

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re J.G., a Person Coming Under the
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

A.G.,

Defendant and Appellant.

A135110

(Alameda County
Super. Ct. No. HJ11016655D)

I.

INTRODUCTION

In this juvenile dependency matter, appellant A.G., the maternal grandmother of the minor, J.G., appeals from an order denying her petition under Welfare and Institutions Code section 388.¹ In appellant’s section 388 petition, she requested removal of J.G. from her foster parents, who have cared for the minor her entire life and who wish to adopt her, and that a placement in appellant’s home should be made. The juvenile court

¹ All statutory references are to the Welfare and Institutions Code. Under section 388, a dependency court order may be changed or modified upon a showing of changed circumstances or discovery of new evidence so long as the proposed change or modification would promote the best interests of the child. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415 (*Jasmon O.*)) We adopt the *Jasmon O.* court’s usage of “best interests” of the child in the plural, rather than the singular, and have made all such appropriate adjustments throughout this opinion for consistency.

denied appellant's section 388 petition after finding that a change in placement was not in the minor's best interests.

On appeal, appellant primarily contends that the Alameda County Social Services Agency (the Agency) and the juvenile court gave insufficient weight to appellant's placement request under the requirements of section 361.3, affording preferential consideration to a relative's request. Appellant claims the resulting denial of her section 388 petition should be reversed to allow her the full benefits of preferential placement consideration under section 361.3, and "the matter remanded to the trial court to start the transition of [the minor] into her grandmother's home."

For the reasons stated below, we determine that the court's denial of appellant's section 388 petition did not constitute an abuse of discretion. Therefore, we will affirm the challenged order.

II.

FACTS AND PROCEDURAL CIRCUMSTANCES

The minor was taken from her mother's custody a few days after her birth in March 2011 after the mother exhibited abnormal and uncooperative behavior in the hospital. At three days old, the minor was placed in her current foster home, where she has remained throughout these proceedings.

The mother has a long-standing and well-documented history of mental health problems which have resulted in a string of inpatient psychiatric hospitalizations. She has a diagnosis of schizophrenia and bipolar disorder that is untreated because she denies that she has a mental illness, and believes it is a violation of her rights to be forced to take medication.

Appellant, the maternal grandmother, was present at the hospital following the minor's birth. At that time, she expressed an interest in having the minor placed in her care. Shortly after the minor's birth, a "Team Decision Making Meeting" was held to determine the best placement option for the minor. It was decided that appellant would be the first choice for placement pending home approval and the second choice was to have the minor remain in foster care. However, appellant delayed completing the

required home assessment. Appellant reported that she was unable to have her home assessed because she was in the middle of remodeling it; the kitchen was completely gutted and one of the bathrooms was being remodeled. Several months later, the Agency's social worker told appellant that the relative assessment referral needed to be closed because any assessment needed to be completed within 30 days. Appellant was informed that a new referral could be submitted when the construction was done and her home was ready for assessment.

In the meantime, dependency jurisdiction was assumed over the minor and she was continued in her foster care placement. The mother received reunification services but was out of compliance with her reunification plan. Her behavior deteriorated over the course of the minor's dependency, and she committed a number of violent and threatening acts toward those having contact with the minor. She believed the minor had been kidnapped and that the Agency "is a child-kidnapping organization with child-kidnapping artists." She wrote to Governor Edmund G. Brown, Jr. explaining that she is "fighting to get my newborn child out of the corrupted Juvenile Court" and she sought his assistance to "return my infant kidnapped by Child Protective Services." For their own safety, the minor's social worker and foster family obtained restraining orders against the mother. She violated the restraining order by going to the foster parents' home and sending letters and documents in the mail.

On November 7, 2011, at the six-month review hearing, mother's reunification services were terminated. The minor's foster parents were granted de facto parent status, and the trial court set the case for a permanency planning hearing pursuant to section 366.26.

On September 14, 2011, appellant again expressed her interest in having the minor placed with her. The social worker informed appellant that there was no guarantee that she would be selected for placement because the minor, who was now six months old, had developed a loving relationship with her foster parents, who wished to adopt her, and she was thriving in their care. On October 3, 2011, a second meeting was held to determine the best permanency option for the minor. Appellant participated in the

meeting. The Agency recommended that the minor remain in her current placement with a permanent plan of adoption. Nevertheless, on October 13, 2011, appellant was referred for a relative home assessment. Appellant's home was approved on November 10, 2011.

Appellant filed a section 388 petition on November 18, 2011, requesting the court place the minor in her home. She explained the delay in seeking custody: "Early on in the case . . . [w]hen the baby was born, my house was under construction. I attempted over and over to complete the project, but there was one problem after another (out of my control) such as unexpected plumbing problems, [and] contractor injury which significantly delayed the project. Once the project was near completion, I attempted to re-apply for relative placement and that is what I have done at this time." She indicated: "I have asked for visitation over and over and the social workers have luckily accommodated my requests, however, I have only had four visits." "Although I had [only] four visits, they were wonderful."

In the report prepared for the hearing on appellant's section 388 petition, the Agency recommended that the minor remain with her foster parents and that adoption remain the permanent plan. The social worker wrote: The minor, "age 11 months, has developed a close relationship with her caregivers. They have been providing her consistent care since she was 3[]days old. Although [appellant's] home has been approved, it does not appear to be in [the minor's] best interest[s] to move her. It is concerning that it took 8 months for the home . . . to be approved and during [that] time [appellant] did not pursue consistent visitation. As a result, it is recommended to maintain [the minor's] placement in her current home under the plan of adoption."

A contested hearing on appellant's 388 petition commenced on February 27, 2012. Appellant testified that she is willing to adopt the minor and cooperate with all court orders. She has the financial means to take care of the minor. She gets support from her ex-husband and she has a business, a party supply store. She does not run her business because she is busy with her family. She has been in the same three-bedroom house for 18 or 19 years. She lives there with two of her children. She has a room and baby supplies ready for the minor.

Appellant explained that she wanted to have the minor placed with her after she was born but her “house wasn’t ready.” The house was under construction from approximately September 2010, prior to the minor’s birth, until about October 2011. At the time of her testimony, appellant indicated she had participated in five supervised visits with the minor. She acknowledged that she did not visit the minor for a four-month period between April and August 2011. She explained further that she did not make a request to see the minor more at the beginning of the minor’s life because she thought the mother would “follow through with her kid.” Appellant admitted during the minor’s entire dependency, she had never made a request for visitation that was denied.

Appellant testified that her daughter, the minor’s mother, had not lived with her for about three years, and that she does not visit. However, she acknowledged that in the recent past, appellant had allowed the mother to use her address to receive mail; and appellant had let the mother use her cell phone because the mother did not have a phone. She indicated that if the minor was placed with her, she would be willing to call the police and file for a restraining order in order to protect the minor from her mother.

The court announced its ruling on March 16, 2012. The court denied appellant’s section 388 petition for modification after finding that appellant “not necessarily through any fault of her own, . . . has not established a relationship with this child in the way that [the foster parents] have established a relationship. [Appellant] has had five visits with the child which is about six hours during the course of her life.” The court found “it would not be in [the minor’s] best interest[s] to be removed from the custody” of the foster parents who have offered her “a stable placement.”

III.

DISCUSSION

A. Standard of Review

The grant or denial of a petition brought under section 388 is committed to the sound discretion of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*)). The court’s “ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.]” (*Ibid.*) Likewise, that same deferential

standard governs review of the juvenile court’s decision whether to place a dependent child with relatives. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067; *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863 (*Alicia B.*))

B. Overview of Parties’ Contentions on Appeal

Appellant asserts that by enacting section 361.3, the Legislature has indicated its preference that dependent children be placed with relatives; and in this case, the Agency “fail[ed] to articulate a viable reason why it did not make a concerted, good faith effort to place [the minor] with her own grandmother.” She requests the case be remanded with directions to the court to: (1) vacate its order denying appellant’s placement request; and (2) start the process of transitioning the minor into her home.

In response, the Agency insists that the court properly denied appellant’s section 388 petition and motion to change placement because a new placement was not necessary, and therefore the section 361.3 relative placement preference did not apply. The Agency also claims appellant has failed to show that removing the minor from her de facto parents and the only home she has ever known would be in the child’s best interests.

C. Section 361.3—Relative Placement Preference

Section 361.3, often referred to as the relative placement preference, provides that preferential consideration must be given to suitable relatives whenever the placement of a dependent child must be made. (§ 361.3, subds. (a), (d).) “ ‘Preferential consideration’ means that the relative seeking placement shall be the first placement to be considered and investigated.” (§ 361.3, subd. (c)(1); *In re Sarah S.* (1996) 43 Cal.App.4th 274, 286 (*Sarah S.*) [preferential consideration places the relative at the head of the line when the court is determining which placement is in the child’s best interests].) However, the relative placement preference established by section 361.3 does not constitute “a relative placement *guarantee*.” (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 798, original italics (*Joseph T.*)) Although the statute does not insure relative placement, it does “express[] a command that relatives be assessed and *considered* favorably, subject to the juvenile

court’s consideration of the suitability of the relative’s home and the best interests of the child.” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 320, original italics.)

Section 361.3 identifies the factors that the court and social worker must consider in determining whether the child should be placed with a relative, including the child’s best interest, the parents’ wishes, the good moral character of the relative and any other adult living in the home, the nature and duration of the relationship between the child and the relative, the relative’s desire to provide legal permanency for the child if reunification fails, and the relative’s ability to protect the child from his or her parents. (§ 361.3, subd. (a)(1)-(8).) The juvenile court is required to consider the factors identified in section 361.3, subdivision (a), “in determining whether placement with a particular relative who requests placement is appropriate. [Citation.]” (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 377, fn. omitted.) However, the “linchpin of a section 361.3 analysis is whether placement with a relative is in the best interests of the minor. [Citation.]” (*Alicia B.*, *supra*, 116 Cal.App.4th at pp. 862-863.)

D. Applicability of Section 361.3

Although the issue was contested, the juvenile court believed appellant should be given the benefit of section 361.3, the relative placement preference. However, in considering the section 361.3 placement criteria, the trial court found that it would not be in the minor’s best interests to change the minor’s placement, and therefore, the preference was overridden. As a threshold matter, we agree with the Agency that section 361.3 was not properly at issue in this case.

By its terms, section 361.3 applies in two situations: When a child is removed from parental custody (§ 361.3, subd. (a)) and thereafter, “whenever a new placement of the child must be made” (§ 361.3, subd. (d).)

We consider the first situation when section 361.3 applies—removal from parental custody. Section 361.3, subdivision (a) provides in part: “In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative” This provision “assures interested relatives

that, when a child is taken from her parents and placed outside the home pending the determination whether reunification is possible, the relative's application will be considered before a stranger's application. [Citation.]” (*Sarah S.*, *supra*, 43 Cal.App.4th at p. 285.)

When the minor was removed from her mother's custody at birth and a placement became necessary, the record reveals appellant was accorded preferential consideration as required by the statute (§ 361.3, subd. (a)). Appellant was present at the hospital following the minor's birth. Shortly after her birth, a “Team Decision Making Meeting” was held to determine the best placement option for the minor. It was decided that appellant would be the first choice for placement pending home approval and the second choice would be to have the minor remain in foster care. However, appellant delayed completing the required home assessment. Appellant reported that she was unable to have her home assessed because construction was ongoing at her house and she did not consider the home habitable for an infant. Because it is conceded that appellant was unable to accept the minor into her home when the minor was removed from parental custody; there was no violation of the preferential consideration afforded under section 361.3, subdivision (a).

The relative placement preference also applies when a change of placement becomes necessary. Section 361.3, subdivision (d) provides in part that “whenever a new placement of the child must be made, consideration for placement shall again be given as described in this section to relatives who have not been found to be unsuitable and who will fulfill the child's reunification or permanent plan requirements.”² The relative placement preference afforded by section 361.3, subdivision (d), has been found to apply when a new placement becomes necessary after reunification services are terminated, but

² Subdivision (d) of section 361.3 further states: “In addition to the [relative placement] factors described in subdivision (a), the county social worker shall consider whether the relative has established and maintained a relationship with the child.” This provision refutes appellant's argument that “the strength and nature of the relative-child bond is not a criteria for placement under [section] 361.3.”

before parental rights are terminated. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.) Conversely, when there is no need for a change in the child’s placement, the preference has been found not to apply. (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 853-855.)

We recognize that the court in *Joseph T.*, *supra*, 163 Cal.App.4th 787, has held that the relative placement preference afforded by section 361.3, subdivision (d) should be an ongoing preference, whether or not a new placement is needed. (*Id.* at p. 795.) Specifically, the court in *Joseph T.* expanded the relative preference after disposition to whenever a relative comes forward during the reunification period and requests placement, whether or not a new placement is needed. (*Id.* at p. 794.) Even if subdivision (d) is construed as broadly as *Joseph T.* suggests, a matter we need not decide, it does not support appellant’s relative placement request. Unlike the relative in *Joseph T.*, appellant did not seek the minor’s placement until *after* the reunification period ended, the point in the dependency process where the focus necessarily shifts from the desire of the extended family to maintain a relationship with the child to the child’s need for permanence and stability. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

To our knowledge, the relative placement preference has never been applied to remove a child in a long-term, stable and continuing placement because a relative has come forward, after termination of reunification services, seeking placement of the child. Therefore, at the time of appellant’s request for custody of the minor, there was no longer a section 361.3 relative placement preference.

E. Section 388 Petition

Of course, even after reunification services have been terminated, section 388 allows a relative to seek placement of a dependent child who is in a still-viable placement upon a showing of changed circumstances, if it would be in the best interests of the child. However, where a section 388 petition is brought to change the court’s earlier placement order after the termination of reunification services, as in this case, our Supreme Court has instructed that “the predominant task of the court [is] to determine the child’s best interest[s]” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 320.) Specifically, “[a]fter the

termination of reunification services, the parents' [and extended family's] interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest[s] of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest[s] of the child." (*Id.* at p. 317.)

In *Stephanie M.*, the maternal grandmother requested placement after Stephanie was detained and placed in foster care. (*Stephanie M., supra*, 7 Cal.4th at pp. 303-304.) The social worker recommended against placement with the grandmother because the grandmother did not believe that the parents had abused Stephanie. (*Id.* at pp. 304-305.) As the case progressed, Stephanie remained with the foster parents, who had applied for de facto parent status and who wished to adopt her. (*Id.* at pp. 305-306.) After the juvenile court set a section 366.26 permanency planning hearing, the court heard a contested section 388 petition regarding whether Stephanie's placement should be changed from the foster parents to the grandmother. (*Id.* at p. 306.) The juvenile court denied the section 388 petition on the ground that the change of placement was not in Stephanie's best interests. (*Id.* at p. 308.)

The appellate court reversed the order, finding that the juvenile court had failed to give sufficient weight to the relative placement preference set forth in section 361.3. (*Stephanie M., supra*, 7 Cal.4th at pp. 316, 319.) Our Supreme Court granted review and reversed the appellate court's ruling, concluding that "[t]he Court of Appeal erred in giving too great weight to the grandmother's interest in maintaining a family tie with the child and substituting its judgment for that of the juvenile court." (*Id.* at p. 324.) At that late stage of the dependency proceedings, "on the motion for change of placement, the burden was on the moving parties to show that the change was in the best interests of the child *at that time*. Evidence that at earlier proceedings the court had not sufficiently considered placement with the grandmother was not relevant to establish that at the time

of the hearing under review, placement with the grandmother was in the child's best interests." (*Stephanie M., supra*, 7 Cal.4th at p. 322, fn. omitted.)

"Putting aside the question whether the grandmother had any cognizable interest at all, and treating her as a parent, her interests were not significant compared to the need of the child for stability. [Citation.]" (*Stephanie M., supra*, 7 Cal.4th at p. 324.) The court concluded, "[t]he Legislature has declared that a dependent child has an interest in continuity and stability in placement. [Citations.] This interest was served by the order denying change of placement." (*Id.* at p. 326.)

Properly focusing on the minor's interests rather than appellant's interests, as we are required to do under *Stephanie M.*, we determine that the juvenile court could reasonably find that appellant had failed to make the necessary showing that it was in the minor's best interests *at the relevant time*—on March 16, 2012, when the court ruled on appellant's section 388 petition—to remove the child from her stable, long-term placement with her de facto parents and place her with appellant who was "merely [a] friendly visitor[]," as characterized by the trial court. It was undisputed that the child was healthy and happy in the foster parents' home, where she had lived her entire life; and that she had bonded with them, calling them "Mom" and "Daddy." They were devoted to her and wished to adopt her. (See *Jasmon O., supra*, 8 Cal.4th at p. 421 [existing psychological bond between dependent children and their caretakers is extremely important factor bearing on any placement issue].)

In contrast, the minor had only interacted with appellant during a total of six supervised visits, with two of the visits taking place after appellant filed her section 388

petition.³ As the evidence in this case demonstrates, “the minor had been with her foster-adoptive family for most of her life. Evidently, the trial court felt that to ‘wrench’ her away from her source of stability and security to live with a strange family would be detrimental to the child’s welfare. We see no abuse of discretion in this exercise of the court’s judgment. It would be contrary to Legislative policy to uproot the child and force her to adjust to a new home.” (*In re Baby Girl D.* (1989) 208 Cal.App.3d 1489, 1495.) For the foregoing reasons, we cannot say the trial court abused its discretion in denying appellant’s section 388 petition.

³ Appellant repeatedly blames the Agency and the juvenile court for failing to facilitate more frequent and more liberalized visitation with the minor. However, the record is undisputed that she did not take advantage of all of the visitation that was offered her. After the minor was discharged from the hospital in March 2011, appellant visited her just once, on April 4, 2011, and then stopped visiting between April and August—for four months. By appellant’s own admission, she did not take advantage of visitation with the minor because she thought the mother would follow through with reunification. She started visiting the minor again on August 1, 2011, and had visits on September 28, 2011, October 20, 2011, and February 22, 2011. At the time she filed her section 388 petition, appellant stated she had participated in a total of four supervised visits with the minor and that the visits were “wonderful.” She admitted in her testimony that she never tried to arrange additional visits through the Agency nor was she denied any visitation request. Based on this record, appellant’s argument that the visitation offered by the Agency and the court doomed her effort to establish a relationship with the minor is simply not supported.

IV.
DISPOSITION

The order denying the section 388 petition is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

HUMES, J.