* (1994) 24 Cal. App. 4th 1823, 1835.)

The Fifth Appellate District agreed that J.C. retained a fundamental interest in the companionship, custody, management and care of the child, but held that J.C.'s interests were not "injuriously affected" by the denial of his parent's placement request. (Slip Opn. 6-7.) The court reasoned that since the legal parental relationship was extinguished by virture of the adoption, regardless, of who adopted, J.C. had no interest to be

"injuriously affected" by the court's decision. However, as argued above, J.C. would continue to have a legal relationship with K. as a brother, if not as a father.

But this restrictive view of the interests of an extended biological family is unwarranted. As the United States Supreme Court noted:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. (*Moore V. City of East Cleveland, Ohio* (1977) 431 U.S. 494, [97 S. Ct. 1932; 52 L. Ed. 2d 531.].)

J.C.'s interest in his son is far beyond simple physical reunification- - it is an interest in the integrity of the extended biological family and the need to protect that integrity from specious government action. Preserving the integrity of his biological family is important and legally defensible as J.C. , K. and K.'s older full siblings will all share the legal bond of brotherhood.

The importance of blood relatives has been explained as "the common-sense notion that blood relatives are most likely to look out for one another's interests, through good times and bad" is the basis for the blood relative preference in the State of Minnesota. (*In the Matter of the*

Welfare of D.L. (1992) 486 N.W.2d 375, 380.) And the "integrity and stability of their familial relationship" has been noted to be an important private liberty interest. (*Rivera v. Marcus* (2d Cir. 1982) 696 F.2d 1016, 1027.) And advocates for relative placement report that:

> Children and relatives often describe the intangible benefits of permanence in grandfamilies—when achieved through adoption or guardianship. Youth speak of their sense of belonging when they live with an aunt or grandparents. Relatives discuss their sense of commitment to their children and to their children's biological parents. Youth often mention that their relationship with their brothers and sisters, which they are able to sustain when they live with relatives, are the strongest and most stable aspect of their lives. (*Time for Reform: Support Relatives in Providing Foster Care and Permanent Families for Children* (http://ipath.gu.org/documents/A0/OutcomesForChildren_Final.pdf.).)

And besides "California's strong public policy favoring the facilitation of family reunification" through placement relative caregivers who are more likely to favor the goal of reunification and less likely than nonrelative caregivers to compete with the parents for permanent placement of the child, the courts have recognized that "[a] relative, who presumably has a broader interest in family unity, is more likely than a stranger to be supportive of the parent-child relationship." (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 797-798.) This broader interest in family unity is what sets apart the relative placement with the paternal grandparents from the fostercare placement in this case and demonstrates the depth of the injurious

effect on J.C.'s interests.

The paternal grandparents were unequivocal that J.C. and A. would have no contact with the children, due to their drug abuse and lifestyle, but Mary also testified that in the future if J.C. and A. "straighten up, if they have a home and a job, if they live a different lifestyle, then we're willing to let them see the children and the children see them." (7 R.T. 875, 885, 868.) The children in this case are K.'s full siblings who are in the process of being adopted by the grandparents, as well as K. By contrast, the current careprovider stated to both the court and the Agency that she requested no visits with the biological family. (3 C.T. 755-756.) This also included the biological full siblings of K.

Thus, the denial of the paternal grandparents' section 388 modification petition requesting custody directly impacts J.C.'s future practical relationship with his son, regardless of the legal "parent-child" relationship. If K. is placed with J.C.'s parents with the permanent plan of adoption, J.C. has the opportunity to visit and have a relationship with his son, contingent on J.C.'s appropriate behavior and lifestyle. But if K. is adopted by the current foster placement, there is no potential for a future legal or practical relationship. Thus J.C. has an "immediate and substantial interest" which has been adversely affected by the juvenile court's denial of placement with the paternal family.

In short, J.C. has standing to appeal the denial of his parents' section 388 modification petition requesting that the court place K. into their home for permanent placement.

ARGUMENT IV.

J.C. HAS STANDING TO CHALLENGE THE TRIAL COURT'S DENIAL OF THE SECTION 388 MODIFICATION PETITION REQUESTING THAT K. BE PLACED WITH THE PATERNAL GRANDPARENTS BECAUSE HE IS A PARTY OF RECORD AND HIS COUNSEL ACTIVELY PARTICIPATED AT THE CONTESTED HEARING ON THE PETITION; SPECIFICALLY JOINED THE ARGUMENT OF THE PATERNAL GRANDPARENTS' COUNSEL AND REQUESTED THE COURT PLACE K. WITH THE PATERNAL GRANDPARENTS

As a separate and distinct ground to assert standing to challenge the juvenile court's denial of the paternal grandparents' section 388 modification petition requesting relative placement, J.C. asserts that his counsel's active participation in the evidentiary hearing on the petition; joinder in the grandparents' argument in support of the section 388 modification petition; and his own argument in support of the petition constitutes a joinder of the petition, thereby conferring standing.

To reiterate, as established in Argument I., J.C. is clearly a party of record in this matter. In addition, J.C.'s unequivocal position from the outset, was that he desired his son placed with the paternal grandparents. To that end he appeared with his mother at the detention hearing when she requested placement of K. in her home. (1 R.T. 8.)

Then at the May 21, 2009, initial hearing on the paternal grandparents' section 388 modification petition requesting placement of K. in their home, the court inquired of all parties regarding their position on the requested relief. (5 R.T. 509-511.) Counsel for J.C. responded "Well, the last thing my client said to me when we had communication was he didn't want children with anybody other than his parents. So I would join in that request for a contested hearing. (5 R.T. 511.)

Then during the contested hearing on the section 388 modification petition, held on August 20, 2009, which concluded on August 21, 2009, J.C.'s counsel stated "I would like to join in counsel's argument. But because I agree with it, there are a couple of points I want to make too." (8 R.T. 1098.) Then, at the conclusion of his argument, counsel requested the court to follow counsel's recommendation in regard to placement of the child with the grandparents. (8 R.T. 1099.) Throughout the taking of testimony, counsel for J.C. also participated in the hearing by questioning witnesses in support of the modification petition, such as the author of the report denying the grandparents' grievance appeal (8 R.T. 1017-1023), the paternal grandmother (7 R.T. 897-899); and the Tulare County Adoption social worker (7 R.T. 830-832).

The Fifth Appellate District noted: "Following a two-day evidentiary hearing on the grandparents' petition, father's counsel joined in their

argument for placement." (Slip Opn. 3.) This joinder alone should be sufficient to confer standing. In denying a father appellate standing to challenge the dismissal of a mother's section 388 petition for reunification services and visitation, the Court of Appeal, Third Appellate District ruled that "appellant must show how the denial of a modification petition filed by the mother, which did not relate to appellant, and in which appellant did not join, affected his interests." (*In re D.S.* (2007) 156 Cal. App. 4th 671 , 674.) The Third Appellate District noted that the record provided no support for the claim, because [p]resumably, had he wished to do so, at the hearing on the petition appellant could have joined in the mother's arguments. He did not so join, probably because he had no stake in the mother's request for a visitation order." (*Ibid.*)

Here J.C. counsel did more than simply join in the argument- - he joined in the requested relief at the first hearing on the section 388 modification petition and proffered his client's explicit statement that he wanted his child with his parents. (5 R.T. 511.) Then, counsel actively participated in the proceedings through examination of witnesses. (7 R.T. 830-832, 897-899; 8 R.T. 1017-1023) And again, at the close of evidence, reiterated his client's desire to have K. placed with the paternal grandparents, joined in the arguments of the paternal grandparents' counsel and expanded the argument with his own points.

In *Cesar V. v. Superior Court, supra*, the appellate court allowed the father to challenge the denial of his mother's section 388 modification petition requesting preferential relative placement consideration, where the father "extensively litigated the issue below," although the court noted that otherwise, father lacked appellate standing. (*Cesar V. v. Superior Court, supra*, 91 Cal. App. 4th at p. 1034.)

Under these circumstances, J.C. has joined the grandparents' section 388 modification petition, and his rights are intertwined such that he properly challenged the denial of that petition on appeal.

CONCLUSION

J.C. requests this court to allow him to challenge the wrongful denial of his parents section 388 modification petition requesting that his son, K., be placed into the home of the paternal grandparents, so the grandparents can adopt K., along with his other five siblings. Trial court decisions of this magnitude, which affect the very fabric of families such as J.C.'s, should be able to withstand the scrutiny of appellate review.

To foreclose such review on the technical grounds of standing flies in the face of the "well established policy that, since the right of appeal is remedial in character, our law favors hearings on the merits when such can be accomplished without doing violence to applicable rules. Accordingly in doubtful cases the right to appeal should be granted." (*Lee v. Brown* (1976)

18 Cal.3d 110, 113.)

Respectfully submitted:

Date: September 23, 2010 _____

MONICA VOGELMANN
Attorney for Appellant

Word Count Certification

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I, Monica Vogelmann, appointed counsel for appellant, hereby certify that I prepared the foregoing Appellant's Opening Brief on the Merits on behalf of my client, and that the word count for this brief is [_8,641__] excluding tables. This brief therefore complies with the rule which limits a computer-generated brief to 14,000 words. I certify that I prepared this document in Word Perfect X4 word processing program, and that this is the word count the Word Perfect X4 word processing program generated for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: September 23, 2010 _____

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In re K.C.
Supreme Court No. S183-320
Court of Appeal No. F058395
Superior Court No. 08JD0075

DECLARATION OF SERVICE

I, the undersigned, declare: I am over the age of eighteen years and not a party to the cause; I am employed in, or am a resident of, the County of Otsego, New York where the mailing occurs; and my business address is P.O. Box 1034, Cooperstown, New York 13326. I served the Appellant's Opening Brief on the Merits by placing a true and correct copy thereof in a separate envelope addressed to each addressee listed below

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I then sealed each envelope and with the postage thereon fully prepaid, I placed each for deposit in the United States mail at Cooperstown, New York, on September 23, 2010. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 23, 2010, at Cooperstown, New York.

_____
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