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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.P. et al., Persons Coming Under
the Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.P. et al.,

Defendants and Appellants.

E054723

(Super.Ct.Nos. J232226 &
J230415)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A.

Buchholz, Judge. Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and
Appellant. J.P.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and
Appellant P.J.

Jean-Rene Basle, County Counsel, Svetlana Kauper and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for minors.

J.P. (Father) appeals from the juvenile court's order denying his petition to modify a court order related to his daughter, D.P. (Welf. & Inst. Code, § 388.)¹ Father contends the juvenile court erred because his petition reflected (1) changed circumstances, and (2) the modification would be in D.P.'s best interests. We affirm the judgment.

P.J., the de facto parent of D.P. and M.G. (D.P.'s half-sister) appeals the juvenile court's order removing D.P. and M.G. from her care. P.J. contends the juvenile court erred because (1) substantial evidence does not support the finding that P.J. hit D.P.; (2) there is substantial evidence that D.P. and M.G. were thriving in P.J.'s care; and (3) the juvenile court did not address the appropriate factors for relative placement (§ 361.3). We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. BACKGROUND

Father and K.R. (Mother)² were both in special education classes when D.P. was an infant. Mother was 16 years old and living in a group home when D.P. was born. D.P. was born prematurely, and suffered from sleep apnea. Mother had been adopted

¹ All subsequent statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

² Mother is not a party to this appeal.

by the maternal great-grandparents following the maternal grandmother's drug-related death. The maternal great-grandparents ordered Mother to leave their house when she became pregnant, and Mother was on probation for kicking a police officer, hence, Mother's need to reside in a group home. Staff at the group home found Mother lacked patience with D.P. or became easily frustrated with D.P. At one point, D.P.'s sleep apnea monitor "began to go off," and Mother threw the monitor against the wall, breaking it. Mother told group home staff, "'I'm tired of this and I want the baby's father to come and get her because I'm tired of her.'" D.P. was removed from Mother's care when D.P. was two months old.

Father was 15 years old at the time of D.P.'s removal. When the Department investigated the possibility of placing D.P. with Father, it discovered Father was living with the paternal grandmother, who had been charged with child endangerment. (Pen. Code, § 273a.) D.P. was placed in the hospital, on a breathing monitor, to be followed by a foster care placement. On September 4, 2007, the juvenile court found Father to be D.P.'s biological father. The court ordered the Department to assess P.J., who was supposedly D.P.'s paternal great-aunt, for placement of D.P.³

B. YEARS 2007 THROUGH 2011

Mother's probation officer informed the Department that the paternal grandmother was pushing Mother and Father to have another child. The probation

³ In 2007, due to Father's and P.J.'s representations, the Department believed P.J. was D.P.'s paternal great-aunt. As will be presented *ante*, in 2011, Mother and the Department discovered P.J. may not be Father's relative.

officer told the Department, “[T]here are strange things going on in the home of the paternal grandmother.” For example, the paternal grandmother had approximately 12 people staying in her home, and ex-probationers and an ex-parolee were “in and out of the home on a regular basis.”

D.P. was diagnosed as having special needs and was placed in a foster home for medically fragile children. Specifically, in 2008, D.P. was suffering from apnea, gastro esophageal reflux disease, and chronic constipation. D.P. was being evaluated for a suspected seizure disorder and cerebral palsy.

Father completed his parenting classes in November 2007. Father also completed medical fragility training. During visits D.P. would scream and cry until shaking or convulsing when held by Mother or Father. To address the problem, the Department increased Mother’s and Father’s visitation with D.P. Father worked on being less frustrated and more patient with D.P. Eventually, Father was able to hold D.P. for a few minutes without D.P. crying. Father stated he would try to do well in high school and quit smoking for the sake of D.P. The Department found both Mother and Father had shown “a great leap in maturity.”

The Department concluded that placing D.P. in Father’s care would be problematic, since Father was a minor residing in the paternal grandmother’s home; specifically, that Father had been listed as a victim in multiple referrals to the Department, two of which were substantiated. Father had been removed from the paternal grandmother’s home when he was six years old, due to Father’s brother sexually molesting his sister, and the paternal grandmother not responding to the

incident. Father stayed in foster care for eight months before reuniting with the paternal grandmother.

D.P. was placed in Mother's care on July 1, 2008; they resided together at Mother's foster home. In October 2008, the Department expressed concern that Father spoke inappropriately to Mother and "call[ed] her names." Father consistently visited D.P. and appeared bonded to D.P.

In October 2008, Father was frequently vomiting, which the Department believed could have been caused by depression. Father was referred to counseling; however, Father did not believe he needed counseling. A social worker told Father that if he did not feel the need for counseling, then the Department would recommend services be terminated for Father. On March 11, 2009, the juvenile court terminated Father's reunification services.

In September 2009, Mother was 18 years old and expressed a desire to move into P.J.'s home. P.J. was a licensed foster parent, and had been supervising Father's weekly visits with D.P. every other weekend. In October 2009, Mother gave birth to a second daughter, M.G. M.G.'s presumed father was T.G.

In December 2009, the Department received a referral alleging Mother had physically abused D.P. D.P. had bruising on the left side of her face, from the inner ear to the area below the corner of her eye. The Department contacted law enforcement; law enforcement asked D.P. how she received her bruises, and D.P. whispered, "[M]y mommy did it." At the police station, Mother admitted to the social worker that she hit

D.P. Mother stated that she “back handed [D.P.] across the face.” D.P. fell on the floor, and Mother hit her again. Mother was arrested for physically abusing D.P.

M.G.’s father, T.G., was unable to care for M.G. Father was willing to take custody of D.P., but due to the concerns related to the paternal grandmother, D.P. could not be placed with Father. The Department detained D.P. and M.G. P.J. was unable to take the children, due to already having too many foster children in her care. However, P.J. said she would be willing to take D.P. and M.G., when she was approved to do so. D.P. and M.G. were placed in foster care.

On December 17, 2009, Father offered to move to another residence, away from the paternal grandmother, in order to obtain custody of D.P. and M.G. The social worker did not place D.P. and M.G. with Father due to Father’s living situation and services being terminated.

Mother was convicted of child abuse and sentenced to jail for a term of two months—February through March 2010. Father stated that he “knew nothing” about the interactions between Mother and D.P. Father requested D.P. be placed with him or P.J. When the social worker asked Father how he would support D.P., Father said, “I don’t have a job, but I will just go on Welfare.” Father told the social worker he moved in with a friend, because he knew D.P. could not live at the paternal grandmother’s house. However, Father later contradicted himself when he reported “there are a lot of people living at the house with [Father] and his mother.” Father also reported that he was failing all his high school classes. Father continued visiting D.P. When D.P. saw Father at visits she would run to him and say, “Da Da!” During visits,

Father changed D.P.'s diapers, gave her breathing treatments, fed her, and played with her. The Department concluded that Father's visits with D.P. were appropriate, but he was unable to provide D.P. with housing or basic necessities, given Father's lack of a job and failing grades.

D.P. and M.G. were placed with P.J. on January 6, 2010. Mother accused Father of soliciting high school classmates to "'jump'" Mother. Father also accused Mother of soliciting high school classmates to "'jump'" him. In June 2010, the Department reported D.P. and M.G. were doing well in P.J.'s home, and Mother and Father were living together in the paternal grandmother's home. Mother failed to report for her jail sentence, so she was taken into custody on June 2, 2010.

On June 30, 2010, a social worker made a regular monthly visit to P.J.'s home. The home smelled strongly of urine. The social worker became lightheaded and ill while in the house. P.J. said she had three cats, four dogs, and two stray dogs she just found. P.J. said D.P. was still "very much" suffering from asthma, and that she believed M.G. might also have asthma because M.G. had a constant cough. P.J. said she did not know if M.G. and D.P. were allergic to pets. P.J. said she would like to adopt M.G. and D.P. if reunification did not occur. During an unannounced visit on August 6, 2009,⁴ two Department employees found the odor of urine in the house to be "atrocious," which made it difficult for them to complete their visit.

⁴ Chronologically, this appears to be a typographical error; the visit likely occurred on August 6, 2010.

On August 25, 2010, P.J. requested de facto parent status for D.P. and M.G. The juvenile court granted P.J. de facto parent status for both children on September 16, 2010. In November 2011, the Department reported that Mother, Father, and T.G. had been unable to complete their case plans, and due to cognitive delays the three parents might not be able to benefit from services.

On December 22, 2010, Father was convicted of falsely reporting a crime. (Pen. Code, § 148.5.) Father was granted probation for three years. Father attended 12 one-hour therapy sessions. Father continued his supervised visits with D.P. The Department expressed concern that after 42 months Father still did not appear capable of providing D.P. with housing and other necessities.

In April 2011, Mother was six months pregnant with her third child. Mother and Father had decided to conceive another child together because “they did not think that they were going to get [D.P.] and [M.G.] back.” Although Mother was 20 years old, she continued to be a high school student. Sometime between May 2010 and May 2011, Mother discovered P.J. was not Father’s relative by blood or marriage. The Department noted D.P. and M.G. appeared bonded to P.J.

C. P. J.

On May 12, 2011, the Department received a referral related to P.J. It was reported that P.J. struck D.P. on her back and buttocks approximately one dozen times with an open hand, and cussed at the child, while in a preschool parking lot. D.P. screamed and cried while being hit. A Department employee met with D.P., who was three and a half years old. D.P. denied being hit in the preschool parking lot. D.P. said

she receives a timeout when she misbehaves. P.J. admitted “swatting” her son, J.M.,⁵ but denied striking D.P.

A Department employee interviewed staff at D.P.’s school. One teacher stated that on one occasion D.P. had her sandals on the wrong feet when P.J. came to pick her up. P.J. yelled at D.P. in front of the class, and belittled D.P. while D.P. cried. During a different incident, in which D.P. wet her pants, P.J. stood over D.P. and yelled at her in front of the class, while D.P. cried. On May 9, 2011, D.P. wet her pants while sitting on the classroom carpet. P.J. yelled, ““Did you just pee on the carpet!”” P.J. left with D.P. shortly thereafter to go home; a parent came into the classroom, disturbed to have seen P.J. in the car ““[b]eating”” D.P. The parent said, “P.J. [was] always screaming and yelling at the kids and throwing the baby, [M.G.], in her car seat.” A teacher reported that D.P. and M.G. are in her class, and they both appear sad and “go into a shell when P.J. walks in.” The teacher and principal both described D.P. as appearing “afraid.”

The social worker spoke to the parent who witnessed the parking lot incident. The parent was parked two parking places away from P.J. The parent saw P.J. raise her hand “as far as she could reach” above her head and then bringing it down to strike D.P. “again and again” on her back, buttocks, and legs—“covering the child’s entire backside with her blows.” The parent heard P.J. saying, ““Why would you do that, what made you think you could do that, don’t ever do that again,”” while also cursing at the child. The parent estimated P.J. struck D.P. a dozen times.

⁵ P.J. was granted permanent guardianship of J.M. in March 2007.

When interviewed, J.M. said P.J. spanks his buttocks and sometimes leaves marks and bruises. J.M. said P.J. does not spank D.P. and M.G.; however, his answers “seemed scripted.” The social worker asked if P.J. becomes “upset a little or a lot” when D.P. wets herself. J.M. responded, “[A] lot.” A social worker asked D.P. if anyone was allowed to spank M.G., and D.P. responded, “Only [P.J.]” The social worker asked if D.P. had seen P.J. spank M.G., and D.P. held up four fingers. D.P. told the social worker P.J. had not spanked M.G. that day, but had spanked her yesterday. D.P. explained that M.G. was splashing the dog’s water, so P.J. spanked M.G. twice over her diaper. D.P. “appeared very guarded” about questions involving her urinary accidents.

The Department decided to remove D.P. and M.G. from P.J.’s care. On May 20, 2011, the children were taken for emergency forensic medical evaluations. A bruise was found on M.G.’s buttocks. The location of the bruise was such that it would be difficult to have obtained it from falling. Bruises were also found on D.P. On May 24, 2011, the juvenile court ordered D.P. and M.G. be removed from P.J.’s home and placed in foster care.

On July 12, 2011, July 27, 2011, and August 22, 2011, the juvenile court held a contested jurisdiction and disposition hearing related to the removal of the children from P.J.’s home. At the hearing, Deanna, a parent who also had a child in D.P.’s preschool class, testified. Deanna was present when D.P. urinated while sitting on the carpet. Deanna heard P.J. raise her voice at D.P. P.J. “was being really loud, asking the little

girl a lot of questions about being wet and sitting in a wet spot [and] there were many other children around.”

Deanna explained that she then went out to the parking lot with her child, and they went to their car. While in the parking lot, Deanna saw P.J. After Deanna put her child in her seat, she heard screaming, and looked up. Deanna saw P.J. standing by the side of P.J.’s van, where the door slides open, cursing, yelling, and striking D.P. with an open hand. P.J. raised her hand “high up in the air” before striking D.P. P.J. said to D.P., “What the fuck do you think you’re doing[?] Why would you fucking do that? Don’t ever do that again.” D.P. was screaming as she was being hit.

P.J. was standing at the opening of the van while striking D.P. P.J. was facing Deanna while the incident was occurring. Deanna estimated that P.J. struck D.P. six to 12 times. Deanna removed her daughter from the car and went back into the classroom. Deanna reported what she had witnessed to a school employee.

Also at the hearing, Rochelle Ashton-Keenan, a family therapist, testified. The therapist had met with D.P. every other week from August 2010 through May 2011. D.P. never told Keenan that P.J. struck her or yelled at her. D.P. never indicated that she disliked living with P.J.

Another witness at the hearing was Lorrie Moudy, who certified P.J.’s home when P.J. became a foster parent. Moudy estimated she had been to P.J.’s home 30 times in the past year to visit another foster child in P.J.’s care. During those visits, Moudy never saw anything that would cause her to be concerned about the safety of the children in P.J.’s care. Moudy never saw bruises on D.P.

P.J. also testified at the hearing. P.J. denied yelling at D.P. for urinating. P.J. explained that she is a loud person, but she was not angry and did not use obscenities when speaking to D.P. P.J. also denied hitting D.P. in the school parking lot. P.J. did not know Deanna, and believed Deanna mistook P.J. changing D.P.'s clothing for striking D.P. because the van has tinted windows.

Another witness was Wanda Fisher. Fisher owned the preschool that D.P. attended. Fisher was present on May 19 when D.P. and M.G. were examined by a nurse. Fisher did not see any bruises or abrasions on M.G.'s body; however, Fisher did notice a "mark" on M.G.'s buttocks. Fisher explained that it was a just a mark, which had been on M.G.'s buttocks since she first started at the school approximately two months prior.

Tareef Salah, a social worker for the Department, also testified. Salah stated that a public health nurse examined the children, and found "suspicious marks on the children."

The juvenile court found Deanna's testimony to be credible. The court found that none of the other witnesses were present at the time of the parking lot incident. The juvenile court found true the allegation that P.J. spanked D.P. causing D.P. to suffer physical and emotional abuse. The juvenile court also found true an allegation that P.J. yelled and screamed at D.P. causing D.P. to suffer emotional abuse. As to M.G., the juvenile court found true the allegation that spanking D.P. put M.G. at substantial risk of harm. Thus, the court found the minors came within the court's dependency jurisdiction.

(§ 387.)

As to section 361.3, which relates to relative placement, the juvenile court said, “Continuance of the minors in the home of the NREFM is no longer appropriate in view of the [section] 361.3 criterion. It is in the minors’ best interest to remove them from the home of [P.J.]” In regard to disposition, the court found placing the children with P.J. was no longer appropriate. The court ordered the children removed from P.J.’s care, and placed in the custody and control of the Department.

D. FATHER

On September 16, 2011, Father filed a petition to modify a court order. (§ 388.) In the written petition, Father requested the juvenile court reinstate his reunification services, which had been terminated on March 11, 2009. Father asserted the change would be in D.P.’s best interests because D.P. “has a very close relationship with her father and would enjoy and benefit from more frequent visits for longer periods of time and unsupervised.” Father asserted his visits with D.P. were “frequent, constant, unmonitored and positive.”

Father explained the Department would not place D.P. in his care because he had not completed his case plan; however, Father asserted he had completed his case plan. Father asserted he finished the counseling requirement on January 6, 2011, which completed his case plan. Further, Father provided a document reflecting his enrollment in Victor Valley College, with an automotive major.

The Department filed a response to Father’s petition. The Department noted Father was “merely” D.P.’s biological father—not D.P.’s presumed father. The Department asserted Father had never resided with D.P. or financially supported the

child. The Department agreed Father had completed counseling; however, the Department argued it remained to be seen whether Father had benefitted from the counseling. The Department argued there was no evidence of Father being able to care for himself, and pointed out a lack of evidence that Father completed high school. The Department asserted Father was living with D.P.'s maternal grandfather, and was not financially supporting himself.

Further the Department asserted Father suffered issues with self-esteem; healthy relationship skills; appropriate responsibilities; and appropriate boundaries, limits, and family roles. The Department argued Father had not made any significant changes in the problems that led to the dependency. Moreover, the Department argued Father could not be having unmonitored visits with D.P., as Father claimed, unless Father was violating the visitation orders.

The Department further argued that even if Father received further reunification services, it would be unlikely the Department would agree to a change in Father's visitation with D.P., because he would first need to show that he was changing due to the services. The Department asserted Father had approximately four years to demonstrate a change that would allow D.P. to be returned to his care; since Father had not done so, the Department argued it was unlikely Father could make the necessary changes within the six to 18 months provided for further services.

The juvenile court held a hearing on Father's petition on October 11, 2011. At the hearing Father asserted he had unsupervised visits with D.P. while the case was in Riverside County's jurisdiction; however, he stopped having unsupervised visits when

the case was transferred to San Bernardino County's jurisdiction. Further, Father asserted he had a job, and he brought a leave and earnings statement from the San Bernardino County Superintendent of Schools as proof of his employment. Father's employment began on August 20, 2011. Father argued he did not pose a danger to D.P., as all his visits were appropriate; D.P.'s sibling (Mother's third child) was in Father's care and not in danger.

The Department feared that if the case persisted for much longer, D.P. would no longer be at a desirable age for adoption, which would be detrimental to D.P. The Department further argued that Father was living with Mother and their baby, in the maternal grandfather's home, and Mother appeared unable to benefit from services. The Department concluded that Father did not have a change in circumstances that would support a reinstatement of his reunification services.

The Department added that D.P. and M.G. have been together for most of M.G.'s life. The Department said the children continued to be placed together after they were removed from P.J.'s home. The Department argued D.P.'s case had been persisting for four years and three months, and that it was in D.P.'s best interests to place her for adoption.

Counsel for D.P. argued that Father was only a biological Father, not a presumed Father. D.P.'s counsel asserted Father could not rise to the level of a presumed father since he never resided with D.P. D.P.'s counsel argued Father legally had no right to custody of D.P., and therefore, Father should have filed a section 388 petition requesting presumed father status, before he filed the petition for additional services.

D.P.'s counsel expressed concern that the case would continue for another four years if the petition were granted. D.P.'s counsel asked the court to deny Father's petition. Attorneys at the hearing argued about whether Father may have been designated a presumed Father sometime in 2007, but the relevant court records from Riverside were not immediately available.

The juvenile court said: "What I'm concerned about is this case had been going on since, approximately 2007 [a]nd I don't really see a change in circumstances. The trial court continued: "I mean, essentially he's been at supervised visits for the last two years of this. I mean the last two year period, basically, since the case was transferred to San Bernardino. And there's been no change of that visitation schedule. So again, I guess I don't see what circumstances have changed." The juvenile court added that gaining employment "in and of itself is not grounds for the court to find a change in circumstance." In regard to D.P.'s best interests, the court remarked that D.P. had never lived with Father, and D.P. had a strong bond with M.G., but not with Father's and Mother's youngest child.

The juvenile court found Father had made "wonderful strides," but he was not in a position to care for D.P., and the court was unsure how six months of services would cure the problem. The court said, "I don't see any change. You knew when you were here back in March of 2011 that the court wanted to see you make substantial strides to be able to care for this minor. And, I just haven't seen anything additional from you since that date. And I don't see that it is in [D.P.'s] best interest today to offer you services. And with that, the court will deny the [section] 388 request."

DISCUSSION

A. FATHER

Father contends the juvenile court erred by denying his petition to modify a court order because he showed changed circumstances and that the modification would be in D.P.'s best interests. We disagree.

Section 388 permits a parent to petition the juvenile court to change, modify or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a); *In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.) “The petitioner has the burden to show a change of circumstances or new evidence and [that] the proposed modification is in the child’s best interests. [Citation.] Generally, the petitioner must show by a preponderance of the evidence that the child’s welfare requires the modification sought. [Citation.]” (*In re B.D.*, at p. 1228.) “For a parent ‘to revive the reunification issue,’ the parent must prove that circumstances have changed such that reunification is in the child’s best interest. [Citation]” (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512.) We review the juvenile court’s ruling on the petition for modification for an abuse of discretion. (*In re B.D.*, at p. 1228.)

We first address the changed circumstances prong. The juvenile court’s decision on this prong was within reason because Father was living with Mother, who physically abused D.P., and he had nothing showing any progress in caring for D.P. Father did not provide financial support for D.P., have overnight visits with D.P., or otherwise show a change of circumstances in his life as it related to D.P. Given that Father’s interactions with D.P. remained essentially the same, the juvenile court’s finding was reasonable.

In regard to the second prong, the best interests of the child are determined by considering (1) the seriousness of the problem that led to the dependency; (2) the strength of the parent-child bond; and (3) whether the problem that led to the dependency has been resolved, or the ease with which it may be resolved. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

The dependency was caused by (1) Mother not appropriately caring for D.P.'s health issues; and (2) Father living with the paternal grandmother, who had an abusive past. At the time of the petition, Father had moved away from the paternal grandmother's home, but was living with Mother, who was convicted of physically abusing D.P. Thus, Father's living situation had not improved such that it would be in D.P.'s best interests to live with him, because Father was still living with a person who had an abusive past.

As to the parent-child bond, it appeared Father visited D.P. regularly, but the visits were supervised and never increased to overnight visitations. D.P. referred to Father as "Da da," but she never lived with Father. Given the evidence, it is not clear that D.P. and Father shared a particularly strong bond.

In regard to resolving the problem that led to the dependency, it is important to again note that Father was living with Mother, who abused D.P. At the beginning of the dependency proceedings, D.P. could not be placed with Father because he was living with his abusive mother, and at his petition hearing he was living with Mother, who also has a history of abusing her child. Accordingly, the primary circumstance that led to Father not being able to have custody of D.P. did not change.

Further, Father did not show how he would be able to reunify with D.P. once his additional services ended, because (1) Father had services until 2009, and was unable to regain custody of D.P., so it was not clear how further services would resolve the remaining issues; (2) Father had limited financial means and access to healthcare, so it was unclear if Father could support D.P. if he were not living with Mother; and (3) Father was still suffering from unresolved self-esteem and relationship issues. Moreover, it was not clear that Father had a legal right to take custody of D.P. once the services ended, since Father may have only had biological father status—not presumed father status. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596 “[O]nly a presumed father is entitled to custody of his child.”).)

Given the foregoing, the juvenile court’s decision was reasonable because it was not clear how providing Father with additional services would benefit D.P. The juvenile court could reasonably conclude that at the end of the services the parties would be in the same position, except D.P. would be slightly older and further away from a desirable adoptable age. Thus, we conclude the juvenile court did not err by denying Father’s petition.

Father points out the variety of changes he made, such as attending therapy, caring for his infant child, moving into a new home, and obtaining employment. Father’s argument shows that a finding of changed circumstances could have been possible, but it does not explain why the juvenile court’s finding was unreasonable. As set forth *ante*, Father still was not having unsupervised visitation with D.P. or overnight

visits with D.P. Given that Father's interactions with D.P. had not changed, the juvenile court's decision was reasonable.

In regard to D.P.'s best interests, Father asserts the problems that led to the dependency were mostly resolved because he was over the age of 18 and no longer living with the paternal grandmother. Father asserts he was the only father figure in D.P.'s life, and they shared a strong bond. Further, Father asserts D.P. "repeatedly expressed a desire to return to the care of [Mother] and [Father]." Father contends the foregoing evidence shows the problems were resolved and it would be in D.P.'s best interests to provide Father additional reunification services.

Father's argument is not persuasive because it is unclear that the problems leading to the dependency had been resolved, since Father is still living with a person who has a history of child abuse. Additionally, D.P. did not request to live with Father, rather, D.P. requested to live with Mother. Thus, it is unclear if Father and D.P. have a particularly strong bond. In sum, we are not persuaded that the juvenile court's decision was unreasonable.

Finally, as to Father's legal status in relationship to D.P., Father asserts his status is ambiguous, but a biological father has a right to file a section 388 petition. The problem with this argument is that it is unclear how it would be in D.P.'s best interests to stay in foster care for an additional six months, while reunification services are being provided to a person who might not be able to gain legal custody of her. Accordingly, we find Father's argument to be unpersuasive.

B. P. J.

Under one point heading, P.J. asserts the trial court erred by removing D.P. and M.G. from her care because (1) there was insufficient evidence P.J. struck D.P. because there were no marks on D.P.; (2) there was insufficient evidence that placement with P.J. was inappropriate, because D.P. was “thriving” in P.J.’s care; and (3) the juvenile court failed to address the section 361.3 factors concerning relative placement. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [“State each point under a separate heading[.]”].) We try to separate P.J.’s different arguments, so as to address her concerns.

1. *SUBSTANTIAL EVIDENCE—PHYSICAL ABUSE*

P.J. contends the juvenile court erred by removing D.P. and M.G. from her home because there was insufficient evidence P.J. struck D.P. due to there not being marks on the child. We disagree.

The Department filed a petition to remove D.P. and M.G. from P.J.’s care pursuant to section 387. A section 387 petition is a supplemental petition. (§ 387.) Under section 387, the petitioner must prove “the previous disposition has not been effective in the rehabilitation or protection of the child, or in the case of a placement with a relative, sufficient to show that the placement is not appropriate in view of the criteria in Section 361.3.” (§ 387, subd. (b); see also *In re Javier G.* (2006) 137 Cal.App.4th 453, 459 [“petitioner must prove”].) Section 361.3 includes a variety of factors, such as (1) the best interests of the child, (2) whether any adults in the home have a history of violence; and (3) the ability to provide a safe and secure environment

for the child. When a petition is filed to remove a child from the custody of a relative, as opposed to a parent, the court uses the preponderance of the evidence burden of proof, as opposed to the clear and convincing evidence standard of proof. (*In re A.O.* (2004) 120 Cal.App.4th 1054, 1061.) “In performing our substantial evidence review, we “view the record in the light most favorable to the order and decide if the evidence is reasonable, credible and of solid value.” (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078.)

Deanna saw P.J. striking D.P. six to 12 times in the preschool parking lot and yelling obscenities at the child while D.P. screamed. D.P. said P.J. spanked M.G. when M.G. splashed the dogs’ water. J.M. said P.J. is “a lot” upset when D.P. has urinary accidents. P.J. admitted hitting J.M. J.M. said P.J. sometimes leaves bruises when she strikes him. The foregoing evidence, especially the eyewitness account, is reasonable and credible evidence supporting a finding that P.J. hit D.P. multiple times while cursing at the child. Thus, we conclude the juvenile court’s finding is supported by substantial evidence, because the placement with P.J. was not appropriate for the rehabilitation or protection of D.P. Further, to the extent P.J. is a relative, the substantial evidence of physical abuse supports the finding the placement with P.J. is not in D.P.’s best interests, as the home is not safe due to P.J. having a history of violence.

P.J. asserts the juvenile court’s finding is not supported by substantial evidence because there were no bruises or marks on D.P. Contrary to P.J.’s assertion, bruises were found on D.P. However, it is important to note that the Department received the

referral about the parking lot incident on May 12, 2011. D.P. was not examined for marks or bruises until May 19 or 20, 2011. Given the one week lapse in time from the incident to the exam, it is possible that if D.P. had more bruises, they healed before the examination. Thus, a lack of severe bruising does not equate with a lack of substantial evidence.

Next, P.J. asserts it is unlikely she would have hit D.P. and yelled at D.P. in a public parking lot with people around. P.J.'s argument appears to be calling into question Deanna's credibility. An appellate court does not assess the credibility of witnesses. (*In re R.C.* (2008) 169 Cal.App.4th 486, 491.) Thus, we find P.J.'s argument to be unpersuasive, because she is essentially arguing that Deanna's testimony is not credible.

2. *SUBSTANTIAL EVIDENCE—PROTECTION*

P.J. asserts there was insufficient evidence that placement with P.J. was inappropriate, because D.P. was "thriving" in P.J.'s care.⁶ We disagree.

The laws related to section 387 petitions are set forth *ante*, so we do not repeat them here. D.P. was removed from Mother's care a second time because Mother "back handed [D.P.] across the face." D.P. fell on the floor, and Mother hit her again. Mother was arrested for physically abusing D.P. D.P. was later placed with P.J. who then struck D.P. six to 12 times while cursing at the child. The foregoing is substantial evidence that placement with P.J. was not effective in rehabilitating and protecting D.P.

⁶ P.J.'s argument relates only to D.P.—M.G. is not included.

from her abusive past, because D.P. was placed in P.J.’s care to protect her from further physical abuse. Specifically, subjecting a physically abused child to further physical abuse is not an adequate means of rehabilitating or protecting the child from physical abuse. (See *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1200, fn. 13 [“[A] care provider’s abusive behavior toward a dependent child could presumably be a basis for a change in placement.”].)

Further, to the extent P.J. is considered a relative, the evidence of violence by P.J. would support a finding that (1) it is not in D.P.’s best interests to be placed with P.J., given D.P.’s history of trauma, (2) P.J. has a history of violence; and (3) P.J. is not providing a safe and secure home for D.P. Thus, under the relative standard, the juvenile court’s decision is also supported by substantial evidence.

P.J. contends placement of D.P. with P.J. was effective in rehabilitating and protecting D.P. because D.P. was thriving in P.J.’s care. Contrary to P.J.’s position, evidence reflects D.P. appeared sad and went “into a shell when P.J. walk[ed]” into her classroom. As explained *ante*, we must view the evidence in the light most favorable to the judgment. There is evidence reflecting that D.P. was not thriving in P.J.’s care. Thus, we find P.J.’s argument to be unpersuasive.

3. *RELATIVE PLACEMENT*

P.J. asserts the juvenile court erred by not addressing the relative placement factors. (§ 361.3.) We disagree.

The supplemental petition statute provides: “The supplemental petition shall be filed by the social worker in the original matter and shall contain a concise statement of

facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child or, in the case of a placement with a relative, sufficient to show that the placement is not appropriate in view of the criteria in Section 361.3.” (§ 387, subd. (b).) Section 361.3 concerns relative placement.

The juvenile court found P.J. was not related to D.P. The juvenile court’s minute order refers to P.J. as “de facto parent” and “non related extended family member” (NREFM). A NREFM is “any adult caregiver who has an established familial or mentoring relationship with the child.” (§ 362.7.) When the juvenile court announced its findings, it said, “NREFM [P.J.] has spanked the child.” Given that the juvenile court found P.J. is not related to D.P., the juvenile court would not have erred by not considering the relative placement factors.

Nevertheless, the juvenile court *did* consider the relative placement factors. In stating its decision, the juvenile court said, “Continuance of the minors in the home of the NREFM is no longer appropriate in view of the [section] 361.3 criterion.” The court did not explain its reasoning, but it did render a ruling related to section 361.3. Accordingly, we conclude the juvenile court did not err.

P.J. asserts the juvenile court erred because (1) she was described as D.P.’s paternal great-aunt early in the case; (2) the social worker only identified her as not being a blood relative, so she could still be a relative by marriage; and (3) “[n]owhere on the record did the juvenile court downgrade [P.J.’s] status from a relative to a NREFM.” Contrary to P.J.’s position, the Department wrote, “[P.J.] is not related to

[Father] by *blood or marriage.*” (Italics added.) Further, the juvenile court found P.J. to be a non-relative of D.P. Specifically, the juvenile court said, “NREFM [P.J.] has spanked the child.” The juvenile court also referred to P.J. as a NREFM in its minute order. Given the foregoing, we are not persuaded by P.J.’s argument.

DISPOSITION

The judgments are affirmed. The stay of the section 366.26 hearing ordered by this court on May 25, 2012 is hereby lifted.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.