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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NAPA COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Petitioner,

v.

THE SUPERIOR COURT OF NAPA
COUNTY,

Respondent;

M.N. et al.,

Real Parties in Interest.

A144746

(Napa County
Super. Ct. No. JV17741)

This writ matter arises from dependency proceedings involving D.N., a boy born in February 2014. In April 2014, when D.N. was two months old, the Napa County Department of Health and Human Services (the Department) removed him from the custody of his mother, Y.P., and his father, C.N., and the juvenile court ordered D.N. detained. D.N. was placed in the care of foster parents E.C. and I.P. After denying reunification services to Y.P. and C.N. in September 2014, the juvenile court terminated their parental rights in February 2015, ordered adoption as the permanent plan for D.N., and referred him to the Department for adoptive placement.

In March 2015, when D.N. was thirteen months old and after termination of parental rights, the court granted a Welfare and Institutions Code section 388¹ petition filed by D.N.'s paternal grandmother, M.N., and ordered D.N. removed from his foster placement and placed with his paternal grandparents, M.N. and G.N., concluding the Department had improperly failed to consider placing D.N. with them earlier. The juvenile court granted the Department's request to stay the order pending writ review.

The Department then filed this writ petition, contending the juvenile court erred by overriding its decision to keep D.N. in his foster placement after termination of parental rights. We issued an order to show cause; M.N. and G.N., through appointed counsel, filed a return to the petition; and the Department filed a reply. We agree with the Department that the juvenile court did not accord sufficient deference to the Department's placement decision, and we therefore grant the Department the requested relief.²

I. BACKGROUND

A. D.N.'s Detention and Placement with the Foster Parents

The Department filed the initial dependency petition in this matter on April 15, 2014. The Department alleged that, on March 17, 2014, D.N.'s father, C.N., shot a woman in the presence of D.N. and his mother Y.P., and was incarcerated based on the resulting criminal charges. The Department also alleged Y.P. had failed or was unable to protect D.N. adequately due to cognitive delays (mild mental retardation), untreated mental health issues (severe depression) and substance abuse issues (alcohol and marijuana) (see § 300, subd. (b)).

The social worker's investigative narrative attached to the petition described the family's contacts with the Department. In February 2014, when D.N. was less than one

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated. All rule references are to the California Rules of Court.

² The foster parents, E.C. and I.P., appealed the juvenile court's order (No. A145077). We stayed proceedings in that appeal, pending determination of the Department's writ petition.

week old, the Department received a referral alleging general neglect of D.N. Beginning on March 6, 2014, the Department investigated a second referral alleging general neglect of D.N. When a social worker met with D.N.'s mother Y.P. on April 1, 2014 (after several attempts to contact her), she and D.N. were living in an addition to the home of paternal grandparents G.N. and M.N., but according to family members, Y.P. frequently moved between other households. Y.P. did not tell the Department about the shooting that had occurred in March, and the Department did not become aware of it until April 11, 2014.

At the time the Department conducted this investigation, Y.P.'s other son (D.N.'s half-brother), six-year-old D.B., was the subject of an ongoing dependency proceeding. Y.P. had failed to reunify with D.B. despite the provision of numerous services.

Based on C.N.'s shooting in the presence of D.N., as well as Y.P.'s untreated mental health and substance abuse issues and her failure to participate in services in D.B.'s case or to reunify with D.B., the Department asked the court to detain D.N.

The court held a hearing on detention on April 16, 2014, and continued the matter to the following day. The Department took D.N. into protective custody on April 16, 2014, and placed him in the confidential foster home of E.C. and I.P. At the detention hearing the next day, the court ordered D.N. detained and set a contested detention hearing for April 22, 2014. After the contested hearing, the court again ordered D.N. detained based on the Department's recommendation. The court vested D.N.'s temporary placement and care with the Department. With the court's permission, the Department subsequently filed an amended petition alleging dependency jurisdiction under section 300, subdivisions (b) (failure to protect) and (j) (abuse or neglect of sibling).³

³ G.N., the paternal grandfather, attended the continued detention hearing on April 17, 2014. G.N. and M.N. both attended the contested detention hearing on April 22, 2014, and were assisted by a Spanish language interpreter. G.N. and M.N. were present, and received assistance from Spanish language interpreters, at a number of subsequent hearings in the case.

B. Jurisdiction

The jurisdiction report filed on June 3, 2014 noted C.N. was still in jail in Solano County. The report, elaborating on the details of the alleged March 17 shooting, stated that C.N. shot a friend of Y.P.'s in the face in a room where D.N. was sleeping. The report detailed C.N.'s significant prior criminal record. The report also noted Y.P.'s significant history with the Department as a minor. The Department reported that, after the detention hearing on April 17, 2014, the social worker met with the paternal grandparents, G.N. and M.N. G.N. told the social worker he was not fully aware of what had happened until that hearing, as the grandparents had received translation during the hearing. The social worker received personal information from G.N. and M.N. to submit a relative placement request. C.N. told the social worker that his parents had told him that if D.N. were ever placed with them, C.N. would not be able to live with them. Y.P. was spending part of her time at the home of G.N. and M.N., and part of her time with her aunts.

C.N. submitted the jurisdictional determination to the court on the basis of the social worker's report. After a contested hearing for Y.P., the juvenile court sustained the petition and exercised jurisdiction over D.N. By this time, Y.P. had missed visits with D.N., moved out of G.N.'s and M.N.'s home, "disappeared" from her aunt's home, failed to stay in contact with the Department, and was in a relationship with a person who "appear[ed] to be gang involved."

C. Disposition and the Setting of a Section 366.26 Hearing

In its August 6, 2014 report for the disposition hearing, the Department recommended denial of reunification services to both parents. Y.P. had failed to engage in services, had failed to address the Department's concerns about her ability to parent her older son D.B. safely, had failed to keep in touch with the Department, and had not visited D.N. consistently. The report states: "The paternal grandparents stated interest in placement for [D.N.]. The placement unit completed an assessment for the paternal grandparents and determined that the home had an ineligible member and the home could not be approved. On 7/30/14 [social worker Maria Sabeh] explained to the paternal

grandfather that there was an ineligible member in the household and that their home could not be approved. The paternal grandfather stated that he was saddened by the news but that he understood. The Department will continue to work with the family to assess if there are other family members interested in placement.” The report further states: “[D.N] has also had the opportunity to visit with the paternal grandfather. The paternal grandfather has been observed to be appropriate with [D.N] during the visits.” D.N. was accepted for concurrent planning with the Napa County Adoptions Unit, and an adoption social worker was assigned to work on concurrent planning.

At the conclusion of the contested disposition hearing on September 17, 2014, the court adopted the Department’s recommendations, including placing “the care, custody and control of the child with the Director of [the Department] for supervision, planning and placement as he sees fit, contemplated placement to be in a confidential foster home,” and finding that “[t]he child’s placement is necessary and appropriate.” The court also found “the Department has made diligent efforts to identify, locate and contact the child’s relatives.” The court found the Department had made reasonable efforts to prevent or eliminate the need for removal and found by clear and convincing evidence that reunification services should be denied to Y.P. pursuant to section 361.5, subdivision (b)(10) and to C.N. pursuant to section 361.5, subdivision (e)(1). The court set a section 366.26 permanent plan hearing for January 13, 2015.

D. The Section 388 Petitions and the Termination of Parental Rights

On November 25, 2014, the foster parents, E.C. and I.P., filed a petition for de facto parent status, which the court granted on December 11, 2014.⁴ On December 23, 2014, Y.P. filed a section 388 petition asking the court to vacate its order denying her family reunification services, vacate the section 366.26 hearing, and order a plan of

⁴ Rule 5.502(10) states: “ ‘De facto parent’ means a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child’s physical and psychological needs for care and affection, and who has assumed that role for a substantial period.”

family reunification for Y.P. The juvenile court set a hearing on that petition for January 8, 2015 and later continued it to January 13, 2015.

The Department filed its section 366.26 report on January 8, 2015. The Department recommended that the court terminate the parental rights of Y.P. and C.N. and order adoption as the permanent plan for D.N. The report stated that the de facto parents with whom D.N. had been placed since his removal were committed to adopting him. The adoption assessment noted that “[D.N.] has had bi-weekly visits with his paternal grandparents at the Department.” Visits initially were supervised, but on November 30, 2014 the social worker coordinated an unsupervised visit. The adoption assessment stated: “To date, the paternal grandparents are the only relatives who have come forward on [D.N.’s] behalf. After careful consideration the Department has determined that it will be in [D.N.’s] best interest to remain in his current placement to best meet his permanency needs.” D.N. was attached to the de facto parents and their daughter. D.N. did not show signs of cognitive or developmental delays and was developing appropriately for his age.

On January 9, 2015, M.N., the paternal grandmother, filed a section 388 petition asking the court to change its order placing D.N. in the foster home and to place him in the paternal grandparents’ home instead. The section 388 request stated that the grandparents had told the foster home “we want the baby” and that they had tried to contact “the director, supervisor and people who make the [decision],” but “they won’t answer.” The request stated the grandparents had done “all the requirements they asked for, and they say everything was fine but, they came up with that [decision], and we love him as his grandparents and family and the parents of the baby don’t want any other people to have their baby, only [his] grandparents.”

At the January 13, 2015 hearing, the court set Y.P.’s section 388 petition (seeking to vacate the order denying reunification services) for hearing on February 4, 2015. The court also set the section 366.26 hearing and the hearing on M.N.’s section 388 petition (seeking placement of D.N. with the paternal grandparents) for February 4, but the court specified that those matters would not be heard on that date. The court stated the section

366.26 matter was “trailing” Y.P.’s section 388 petition. The court stated M.N.’s section 388 petition “should be heard at some time after the [section 366.26] hearing, presumably, but it is on calendar on [February 4] and it will be in trailing status and the Court is signing that request at this point.”

On February 4, 2015, after hearing testimony from Y.P. and the Department, the court denied Y.P.’s section 388 petition. As to the section 366.26 issues, Y.P. then submitted on the basis of the recommendation in the social worker’s section 366.26 report. The court set the section 366.26 hearing for February 10, 2015. The court set M.N.’s section 388 petition for hearing on March 11, 2015, to give G.N. and M.N. time to seek to retain counsel.

At the section 366.26 hearing on February 10, 2015, C.N. submitted on the recommendation in the section 366.26 report. The court adopted the social worker’s recommendations, found that “the child’s placement continues to be necessary and appropriate,” terminated the parental rights of Y.P. and C.N., and ordered adoption as the permanent plan for D.N. In its order after hearing, the court specified that D.N. was “referred for adoptive placement by the Department,” and “[p]ursuant to [section 366.26, subdivision (j)] the Department is responsible for the custody and supervision of the child until the adoption is complete.”

E. The Hearing on M.N.’s Section 388 Petition

At a status hearing on February 19, 2015, G.N., the paternal grandfather, stated he had not hired an attorney, but he wished to move forward with the contested section 388 hearing set for March 11.

On March 11, 2015, the contested section 388 hearing began. G.N. and M.N. appeared and were not represented by counsel, but they wished to proceed with the hearing. The court asked them questions, as did counsel for the Department. Social worker Maria Sabej testified, and Araceli Vega, the adoption social worker, testified as an expert in child welfare. E.C., the de facto mother, also testified with the assistance of a Spanish language interpreter.

At the outset of the hearing, the court asked county counsel to explain why the Department had not considered G.N. and M.N. for placement. County counsel responded that the Department had considered G.N. and M.N. for placement, but as reflected in the August 6, 2014 disposition report, the Department determined “there was someone living in the home that had nonwaivable offenses.” (See §§ 361.3, subd. (a), 309, subd. (d).)

G.N. testified he and M.N. worked with social worker Rosa Grace for about three or four months, from the time she first visited to check the home for possible placement in April or May of 2014. G.N. was initially told that his son, G.N., Jr., who was living with the grandparents and was on probation for “a DUI,” made them ineligible for placement, so G.N., Jr. was making arrangements to move out. Less than a month later (perhaps in June or July 2014), Grace called and told G.N. the son did not need to leave, as long as he provided a letter from his probation officer, proof of his enrollment in the Drinker Driver Program, and a letter from a judge, which he was trying to obtain. G.N. and M.N. also completed a report of their interest in having D.N. placed with them. G.N. and M.N. were led to believe D.N. would be placed with them once G.N., Jr. provided the documents.

After G.N. and M.N. gave the Department the letter from the probation officer and the program enrollment confirmation, they received a letter from the Department sometime in July 2014 stating D.N. could not be placed with them because G.N., Jr. was still living with them. A different social worker, Maria Fernandez, had begun working on the case. G.N. filled out an appeal and then met with Fernandez a week later. At the meeting, G.N. told Fernandez that G.N., Jr. could move out. Fernandez stated G.N., Jr. definitely had to leave for D.N. to be placed with the grandparents. G.N. testified that G.N., Jr. moved out about 15 days later, which G.N. stated was in early November 2014. G.N. notified Fernandez, who inspected the home the next day and said everything was fine. G.N. and M.N. were later able to take D.N. home with them for three hours one Sunday. G.N. and M.N. repeatedly asked when D.N. would be placed with them, and they were told it was a long process with a lot of paperwork, but they were never given a date.

During this time, in August or September 2014, another son, A.N., moved into the house with his family. Fernandez told G.N. the Department would have to fingerprint A.N. and start the record check process again. The Department sent a second form for A.N.'s wife later. A.N. did not have a record.

In November or December 2014, social worker Araceli Vega met with G.N. and M.N. and told them that D.N. would not be placed with them. Up to that point, G.N. and M.N. believed D.N. would be placed with them. None of the people they met with could tell them why D.N. was not being placed with them. Finally, a supervisor told G.N. that it was better for D.N. that he not live with G.N. and M.N.

G.N. visited D.N. throughout the dependency, initially weekly with Y.P. (the mother), and then after she stopped, every two weeks for an hour as permitted by the Department. M.N. was not able to visit often due to her work schedule. Neither G.N. nor M.N. could specify any dates before October 2014 when M.N. visited.

Social worker Maria Sabeh testified she was the worker on the case from April to around September 2014. She had a conversation with G.N. around the end of July 2014, in which she told him there was an ineligible member in his household so the Department could not place D.N. in his care. Sabeh told G.N. that, if his son moved out, the home would need to be reassessed. G.N. visited D.N.; M.N. did not. Sabeh testified about D.N.'s relationship with his foster parents, stating they have "a very strong bond." D.N. sees the foster parents as his primary caregivers. Moving him would be a huge change, since they are the only parents he knows. Asked if she had concerns about G.N. and M.N., Sabeh noted they had attended numerous hearings and received translation assistance, and she believed G.N. knew exactly what was going on, yet the grandparents did not seem to know what was going on with C.N. or why he was in jail. That raised safety concerns as to their ability to protect D.N. from C.N. if he were released. In her conversation with the grandparents after the first detention hearing, Sabeh explained to them, through translation, that C.N. had admitted the shooting for which he was in custody. G.N. and M.N. "were just in denial of what was going on [with C.N.]. They said he had always been a good son. They didn't have any concerns about him." C.N.

had an extensive criminal record as a juvenile and as an adult, yet G.N. and M.N. told Sabeah they had no knowledge of that record. “[T]hat was a concern, as far as what they were aware of and their ability to be able to say who would be safe to be around [D.N.] or not, including [C.N.]”⁵ C.N. was living in G.N.’s and M.N.’s home when he was arrested on the current charges. Sabeah believed it would be in D.N.’s best interests to remain in the foster placement where he had been for almost a year.

The Department, counsel for D.N., and the court appointed special advocate (CASA) worker opposed M.N.’s request for a change in D.N.’s placement.

E.C., the foster mother, testified about the relationship that she, her husband and their six-year-old daughter have with D.N. They consider D.N. to be their son and brother, and they would like to adopt him. They understand G.N. and M.N. will always be D.N.’s grandparents and they will always be welcome. The grandparents celebrated D.N.’s first birthday at the foster family’s house. E.C. testified D.N. is attached to her in the same way her daughter is attached to her.

Adoption social worker Araceli Vega testified she first met with G.N. and M.N. on October 15, 2014. At that meeting, Vega, who speaks Spanish, told G.N. and M.N. they could not be approved for custody because there was an ineligible member in their household. They did not ask any questions about that. Vega next met with the grandparents on December 1, 2014, to assess their home after the ineligible son had moved out. The grandparents told Vega the son had moved out during Thanksgiving break near the end of November. On December 19, 2014, Vega and another worker met with G.N. and M.N. and told them the Department was no longer going to consider their home for placement. The grandparents disagreed with that decision. At one of the

⁵ In their return, G.N. and M.N. assert that Sabeah “admitted” her concern about their ability to protect D.N. “no longer existed at the time of the [March 2015] hearing.” But Sabeah only testified (in response to a question from the court) that, *if* C.N. were convicted and incarcerated for a lengthy period, she would no longer be concerned about the grandparents’ ability to protect D.N. from C.N. Sabeah did not testify that her concerns had faded because of any observed change in the grandparents’ lack of knowledge or insight about C.N.

meetings, Vega wrote down the forms the grandparents would need to file to challenge the decision. On January 6, 2015, Vega and her supervisor met with G.N. and M.N., and the supervisor explained the reasons the Department was not able to place D.N. in their care.

Vega confirmed that G.N. and M.N. had filed a letter of appeal with the Department. Vega spoke with Fernandez about it. Vega was not aware the grandparents based their appeal on Grace's telling them G.N., Jr. could remain in the home if he provided the requested documentation.

Vega testified about the emotional development of a child of D.N.'s age and about her observations of his interactions with the foster parents, E.C. and I.P. D.N. was doing "great" in their care. The attachment between D.N. and the foster parents is secure, and they have "a very close bond. It's [intact], and it's not temporary." The six-year-old daughter and D.N. see each other as siblings. Vega testified the Department's main concern about the grandparents after the ineligible son moved out was that the grandparents did not have "a good grasp to what it meant to protect the child from other individuals who could be harmful to the child's well-being and safety." Vega opined it would be in D.N.'s best interests to remain with the foster parents because of their "great bond, positive bond, and attachment that he has to both the foster parents and their daughter. They see him as part of their family." When visiting with the grandparents, D.N. did not reject them, but "his appearance was neutral." "His excitement is different from what it is with the foster parents. He's more worried when he's with the paternal grandparents."

After the presentation of evidence, the court stated it wished to hear argument at the next hearing but that it was "inclined to grant this motion" The court stated it had "real concerns about the way that this matter has been handled." The court recognized D.N. "has bonded, I think more strongly with the foster parents, but through no fault to the grand parents." The fact G.N., Jr. had moved out of the grandparents' house "is new evidence. *Whether or not placing the child now with the grandparents is in the best interest of the child, probably not. But I don't know that for certain.* [¶] And

there's a reason the Legislature grants preferential consideration to relatives for placement, that is because the Legislature believes it's in the best interest of the child to be placed with family." (Italics added.) "[A]nd it's true, it's just—it's such an unfair act to the child, to the foster parents, to the grandparents, everyone loses in this situation. But I have to follow the law, and I do think that the grandparents should have been considered for placement. [¶] To say that they may not protect the child from father, it's an attempted murder, he's looking at 15 years to life. To say they can't protect the child if he's convicted, and even if he's not, if the gentleman is acquitted, there's no reason he shouldn't visit with his child."

F. The Court's Ruling on M.N.'s Section 388 Petition

The court continued the hearing to March 25, 2015 for argument. On March 20, 2015, the de facto parents, E.C. and I.P., filed a request for prospective adoptive parent designation and objected to removal of D.N.

At the March 25, 2015 hearing, the court found G.N. and M.N. had met their burden of proof by a preponderance of the evidence, and the court ordered D.N. removed from the home of foster parents E.C. and I.P. and placed with the paternal grandparents, G.N. and M.N. The court granted the Department's request to stay its order pending resolution of the writ petition that county counsel stated the Department would file. The court ordered increased visitation with the grandparents, for a minimum of one hour per week, pending resolution of the writ.

In announcing its ruling, the court stated: "[I]n essence the grandparents were told that they would be considered for placement and that their son could remain in the home, even though he technically could be considered an ineligible member of the household. They relied on that representation. They didn't take any actions to have a court review those representations. Many months went by. [¶] Months later they're told that the child cannot be placed with them because they're not eligible for placement, given that their son is still living in the home. The grandparents asked the son to move out of the home and he does in November and now in December, though—it was December 19th. They were advised December 19, 2014 . . . [that] now they're not being considered because . . .

the Department is not secure in the notion that the grandparents can protect the minor child from the father. [¶] So it's a moving target. The entire time the Department has created a moving target. And that's not equity and we cannot as a community feel that we can trust our public institutions when that occurs. So that's the problem that I have with this case, is that there was no consistency, and it's impossible unless you have consistency for anyone to meet the Department's requirements regarding placement."

The court continued: "It's pretty clear to me that Welfare and Institutions Code section 361.3(a) and (d) . . . require that family members be given preference for placement at disposition. That did not occur. I don't believe that the Department ever had any serious thought about placing [D.N.] with the grandparents. I think they were given some directions. They were told that their son [G.N., Jr.] would have to obtain a letter from a Probation officer, which he did; that he would have to show proof of enrollment into a DUI class, which he did, and that they would have to obtain a letter from a judge. What the purpose of that could ever be, I have no idea. And it's quite a big hurdle and that was never met. [¶] But it appears that [G.N., Jr.] was working on trying to meet all of these requirements. And the next we hear is that in July or August there's a letter from Maria Fernandez, the social worker, indicating that the grandparents have not been approved. That then is confirmed by Miss Sabeh, included in—and I believe it was the disposition report that the grandparents were not considered for placement given the ineligible member in the household. [¶] After the son moved out Miss Vega allowed for the grandson to visit with the grandparents, the grandparents again being led to believe that maybe they were still being considered. So again there's a lack of consistency. The grandparents welcomed the grandson; I think it was in their home the grandson was allowed to visit and at every stage the grandparents are meeting their obligations, visiting with the grandchild, appealing a letter that was written by Miss Fernandez and then ultimately filing this 388 petition [before the section 366.26 hearing on] February 10, 2015."

The court concluded: "I find that the grandparents have made the following efforts: They have visited with the child at every opportunity; they asked their son, the

ineligible member of the household, to move out; they attended the grandson's first birthday; they established an amicable relationship with the foster parents; they appealed the Department's decision when they were initially told they were not being considered; they filed a 388 petition and now most recently they were advised that their son, who faces 15 years to life, could pose a threat to their grandson. [¶] I believe that the grandparents have met the burden of proof by preponderance of the evidence, and the evidence the Court is considering is the fact that the son did move out and that the Department changed the criteria for placement midway. [¶] Has there been an abuse of discretion? I believe there has. I don't think the Department followed the law. That is an abuse of discretion. Now we're left with what is in the best interests of the child and whether granting this request will promote the best interests of the child. And that's the hardest hurdle that this Court is having to address. [¶] The point of these cases is the preservation of family. That is of high importance. There's no reason to place a child with strangers when we have family members who are willing and able to care for a child and it's not been proven to my satisfaction that these grandparents were not eligible for placement. [¶] There's a reason the legislature believes that family members should be given preference as early as disposition stage. The fact that this child has not bonded with the grandparents, that is the fault of the Department. They placed the child with strangers, they gave the grandparents false illusion that the child could be placed with them. The child was young, the child bonded with strangers; now these strangers have become the child's parents. [¶] So what's happened in this case is difficult for me to condone because it's not proper and the law was not followed. And I fear that I'm setting the wrong precedence of the Department if I go along with the request that [county counsel] has made this morning. [¶] The law says the Court can intervene in termination of parental rights placement decisions only in exceptional circumstances. I find this to be an exceptional circumstance. I ask for wisdom when I make determinations on cases and I made it on this case. I am going to ask the child be removed and be placed with the grandparents."

G. The Department's Writ Petition

The Department filed a petition for extraordinary writ relief.⁶ We appointed appellate counsel for G.N. and M.N., and issued an order to show cause. G.N. and M.N., through their counsel, filed a return to the petition, and the Department filed a reply.

II. DISCUSSION

Under section 388, a person having an interest in a dependent child may petition to modify a prior order “upon grounds of change of circumstance or new evidence.” (§ 388, subd. (a)(1); see rule 5.570(a).) At a hearing on a section 388 petition seeking to change a child's placement, the moving party must show a change of circumstances or new evidence and that a change in placement is in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)) We review the juvenile court's ruling on a section 388 petition for abuse of discretion. (*Id.* at p. 318.)

After termination of parental rights, a juvenile court may only disturb a social services department's placement decision if that decision constitutes an abuse of discretion. Section 366.26, subdivision (j) provides that, once the juvenile court has

⁶ In its notice of intent to file a writ petition, and in the petition itself, the Department invoked the rules governing writ review of an order designating or denying the specific placement of a dependent child after termination of parental rights. (See § 366.28; Rules 8.454, 8.456.) Under those rules, a petition must be served and filed within 10 days after the record is filed in the reviewing court. (Rule 8.456(c)(1).) The record was filed in this court on April 23, 2015. G.N. and M.N. assert in their return that the deadline to file the Department's petition therefore was Monday, May 4, 2015, so the Department's petition, filed on May 7, 2015, was untimely.

We disagree. Upon the filing of the record on April 23, 2015, the clerk of this court sent a notice to the parties stating the deadline to file a writ petition was May 8, 2015 (i.e., 15 days after the clerk deposited the notice in the mail). (See Rule 8.454(j)(2) [when record is filed, reviewing court clerk must notify the parties and specify the deadline to file a writ petition]; *Roxanne H. v. Superior Court* (1995) 35 Cal.App.4th 1008, 1010, fn. 3 [because notice specifying deadline to file writ petition challenging order setting section 366.26 hearing was served by mail, 10-day deadline was subject to time extensions of Code Civ. Proc., § 1013, subd. (a), including 5-day extension when notice is mailed in California; accordingly, the date set in the court's notice was 15 days after record completion].) The Department timely filed its petition on May 7, 2015, prior to the May 8, 2015 deadline specified in this court's notice.

terminated parental rights and referred a child for adoptive placement, the social services department “shall be responsible for the custody and supervision of the child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption . . . is granted, except as specified in subdivision (n).”⁷ (Accord, Fam. Code, § 8704, subd. (a); *Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 733 (*Theodore D.*)). The Department’s discretion is not unfettered. The juvenile court retains jurisdiction over the child until he or she is adopted, and thus may review the Department’s exercise of its discretion as to post-termination placement. (§ 366.3, subs. (a), (d), (e)(1); *Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 649–650.) The court may not substitute its independent judgment for that of the Department. Instead, the court may only overturn the Department’s decision as to the child’s placement pending adoption if the Department has abused its discretion in making or maintaining the placement. (*Los Angeles County Dept. of Children Etc. Services v. Superior Court* (1998) 62 Cal.App.4th 1, 10 (*Paul C.*)).⁸ “Absent a showing that [the Department’s] placement decision is patently absurd

⁷ The only exception to agency discretion specified in section 366.26, subdivision (j) (i.e., the limitation on agency discretion stated in § 366.26, subd. (n)) did not apply in this case. Section 366.26, subdivision (n) limits an agency’s discretion to *remove* a child from the home of a prospective adoptive parent. It did not limit the Department’s discretion in this case to determine D.N. should *stay* in the home of foster parents E.C. and I.P.

⁸ Because we resolve this writ proceeding on the ground that the juvenile court did not accord sufficient deference to the Department’s decision as to where D.N. should be placed pending adoption (as required by § 366.26, subd. (j)), we do not address the applicability of the caretaker preference set forth in section 366.26, subdivision (k), which provides: “Notwithstanding any other provision of law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent and removal from the relative caretaker or foster parent would be seriously detrimental to the child’s emotional well-being. [¶] As used in this subdivision, ‘preference’ means that the application shall

or unquestionably not in the minor's best interests, the juvenile court may not interfere and disapprove of the minor's placement, thereby requiring that the minor be relocated to another home." (*Theodore D.*, *supra*, 58 Cal.App.4th at p. 734.)

Here, the Department placed D.N. with foster parents E.C. and I.P. at detention in April 2014, and the juvenile court found at disposition in September 2014 and again upon termination of parental rights in February 2015 that the placement was necessary and appropriate. In its adoption assessment filed with its January 2015 report for the section 366.26 hearing, the Department stated it had determined that continuation of D.N. in that placement would be in D.N.'s best interests and would "best meet his permanency needs." In deciding to override that placement in March 2015, the juvenile court did not find (and the grandparents do not argue) that the foster parents' home was in any way unsuitable, nor did the juvenile court disagree with the Department's assessment that D.N. had bonded strongly with his foster parents. In these circumstances, and as we explain further below, we find no basis for a conclusion that the Department's decision to keep D.N. in his foster placement after termination of parental rights constituted an abuse of discretion.

G.N. and M.N. argue the relative placement preference in section 361.3 (which the juvenile court cited) supports the juvenile court's order placing D.N. with them. Section 361.3 provides that, when a child is removed from parental custody, or thereafter when a new placement of the child is necessary, social workers and juvenile courts must give preferential consideration to a request by a relative for placement of a dependent child with the relative. (§ 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, 285–286 (*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

be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child."

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 (*Joseph T.*.) Although the statute does not ensure 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.)

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 interests, 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 must consider the factors identified in section 361.3, subdivision (a), “in determining whether placement with a particular relative who requests placement is appropriate.” (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 377.) However, the “linchpin of a section 361.3 analysis is whether placement with a relative is in the best interests of the minor.” (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 862–863.) “When section 361.3 applies to a relative placement request, the juvenile court must exercise its independent judgment rather than merely review [the agency’s] placement decision for an abuse of discretion.” (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1033 (*Cesar V.*.)

We agree with the Department that section 361.3 does not support the juvenile court’s order overriding the Department’s decision as to D.N.’s post-termination placement. As noted, the relative placement preference in section 361.3 applies in selecting a temporary placement (1) when a child is removed from parental custody (i.e., at the disposition hearing), and (2) thereafter “whenever a new placement of the child

must be made”⁹ (§ 361.3, subds. (a), (d); *In re Lauren R.* (2007) 148 Cal.App.4th 841, 854, 857 (*Lauren R.*.) It does not apply where, as here, the court has terminated parental rights. “It is well established that the relative placement preference found in section 361.3 does not apply after parental rights have been terminated and the child has been freed for adoption.” (*Cesar V., supra*, 91 Cal.App.4th at p. 1031.) Moreover, as noted, after the juvenile court has terminated parental rights and referred a child for adoptive placement, the court may *not* substitute its independent judgment for that of the agency, but is limited to determining whether the agency has abused its discretion in making or maintaining the placement. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 72.)

In their return to the Department’s petition, G.N. and M.N. concede the relative placement preference does not apply once parental rights have been terminated. But G.N. and M.N. contend section 361.3 did apply when the court adjudicated M.N.’s section 388 petition after termination of parental rights, because they initially requested that D.N. be placed with them prior to disposition. In support of this argument, they rely on the recent decision by Division Three of this court in *In re R.T.* (2015) 232 Cal.App.4th 1284 (*R.T.*). We conclude *R.T.* is distinguishable and does not support application of section 361.3 in this case.

In *R.T.*, two paternal aunts requested placement of the dependent child (an infant) with one of them in August 2012, shortly after the child was removed from parental custody. (*R.T., supra*, 232 Cal.App.4th at p. 1293.) At a combined jurisdictional and dispositional hearing later in August 2012, before completion of the relatives’ home

⁹ The second of these situations never arose in this case. After the court ordered D.N. placed with E.C. and I.P. at disposition in September 2014, it never became necessary to make a new placement. (See § 361.3, subd. (d).)

As G.N. and M.N. note, the court in *Joseph T.* held the relative preference should continue to apply after disposition whenever a relative comes forward during the reunification period and requests placement, whether or not a new placement is needed. (*Joseph T., supra*, 163 Cal.App.4th at p. 794.) But even assuming this broad construction of section 361.3 is correct (a matter we need not decide), it would make no difference in this case, because there was no post-disposition reunification period. As noted, the court denied reunification services to Y.P. and C.N. at the disposition hearing.

studies, the court ordered that placement remain with the nonrelative selected by the agency. (*Ibid.*) The agency later completed home inspections and approved the aunts' homes (in October 2012), but never evaluated them for placement under the criteria set forth in section 361.3. (*R.T., supra*, Cal.App.4th at p. 1293.) In November 2012, when the child was four months old, one aunt and uncle filed a motion under section 388 to modify the child's placement, alleging they had been denied preferential consideration for placement. (*R.T., supra*, at pp. 1293–1294.) Ten months later, in September 2013, after multiple evidentiary hearings and when the child was 14 months old, the juvenile court rejected the applicability of the section 361.3 relative preference and denied the relatives' modification motion. (*R.T., supra*, at p. 1294.) After another four months, in January 2014, the juvenile court terminated parental rights and ordered the child placed for adoption. (*Id.* at p. 1295.) In consolidated appeals, the child's parents challenged the order terminating parental rights, and the aunt and uncle challenged the denial of their section 388 motion. (*R.T., supra*, at p. 1292.)

Division Three held the agency and the juvenile court failed to properly apply the section 361.3 relative placement preference because they failed to evaluate the relatives for placement either before or after the combined jurisdictional and dispositional hearing in August 2012. (*R.T., supra*, 232 Cal.App.4th at pp. 1295, 1297.) The appellate court further held the juvenile court erred in deeming the section 361.3 relative preference inapplicable to postdisposition proceedings and therefore “ ‘irrelevant’ ” when the aunt and uncle raised it in their modification motion, which they filed in November 2012, “early in the dependency process, before a permanent planning hearing, when R.T. was only four months old.” (*R.T., supra*, at p. 1300.) The appellate court stated the law is unsettled as to whether a relative is entitled to preference when he or she requests placement after the dispositional hearing when the child is in a stable placement. (*Ibid.*, citing *Lauren R., supra*, 148 Cal.App.4th at pp. 854–855 and *Joseph T., supra*, 163 Cal.App.4th at pp. 794–795.) Division Three stated, however, that “[t]he issue has no bearing here, where the relatives invoked the preference *before* the dispositional hearing, the agency and court failed to apply it at disposition, and the error was timely raised by a

section 388 motion.” (*R.T.*, *supra*, 232 Cal.App.4th at p. 1300.) Under those circumstances, the juvenile court “should have directed the agency to evaluate the relatives for placement under the relevant standards (§ 361.3, subd. (a)(1)-(8)) and, upon receipt of the evaluation and the agency’s placement recommendation, exercised its independent judgment to consider if relative placement was appropriate.” (*R.T.*, *supra*, 232 Cal.App.4th at p. 1300.) Division Three determined that, because the juvenile court erred in failing to apply the statutory relative placement preference (and, separately, in failing to determine if the agency abused its discretion in rejecting the parents’ relinquishment of the child for adoption by designated relatives), “none of the orders on appeal may stand and remand is necessary.” (*Id.* at p. 1308.)

R.T. does not establish that section 361.3 provided the appropriate framework for the juvenile court to apply in resolving M.N.’s section 388 petition seeking a change in D.N.’s placement. As noted, in *R.T.*, the juvenile court ruled on the relatives’ section 388 modification motion (which they had filed 10 months earlier) *before* it terminated parental rights. (*R.T.*, *supra*, 232 Cal.App.4th at pp. 1294–1295, 1300.) Here, the juvenile court on February 10, 2015 terminated parental rights, referred D.N. for adoptive placement by the Department, and specified that, pursuant to section 366.26, subdivision (j), the Department is responsible for D.N.’s custody and supervision until the adoption is complete. Accordingly, on March 25, 2015, when the court ruled on M.N.’s section 388 petition, the Department was vested with discretion to determine D.N.’s placement, subject only to review by the juvenile court for abuse of discretion. (§ 366.26, subd. (j); *In re Harry N.* (2001) 93 Cal.App.4th 1378, 1397–1398.)

At that stage of the proceedings, application of the section 361.3 relative placement preference (and the accompanying rule that a juvenile court is to exercise its independent judgment on the placement issue (see *In re H.G.* (2006) 146 Cal.App.4th 1, 14–15)) would be inconsistent with the Department’s statutory post-termination placement authority, which existed regardless of when the placement dispute initially arose. (See *Paul C.*, *supra*, 62 Cal.App.4th at p. 10 [on review of placement order issued after termination of parental rights, the fact that the “genesis” of the placement dispute

was an earlier order that predated termination of parental rights “is of no moment given the clear statutory mandate empowering the Department to place the child after parental rights had terminated. The effect of the trial court’s [order issued after termination of parental rights] is to deny Department the ability to implement that statutory authority and that is the order contested in the present proceeding.”]; Seiser & Kumli, *Seiser & Kumli on California Juvenile Courts Practice and Procedure* (2015 ed.) Supplemental and Subsequent Petitions, § 2.140[3], pp. 2-493 to 2-494 [when a § 388 petition seeking a change in placement (rather than seeking return of the child to a parent or renewed reunification services for a parent) is filed after a § 366.26 hearing has been set, “in most instances the court should determine the selection of the permanent plan first, and thereafter consider whether it can or should grant the requested modification of prior court orders”; “[I]n considering the petition for a modification of placement after the termination of parental rights the court must recognize the change in the law regarding placement of a freed child” (i.e., the agency’s post-termination placement authority)].) *R.T.* did not involve this situation, and the appellate court in that case did not hold or suggest that the section 361.3 relative preference (or the rule that a juvenile court may exercise its independent judgment on pre-termination placement issues) can apply when a juvenile court rules on a placement issue *after* termination of parental rights. (See *R.T.*, *supra*, 232 Cal.App.4th at p. 1307 [noting that “[a] juvenile court exercises its independent judgment when it is responsible for making certain decisions, as in the placement of a dependent child *before the termination of parental rights and referral for adoption*”], italics added.)¹⁰

¹⁰ Acknowledging the more limited scope of the juvenile court’s review of the Department’s placement decisions after termination of parental rights, G.N. and M.N. suggest the court should have heard M.N.’s section 388 petition *before* holding the section 366.26 hearing, and county counsel should not have suggested holding the section 366.26 hearing first. But at the February 4, 2015 hearing, when the court set the hearing dates for those two matters, there was no reason to postpone the section 366.26 hearing (especially since Y.P. had submitted on the social worker’s recommendation), while the court reasonably set the hearing on M.N.’s petition later, to give G.N. and M.N. time to seek to retain counsel. We decline to hold that the legal standards governing placement

For the foregoing reasons, the Department had authority to determine D.N.’s post-termination placement, subject to the juvenile court’s review for abuse of discretion. (§§ 366.26, subd. (j), 366.3, subds. (a), (d), (e)(1); *Fresno County Dept. of Children & Family Services v. Superior Court*, *supra*, 122 Cal.App.4th at pp. 649–650.) As an alternative to their argument that the relative placement preference applies, G.N. and M.N. contend the juvenile court did not err because it correctly found the Department abused its discretion. As noted, the juvenile court did not find the Department abused its discretion in finding the foster parents’ home was suitable and D.N. had bonded with the foster parents. Instead, at the March 25, 2015 hearing, the juvenile court stated the Department abused its discretion because it did not “follow[] the law,” i.e., it did not give G.N. and M.N. preferential consideration at the disposition stage as required by section 361.3, subdivisions (a) and (d). But evidence that the Department gave insufficient consideration to relative placement pre-termination did not provide a basis to change D.N.’s post-termination placement and was not relevant to establish that, *at the time of the March 2015 hearing*, placement with the grandparents was in D.N.’s best interests. (See *Stephanie M.*, *supra*, 7 Cal.4th at p. 322 [“[A]t the hearing 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 [juvenile] 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.”].)¹¹

issues after termination of parental rights (or the interests of relatives in having a placement request decided under different standards) require postponement of a section 366.26 hearing.

¹¹ We note that, if the court had been concerned earlier in the case about the adequacy of the Department’s consideration of the grandparents (who attended many hearings) for placement, the court could have asked the Department about that issue at the detention hearings on April 17 and 22, 2014, the hearings (initially set to address jurisdiction) on May 13, June 5, and June 12, 2014, the contested jurisdictional hearing on July 21, 2014, the hearing (initially set for disposition) on August 7, 2014, and the contested disposition hearing on September 17, 2014. Instead, the record on this point

G.N. and M.N. also contend the juvenile court properly found placement with them *would* be in D.N.’s best interests. As noted, at the conclusion of the testimony at the March 11, 2015 hearing on M.N.’s motion for a change of placement, the court stated it was inclined to grant the motion. The court stated it believed the Department had not properly handled the grandparents’ request for placement, with the result that D.N. “has bonded, I think more strongly with the foster parents, but through no fault to the grand parents.” The court found that the fact G.N.’s and M.N.’s son G.N., Jr. had moved out of their home was “new evidence.” The court then stated: “Whether or not placing the child now with the grandparents is in the best interest of the child, probably not. But I don’t know that for certain.”

On March 25, 2015, after hearing argument, the court announced its ruling, explaining its conclusion the Department failed to apply the statutory relative placement preference and failed to give serious consideration to the grandparents’ request for placement. The court then stated: “Now we’re left with what is in the best interests of the child and whether granting this request will promote the best interests of the child. And that’s the hardest hurdle that this Court is having to address. [¶] The point of these cases is the preservation of family. That is of high importance. There’s no reason to place a child with strangers when we have family members who are willing and able to care for a child and it’s not been proven to my satisfaction that these grandparents were not eligible for placement.” In effect, as G.N. and M.N. note in their return to the Department’s writ petition, the juvenile court found it would be in D.N.’s best interests to be placed with relatives instead of “strangers.”

consists primarily of after-the-fact testimony (given at the March 11, 2015 hearing) about conversations between the social workers and the grandparents. Moreover, even if the court had addressed the question of relative placement earlier in the case and determined that the Department’s evaluation process was deficient or unfair, that would not have established that therefore placement with the grandparents was appropriate. Instead, any placement could occur only if there were no legal impediments (such as the criminal record of a resident of the home (§§ 361.3, subd. (a), 309, subd. (d)), and if placement was appropriate in light of the statutory criteria (§ 361.3, subd. (a)(1)-(8)).

The juvenile court was incorrect in suggesting that, in March 2015, the overriding goal of the instant dependency proceeding was the preservation of family. Instead, after the termination of reunification services (which occurred in September 2014), the goal of family reunification is no longer paramount, and “ ‘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 interests 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 interests of the child.” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In light of this shift of focus, the juvenile court was incorrect in concluding that removing D.N. from his stable and suitable foster placement and placing him with G.N. and M.N. was in his best interests because they are relatives.

The juvenile court’s concern that the Department did not treat G.N. and M.N. fairly, such as by giving them inconsistent information about the steps needed to have D.N. placed with them, also does not support a conclusion that it is now in D.N.’s best interests to be removed from his current placement and placed with G.N. and M.N. “The overriding concern of dependency proceedings . . . is not the interest of extended family members but the interest of the child.” (*Lauren R.*, *supra*, 148 Cal.App.4th at p. 855; *Stephanie M.*, *supra*, 7 Cal.4th at pp. 323-324 [Court of Appeal mistakenly focused on alleged violations of grandmother’s rights during the dependency proceeding, rather than on whether a change in placement to the grandmother’s home would be in the best interests of the child].)

It may well be that the Department could have communicated more clearly to G.N. and M.N. exactly what challenges they faced in obtaining placement of D.N. with them. The Department’s suggestion to this couple that all they needed to do was arrange for the departure from their home of G.N., Jr. (or to obtain various documents permitting him to stay), leaving them with the misimpression that that was the sole relevant issue, was unfortunate. But the record makes quite clear there were other, deeper considerations involved. G.N. and M.N. have shown an inability or unwillingness to recognize the

extensive entanglement of their own son, D.N.'s father, with the criminal justice system, and that blind spot naturally raises questions about their ability to parent D.N. While the assigned social workers may not have been as direct as they might have been about this issue with G.N. and M.N., that lack of candor is not a basis to ignore the Department's assessment of D.N.'s long-term best interests and substitute instead a rigid and categorical preference for placement with relatives. Perhaps delivering a fuller assessment of the situation to G.N. and M.N. was difficult given the evident sincerity and earnestness with which they sought custody of D.N. But in the end, whatever concern the juvenile court had about G.N. and M.N. being misled had no place in the court's review of the Department's discretionary placement decision following termination of parental rights. Placement of a child cannot be earned by estoppel.

The record and the applicable legal standards do not support a conclusion that the Department abused its discretion under section 366.26, subdivision (j) by determining that placement with foster parents E.C. and I.P. was appropriate and in D.N.'s best interests. We therefore conclude the juvenile court abused its discretion in granting M.N.'s section 388 petition and ordering a change in D.N.'s placement. (See *Paul C.*, *supra*, 62 Cal.App.4th at p. 12 [trial court erred in overriding agency's decision as to child's post-termination placement, where trial court could not reasonably conclude agency abused its discretion].)

III. DISPOSITION

Let a peremptory writ of mandate issue compelling respondent court to (1) set aside its order of March 25, 2015, granting M.N.'s section 388 petition and ordering that D.N. be removed from his foster placement and placed with paternal grandparents G.N. and M.N., and (2) enter a new order denying M.N.'s section 388 petition.

Streeter, J.

We concur:

Reardon, Acting P.J.

Rivera, J.