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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re KAYLA C., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

DANNY C.,

Defendant and Appellant.

D065421

(Super. Ct. No. NJ12624F)

APPEAL from an order of the Superior Court of San Diego County, Michael J. Imhoff, Commissioner. Affirmed.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for
Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County
Counsel, and Paula J. Roach, Deputy County Counsel, for Plaintiff and Respondent.

Danny C. appeals an order denying his petition under Welfare and Institutions Code section 388¹ and terminating his parental rights in the juvenile dependency case of his minor daughter, Kayla C. Danny's petition sought to change Kayla's placement from foster care to the home of Michelle C., Danny's sister. Danny contends that the juvenile court erred by summarily denying his petition. Danny further contends that the order should be reversed because (1) the court erred by not adequately inquiring as to Kayla's paternity; (2) the court erred by not providing sufficient notice to Danny of Kayla's dependency case; (3) the court erroneously appointed counsel for Danny without requiring notice to Danny of counsel's potential conflict of interest; and (4) the court erroneously relieved counsel for Danny without a showing of good cause. We conclude that the court properly denied Danny's petition under section 388 and that any error was harmless. We therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

On April 3, 2013, the San Diego County Health and Human Services Agency (the Agency) petitioned the juvenile court under section 300, subdivision (b), on behalf of newborn Kayla. Kayla and her mother, S.M., tested positive for amphetamines at the time of Kayla's birth. S.M. admitted using drugs during her pregnancy and had received little prenatal care. Danny, who S.M. identified as Kayla's biological father, admitted that he knew S.M. used drugs while she was pregnant, and that he had not done anything to try to prevent her from doing so. Danny also admitted to a history of drug use himself.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

The Agency concluded that Kayla had suffered, or was at substantial risk of suffering, serious physical harm or illness in view of S.M.'s and Danny's failure to protect Kayla and their inability to provide for her care.

S.M. and Danny were homeless, sometimes living in a tent on a riverbed in Oceanside, California. S.M. and Danny had two older children together, Daniel C. and Carter C. Daniel and Carter were also the subjects of dependency proceedings based on their parents' drug use. S.M.'s and Danny's parental rights to Daniel and Carter were ultimately terminated.

An Agency social worker interviewed Danny soon after Kayla was born. When the social worker told Danny about a potential court hearing for Kayla, Danny responded: "I don't want to be in court. You can count me out on that. I am just going to relinquish my rights." Danny expressed concern that he would be held financially responsible for Kayla. Danny said that Kayla should be placed with her maternal grandmother, Nancy L. For notice purposes, Danny gave the Agency his father's home address in Oceanside.

At Kayla's detention hearing, the court found that the Agency had made a prima facie showing under section 300, subdivision (b), and ordered that Kayla be detained in out-of-home care. S.M. and Danny did not attend the hearing.

The Agency recommended that no reunification services be provided to S.M. or Danny, and that a selection and implementation hearing under section 366.26 be scheduled. The Agency based its recommendation on S.M.'s and Danny's failure to reunify with Kayla's siblings Daniel and Carter, the termination of S.M.'s and Danny's

parental rights to Daniel and Carter, and S.M.'s and Danny's ongoing drug addiction. (See § 361.5, subd. (b)(10), (11) & (13).)

The Agency gave written notice of its recommendation to S.M.'s mother, Nancy. Nancy had suggested that contacting her would be the best way to reach S.M. and Danny. An Agency social worker also went to a local church in an effort to locate them. After Nancy reported that she had not seen S.M. and Danny, the Agency social worker delivered a duplicate copy of Danny's notice to his father's home in Oceanside. Neither S.M. nor Danny had contacted the Agency since they were interviewed at the hospital shortly after Kayla's birth.

In its jurisdiction and disposition report, the Agency noted that it was evaluating Nancy's home for potential relative placement. The Agency also stated that Danny's sister, Michelle, was reportedly not interested in caring for Kayla. The Agency intended to pursue further contact with Michelle and other relatives as they were identified.

Neither S.M. nor Danny appeared at the next hearing on jurisdiction. Prior to the hearing, Danny was located in local law enforcement custody. Although the court issued an order to produce Danny, he was not brought to court. The court therefore continued the hearing and issued a new order to produce. The court also appointed the conflict parent office of the Dependency Legal Group as counsel for Danny. Jennifer Turner, an attorney with the conflict parent office, specially appeared at the hearing for another attorney in that office, to accept the appointment. During the hearing, Turner disclosed that she had represented the Agency in a previous dependency case involving this family.

The Agency, Kayla's counsel, and S.M.'s counsel waived any potential conflict for purposes of the hearing.

S.M. and Danny did not appear at the rescheduled hearing. Danny had been released from custody. The court continued the hearing again to allow service of the Agency's petition on Danny. Danny's counsel noted that Danny had provided his father's address in Oceanside for notice purposes. The court ordered that the petition be amended to include the Oceanside address. After the hearing had concluded, Danny appeared at the courthouse and was served with a copy of the petition and notice of the further rescheduled hearing. He was also given the social worker's business card.

Neither S.M. nor Danny appeared at the further rescheduled hearing. At that hearing, Danny's counsel requested to be relieved because the cell phone number that Danny had provided no longer worked, Danny had had no contact with the Agency, and Danny was not currently in custody. The court granted the request, but noted that counsel would be reappointed if Danny were to appear and request counsel. The court then sustained the allegations of the petition and set a disposition hearing.

Despite the court's previous amendment to the petition, notice of the court's jurisdictional order was erroneously sent to the local jail rather than to the Oceanside address that Danny had provided. Around this time, Danny's sister Michelle had a supervised visit with Kayla.

At the scheduled disposition hearing, neither S.M. nor Danny appeared. The Agency requested a continuance, which the court granted. Notice of the court's order had again been erroneously sent to the local jail. At the rescheduled hearing, the court

ordered that Kayla remain in foster care and that no reunification services be provided to S.M. or Danny. The court scheduled a selection and implementation hearing under section 366.26. This time, notice of the court's order—including the date and time of the section 366.26 hearing—was correctly sent to the Oceanside address of Danny's father. Danny was personally served with notice of the section 366.26 hearing by his father as well.

Two months later, Danny's previous counsel filed a request for a special hearing. Danny was seeking reappointment of counsel and paternity testing. At the hearing, the court reappointed counsel for Danny. By the time of the hearing, Danny was no longer seeking paternity testing because the court clerk had obtained the record of a voluntary declaration of paternity signed by Danny after Kayla's birth. At Danny's request, the court granted him presumed father status. (See Fam. Code, § 7611.) Danny also requested visitation for himself and assessment of his sister, Michelle, for placement. The court granted visitation for Danny and authorized a home evaluation for Michelle.

Danny visited Kayla once before he was taken into custody again. Two months later, Danny began weekly visitations. Around the same time, Danny filed a special hearing request to institute weekly visits with Michelle and to allow her to attend Kayla's doctor's appointments with the foster parents. The court declined to make any orders but encouraged Danny and Michelle to work with the Agency to set up a visitation schedule that would accommodate Kayla's routine. The court stated that it did not want to delay planning for Kayla's future. If Danny wanted to request that Kayla be placed with

Michelle, the court recommended that he file a petition for change in placement under section 388 rather than seek increased visitation.

Michelle began to attend some visits along with Danny, approximately every other week. Their visits were generally affectionate and pleasant. Michelle's home was inspected and, at the time of the section 366.26 hearing, it was expected that her home would be approved. Although Michelle had been the subject of two Agency referrals in 2000 (for domestic violence) and 2007 (for physical abuse), the Agency did not believe that Kayla would be at immediate risk of abuse or neglect in Michelle's care.²

In advance of the section 366.26 hearing, the Agency recommended that S.M. and Danny's parental rights be terminated and that adoption be selected as Kayla's permanent plan. The Agency noted that Kayla was a special-needs child, due to her mother's drug use and her premature birth. Kayla was developmentally delayed, had difficulty feeding, and did not do well with new people. She had numerous weekly appointments for physical and other therapy. She was very strongly attached to her foster parents, who had cared for her since her release from the hospital.

On the day of the section 366.26 hearing, Danny filed a petition under section 388 requesting that Kayla be placed with his sister Michelle. In his petition, Danny noted that, since the disposition hearing, he had appeared and the court had ordered evaluation

² Danny requested discovery from the Agency regarding these referrals. The Agency responded that Michelle would have to sign a waiver before it could release the information. At the settlement conference, Danny asked the court to order the Agency to provide the waiver form to Michelle. The court declined and simply asked the Agency to follow up with Danny and Michelle.

of Michelle's home for placement. Danny alleged that placement with Michelle would be in Kayla's best interests because Michelle was Kayla's aunt and further alleged that her home had been "deemed approved" for placement. Danny claimed that Michelle had expressed interest in placement in the early stages of Kayla's dependency, and that the Agency had failed to properly evaluate her.

With his petition, Danny submitted a five-page statement from Michelle. In the statement, Michelle claimed that she had expressed interest in Kayla being placed with her to an Agency social worker within the first month of Kayla's dependency case. Michelle had also asked for visitation with Kayla, which was arranged. Michelle had one visit with Kayla and her foster parents. Michelle also spoke with Kayla's foster mother extensively around that time about Kayla's medical needs. Michelle stated that she could not call the foster parents to arrange any further visits because she was not "privileged enough" to have their telephone number. She claimed that she had spoken with an Agency social worker again around the same time and that she had confirmed her interest in Kayla's placement. Michelle did not contact anyone from the Agency again for approximately three or four months.

In the statement, Michelle went on to explain that, after returning from a family vacation, Michelle had called the Agency to request an update. An Agency social worker spoke with Michelle and told her that she could not be considered for visitation because Danny's paternity had not been established. Around this time, Danny reappeared in the court proceedings, requested counsel, and established paternity. Once Michelle was informed that paternity had been established, she began the relative home evaluation

process. Michelle requested visitation, but the Agency told her that the home evaluation should be completed first. She later began visiting Kayla during Danny's visits.

Both the Agency and Kayla's foster parents disputed aspects of Michelle's statement. The Agency reported that Michelle was "very standoffish" during her initial visit with Kayla. Michelle had told Kayla's foster parents that she was unsure whether she could provide long-term care for Kayla, and said that she felt pressured by the Agency to consider placement. The Agency indicated in a report around that time that Michelle was not interested in placement. Kayla's foster parents said that they had given Michelle their phone number, but she did not call to request any visits after the initial one. The Agency also reported that Michelle had not requested visits with Kayla while her home was being evaluated, and that Michelle seemed uninterested in, and minimized, Kayla's special needs. In addition, Michelle had a busy schedule that might impact her ability to care for Kayla. She had cancelled several visits with Kayla because of her schedule. The Agency also noted that Michelle expressed displeasure at the prospect that the Agency and the court would continue to be involved even if Kayla were placed with her.

At the hearing, the court first considered Danny's section 388 petition. After hearing argument from counsel, the court summarily denied the petition without ordering an evidentiary hearing. The court noted Kayla's special needs and her extensive therapy schedule. The court also noted that Kayla was thriving in her current placement. Michelle's home, by contrast, had not yet been formally approved by the Agency. The court found that Danny had not shown that the circumstances surrounding Kayla's

placement had changed or that a change in placement would be in Kayla's best interests. The court then proceeded with the section 366.26 hearing. The court found that Kayla was adoptable and that no exception to adoption applied. The court therefore found adoption to be in Kayla's best interests, terminated Danny's and S.M.'s parental rights, and ordered adoption as Kayla's permanent plan. Danny appeals.

DISCUSSION

I

A

Danny first contends that the juvenile court erred by not adequately inquiring into Kayla's paternity. Specifically, Danny maintains that the court was required to contact the California Department of Child Support Services at the outset of Kayla's dependency case to determine whether Danny had filed a voluntary declaration of paternity. A voluntary declaration of paternity has the same force and effect as a judgment of paternity and is generally sufficient to entitle the male declarant to presumed father status in dependency proceedings. (Fam. Code, § 7573; *In re Liam L.* (2000) 84 Cal.App.4th 739, 747.) Danny claims that the court's failure to make this inquiry prevented him from establishing presumed father status at an earlier stage of the proceedings, and thus hindered Michelle's ability to seek placement of Kayla in her home.

Section 316.2 establishes the court's duty of inquiry: "At the detention hearing, or as soon thereafter as practicable, the court shall inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers." (§ 316.2, subd. (a); see Cal. Rules of Court, rule 5.668(b).) Among other things, the

statute requires the court, as it deems appropriate, to inquire "[w]hether any man has formally or informally acknowledged or declared his possible paternity of the child, including by signing a voluntary declaration of paternity." (§ 316.2, subd. (a)(5); see Cal. Rules of Court, rule 5.668(b)(5).) Additionally, the court must direct the court clerk to inquire of the local child support agency to determine whether parentage has been established through a court order or judgment or through a voluntary declaration of paternity. (Cal. Rules of Court, rule 5.635(d)(2).)

The court fulfilled its statutory responsibilities. The Agency provided the court with the information that it had gathered regarding Kayla's paternity. The Agency's initial report to the court identified Danny as Kayla's alleged father but explained that Danny had disclaimed responsibility for Kayla. The court thus had reason to believe that Danny had not voluntarily declared paternity of Kayla. Neither Danny nor S.M. appeared in court during the detention, disposition, or jurisdiction phases of Kayla's dependency case. As a result, the court could not inquire directly of Danny or S.M. about Kayla's paternity. However, pursuant to the California Rules of Court, the court requested that the local child support agency (here, the County of San Diego Department of Child Support Services) determine whether Kayla's parentage had previously been declared. The County of San Diego Department of Child Support Services responded but did not identify any order, judgment, or voluntary declaration establishing parentage.

Danny does not offer any authority that would support a requirement that the court inquire of the Department of Child Support Services directly regarding Kayla's paternity under these circumstances. However, even if the court had such a duty, any error in not

contacting that department was harmless. The Agency appears to agree with Danny that we apply the standard of harmlessness beyond a reasonable doubt to this error. (See *In re Justice P.* (2004) 123 Cal.App.4th 181, 193 (*Justice P.*))

It was Danny's responsibility to come forward and ask the court to recognize his status as a presumed father. (See *In re O.S.* (2002) 102 Cal.App.4th 1402, 1410.) Danny showed little interest in the proceedings until months after the section 366.26 hearing had already been set. Danny did not ask that any of his relatives be considered for placement. Instead, he told the social worker that he would like Kayla to be placed with S.M.'s mother Nancy. At the outset of Kayla's dependency, Michelle also reportedly did not wish to care for Kayla. Even if the court had inquired of the Department of Child Support Services and obtained Danny's voluntary declaration of paternity, there is no reason to believe that the outcome of the proceedings would have been different. The court's discovery of Danny's voluntary declaration of paternity would not have overcome the impact of Danny's disinterest in the proceedings or Michelle's reported disinterest in caring for Kayla. Because these two factors, and not the lack of discovery of the paternity declaration, led to Kayla's placement in foster care, any error by the court was harmless beyond a reasonable doubt.

B

In a related argument, Danny contends that the juvenile court failed to comply with the notice provisions of section 316.2. Those provisions require the court to provide notice to an alleged father "at his last and usual place of abode by certified mail return receipt requested" that he may be the father of a child in dependency proceedings.

(§ 316.2, subd. (b).) "The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Counsel form Paternity-Waiver of Rights (JV-505) shall be included with the notice." (*Ibid.*; see Cal. Rules of Court, rule 5.635(g).) "Among other things, the JV-505 form informs an alleged father that he has a right to be present at hearings to establish paternity." (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 387.)

Danny was identified from the outset of the dependency proceedings as Kayla's alleged father. The notice provisions of section 316.2 therefore applied to him. "An alleged father in dependency proceedings is entitled to notice, because notice provides him an opportunity to appear and assert a position and attempt to change his paternity status." (*In re O.S.*, *supra*, 102 Cal.App.4th at p. 1408.)

Danny asserts, without any supporting citation, that "the court did not send [Danny] information about his status or send him the JV[-]505 form." While it does not appear that the court sent any notices via certified mail return receipt requested, Danny was provided notice of the dependency proceedings in various forms. For example, Danny was provided notice of the initial jurisdiction and disposition hearing—including the Agency's recommendation that a section 366.26 hearing be set—by service on his father at the Oceanside address that Danny provided to the Agency. Danny was later personally served with the petition and notice of the rescheduled jurisdiction and disposition hearing, and was given the social worker's contact information.

Danny does not explain how these notices differ in substance from those required by section 316.2. Nor does Danny point to any evidence in the record showing that Danny did not receive the JV-505 form with these notices. The court's error in failing to deliver these notices via mail is clearly harmless beyond a reasonable doubt. (See *In re J.H.* (2007) 158 Cal.App.4th 174, 183 ["[E]rrors in notice do not automatically require reversal but are subject to the harmless beyond a reasonable doubt standard of prejudice."].)

Even if Danny had established error under section 316.2 (e.g., failure to provide the JV-505 form), any such error would also be harmless in light of the notices that he indisputably did receive, his express lack of interest in the proceedings, and his failure to request relative placement with Michelle until late in the proceedings. Since he was served with the Agency's petition under section 300, Danny had notice of Kayla's dependency proceedings and the potential impact on his parental rights. (See *In re Marcos G., supra*, 182 Cal.App.4th at p. 389.) The Agency also personally delivered, to Danny's father, notice of its recommendation that a section 366.26 hearing be set and that no reunification services be offered. Both of these notices included notice of the next court hearings, which Danny failed to attend. The court's order setting the section 366.26 hearing was also mailed to the Oceanside address that Danny provided. Notwithstanding these notices, Danny did not contact the Agency or request any substantive involvement in Kayla's dependency case until five months after Kayla's detention and two months after the court's order setting the 366.26 hearing was mailed. Rather, Danny specifically

disclaimed any interest in Kayla and stated that she should be placed with S.M.'s mother Nancy.

Under these circumstances, Danny has not shown that if the court had mailed the notices required by section 316.2, including the JV-505 form, this would have had any effect on his participation in Kayla's dependency proceedings, or that he would have requested relative placement with Michelle any earlier. For example, Danny has not shown that the notices required under section 316.2 would have led him to consider relative placement any more than the notices that he did receive. Moreover, the Agency reported at the outset of Kayla's dependency case that Michelle was not interested in caring for Kayla. Michelle's reported interactions with Kayla's foster parents corroborated this report; Michelle told the foster parents that she felt pressured by the Agency to consider placement and did not know whether she could provide long-term care to Kayla. In light of Michelle's unwillingness to care for Kayla, there is nothing to indicate that notice to Danny under section 316.2 would have had any effect on Kayla's potential placement with her, (see *In re J.H.*, *supra*, 158 Cal.App.4th at pp. 184-185 [notice error harmless where relative was "unwilling or unable" to care for the dependent child]), or that service under section 316.2 would have led Danny, or the court, to consider placement with Michelle any earlier than they did in this case. Any error under section 316.2 was therefore harmless beyond a reasonable doubt.³

³ In light of our conclusion, we need not consider whether Danny forfeited his claims of error by not raising them in the trial court.

II

Danny next contends that the juvenile court erred in appointing attorney Jennifer Turner to represent him. Once the court determined that Danny was in law enforcement custody, the court appointed the conflict parent office of the Dependency Legal Group as Danny's counsel. An attorney from that office, Jennifer Turner, specially appeared at the hearing to accept the appointment on behalf of another attorney. Turner previously represented the Agency in proceedings concerning the family. Danny argues that Turner should have disclosed this potential conflict of interest prior to the hearing. (See Cal. Rules Prof. Conduct, rule 3-310(B)(2)(a).)

Even assuming that Danny has not forfeited this argument by failing to raise it in the trial court, and further assuming that the trial court is responsible for ensuring disclosure, Danny has not established reversible error in the appointment order. Turner was not Danny's counsel. She appeared only to accept appointment of the conflict parent office; she had no substantive involvement in Danny's case. Under these circumstances, disclosure to Danny was not required. Moreover, Danny offers no argument that he was prejudiced by the purported error, and concedes that there was no actual conflict. Danny's request for a new appointment hearing is without merit.

III

Danny maintains that the juvenile court erred in subsequently relieving his counsel. Appointed counsel in juvenile dependency cases may be relieved for cause. (See § 317, subd. (d).) Cause for relief may appear where an attorney is unable to communicate with his or her client, such that the attorney "cannot possibly know what

course of action their clients expect them to pursue." (*Janet O. v. Superior Court* (1996) 42 Cal.App.4th 1058, 1066 (*Janet O.*)) "Under these circumstances, a juvenile court should be permitted to conclude that [the clients] no longer desire representation, and may, pursuant to section 317, find that good cause exists to relieve counsel." (*Ibid.*; see *In re Jesse C.* (1999) 71 Cal.App.4th 1481, 1490.) We review the trial court's order relieving counsel for abuse of discretion. (*In re Jesse C.*, at pp. 1490-1491.)

Danny did not request counsel and, at the outset of Kayla's dependency case, told the Agency that he would not participate in dependency proceedings. Despite being provided notice, Danny did not appear at court hearings or contact the Agency. Counsel was appointed for him only when the court discovered that he was in custody. Although Danny later appeared at the courthouse on one occasion, after a scheduled hearing had concluded, he did not appear at the next hearing, of which he had notice, and did not contact the Agency or his attorney. Danny's counsel therefore requested to be relieved, noting that the cell phone number that Danny had provided was not working, Danny had no known address, and Danny was no longer in custody.

Under these circumstances, Danny's counsel would be unable to know what course of action Danny would have her pursue. (See *Janet O.*, *supra*, 42 Cal.App.4th at p. 1066.) Indeed, Danny's last expressed intention was to relinquish his rights to Kayla and not appear in court. "To construe the section's language as prohibiting the court from relieving counsel where, as here, the evidence indicates [Danny] no longer desire[d] representation, would scuttle the purpose of the statute which is to provide counsel only to those parents who desire representation and are financially unable to afford counsel."

(*Janet O.*, at p. 1064.) While the court could reasonably have determined that counsel should have made additional efforts to contact Danny, including at his father's Oceanside address, it was not an abuse of discretion for the court to relieve counsel when it did.

Danny argues that *In re Malcolm D.* (1996) 42 Cal.App.4th 904 supports his claim of error. We disagree. In that case, the mother objected to the Agency's recommendation that the court order adoption as the permanent plan for her child. (*Id.* at p. 916.) A contested hearing under section 366.26 was set. At the hearing, counsel for the mother stated that she had not been able to contact the mother. (*In re Malcolm D.*, at p. 914.) The trial court relieved the mother's counsel, reasoning that counsel could not participate in the proceedings without the mother's cooperation. (*Ibid.*) The Court of Appeal disagreed, noting that the mother had expressed her desire to contest the Agency's adoption recommendation. (*Id.* at p. 916.) Counsel therefore could have participated in the hearing and argued, for instance, that the child was not adoptable. (*Ibid.*) Here, the only expression of Danny's intentions with respect to the dependency proceedings was his statement that he did not want to participate in the proceedings and that he wanted Kayla placed with Nancy. Thus, unlike *In re Malcolm D.*, Danny's counsel would have been acting against Danny's express wishes if counsel had, for example, advocated placement with Michelle. The court therefore properly found good cause to relieve Danny's counsel. (See *Janet O.*, *supra*, 42 Cal.App.4th at p. 1066.)

Danny claims that even if good cause existed to relieve his counsel, the trial court nevertheless erred in doing so because there is no evidence that Danny was provided notice of counsel's intent to seek relief. (See Code Civ. Proc., § 284; *In re Jesse C.*,

supra, 71 Cal.App.4th at p. 1491.) Any such error was harmless, however, if it is not reasonably probable that a result more favorable to Danny would have been reached had notice been given. (See *In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1195; see also *In re Malcolm D.*, *supra*, 42 Cal.App.4th at p. 919.)

Given Danny's expressed lack of interest in the proceedings, it is not reasonably probable that he would have contested his counsel's request to be relieved if he had received prior notice of counsel's intention in that regard. Moreover, even if the court had not relieved Danny's counsel, Danny has not shown that it is reasonably probable that he would have obtained a more favorable outcome, i.e., that Kayla would have been placed with Danny's sister Michelle. At the time counsel was appointed, Danny had expressed no interest in having Kayla placed with Michelle, and Michelle had reportedly stated that she did not want to care for Kayla. Danny has not shown that it is likely that continuing counsel's appointment would have led Danny to participate in the proceedings and request placement with Michelle earlier than he did. Any error in failing to provide notice to Danny of counsel's intention to request to be relieved was harmless.

IV

Danny contends that the juvenile court erred by summarily denying his petition under section 388. "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . ." (§ 388, subd. (a)(1).) "A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a

preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child." (*In re Zachary G.* (2000) 77 Cal.App.4th 799, 806 (*Zachary G.*)) "Such petitions are to be liberally construed in favor of granting a hearing to consider the parent's request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310.)

"However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*Zachary G., supra*, 77 Cal.App.4th at p. 806; see *In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.)

Our standard of review is well-established: "We review the juvenile court's summary denial of a section 388 petition for abuse of discretion." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; see *Zachary G., supra*, 77 Cal.App.4th at p. 808.) Danny takes issue with this standard, arguing that de novo review should apply. Danny does not cite any case where such a de novo standard was applied to the denial of a section 388 petition. Instead, Danny claims that our consideration of the sufficiency of a petition under section 388 is akin to the sufficiency of a plaintiff's showing that he or she is entitled to plead a punitive damages claim against a health care provider under Code of Civil Procedure section 425.13, which is reviewed de novo. (See *Aquino v. Superior*

Court (1993) 21 Cal.App.4th 847, 855-856.) We disagree. In considering the sufficiency of a section 388 petition, "the court may consider the entire factual and procedural history of the case." (*Justice P.*, *supra*, 123 Cal.App.4th at p. 189.) The juvenile court must determine whether, in light of the history of the proceedings before it, the petition has alleged a change in circumstance and the requested relief would be in the best interests of the dependent child. These are matters that the juvenile court is most qualified to assess, and our review of the juvenile court's decision properly gives deference to that court's findings. We will not depart from the established abuse of discretion standard. (See *In re Anthony W.*, at p. 250; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.)

A petition under section 388 must make a prima facie showing of both changed circumstances and that the proposed modification would be in the child's best interests. Thus, under section 388, "the hearing is only to be held if it appears that the best interests of the child may be promoted by the proposed change of order, which necessarily contemplates that a court need not order a hearing if this element is absent from the showing made by the petition." (*Zachary G.*, *supra*, 77 Cal.App.4th at p. 807, fn. omitted; see *Justice P.*, *supra*, 123 Cal.App.4th at p. 189.)

Danny's petition sought placement of Kayla with his sister Michelle. Danny alleged that "[t]he [L]egislature has found relative placement if possible is always in the minor's best interest. In this case Paternal Aunt Michelle[']s . . . home evaluation has been deemed approved. The Agency failed to comply with both [section] 309[, subd.](e) and 361.3 despite the Paternal Aunt making efforts to have Kayla in her care at the early stages The Agency appears to have deliberately ignored their responsibilities under

[section] 309[, subd.](e) and 361.3." Danny's petition also referred to Michelle's typed statement, which was attached. Michelle's statement recounted the difficulties that she claims to have encountered in visiting Kayla and obtaining relative placement.

Even assuming that Danny sufficiently alleged a change in circumstances, Danny's petition failed to allege facts that would support a finding that Kayla's best interests would be served by placing her with Michelle. By the time Danny filed his section 388 petition, Kayla had been with her foster parents for over 10 months. Kayla's foster home was the only one that she had ever known, and Kayla was strongly attached to her foster parents. Kayla's foster parents wanted to adopt her and were approved for adoption. By contrast, Kayla had spent only a handful of short visits with Michelle. While it was expected that Michelle's home would be approved for placement, she had not been approved for adoption. "In any custody determination, a primary consideration in determining the child's best interest is the goal of assuring stability and continuity. [Citation.] 'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).

Moreover, consideration of Kayla's special needs, and of her foster parent's history of care, is appropriate. (*Stephanie M., supra*, 7 Cal.4th at p. 325.) Because of her premature birth and drug exposure, Kayla had numerous, significant special needs which necessitated a heightened level of care. Kayla's foster parents had proven their ability to care for Kayla, to take her to her numerous weekly appointments, and to provide her with

the necessary environment for her to thrive. Danny's petition does not address whether Michelle's care would be in Kayla's best interest given her unique needs.

With respect to best interests, Danny's only allegation was, in essence, that it is always in a child's best interests to be placed with a relative. However, the mere fact that Michelle is Kayla's relative did not require the court to conduct an evidentiary hearing on Danny's petition. As a relative, Michelle was entitled to "preferential consideration" by the Agency. (See § 361.3, subd. (a).) " 'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) The statute does not mandate that a child be placed with a relative, and it does not "supply an evidentiary presumption that placement with a relative is in the child's best interest." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 320.) Instead, the court must "determine whether such a placement is *appropriate*, taking into account the suitability of the relative's home and the best interest of the child." (*Id.* at p. 321.)

Danny was thus required to allege facts, beyond Michelle's status as Kayla's relative, to establish the appropriateness of Michelle's home and support his conclusion that changing Kayla's placement would be in her best interests. Danny did not do so. The fact that it was expected that Michelle's home would be approved for placement was insufficient, since this fact established only that Michelle's home met the Agency's minimum standards and has little relevance to the question of whether Kayla's best interests would be served by her placement with Michelle. "[R]egardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of

the child, whose bond with a foster parent may require that placement with a relative be rejected." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 321.)

Similarly, the alleged errors on the part of the court and the Agency that Danny cites do not show that placing Kayla with Michelle would be in Kayla's best interests. Except as discussed *ante*, Danny does not claim that the alleged errors require reversal on their own. When assessed in the context of section 388, they do not support Danny's claim that the court erred in summarily denying his petition. For example, Danny claims that the court abused its discretion in not ordering the Agency to comply with discovery. However, the discovery that Danny sought to compel went only to the issue of Michelle's own child welfare referrals. (See fn. 2, *ante*.) Danny's arguments regarding prejudice, which focus on other discovery pertaining to Michelle's contacts with the Agency regarding Kayla, are therefore unpersuasive.

Danny's claims that the Agency allegedly failed to provide Michelle notice under section 309, subdivision (e), and failed to accord her relative placement preference under section 361.3, do not address the dispositive question of Kayla's best interests. "[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 interest of the child *at that time*. Evidence that at earlier proceedings the court had not sufficiently considered placement with the [relative] was not relevant to establish that at the time of the hearing under review, placement with the [relative] was in the child's best interest." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 322, fn. omitted.)

Danny's reliance on *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, is misplaced. In that case, this court reversed the juvenile court's denial of a section 388 petition because the court erroneously determined that it did not have jurisdiction to review an agency determination that a relative had committed a disqualifying criminal offense. (*In re Esperanza C.*, at p. 1060.) No such error of law appears in the court's consideration of Danny's section 388 petition.⁴

Even assuming that Danny made a prima facie showing of a change in circumstances, the court did not abuse its discretion in determining that Danny's petition did not allege sufficient facts to allow the court to find that changing Kayla's placement would be in her best interests. "In the context of a motion pursuant to section 388 for change of placement after the termination of reunification services, the predominant task of the court was to determine the child's best interest, which the court here did." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 320.)

⁴ Danny contends that the court erred by not viewing his allegations in the light most favorable to him. (See *In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309, 310 ["Such petitions are to be liberally construed in favor of granting a hearing to consider the parent's request."]; see also Cal. Rules of Court, rule 5.570(a).) We disagree. In the absence of any contrary evidence, we presume that the court has followed the law. (See *People v. Lang* (1989) 49 Cal.3d 991, 1044 ["Trial courts are generally presumed to have understood and followed established law."]; see also *In re Karen A.* (2004) 115 Cal.App.4th 504, 508, fn. 3.) Danny has provided no evidence that the court failed to follow the law in this regard.

DISPOSITION

The order is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.