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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

J.A.,

Defendant and Appellant.

D070087

(Super. Ct. No. NJ14620)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

Julie E. Braden, by appointment of the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips and Kristen M. Ojeil, Deputy County Counsel, for Plaintiff and Respondent.

The court terminated J.A.'s (Father) and S.D.'s (Mother) parental rights to their daughter (A). Neither party challenges the court's termination ruling, but Father appeals from an earlier order denying his petition to move A from her foster home to the home of Father's mother (Paternal Grandmother). (Welf. & Inst. Code,¹ § 388.) The San Diego Health and Human Services Agency (Agency) counters that Father has no standing to challenge this prior order and, alternatively, the court did not err in denying Father's motion to change A's placement.

On the particular circumstances before us, we determine Father has standing to challenge the denial of his motion to change placement. But we find no error. The court did not abuse its discretion in concluding the move was not in A's best interest.

Accordingly, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

Because the sole appellate issue concerns the court's denial of Father's motion to place A with Paternal Grandmother, our factual summary focuses on the evidence relevant to this issue. We describe the facts pertaining to the court's jurisdictional, dispositional, and parental termination findings only as they relate to the placement issue.

Background

A was born in early June 2015 with methamphetamine in her system. Mother used heroin and methamphetamine during the pregnancy, and both parents have abused drugs for many years. Mother and Father had one other child together (I). At the time of

¹ All unspecified statutory references are to the Welfare and Institutions Code.

A's birth, I was almost two years old; he had been removed from the parents' care; and Paternal Grandmother was in the process of adopting him.

Based on A's drug exposure, the Agency detained A shortly after her birth and asked Paternal Grandmother whether she was interested in caring for A. Paternal Grandmother said she wanted to take A, but did not feel she could do so because she was in the process of adopting I; she was caring for two other children; and was feeling overwhelmed. Paternal Grandmother said she worked full time and the paternal aunt assisted with daycare. The Agency later contacted other relatives, but did not find anyone willing to care for A.

About two weeks after A's birth, on June 24, A was released from the hospital and detained in a confidential home with foster parents (Foster Parents), who were experienced in caring for drug-exposed infants. At the time, A was suffering from severe withdrawal symptoms. During the next several months, A continued to have serious medical problems related to her drug exposure, including narcotic drug withdrawal, neonatal abstinence syndrome, gastroesophageal reflux disease, dysmorphology, hypertonicity, torticollis, and diastasis recti. A's doctors believed A was at high risk for developmental disabilities. She required multiple doctor and therapy appointments, and time-consuming daily care that included repeated 30-minute massages, and therapy to address her feeding delays.

At the August 4 jurisdictional hearing, the court found A's parents were unable to properly care for her and sustained the jurisdictional allegations. (§ 300, subd. (b).) The court maintained A's custody with the Foster Parents.

Shortly after, Paternal Grandmother told social workers that she would take custody of A because she wanted A to be with family. But Paternal Grandmother also expressed concern as to whether she would be able to meet the baby's needs, including her numerous medical and therapy appointments. Paternal Grandmother attended visitations with A once in July and once in August, although she was given an opportunity for more visitations.

On August 8, a team decisionmaking meeting was held. At the meeting Paternal Grandmother said she was interested in caring for A with the assistance of A's paternal aunt and paternal great aunt. Social workers explained the necessary steps to obtaining custody, including a completed relative home assessment (RHA). The social workers indicated they would submit an RHA.

Two weeks later, on August 24, the court held a contested disposition hearing. The Agency reports prepared for the hearing did not include any information about Paternal Grandmother's custody request. Likewise, neither Father nor Mother (who were each represented by counsel at the hearing) raised the issue of Paternal Grandmother's stated willingness to care for A. On the custody issue, the court found by clear and convincing evidence that A should be removed from the parents' custody; there were no available relatives able and willing to care for the child; and there were no reasonable means to protect A without removing her from the parents' physical custody. (§ 361, subd. (c)(1).) Without any objection, the court continued A's placement with the Foster Parents.

At the conclusion of the disposition hearing, the court ruled no reunification services would be provided to either parent based on the court's findings their rights had been terminated as to A's sibling and the parents had not made reasonable efforts to treat the chronic drug addiction problems that led to the prior termination of parental rights.² (See § 361.5, subd. (b)(10), (11).) The court referred the matter to a section 366.26 permanency planning hearing.

In September 2015, social worker Karen Castro was assigned to the case. Castro was familiar with Paternal Grandmother because she had been working with her for about one year on I's adoption. Castro had lengthy conversations with Paternal Grandmother about A and A's medical issues. During these conversations, Paternal Grandmother expressed substantial ambivalence as to whether she would be able to care for A.

After her assignment on A's case, Castro checked the file and learned the prior social worker had never submitted the RHA request. Castro filed the request in mid-October. Castro then gave Paternal Grandmother the Foster Parents' phone number, and encouraged her to contact the Foster Parents to learn about A's progress and medical appointment dates. Castro told Paternal Grandmother it was important to go to the appointments. But Paternal Grandmother attended only a few appointments and never called the Foster Parents (except for one call from Paternal Grandmother's daughter regarding a visitation arrangement).

² Mother also had two other children with different men. Mother's parental rights had been terminated as to one of these children, and the other child was living with her father.

In early November 2015, Paternal Grandmother's RHA was approved. During the next two months, the Agency provided Paternal Grandmother the opportunity to visit with A twice per month, and continued to encourage her to attend medical and therapeutic appointments and to call the Foster Mother. However, Paternal Grandmother made no calls to the Foster Parents; did not attend most of the medical appointments; and visited with A twice in November and only once in December.

In its December 2015 report for the section 366.26 hearing, the Agency recommended the court terminate parental rights and maintain A's placement with the Foster Parents, who wished to adopt A. In the report, social worker Castro described the parents' continuing drug abuse issues and opined that neither parent had the type of parental relationship with A that would outweigh the benefits of stability in an adoptive home. Castro also detailed how A was thriving in the Foster Parents' care and was strongly bonded with the Foster Parents, and that the Foster Parents were effectively meeting all of A's medical, therapeutic, and emotional needs.

Castro also described the efforts that had been made to place A with Paternal Grandmother:

"In regards to the placement with [Paternal Grandmother], the Agency's efforts are to place children with family members[;] therefore, since the inception of [A's] dependency case, this [social worker] informed [Paternal Grandmother] and her family of the protocol to obtain placement of [A]. Tearfully [Paternal Grandmother] informed this [social worker] several times that she could not meet the needs of [A]. It was not until August that though [Paternal Grandmother] continued to state on several occasions that she does not feel she could care for the child she had now changed her mind and wanted placement of [A]. Despite her [home] being approved, [Paternal Grandmother] has not been consistent in visiting

[A] since being provided with the opportunity in July 2015. In addition, on October 27, 2015, this [social worker] also informed [Paternal Grandmother] that she could also participate in [A's] medical appointments[, but Paternal Grandmother] has not made an attempt to even identify [A's] medical concerns or attend a medical appointment. It is this [social worker's] opinion that [Paternal Grandmother] is being pressured to obtain placement for [A] by [Father]. . . . Since [A] currently has 14 to 15 monthly medical appointments that does not include the 4 supervised visits with her parents, it would be unrealistic to force [Paternal Grandmother] to care for [A] when she requires a high level of care. [Paternal Grandmother] has stated that she loves and wants the best for [A] but she continues to experience mixed emotions with obtaining placement of [A]."

In her report, A's CASA (court appointed special advocate) similarly opined that A's best interest would be served by remaining with the Foster Parents and that Paternal Grandmother was not in a position to effectively care for A. The CASA discussed that A has "thrived" in the Foster Parents' care, and noted that "[A's] medical issues require consistency, persistence, and patience. . . . [A's] access to resources, such as therapy is due to considerable persistence by her foster mother." The CASA said that although Paternal Grandmother "enjoys spending time" with A, she "has not made attending all of her allowed supervised visits a priority, and has yet to attempt to attend any of A's medical appointments, though she has been informed that she can do so. . . . [I]t is concerning to me that she does not seem to understand that A has severe medical needs that need to be addressed and therapy to undergo."

Beginning in January 2016, Paternal Grandmother's visits were reduced to once per month based on the Agency's conclusion that Paternal Grandmother was not showing interest in the visitations or learning about A's medical needs.

Several weeks later, on January 25, Father filed a section 388 motion, requesting that the court order reunification services be provided to him and that A be placed with Paternal Grandmother. Father stated that A should be placed in the home of a relative, and submitted a copy of Paternal Grandmother's approved RHA.

Several days later, the Agency submitted a report opposing Father's motion. On the reunification services request, the social worker stated Father has not made new efforts to address his drug problems. On the placement issue, the social worker noted that although Paternal Grandmother now has an approved RHA, she "had indicated to the Agency several times in the past that she is unable and unwilling to care for [A]. She has not attended any of [A]'s numerous doctors' visits, and she has never inquired of the Agency or the current caregiver regarding [A]'s health." The social worker also stated: "It is the Agency's opinion that [Paternal Grandmother] is feeling pressured by her son, and is not in a position to take placement of her granddaughter."

At a hearing held several days later, the court found that although Father did not meet his prima facie burden regarding the reunification services issue, he did carry his burden showing changed circumstances regarding A's placement based on Paternal Grandmother's approved RHA. The court set a February 24 hearing, which was later continued to March 18 (combined with the section 366.26 and de facto parent petition hearings).

Several weeks later, the Agency filed a supplemental report. Regarding Father's section 388 motion, the report stated A's placement with Paternal Grandmother would put A's "health and development at severe risk." The report emphasized Paternal

Grandmother's inability and unwillingness to be involved in, and learn about, A's needs; Paternal Grandmother's failure to attend any of A's medical appointments after December 2015, even though she had been repeatedly told of the importance that she do so; and Paternal Grandmother's failure to call the social worker or the Foster Mother to obtain necessary information. The report concluded: "The Agency understands that while there can be great benefit to a child being placed with a relative, that is not the case when it comes to [A]. In fact, not only would it not be a benefit to the child, it would in effect put her health, safety, and development at immense risk. . . . [¶] . . . Due to [the Foster Parents'] attentive care, [A] has made progress in her physical development, and her prognosis is hopeful. The Agency feels that to place [A] in a home where the caregiver has not seized upon the opportunity to learn about her needs, and has not shown the ability to even get to her appointments would be detrimental to [A], and would result in regression of her current progress."

In her supplemental report, the CASA agreed with the Agency's recommendations, and noted the Paternal Grandmother appears to defer to Father on decisions relating to A and Father appears to be pressuring Paternal Grandmother to request custody.

On March 17, the Agency filed an additional report with updated information. In the report, the Agency social worker stated that after the February 24 hearing, she and the Foster Mother gave the Paternal Grandmother detailed information about A's numerous medical appointments, but the Paternal Grandmother came to only one appointment. The social worker also noted that Father appeared to have obtained information concerning the Foster Parents' address without authority, and the Foster Parents have found evidence

that he has been outside their home. The social worker also stated that Father was arrested on February 29 for domestic violence against Mother; Mother had obtained a protective order against Father; and Father had been arrested for violating the protective order. The social worker concluded: "It is clear to the Agency that [Paternal Grandmother] is unable to keep up with the medical needs of her granddaughter, and placing [A] in her home would put her at risk. [¶] It is time for [A] to be given permanency. Her caregivers need to be able to focus on [A]'s needs and health, so she can thrive and have a happy childhood."

Section 388 Hearing

At the section 388 hearing, the court considered each of the reports summarized above, and the parties presented several witnesses. The Agency's adoptions social worker Maria Szanto-Lindner testified consistent with the information in the reports, i.e., that the reason the Agency is not recommending that A be placed with the Paternal Grandmother is the Agency's opinion that Paternal Grandmother is unable and unwilling to effectively care for A. Szanto-Lindner described A's numerous physical and developmental issues, and that she remains a medically compromised baby who requires many medical and therapy appointments as well as time-consuming massages and other special care. Szanto-Lindner said the caregiver training "has consisted [of] . . . monthly appointments upwards of 18 to 20 appointments where they've learned how to feed her, so she doesn't choke and die. They've learned how to help her move, what position she needs to be held in, so she's not further medically compromised. . . . Every time they go to another appointment they learn something new"

Szanto-Lindner also testified that although Paternal Grandmother was given detailed information about A's medical appointments and told to call the Foster Parents, she has not attended most of the appointments and does not call to find out about the results of the appointments. Szanto-Lindner said Paternal Grandmother has gone "back and forth" regarding her placement requests and has repeatedly expressed doubts about her ability to care for A. Szanto-Lindner also said Father has acted inappropriately at medical appointments and "has indicated in the past . . . that as soon as child welfare services is out of the picture he'll be moving in with his mother and helping raising the children." Szanto-Lindner additionally described the strong bond between A and the Foster Parents.

Social worker Castro likewise testified that Paternal Grandmother had not manifested a commitment to providing the necessary care to a special-needs infant. Castro said that beginning in June 2015 through her last contact with Paternal Grandmother in January 2016, Paternal Grandmother told her repeatedly that she was *not* able to take custody of A. Castro testified "It was always like [Paternal Grandmother] wanted to do it but it was always an issue of why she couldn't do it." Castro said that Paternal Grandmother "was always on the fence about it. It was always like, I don't know if I should do it. It seems like the girl has a lot of medical needs. I'm not sure if I can do this. It seems like it's very overwhelming. I've been told she has a lot of appointments." Castro said she had worked with Paternal Grandmother for a long time and that she was a "very nice lady," but Paternal Grandmother did not "appear to grasp the nature" of A's medical problems. Castro also testified that the Foster Mother did not feel safe when

Father attended medical appointments because he would become angry and act inappropriately.

In her testimony, Foster Mother detailed A's medical diagnoses and discussed the time commitment required to care for A, including massages, dealing with feeding issues, trainings, speaking with physicians about medication levels, and travelling to A's numerous medical and therapy appointments. Foster Mother said she was experienced in dealing with drug-exposed babies, as her four-year-old adopted daughter had similar issues. Foster Mother said that A "[has] been evaluated as very high risk for developmental delays [and] that when she's not making forward progress she will be making backward progress." Foster Mother said she was very interested in adopting A.

Paternal Grandmother's testimony at the section 388 hearing was inconsistent with much of the Agency's evidence. Paternal Grandmother said that from the time of A's birth she consistently told the Agency social workers she was ready and willing to care for A and that she never wavered on this issue. Paternal Grandmother testified that if A was placed with her, she has the ability to take A to her numerous medical appointments. Paternal Grandmother said that the social workers told her she was not permitted to go to the doctor appointments with the Foster Mother. She said she was told that she was only permitted to call the Foster Parents twice per week, and that she had called her five times in the past. Paternal Grandmother said she currently had only one other child in her care (A's sibling I), and Paternal Grandmother's sister (who lives with her) and daughter (who lives close by) are available to help her with A's care. Paternal Grandmother said she

wanted A to come live with her because she wanted her to grow up with her brother and she did not want A to be raised "[i]n another place that's not with her own family."

Laurie Mitchell, Paternal Grandmother's employer and friend, testified in support of Paternal Grandmother's custody request. Mitchell said that Paternal Grandmother had consistently told her of her desire to take care of A. Father also presented evidence that Paternal Grandmother had recently completed adoption classes required by the Agency.

In his closing argument, Father's counsel argued the Agency failed to act in good faith and had not engaged in reasonable efforts to place A in Paternal Grandmother's home. He emphasized that Paternal Grandmother had asked for custody at the August 2015 team meeting, but the Agency "drop[ped] the ball" by delaying submitting the RHA for two months and failing to provide Paternal Grandmother with sufficient visitations and assistance with attending medical appointments and visitations. Father's counsel also urged the court to find A's best interest would be served by being placed with a relative to allow her to maintain her family and sibling bonds.

In his closing argument, the Agency's counsel conceded Father met his burden to show changed circumstances (a completed RHA). But he argued that Father had not shown it was in A's best interest to grant his section 388 motion, discussing A's documented medical needs and Paternal Grandmother's demonstrated inability to meet these needs.

A's counsel supported the Agency's position. He said it was not an "easy decision" because it is "terribly important for children, if at all possible, to be raised with family in particular with siblings." But A's counsel said "this case has very unique facts,"

including that A has significant disabilities and remains a "fragile" baby who "needs constant care throughout the day." Counsel said that although Paternal Grandmother has been a good mother and is raising A's sibling, the issue before the court "boils down to . . . the best interest prong," and the facts show A's best interests would not be served by changing the placement.

After considering all of the evidence and these arguments, the court denied Father's section 388 motion, finding "by clear and convincing evidence" it was "not in [A's] best interest to be moved" The court explained its reasoning as follows:

"[W]as there a dropping of the ball? I'd say, yeah. I think Ms. Castro testified . . . that she thought the home evaluation was going to be started sooner. She does say it wasn't, [and] when she discovered it [had not been submitted,] she followed up[.] [W]ould that have changed things, perhaps. Was there a failure to accurately and adequately communicate? That's a tougher call because really the question is: How many affirmative duties do we have? The agency has a certain affirmative duty as relates to the child. But their affirmative duty ends as to extend past the child, then the parents.

"The parents have an affirmative duty if they wish to proceed and/or if they wish to see the child go somewhere else and to start asking, raising questions, then the relative I think has a certain affirmative duty also in terms of following up.

"So a couple of things are important to me. One, as everybody has indicated, the first prong is met because there is a positive home evaluation that was not in effect at the time of the original court order, so that's a new and different fact.

"The second issue is whether or not it would be in the child's best interest to change placement. Here's the biggest distinction I see, three things. [Father's counsel] says . . . that [the Foster Mother] is able to do it over a period of time and therefore [Paternal Grandmother] can do it over a period of time. That assumes they were in the same circumstances at the time of a placement. And

here [the Foster Mother] is not in the same circumstance. She had already been through a process of dealing with a special needs child.

"So at base level she was in a different position in terms of being able to deal with [A]. The second thing . . . that's uncontradicted . . . is . . . that if [A] is not progressing she is regressing. It isn't like reaching a baseline and knock on wood you stay there until something brings you up. There's no question in my mind that to move [A] at this time someone who has to go through the initial training would result in significant regression of [A], which is clearly not in her best interest.

"And I can't ignore the testimony that was presented by [the social worker] that [Father] says as soon as CPS is out of the picture he's back and he's raising the kid. [¶] I heard her testify to it, it wasn't contradicted by anyone including [Paternal Grandmother]."

The court then conducted the section 366.26 hearing. After considering the evidence, the court found A was adoptable and the beneficial parent-child exception inapplicable. The court thus terminated the parental rights of both Mother and Father.

DISCUSSION

Father does not challenge the court's ruling terminating his parental rights. Instead, his sole appellate contention is that the court erred in denying his section 388 motion to change A's custody from the Foster Parents to Paternal Grandmother. The Agency argues that Father has no standing to raise this issue as his parental rights have been terminated, and even if he has standing, the court acted within its discretion in denying the motion. Under the particular circumstances of this case, we determine Father has standing to challenge the section 388 ruling. However, we determine the court did not abuse its discretion in denying the section 388 motion.

I. *Standing*

Generally, when a parent appeals from a judgment terminating parental rights, the party has standing to appeal prior placement orders "only if the placement order's reversal" would have "advance[d] the parent's argument against terminating parental rights." (*In re K.C.* (2011) 52 Cal.4th 231, 238.) Father opposed termination of parental rights in the proceedings below. A dependent child's placement with relatives is a potentially relevant factor in determining whether to choose adoption as a permanent plan. (See § 366.26, subd. (c)(1)(A).) On this record, there is at least some possibility (however slight) that Father's parental rights were affected by the court's denial of his section 388 motion. Accordingly, under the particular circumstances of this case, we conclude Father had standing to challenge the court's section 388 ruling.

II. *Legal Principles Governing Father's Section 388 Motion*

To prevail on a section 388 petition, the party must show: (1) new evidence or changed circumstances; and (2) the proposed change would promote the child's best interests. (*In re D.B.* (2013) 217 Cal.App.4th 1080, 1089.) Additionally, when the section 388 petition seeks to move a child to a relative's custody, this two-prong test must be considered in conjunction with the statutory relative placement preference set forth in section 361.3.³ (*In re Isabella G.* (2016) 246 Cal.App.4th 708, 719-723 (*Isabella*).)

³ Section 361.3 states in relevant part: "(a) In any case in which a child is removed from the physical custody of his or her parents . . . , preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative In determining whether placement with a relative is appropriate, the county social worker and court shall consider, but shall not be limited to, consideration of all the

Under section 361.3, the Legislature intended " '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.' . . . [¶] . . . When considering whether to place the child with a relative, the juvenile court must apply the [section 361.3] placement factors, and any other relevant factors, and exercise its independent judgment concerning the relative's request for placement." (*Isabella*, at p. 719.) Section 361.3 seeks to implement the public policy goal of preserving families during the dependency process. (See *In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1112 (*Lauren*).)

In *Isabella*, this court recently recognized that the section 361.3 relative preference applies when making the initial placement decision *and* during the subsequent dependency period. (*Isabella, supra*, 246 Cal.App.4th at pp. 719-723; see *Cesar V. v.*

following factors: (1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs. [¶] (2) The wishes of the parent, the relative, and child, if appropriate. [¶] (3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement. [¶] (4) Placement of siblings and half siblings in the same home [¶] (5) The good moral character of the relative and any other adult living in the home [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] . . . [¶] (F) Facilitate visitation with the child's other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) Provide legal permanence for the child if reunification fails. [¶] However, any finding made with respect to the factor considered pursuant to this subparagraph and pursuant to subparagraph (G) shall not be the sole basis for precluding preferential placement with a relative. [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8) The safety of the relative's home. For a relative to be considered appropriate to receive placement of a child under this section, the relative's home shall first be approved pursuant to the process and standards described in subdivision (d) of Section 309."

Superior Court (2001) 91 Cal.App.4th 1023, 1032; *In re Joseph T.* (2008) 163 Cal.App.4th 787, 793.) Specifically, we held the relative preference rules govern even if the reunification period has ended and a new placement is not "necessary" (i.e., there would be no placement change considered except for a relative's placement request). (*Isabella*, at p. 723.) We explained that "[i]deally, the statutory scheme contemplates the Agency has identified and approved the child's relatives for placement before the dispositional hearing," but the Legislature did not intend to limit to this time period the the obligation to consider a relative's custody request. (*Id.* at p. 719.)

But in *Isabella* we also recognized that despite the strong relative preference rules, a relative is not guaranteed custody and the focus must remain on the child's best interests. (*Isabella*, *supra*, 246 Cal.App.4th at p. 723; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 317-320, 322 (*Stephanie*); *In re Joshua A.* (2015) 239 Cal.App.4th 208, 218-219; *Lauren*, *supra*, 158 Cal.App.4th at pp. 1112-1113.) When considering a relative's placement request, the child's best interests are paramount, and the court must consider the statutory factors that seek to ensure the child's interests are promoted and protected. (§ 361.3, subd. (a)(1); *Stephanie*, *supra*, 7 Cal.4th at p. 320 [even if the relative preference applies, it does not "overcome the juvenile court's duty to determine the best interest of the child"]; see *Lauren*, *supra*, 158 Cal.App.4th at p. 1112; see also *In re Joshua A.*, *supra*, at pp. 218-219.) "[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*, *supra*, at p. 321.)

Accordingly, when a party brings a section 388 motion seeking to move a minor's custody to a relative's home after the disposition hearing or after a section 366.26 reference, the court must give preferential consideration to the request, but this consideration must include an assessment of the child's current circumstances and whether the new placement would be in the child's best interest. (*Isabella, supra*, 246 Cal.App.4th at p. 723; see *Stephanie, supra*, 7 Cal.4th at pp. 317-320, 322.)

A juvenile court has broad discretion in making these determinations. (*Stephanie, supra*, 7 Cal.4th at p. 318; accord, *In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.) "[A] reviewing court will not disturb that [custody] decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. . . ." (*Stephanie, supra*, at p. 318.) When reviewing the juvenile court's conclusion on this issue, we may not substitute our judgment for that of the court. (*Id.* at p. 319.) We must view all evidence in the light most favorable to the ruling, indulging in all reasonable inferences to support the decision, and keeping in mind the principle that issues of fact and credibility are matters to be determined by the juvenile court. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734.)

III. Analysis

The juvenile court found Father met his burden to show changed circumstances based on Paternal Grandmother's approved RHA. But the court found that placement with Paternal Grandmother was not in A's best interest. Father challenges the latter finding. On our careful review of the entire record, we find no abuse of discretion.

First, the record supports the court's conclusion that A would not be physically safe in Paternal Grandmother's home and would likely regress. It was undisputed that A's methamphetamine exposure resulted in serious medical conditions and a substantial risk of developmental problems, necessitating time-consuming care and therapeutic treatments to protect her life and long-term health. The court had a reasonable basis to find that Paternal Grandmother would not be able to meet these needs. Although Paternal Grandmother testified that she was willing and able to care for A, the court could reasonably credit the social workers' contrary testimony that Paternal Grandmother had manifested a lack of interest in learning about A's special needs and to devoting the substantial time that would be necessary to successfully care for A. The court could rely on Paternal Grandmother's past actions, rather than her testimony, in deciding she was not fit to care for A. Paternal Grandmother's statements and actions manifested her inability to provide appropriate care for A, despite her testimony to the contrary.

Further, the court had a reasonable basis to find credible the evidence showing Paternal Grandmother's custody request was motivated primarily by pressure from Father, who wanted to raise A once the dependency court had terminated its jurisdiction. The evidence showed that Father was able to manipulate Paternal Grandmother; Father was unwilling to accept the seriousness of A's medical condition; Father had manifested anger and frustration during medical appointments; Father had committed domestic violence against Mother; and Paternal Grandmother would be unable to protect A from Father. We find unavailing Father's assertions that the evidence did not support these facts.

The court could also properly take into consideration that Paternal Grandmother and A did not have a close relationship, despite that the Agency had provided Grandmother with numerous opportunities to call the Foster Mother, attend medical appointments, and visit with A. Because Paternal Grandmother had not taken advantage of these opportunities, she had maintained only a friendly grandparent-type relationship with the young child. Contrasted with this relationship, the undisputed evidence showed that A was strongly bonded with the Foster Parents. The evidence showed that A had substantially progressed and was thriving in the Foster's Parents' care; and if this intensive level of care was not maintained, A would likely regress and not catch up on her development. Father contends Paternal Grandmother would have replicated this care if given a chance. The trial court specifically rejected this argument, and it had a reasonable grounds for doing so.

Based on all of the evidence before it, the court could properly conclude that it was not in A's best interest to be moved from the Foster Parents to Paternal Grandmother's custody. A's fragile medical condition, together with findings that Paternal Grandmother would not be able to meet A's needs, provided ample evidence that A should not be placed with Paternal Grandmother. (See *Stephanie, supra*, 7 Cal.4th at p. 325.)

In asserting that the court's denial of his motion was "arbitrary and capricious," Father relies on portions of the record that are favorable to him. For example, he cites to the fact that Paternal Grandmother took required adoption classes and the fact that Paternal Grandmother had been approved to adopt A's toddler brother. However, the

issue before us is not whether the court could have found in Father's favor based on this evidence, but whether the court was compelled to do so. The answer is clearly no.

Despite the fact that Paternal Grandmother took the required adoption classes and that she was able to effectively care for I (who did not have similar continuing medical problems), the evidence supported a finding that removing A from her current placement was not in her best interests because Paternal Grandmother was not willing and able to care for A, a medically fragile baby.

In asserting the court abused its discretion, Father also cites the Agency's two-month delay in obtaining approval of the Paternal Grandmother's home. The court recognized the Agency's responsibility for the delay, but found the delay was unrelated to the current circumstances. The evidentiary record supports this finding. Even after Paternal Grandmother's home was approved, Paternal Grandmother continued to manifest a lack of commitment to caring for the child and showed no meaningful interest in developing a relationship with A or learning about her problems. These actions were within Paternal Grandmother's control, and were not the Agency's fault. As the court noted, a relative who wishes custody of a dependent child has at least some affirmative duty to follow up with visitations and involve herself in the child's life (to the extent practical). The record supports that the Agency and Foster Parents encouraged Paternal Grandmother's participation, but Paternal Grandmother did not attend medical appointments, call the Foster Parents, or otherwise follow up. The Agency's delay did not affect the court's best interests finding.

Moreover, even assuming the Agency's delay impeded Paternal Grandmother's attempts to more effectively participate in A's care and create a relationship with her granddaughter, the focus at the section 388 hearing must be on the child's best interest and not the Agency's past actions or inactions. (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 855; see *Stephanie*, *supra*, 7 Cal.4th at pp. 322, 323-324.) "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.)

Father next argues we must reverse the judgment because the court disregarded the legislative intent to provide preference to a relative seeking placement of a dependent child. (See § 361.3, subd. (a).) Father's argument is factually unsupported because the record shows the court properly considered the relative preference rules. The court's express finding that the RHA approval constituted a material change of circumstances (even long after reunification services had been discontinued) reflected that the court understood it was required to give preference to Paternal Grandmother's custody request. At the section 388 hearing, counsel for all parties and the court recognized that Paternal Grandmother had the right to custody *if* the custody change was in A's best interest, and the court thus properly focused on Paternal Grandmother's fitness to care for the child. The court's ultimate finding (supported by substantial evidence) that A's best interests would not be served by a custody change does not show the court misapplied the relative preference rules.

We also find immaterial the fact that the court did not specifically refer to section 361.3 in denying Father's section 388 motion. Absent any indication to the contrary, we

are required to presume the court understood and applied the statutory factors. (See Evid. Code, § 664.) In this regard, we find this case distinguishable from *Isabella*, in which this court reversed the juvenile court's denial of a section 388 motion seeking to change custody to the grandparents' home. (*Isabella, supra*, 246 Cal.App.4th at pp. 719-725.) In *Isabella*, the juvenile court expressly found the statutory relative preference rules "did not apply" because reunification services had been discontinued (*id.* at p. 717); the grandparents had a strong relationship with the dependent child and had been part of her life since she was born; the social services agency had misled the grandparents into believing they had preserved their rights earlier in the process; and the grandparents had the ability and strong desire to care for the child (*id.* at pp. 713-717, 724).

These factors were not present in this case. The court here did not find the relative preference rules were inapplicable, and instead expressed its understanding that Grandmother was entitled to custody if the placement was in A's best interest. Unlike in *Isabella*, the evidence thus supported that the court addressed the critical issue—whether the child's best interests would be served by placement with the relative who was entitled to preference. Additionally, unlike the *Isabella* grandparents, the evidence showed Paternal Grandmother was not willing or able to provide the necessary level of care for the grandchild.

Father also contends Paternal Grandmother's ability to care for A's older sibling (I) shows that she could also care for A. Although the trial court could have accepted this argument, it was not required to do so. A was in a different situation from I. Although I was born with opiates in his system, the evidence showed he suffered no withdrawal

symptoms and was described as an otherwise healthy child, who required no special medical appointments or intervention.

Finally, Father contends the court erred because experts have identified methods for successfully transferring custody of infants. In support, Father cites to various academic publications that were not submitted in the proceedings below. Because the documents were not before the juvenile court, we cannot consider these materials on appeal. (See *In re Joseph E.* (1981) 124 Cal.App.3d 653, 657; see also *Gantner v. Gantner* (1952) 39 Cal.2d 272, 278.) In any event, there is no evidence the particular circumstances of A's case were considered by the authors of these publications, and therefore their conclusions would have little or no probative value on the issue of A's best interests.

DISPOSITION

Judgment affirmed.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.