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COURT OF APPEAL, FOURH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

J.S.,

Defendant and Appellant.

D070256

(Super. Ct. No. J519188)

APPEAL from an order of the Superior Court of San Diego County, Kimberlee Lagotta, Judge. Affirmed.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Dana C. Shoffner, Deputy County Counsel, for Plaintiff and Respondent.

Dependency Legal Group of San Diego, Carolyn Levenberg, Stacey Otmann and Alison Schlick for Minor.

J.S. appeals an order denying her relative placement request under Welfare and Institutions Code<sup>1</sup> sections 361.3 and 388 to obtain custody of her granddaughter, Sarah S. J.S. contends the San Diego Health and Human Services Agency (Agency) failed to provide her with preferential consideration for placement of Sarah and the trial court abused its discretion by not granting her request. We disagree and affirm the order.

#### FACTUAL AND PROCEDURAL BACKGROUND

Sarah was born in July 2014. In September of that year, the Agency received a referral alleging that her mother, A.V., was using drugs while caring for Sarah. During the Agency's investigation of the referral, A.V. admitted a long history of heroin and methamphetamine use, and to using methamphetamine while pregnant with Sarah. Shortly after, A.V. tested positive for methamphetamine and amphetamine. A.V. agreed that Sarah's maternal great-aunt, Margo D., who already cared for Sarah regularly, would care for Sarah full-time while A.V. sought treatment for substance abuse. By November, A.V. had made little progress and had missed a scheduled drug test. On November 7, 2014, A.V. took Sarah from Margo's home. Margo reported to the Agency that she was concerned for Sarah's safety and that she could not prevent A.V. from taking Sarah.

On February 23, 2015, the Agency received a report that A.V. was homeless and again using drugs while caring for Sarah. The Agency's social worker spoke with A.V. in

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

early March and she admitted she was living in motels with Sarah and using methamphetamine. A.V. agreed to leave Sarah in Margo's care until she was able to maintain sobriety and become stable. A.V. told the social worker that Sarah's father, S.S., was currently in prison "for attempting to burn their house down 'while [A.V.] was still in it.' " In mid-April, A.V. agreed to a safety plan in which she would enter a treatment program and participate in drug testing, while Sarah remained with Margo.

A.V. entered a treatment program, but dropped out of the program after only a few days. A.V. told the social worker that she needed to work, and could not keep a job and participate in treatment. Margo told the social worker she was concerned A.V. thought Margo was trying to take Sarah away from her, and that Margo could not legally prevent A.V. from taking Sarah. On May 7, 2015, the Agency filed a petition on behalf of then nine-month old Sarah under section 300, subdivision (b) alleging she suffered or was at substantial risk of suffering serious physical harm or illness based on inadequate supervision and the inability of her parents to provide care due to A.V.'s substance use. The following day, the juvenile court made a prima facie finding the petition was true, detained Sarah, and appointed counsel.

On May 22, 2015, J.S., S.S.'s mother, spoke with the family's social worker and requested Sarah be placed with her. In its report for the disposition and jurisdiction hearing, the Agency recognized J.S.'s request for placement, but did not recommend moving Sarah to J.S.'s home because Sarah had only met J.S. twice, J.S. resided in Los Angeles, which would interfere with A.V.'s reunification efforts, and Sarah was bonded to Margo. Margo expressed her desire to continue to provide a home for Sarah, who had

lived with Margo, her husband and their two teenage daughters for the majority of her life. Even though S.S. was only the alleged father, the Agency began the process of evaluating J.S.'s home for visitation.

On the day of the initial jurisdiction and disposition hearing, June 15, 2015, A.V. reported there was a possibility that another man was Sarah's father. As a result, S.S. requested a paternity test and the issue of paternity was deferred. A.V. also contested the court's jurisdiction and the matter was set for trial. Before the contested hearing, the juvenile court received the results of the paternity test confirming S.S. was Sarah's father.

The Agency conducted background checks for J.S., her husband and her adult daughter, who lived in the family home. The background checks revealed J.S. had been referred to child welfare services in the past, and that one of the referrals had been substantiated. This discovery required a waiver for approval of J.S.'s home, which the Agency provided on July 14, 2015. On July 13, 2015, the Agency conducted a safety assessment of J.S.'s house and discovered J.S. did not have a cover, perimeter fence, or security system to prevent Sarah from accessing the home's backyard pool. The Agency required J.S. to correct the deficiency before approving the home.

At the contested jurisdiction and disposition hearing, the juvenile court amended the Agency's petition to reflect S.S. as the presumed father, found true the allegations contained in the petition, declared Sarah a dependent of the court, and removed custody from A.V. The court ordered reunification services for A.V., visitation for both parents, and continued Sarah's placement in Margo's home. The court order also "strongly

suggest[ed], as a case management issue, visitation for the paternal relatives with discretion to expand the visits with notice to minor's counsel."

J.S. had a fence installed around her pool and the Agency approved her home on September 21, 2015. J.S. then retained counsel and on October 19, 2015, filed a petition under section 388 indicating her home had been approved by the Agency and seeking expanded visitation with Sarah, as well as placement if A.V. was not visiting Sarah or if A.V.'s reunification services were terminated. J.S.'s request also asserted that Margo was preventing Sarah from visiting her paternal relatives.

The court set a hearing on the request for November 16, 2015. In advance of the hearing, the Agency reported that J.S. had come to San Diego to visit with Sarah twice in September and, after the Agency's approval of J.S.'s home, had overnight weekend visits with Sarah twice.<sup>2</sup> The Agency explained that Margo canceled one overnight visit after she learned that J.S. had allowed A.V. to visit Sarah without the Agency's authorization. In response to J.S.'s allegations that Margo was preventing visits with paternal relatives, Margo stated that once visitation with J.S. began, other paternal relatives no longer contacted her and she assumed J.S. was facilitating visits for those relatives while Sarah was in J.S.'s care.

In its report for the November hearing on J.S.'s request, the Agency stated that it would be working with Margo and J.S. to facilitate a visitation schedule that all the relatives supported. The social worker stated that because Sarah's emotional and

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<sup>2</sup> J.S. also had a supervised visit with Sarah at the Agency's office on July 14, 2015.

developmental needs were being met by Margo and A.V. was still in the reunification period, it was in Sarah's best interest to remain in Margo's care. The social worker also indicated that if circumstances changed, the Agency would consider J.S. for placement. At the November 16, 2015 hearing, the juvenile court found J.S. had shown changed circumstances and set a further contested hearing on her placement request in January.

A.V. continued to struggle, she lost contact with the Agency, was arrested several times for drug-related crimes, and did not visit Sarah regularly. As a result, in its report for the six-month review hearing the Agency recommended the court terminate reunification services and set a permanency planning hearing under section 366.26. Sarah continued to thrive in Margo's home. Margo also coordinated weekend visits for Sarah at J.S.'s home one or two times each month and J.S. visited Sarah in San Diego. The Agency continued to recommend Sarah remain in Margo's care because Sarah had formed strong attachments to Margo, her husband and their two daughters, and because the Agency thought separation from them could cause stress and negatively impact Sarah's development.

At the six-month review hearing on January 13, 2016, A.V.'s counsel contested the termination of reunification services and the juvenile court set a further hearing for March 1, 2016. The court did not rule on J.S.'s request. On February 17, 2016, J.S. filed an amended section 388 petition requesting immediate placement of Sarah. Her amended petition asserted the Agency failed to "abide by the statutory mandate of the relative placement preference to [J.S.'s] request for placement" under section 361.3, subdivision

(c)(1) and (2). At an ex parte hearing on the petition the same day, the juvenile court set the petition to be heard with the contested six-month review hearing on March 1, 2016.

At the review hearing, the juvenile court terminated reunification services and set the section 366.26 permanency planning hearing. The court then proceeded to consider J.S.'s request for placement. The court received the Agency's reports and the curricula vitae of the family's social workers into evidence. After counsel's opening statements, the juvenile court heard the testimony of the Agency's social workers and J.S.'s husband, then continued the hearing to another date. Before the next hearing date, Margo and her husband filed a de facto parent statement. At the continued hearing, the court heard the testimony of the supervising social worker and J.S., then continued the hearing to a third day. Before the final hearing date, the Agency filed a supplemental report, which the court received into evidence, providing detailed information about the time frame for its approval of J.S.'s home. On the final hearing day, J.S. continued her testimony and the court also heard the testimony of Margo and two additional social workers involved in the case.

At the conclusion of the hearing, the juvenile court denied J.S.'s petition. The court first found the Agency was aware of and had considered J.S.'s request for placement at the outset of the proceeding, but that the initial request was not ripe because paternity was not yet established. The court also noted that after S.S.'s paternity was established, any delay in the approval of J.S.'s home resulted from J.S.'s prior child welfare history and the Agency's requirement that the family obtain a fence for their backyard pool. The juvenile court expressly stated it was giving preferential

consideration for the placement of Sarah with J.S and acknowledged J.S.'s fitness for and commitment to caring for Sarah, but found, based on its review of the factors set forth in section 361.3, that it was not in Sarah's best interest to place her with J.S.<sup>3</sup> J.S. timely appealed the court's order.

## DISCUSSION

J.S. asserts the Agency failed to give her the preferential treatment mandated by section 361.3, and the juvenile court abused its discretion by not granting her request for placement of Sarah. We disagree.<sup>4</sup>

### I

"When a child is removed from his or her parents' custody under section 361, the juvenile court places the care, custody, control, and conduct of the child under the social worker's supervision. (§ 361.2, subd. (e).) The social worker may place the child in several locations, including the approved home of a relative. (§ 361.2, subds. (e)(1)-(8).)" (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 862-863 (*Alicia B.*)) Under section 361.3, grandparents and adult aunts, uncles, and siblings are given preferential consideration for placement both at the dispositional phase when a child is

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<sup>3</sup> The juvenile court also designated Margo and her husband de facto parents.

<sup>4</sup> The Agency invites this court to conclude J.S. has abandoned her appeal because she "does not address the juvenile court's independent analysis of the section 361.3 factors in this case." We decline this invitation. J.S. primarily focuses on her contention that the Agency failed to adequately assess her for placement, but her briefing explicitly asserts the juvenile court also failed to properly apply section 361.3.

removed from parental custody, and if "a new placement . . . must be made" thereafter. (§§ 361.3, subds. (a), (d).)

A relative may also seek placement under section 361.3 after the dispositional phase by filing a section 388 petition. (*In re Isabella G.* (2016) 246 Cal.App.4th 708, 722, fn. 11 (*Isabella G.*)). So long as the request is made during the reunification period, the juvenile court assesses the request under the factors set forth in section 361.3, subdivision (a), not under the generalized best interest standard found in section 388.<sup>5</sup> (*Isabella G.*, *supra*, 246 Cal.App.4th at p. 722, fn. 11.) Preferential consideration under section 361.3 "does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining placement in the child's best interests." (*In re Sarah S.* (1996) 43 Cal.App.4th 274, 286 (*Sarah S.*); see also *In re Stephanie M.* (1994) 7 Cal.4th 295, 321 (*Stephanie M.*) ["the court is not to presume that a child should be placed with a relative, but is to determine whether such a placement is *appropriate*, taking into account the suitability of the relative's home and the best interest of the child."].)

Before a child may be placed in a relative's home, the social worker must assess the appropriateness of the placement. (§ 361.4, subd. (a).) The relative's home must meet the same safety standards used in licensing foster homes. (§§ 309, subd. (d) &

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<sup>5</sup> J.S. asserts that "[t]he agency's position that the relative placement preference applies only at the disposition hearing and whenever a new placement is required has been rejected." The Agency, however, does not take this position and the juvenile court properly assessed J.S.'s request for placement under the section 361.3 factors.

361.3, subd. (a)(8).) In considering whether to place the child with a relative, section 361.3, subdivision (a) directs the social worker and court to consider the best interests of the child, including the child's special physical, psychological, educational, medical or emotional needs; the wishes of the parent, the relative and child, if appropriate; the proximity of the placement to the natural parents to facilitate visitation and family reunification; 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 is unsuccessful; and the safety of the relative's home. (§ 361.3, subd. (a).)

In addition, the social worker and the court assess the ability of the relative to provide a safe, secure and stable environment for the child; exercise proper and effective care and control of the child; provide a home and the necessities of life for the child; protect the child from his or her parents; facilitate court-ordered reunification efforts with the parents, visitation with the child's other relatives and implementation of all elements of the case plan; provide legal permanence for the child if reunification fails; and arrange for appropriate and safe child care, as necessary.<sup>6</sup> (§ 361.3, subd. (a)(7).) "The linchpin of a section 361.3 analysis is whether placement with a relative is in the best interests of the minor." (*Alicia B.*, *supra*, 116 Cal.App.4th at pp. 862-863.) We review the court's placement orders under the abuse of discretion standard of review; the court is given wide

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<sup>6</sup> When a relative is being considered because an existing placement is no longer viable, section 361.3, subdivision (d) also directs the social worker to "consider whether the relative has established and maintained a relationship with the child." (§ 361.3, subd. (d)).

discretion and its determination will not be disturbed absent a manifest showing of abuse. (*Sarah S.*, *supra*, 43 Cal.App.4th at p. 286; see *Stephanie M.*, *supra*, 7 Cal.4th at p. 318 ["when a court has made a custody determination in a dependency proceeding, ' 'a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." ' '"].)

## II

Based on these standards, we conclude both the Agency and the juvenile court acted within their discretion. J.S. contends the Agency did not complete a good faith assessment of the relative placement factors set forth in section 361.3, subdivision (a) and harbored a secret intent not to seriously consider J.S. for placement. These assertions are not supported by the record. The Agency began collecting information from J.S. and the members of her household to begin its assessment of her home even before the disposition hearing. The Agency began its official assessment of J.S.'s home as soon as S.S.'s paternity was confirmed in July 2015. The delay in approving J.S.'s home thereafter resulted from the fact that J.S. had a child welfare incident on her record, and the time it took for J.S. to secure a fence for her backyard swimming pool. The Agency, however, quickly waived the child welfare incident and approved J.S.'s home as soon as the fence was installed.

Further, the Agency's reports show it considered the factors set forth in section 361.3, subdivision (a) in reaching its recommendation that Sarah remain in Margo's care. The reports explain that the Agency considered Sarah's best interests; examined the

nature and duration of the relationships Sarah had with Margo and her family, and with J.S.; and considered J.S.'s ability to facilitate reunification efforts for A.V. and to facilitate visitation with Sarah's other relatives (who all resided in San Diego). The testimony of the social workers involved in the case also detailed the Agency's assessment of the section 361.3, subdivision (a) factors. On this record, we cannot say the Agency's recommendation was improper.<sup>7</sup>

The record also shows the juvenile court independently evaluated the relevant factors before denying J.S.'s request. The court recognized J.S. was entitled to preference for placement, then explicitly examined the factors set forth in section 361.3, subdivision (a) before finding that changing Sarah's placement was not in her best interest. The court noted the wishes of the parents were divided, and Sarah's visits with other family members would be impaired by placing Sarah with J.S. because J.S. lived in Los Angeles and all of Sarah's other relatives lived in San Diego. The court found that J.S. was of good moral character and was willing and able to provide a safe home for Sarah, but these factors did not warrant a different result in light of the strong bond Sarah had with

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<sup>7</sup> J.S. cites *In re R.T.* (2015) 232 Cal.App.4th 1284 and *Isabella G.*, *supra*, 246 Cal.App.4th 708 in support of her assertion that the Agency did not assess her home in good faith. In *R.T.*, the social service agency's caseworker testified at the hearing on the paternal aunts' motion requesting placement under section 361.3 that "the agency never considered the paternal aunts for placement and told them so." (*R.T.*, at p. 1294.) Similarly, in *Isabella G.*, the social service agency misrepresented its obligation to consider the paternal grandparents for placement and did not conduct an assessment of them until after the parents' reunification services were terminated. (*Isabella G.*, at pp. 713-715, 721.) Here, the record shows the Agency considered placing Sarah with J.S. throughout the case, and evaluated the factors set forth in section 361.3, subdivision (a) in reaching its recommendations not to change Sarah's placement.

her current caregivers. Because the evidence before the juvenile court supported these findings, the court's denial of J.S.'s request for placement was not an abuse of discretion. (See *Alicia B.*, *supra*, 116 Cal.App.4th at p. 863 ["The reviewing court should interfere only "if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did." [Citations.]" [Citation.]' ".])

J.S. also contends that the "continual focus on Sarah's bond with Margo in comparison to her relationship with [J.S.] in evaluating the best interest factor of the relative placement statute was improper." As discussed, when a relative seeks placement, the "fundamental duty of the court is to assure the best interests of the child, whose bond with a [caregiver] may require that placement with a relative be rejected." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 321.) Both the juvenile court and the Agency appropriately focused on Sarah's well-being under section 361.3 in determining it was not in her best interest to be moved from the caregivers she had lived with for 16 of her 20 months.<sup>8</sup> We are sensitive to J.S.'s desire to hold a larger role in her granddaughter's care and encourage Sarah's family members to continue to work together to remain involved in Sarah's life. Under the facts and circumstances of this case, however, we cannot conclude the court abused its discretion by denying J.S.'s request for placement.

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<sup>8</sup> J.S. complains that the Agency did not observe a visit between her and Sarah, and, therefore, had no basis to compare the relationships. The Agency, however, did not dispute J.S. shared a positive relationship with Sarah and the juvenile court heard extensive testimony from J.S. and her husband about their relationship with her.

DISPOSITION

The order is affirmed.

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IRION, J.

WE CONCUR:

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AARON, Acting P. J.

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PRAGER, J.\*

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\* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.