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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

H.D.,

Defendant and Appellant.

E064642

(Super.Ct.No. SWJ1300460)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.

Affirmed.

Liana Serobian under appointment by the Court of Appeal, for Defendant and  
Appellant.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman and Larisa  
A. Reithmeier-McKenna, Deputy County Counsel, for Plaintiff and Respondent.

## I

### INTRODUCTION

Mother appeals an order terminating her parental rights to her daughter, K.H. (born in 2013) under Welfare & Institutions Code section 366.26.<sup>1</sup> Mother contends the juvenile court erred in denying maternal grandmother's section 388 petition, requesting K.H. be with maternal grandmother (grandmother). Mother asserts she has standing to challenge the order denying changing K.H.'s placement and denying grandmother's section 388 petition. Mother also contends the court erred in terminating her parental rights before ruling on grandmother's section 388 petition. Mother further argues the juvenile court erred in failing to apply the relative placement preference when ruling on grandmother's section 388 petition. She asserts K.H. was strongly bonded to grandmother and her removal from grandmother was without good cause and without a noticed hearing.

We reject mother's contentions and affirm the judgment.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

#### **Juvenile Dependency Petition and Detention Hearing**

Riverside County Department of Public Social Services (DPSS) filed a juvenile dependency petition under section 300, subdivision (b) (failure to protect) on July 12, 2013. DPSS alleged mother neglected K.H.'s health, safety, and well-being by failing to

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

implement a safety plan initiated by child protective services after mother tested positive for methamphetamines and marijuana during her pregnancy with K.H. Mother failed to submit to random drug testing, resulting in her termination from a substance abuse program. D.H., whom mother initially identified as K.H.'s father, had an extensive criminal history, was currently on parole, and also had an extensive history of abusing controlled substances. D.H. admitted currently using marijuana. The Drug Endangered Children's Team searched D.H.'s home and found drug paraphernalia in the room where mother and K.H. were sleeping.

DPSS reported in its detention hearing report that, in June 2013, DPSS received two referrals alleging general neglect of K.H. and mother was "in danger of failing" the Family Preservation Court Program because of her failure to show up for random drug testing and missing several court hearings. At the detention hearing on July 15, 2013, the juvenile court ordered K.H. detained but permitted her to remain in mother's custody conditional upon mother (1) remaining in full compliance with her case plan, (2) enrolling in a drug treatment program, (3) residing with grandmother, (4) not allowing D.H. to have unauthorized contact with K.H., and (5) participating in drug testing.

At the contested jurisdiction/disposition hearing on August 29, 2013, the court found, based on paternity testing, that D.H. was not K.H.'s biological father and was removed from the case. Mother then identified A.W. as an alleged father of K.H. At the combined jurisdiction/disposition and detention hearing on September 26, 2013, the court found A.W. to be K.H.'s biological and presumed father (father) based on paternity testing.

### **Jurisdiction Hearing on Third Amended Petition**

At the October 18, 2013 jurisdiction hearing, the court sustained the allegations in the third amended juvenile dependency petition. The court found true allegations K.H.'s parents had placed her at risk of serious harm. Mother was abusing methamphetamines and had failed to participate in a treatment program. Father failed to provide for K.H. and was also abusing controlled substances. The court ordered K.H. removed from parental custody, and ordered reunification services and visitation for parents. Maternal grandparents were denied placement of K.H. because they allowed father to move into their home and have access to K.H. despite knowing he was prohibited by the court from doing so because he was suspected of abusing drugs and had a criminal history.

### **Six-Month Review Hearing and Section 387 Petition**

At the six-month status review hearing on May 13, 2014, K.H. was placed with mother under the provision of family maintenance status. Father was offered reunification services. Two months later mother was arrested for possession of a controlled substance, and on October 20, 2014, she tested positive for methamphetamine.

On October 27, 2014, DPSS removed K.H. from mother's care and detained K.H. in protective custody. Although grandmother requested K.H. placed with her, K.H. was not initially placed with grandmother for emergency relative placement purposes because maternal grandfather (grandfather) had a criminal history, which included nonexemptible crimes for placement purposes. DPSS reported that, nevertheless, "the Relative Assessment remains active to continue to assess the Maternal Grandmother who has been

supportive of the child and has assisted in the daily care of the child, while placed in the mother's care.”

On October 29, 2014, DPSS filed a section 387 petition, alleging mother continued to abuse controlled substances, placing K.H. at risk. At the detention hearing on the section 387 petition, the trial court ordered K.H. detained in foster care. The court further ordered an RAU (Relative Assessment Unit) assessment of grandmother's home “when appropriate.”

### **Combined 12-Month Review Hearing and Section 387 Jurisdiction Hearing**

At the combined 12-month review hearing and section 387 jurisdiction hearing on December 18, 2014, the trial court sustained the section 387 petition, removed K.H. from mother's custody, and ordered K.H. placed in foster care. Mother waived reunification services under section 361.5, subdivision (b)(14), and the court terminated services. The court found father had failed to comply with his case plan and terminated his reunification services as well. The court set the matter for a section 366.26 hearing. The next day, December 19, 2014, K.H. was placed with grandmother.

On January 15, 2015, DPSS made an unannounced visit with K.H. at grandmother's home, a small one-bedroom apartment. The home was cluttered and there was a heavy smell of cigarette smoke. K.H.'s eyes were red. She was clean and dressed appropriately. Grandmother said K.H. had seen a doctor two weeks before for a viral infection and croup cough. She also went to the doctor during the last week for a fungal diaper rash. Grandmother denied smoking in the apartment. She said she only smoked outside. Grandmother claimed the smoke was from when mother lived there. The smoke

was so bad the social worker could not stay in the home for very long because the smoke made her and another social worker feel ill.

DPSS returned to grandmother's home in February 2015. The social worker reported there were no concerns regarding the home at that time. The previously reported excessive cigarette smoke no longer existed. K.H. appeared happy, in good health, and attached to grandmother.

### **Combined Section 366.26 Hearing and Section 366.3 Postpermanency Status Review**

DPSS reported in February 2015, in a combined section 366.26 hearing report and section 366.3 postpermanency status review report, that K.H. was living with grandmother, who wished to adopt K.H. Grandmother was committed to providing K.H. with a stable and loving permanent home, and was doing so. K.H. was thriving there. She was a healthy, well-adjusted toddler, bonded to grandmother. DPSS determined that adoption by grandmother or a previous foster parent was the most appropriate concurrent plan for K.H. and recommended the permanent plan for K.H. continue to be adoption by grandmother. Additional time was needed to complete a preliminary adoption assessment.

At the section 366.26 hearing on March 3, 2015, the court found good cause for continuing the hearing on the ground the continuance requested by DPSS was necessary for completion of the preliminary adoption assessment. The court ordered in accordance with the parties' stipulation that the appropriate permanent plan for K.H. was planned permanent living arrangement with a specific goal of adoption by September 2, 2015.

## **Removal of K.H. from Grandmother**

On April 21, 2015, DPSS removed K.H. from grandmother's care and placed her in a prospective adoptive home. On May 8, 2015, DPSS filed an ex parte application for reduced visitation. Parents had not visited K.H. for several months. DPSS asserted that frequent visitation would impede K.H. bonding with her new prospective adoptive family. The court ordered visitation reduced to one hour, once a month.

DPSS reported in a section 366.26 hearing addendum report, filed in June 2015, that K.H. was placed with her prospective adoptive parents on April 21, 2015. The prospective adoptive parents are not related to K.H. K.H., who was two years old, was reportedly doing exceptionally well in her new home. She had attached to her new family. She referred to her prospective adoptive parents as "mommy and daddy." Her prospective adoptive parents wanted to adopt K.H. Included in the addendum report is a preliminary assessment of K.H.'s prospective adoptive parents, with whom DPSS recommended K.H. remain. DPSS recommended the court proceed with the adoption process. On April 27, 2015, DPSS determined at a Joint Concurrent Planning Review meeting that the most appropriate concurrent plan for K.H. was adoption by K.H.'s prospective adoptive parents.

In a second addendum report, filed July 1, 2015, DPSS reported that on April 21, 2015, DPSS visited K.H. at grandmother's home unannounced. DPSS had been advised there was an unauthorized person hiding in the back of the building. A social worker knocked on grandmother's front door and waited eight to 10 minutes, while people inside

were heard talking and moving around. Meanwhile a second social worker remained on the side of the building.

When grandmother opened the front door, an older male went out the back door and into another unit. The social worker waiting at the front door entered and discussed with grandmother concerns that unauthorized people were staying at the home.

Grandmother's speech was slurred and at times difficult to understand. She claimed no one lived with her and that her soon-to-be ex-husband was no longer a resident.

Grandmother refused a saliva test because she claimed such tests were unreliable.

An inspection of grandmother's home revealed evidence that a man was living in the home. There were extra toothbrushes, men's deodorant, a bag of clothing next to the sofa, and men's shoes by grandmother's bed. K.H.'s crib was in the same room. When the social worker asked if she could enter the unit grandmother had said was empty, grandmother, who was the building manager, said she did not have a key. Grandmother adamantly denied anyone else lived with her or had spent the night (other than K.H.). When told the other social worker saw a man leave her apartment and enter the empty unit, grandmother said the man was her stepfather. Grandmother called the man and introduced him to the social workers. The man said he had been there the past five days and had been homeless. He admitted he had been arrested and charged with driving under the influence in 1984. The man refused to take a saliva test and failed to provide proper identification.

The two DPSS social workers determined that K.H. should be removed from grandmother's care. When grandmother was told this, she became very emotional,

denied she had done anything wrong, and insisted K.H. could not be taken from her. As K.H. was taken away by DPSS, grandmother yelled and screamed that there was no reason to take K.H. K.H. began crying hysterically. Shortly after leaving grandmother, K.H. calmed down.

Upon returning to the DPSS office, a social worker noticed, when changing K.H.'s diaper, that the opening of K.H.'s vagina was very red and raw, and there was a white discharge. A public health nurse agreed there was cause for concern and that K.H. should have a child abuse and neglect (CAN) exam. The CAN examiner concluded the exam findings were inconclusive. The irritated area could have been caused by sexual abuse or by very poor hygiene. The examiner expressed concern regarding K.H.'s excessive weight of 35 pounds. Her diaper bag was full of candy. It was also noted K.H. had a speech delay and needed speech services.

On August 19, 2015, DPSS reported it had attempted to assess placement with K.H.'s paternal aunts and uncles, to no avail. K.H. was happy living with her prospective adoptive parents. She had lived with them for almost five months. K.H. reportedly was doing exceptionally well. She was more engaged, happy and alert than ever before. K.H. lost the excess weight she gained while living with grandmother and she was starting speech services. K.H. was very attached to her prospective adoptive family. DPSS believed that removal of K.H. from the family could potentially irreparably harm her. DPSS therefore recommended terminating parents' parental rights, leaving K.H. in the care of her prospective adoptive family, and proceeding with adoption.

### **Combined Section 366.26 Hearing and Hearing on Section 388 Petition**

On August 27, 2015, grandmother filed a section 388 petition requesting K.H. returned to her for a plan of adoption. Grandmother requested a change of the March 3, 2015<sup>2</sup> order removing K.H. from grandmother and placing her in a prospective adoptive home. Grandmother alleged the social worker's report was not correct; the social worker wrongfully accused grandmother of misconduct. Grandmother further alleged it was in K.H.'s best interests to be with grandmother because K.H. was strongly bonded to grandmother, grandmother had cared for her and provided her with all her needs, and grandmother could provide K.H. with a loving, stable home.

At the combined sections 366.26 and 388 hearing on September 24, 2015, mother requested K.H. be returned to grandmother. Mother joined in grandmother's section 388 petition. Mother also requested the court to order legal guardianship as K.H.'s permanent plan. During the hearing, grandmother stated that the man DPSS observed at her home was grandmother's stepfather, who was visiting for a few days. Grandmother stated that DPSS had encouraged her to allow K.H. to have supervised contact with relatives. Grandmother claimed she did not know she could not have individuals in her home who had not been approved by DPSS. DPSS believed the unidentified man was K.H.'s maternal grandfather, grandmother's ex-husband, who had a nonexempt conviction and was not approved to be in K.H.'s home. Grandmother testified she provided paperwork

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<sup>2</sup> This date is incorrect. K.H. was removed on April 21, 2015, not on March 3, 2015.

confirming that only she and K.H. lived in her home and had complied with drug testing for DPSS.

After evidence was presented at the combined sections 366.26 and 388 hearing, the court first ruled on the section 366.26 matter. The court terminated parental rights. The court then denied grandmother's section 388 petition. The court found that grandmother's testimony was not entirely credible. Therefore circumstances had not changed since the order removing K.H. from grandmother and placing her with a prospective adoptive family. The court concluded that, even if circumstances had changed, granting the section 388 petition was not in K.H.'s best interests. The court concluded it was in K.H.'s best interests to remain in her current placement.

### III

#### STANDING

Mother contends she has standing to challenge the juvenile court's orders denying grandmother's section 388 petition and denying mother's request during the section 388/366.26 hearing to remove K.H. from her prospective adoptive family and place K.H. with grandmother. Mother argues she has standing because reversal of the two orders has the potential to alter the juvenile court's decision rejecting placement with grandmother.

“Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citations.] An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision. [Citations.]” (*In re K.C.* (2011) 52 Cal.4th 231, 236.)

In *K.C.*, *supra*, 52 Cal.4th 231, the Supreme Court indicated that a grandparent has standing to challenge the denial of a section 388 petition under circumstances similar to those in the present case, but the father lacked standing. As here, the child in *K.C.* was removed from the parents and eventually placed with a prospective adoptive family. (*Id.* at p. 234.) The juvenile court bypassed reunification services for the parents and set a section 366.26 hearing. The child’s grandparents then filed a section 388 petition, seeking to place the child in their home. At a combined hearing, the juvenile court denied the grandparents’ section 388 petition, selected adoption as the permanent plan, and terminated the parents’ rights. (*Id.* at p. 235.) Both the father and the grandparents appealed, but the grandparents’ appeal was dismissed as untimely, and the father’s appeal was dismissed based on a lack of standing. The Supreme Court affirmed. (*Ibid.*)

The *K.C.* court held the father had no standing to appeal the denial of the grandparents’ section 388 petition because the father did not contest termination of his parental rights and thus “relinquished the only interest in *K.C.* that could render him aggrieved by the juvenile court’s order declining to place the child with grandparents.” (*Id.* at p. 238, fn. omitted.)

When determining whether a parent is aggrieved by the juvenile court’s order declining placement with grandparents, we must precisely identify the parent’s interest in the matter. (*K.C.*, *supra*, 52 Cal.4th at p. 236.) “All parents, unless and until their parental rights are terminated, have an interest in their children’s ‘companionship, care, custody and management . . . .’ [Citation.] This interest is a ‘compelling one, ranked among the most basic of civil rights.’ [Citation.] While the overarching goal of the

dependency law is to safeguard the welfare of dependent children and to promote their best interests [citations], the law’s first priority when dependency proceedings are commenced is to preserve family relationships, if possible. [Citation.] To this end, the law requires the juvenile court to provide reunification services unless a statutory exception applies. [Citation.] In contrast, *after reunification services are terminated or bypassed (as in this case), ‘the parents’ interest in the care, custody and companionship of the child [is] no longer paramount. Rather, at this point “the focus shifts to the needs of the child for permanency and stability . . . .”* [Citations.] For this reason, the decision to terminate or bypass reunification services ordinarily constitutes a sufficient basis for terminating parental rights. (§ 366.26, subd. (c)(1).)” (*Id.* at pp. 236-237; italics added.)

There are, however, several statutory exceptions to this general rule concerning termination of parental rights. The statutory exceptions to adoption “permit the juvenile court not to terminate parental rights when compelling reasons show termination would be detrimental to the child.” (*K.C., supra*, 52 Cal.4th at p. 237; § 366.26, subd. (c)(1).) One such exception is the relative guardian exception to adoption, section 366.26, subdivision (c)(1)(A), which applies when “[t]he child is *living with a relative who is unable or unwilling to adopt the child . . .*, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child.” (§ 366.26, subd. (c)(1)(A), italics added.)

In the instant case mother argues she has standing because the reversal of the orders relating to relative placement has the potential to alter the juvenile court’s order

terminating parental rights under the relative guardian exception. This exception would not apply because grandmother is willing to adopt K.H. and mother informed the court at the section 388/366.26 hearing that she wanted grandmother to do so.

In *K.C.*, *supra*, 52 Cal.4th 231, the court stated that, by acquiescing in the termination of parental rights, the father “relinquished the only interest in K.C. that could render him aggrieved by the juvenile court’s order declining to place the child with grandparents.” (*Id.* at p. 238.) However, unlike in *K.C.*, in the instant case, mother joined in grandmother’s section 388 petition seeking placement of K.H. with grandmother; requested during the section 388/366.26 hearing that K.H. be placed with grandmother; argued the relative guardian exception to adoption applied; objected to termination of her parental rights; and requested the court order legal guardianship, rather than adoption, as K.H.’s permanent plan.

The instant case is similar to *In re Esperanza C.* (2008) 165 Cal.App.4th 1042 (*Esperanza C.*), in which a child and her mother appealed orders denying their section 388 petitions requesting the juvenile court to order the child placed with the maternal great-uncle (uncle) and his wife. The child’s father was unknown and the court bypassed mother’s reunification services. The juvenile court concluded it did not have jurisdiction to rule on the section 388 petitions because doing so required the court to review the social services agency’s (SSA) denial of a criminal records exemption. The uncle had a criminal record, which included a conviction that SSA classified as a nonexemptible disqualifying offense for purposes of placement. (*Id.* at p. 1050.)

SSA argued in *Esperanza C.* that mother did not have standing to appeal denial of her section 388 petition because she was not aggrieved; only the uncle was aggrieved. (*Esperanza C.*, *supra*, 165 Cal.App.4th at pp. 1052-1053.) The court in *Esperanza C.* disagreed, holding that the mother had standing to appeal and her appeal was not moot, even though the juvenile court had terminated her parental rights after denying her section 388 petition. (*Id.* at pp. 1054-1055.) The *Esperanza C.* court explained that, “[u]ntil parental rights are terminated, a parent retains a fundamental interest in his or her child’s companionship, custody, management and care. (*In re H.G.* (2006) 146 Cal.App.4th 1, 9-10; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 223; see also §§ 361.3, subd. (a)(2) [directing the court to consider the parent’s wishes for relative placement, if appropriate], 388 [allowing return to parental custody after termination of reunification services], 366.21, subd. (h) [authorizing parental visitation after termination of reunification services].)” (*Esperanza C.*, *supra*, 165 Cal.App.4th at p. 1053.)

In *Esperanza C.*, the court noted that, when parental rights have not yet been terminated, “placement of a child with a relative has the potential to alter the juvenile court’s determination of the child’s best interests and the appropriate permanency plan for that child, and may affect a parent’s interest in his or her legal status with respect to the child. [Citations.] While an alternative permanency plan to adoption may be unlikely on this record, it remains a statutory option for the juvenile court.” (*Esperanza C.*, *supra*, 165 Cal.App.4th at p. 1054.) The *Esperanza C.* court therefore resolved any doubts as to standing in favor of the mother’s right to appeal. (*Ibid.*) The court added that the mother’s appeal was not moot because she had substantial interests at stake that might be

affected by the outcome of the appeal. Reversal of the section 388 petition could lead to a change in the child's placement. (*Esperanza C., supra*, 165 Cal.App.4th at p. 1055.)

DPSS argues that under *In re Jayden M.* (2014) 228 Cal.App.4th 1452 (*Jayden M.*), *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1035, and *In re Jasmine J.* (1996) 46 Cal.App.4th 1802, mother does not have standing in this appeal. In *Jayden M.*, the parents challenged Jayden's removal from his prospective adoptive parents (Jayden's aunt and uncle) on the grounds SSA did not comply with statutory notice requirements under sections 366.26, subdivision (n), and 361.3. The court in *Jayden M.* held the section 366.26, subdivision (n), statutory right "belongs only to the prospective adoptive parents, and not to the biological parents, whose rights are not injuriously affected by a court's failure to comply with the procedural notice requirements of section 366.26, subdivision (n). (See *In re Desiree M.* (2010) 181 Cal.App.4th 329, 333-334 [mother lacked standing to contend the children were not properly notified of the continued § 366.26 hearing in their own case because her rights were not injuriously affected by the lack of notice].)" (*Jayden M.*, at p. 1459.)

The *Jayden M.* court similarly held the parents did not have standing to appeal under section 361.3, which gives preferential consideration to a relative request for placement. The *Jayden* court concluded the parents had no standing to appeal relative placement preference issues once their reunifications services were terminated. Only the relative requesting to be considered for relative placement could contest denial of Jayden's placement with the relative. (*In re Jayden M., supra*, 228 Cal.App.4th at p. 1460, citing *Cesar V. v. Superior Court, supra*, 91 Cal.App.4th at pp. 1034-1035, 1460.)

As in *Jayden M.*, in *Cesar V.* the SSA argued the child's father did not have standing to raise on appeal the relative placement preference issue under section 361.3. The court in *Cesar V.* held the grandmother, but not the father, had standing. The court stated, "[The father] has no standing to appeal the relative placement preference issue. Especially in light of his stipulation to terminate reunification services, we cannot see how the denial of placement with [the grandmother] affects his interest in reunification with the children. It does not preclude [the father] from presenting any evidence about the children's best interests or their relationship with him. (See *In re Vanessa Z.* (1994) 23 Cal.App.4th 258, 261; cf. *In re Daniel D.* [(1994) 24 Cal.App.4th 1823,] 1833-1834 [although challenge was untimely, mother apparently had standing to raise denial of relative placement preference before termination of reunification services where such placement arguably would have affected the mother's chances at reunification].)[] 'An appellant cannot urge errors which affect only another party who does not appeal.' [Citation.]" (*Cesar V. v. Superior Court, supra*, 91 Cal.App.4th at p. 1035.)

The court in *Jasmine J.* similarly held the father did not have standing to raise issues regarding his children's best interests in being placed together, since his own parental rights were not affected. (*In re Jasmine J., supra*, 46 Cal.App.4th at p. 1807.) In *In re Jasmine J.*, the father wanted his daughter, Jasmine, and her siblings to be placed with a relative so that the children could remain together. *Jasmine J.* is not analogous. It concerns a parent raising issues regarding siblings' interests in each other, and not the parent's own interests. In addition, the father did not assert that one of the enumerated

exceptions to adoption applied, such as the relative guardian exception.<sup>3</sup> (*Id.* at pp. 1807-1808.)

Under *Jayden M.* and *Cesar V.*, mother does not have standing to challenge K.H.'s placement under sections 361.3 or 366.26, subdivision (n). Even assuming mother has standing based on the relative guardian exception to adoption (§ 366.26, subd. (c)(1)(a)), it is unlikely the relative guardian exception will apply because grandmother indicated she is willing to adopt K.H. Nevertheless we will address mother's objections on the merits, because reversal of the juvenile court orders might lead to returning K.H. to grandmother, with the possibility of a permanent plan of guardianship, instead of adoption.

#### IV

#### SEQUENCE OF RULINGS

Mother argues that the juvenile court committed prejudicial error by terminating parental rights before deciding grandmother's section 388 petition. Mother asserts that terminating parental rights undermined the applicability of the relative placement preference under sections 361.3, subdivisions (d) and (f), and 366.26, subdivision (k). Mother waived this objection by not raising it in the trial court (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558), and even if not waived because of a lack of opportunity

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<sup>3</sup> The sibling relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(v)) did not exist when *In re Jasmine J.*, *supra*, 46 Cal.App.4th 1802 was decided. It was later added as an exception to adoption.

to assert it after the court stated its rulings, the objection to the order of the rulings does not constitute prejudicial error (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1322-1323).

Subdivision (d) of section 361.3 states: “Subsequent to the hearing conducted pursuant to Section 358 [the disposition hearing], whenever a new placement of the child must be made, consideration for placement shall again be given as described in this section to relatives who have not been found to be unsuitable and who will fulfill the child’s reunification or permanent plan requirements. In addition to the factors described in subdivision (a), the county social worker shall consider whether the relative has established and maintained a relationship with the child.”

There was no prejudice under this statute because DPSS had found grandmother to be unsuitable for placement in April 2015, and the court determined it was not in K.H.’s best interest to be returned to grandmother. Furthermore, as discussed below, the juvenile court did not abuse its discretion in denying the section 388 petition. Therefore the relative placement preference did not apply because a new placement was not required.

Subdivision (f)(2)(B) of section 361.3 does not apply because that provision requires that “the child was previously adopted and the adoption has been disrupted, set aside . . . or the child has been released into the custody of the department or a licensed adoption agency by the adoptive parent or parents.” (§ 361.3, subd. (f)(2)(B).)

As to the relative placement preference under section 366.26, subdivision (k), the record shows that regardless of the juvenile court terminating parental rights before denying the section 388 petition, the court would not have applied the relative preference

to grandmother because “removal from the . . . foster parent would be seriously detrimental to the child’s emotional well-being.” The juvenile court’s comments during the section 388/366.26 hearing demonstrated that the court found that DPSS had valid grounds for removing K.H. from grandmother and it was not in K.H.’s best interests to return the child to grandmother. Therefore any error in the juvenile court terminating parental rights before ruling on the section 388 petition was harmless error. Furthermore, the rulings were entered during a combined section 388/366.26 hearing, in which both matters, including evidence and argument, were considered simultaneously.

## V

### RELATIVE PLACEMENT PREFERENCE

Mother contends the juvenile court erred in not applying the relative placement preference and ordering K.H. returned to grandmother at the section 388/366.26 hearing. Mother argues the preference applies to grandmother as a prospective adoptive parent under section 366.26, subdivision (n), and even if that provision does not apply, the relative placement preference should have been applied under section 361.3, subdivision (a).

#### *A. Section 366.26, Subdivision (n)*

Section 366.26, subdivision (n), provides in relevant part that at a section 366.26 hearing or thereafter, the court “may designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months, the caretaker currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoption process. In determining whether to make

that designation, the court may take into consideration whether the caretaker is listed in the preliminary assessment prepared by the county department in accordance with subdivision (i) of Section 366.21 as an appropriate person to be considered as an adoptive parent for the child and the recommendation of the State Department of Social Services, county adoption agency, or licensed adoption agency.” (§ 366.26, subd. (n)(1).) Subpart (2) of section 366.26, subdivision (n), states steps to be taken by prospective adoptive parents to facilitate the adoption process.

Section 366.26, subdivision (n), provides procedures for judicial review of emergency and nonemergency removals from a designated prospective adoptive parent. (§ 366.26, subd. (n)(3), (4); *State Dept. of Social Services v. Superior Court* (2008) 162 Cal.App.4th 273, 285.) “With the exception of the notice requirements, the same hearing procedures apply to both types of removal and, in each case, the agency ‘must prove by a preponderance of the evidence that the removal is in the best interest of the child.’ (Cal. Rules of Court, rule 5.728(f); see also *id.*, rule 5.727(g).) Further, ‘the child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child’s best interest.’ (§ 366.26, subd. (n)(3)(B); see also *id.*, subd. (n)(4).) Thus, the statute represents a paradigm shift in the standards to be applied to agency decisions in the narrow category of *post termination removal of children from designated prospective adoptive placements* and gives to the court the wide discretion previously afforded the adoption agencies to determine whether the placement is in the best interest of the child.” (*State Dept. of Social Services*, at pp. 285-286; italics added.)

Section 366.26, subdivision (n), does not apply because K.H.'s removal from grandmother was not posttermination. K.H. was removed from grandmother on April 21, 2015, before the section 366.26 hearing terminating parental rights on September 24, 2015. Furthermore, at the time of K.H.'s removal from grandmother, grandmother did not have prospective adoptive parent status. A preliminary adoptive assessment of grandmother had not been completed and therefore DPSS had not yet made a determination as to whether to designate grandmother as a prospective adoptive parent. In addition, K.H. had not lived with grandmother for at least six months during which grandmother was K.H.'s primary caregiver. DPSS placed K.H. with grandmother, as K.H.'s primary caregiver, on December 29, 2014, and removed K.H. from grandmother's care on April 21, 2015.

Even if section 366.26, subdivision (n) applies, all parties received notice of K.H.'s removal from grandmother on April 27, 2015, when DPSS filed an ex parte application for reduced visitation, and neither mother nor grandmother filed a petition challenging K.H.'s removal from grandmother. It was not until August 27, 2015, four months after K.H.'s removal, that grandmother filed a section 388 petition requesting K.H. returned to grandmother. In the meantime, K.H. was placed with her prospective adoptive family, bonded with them, and was thriving in her new home.

*B. Section 361.3*

Mother alternatively argues K.H. should have been placed with grandmother under the section 361.3, relative preference privilege. Section 361.3, subdivision (a), provides: "In any case in which a child is removed from the physical custody of his or her parents

pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative.” Section 361.3, subdivision (a), lists the criteria to be considered when determining whether placement with a relative is appropriate.

The relative placement preference also applies when a new placement must be made after a section 358 disposition hearing. Subdivision (d) of section 361.3 states that, whenever a new placement of the child must be made after the disposition hearing, “consideration for placement shall again be given as described in this section to relatives who have not been found to be unsuitable and who will fulfill the child’s reunification or permanent plan requirements.” (§ 361.3, subd. (d).)

Section 361.3 assures that, when a child is taken from his or her parents’ care and requires placement outside the home, an interested relative’s application for placement will be considered before a stranger’s request. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.) However, the relative placement preference established by section 361.3 does not constitute “a relative placement guarantee.” (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 798.) Nor does section 361.3 “create an evidentiary presumption that relative placement is in a child’s best interests.” (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 855; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 321 (*Stephanie M.*.) [construing former section 361.3].)

The relative placement preference normally does not apply after reunification services are terminated. (*In re Baby Girl D.* (1989) 208 Cal.App.3d 1489, 1493-1494.) “[O]nce the juvenile court determines at a permanency planning hearing that

reunification [with the parents] is no longer possible and that a child should be freed for adoption, there is no longer any reason to give relatives preferential consideration in placement. The overriding concern at this point is to provide a stable, permanent home in which a child can develop a lasting emotional attachment to his or her caretakers. It is for this reason that in any subsequent decision on adoptive placement, a foster parent to whom the minor already has ‘substantial emotional ties’ necessarily is entitled to preference over all other candidates. [Citation.]” (*Ibid.*; see *In re Jessica Z.* (1990) 225 Cal.App.3d 1089, 1098 [the child’s best interest may require that placement with a grandmother be rejected].)

At the time of the section 388/366.26 hearing in the instant case, a new placement was not required and therefore consideration for placement under section 361.3 was not required. At that point, K.H. was in a stable placement, living with her prospective adoptive family. DPSS recommended termination of parental rights, and adoption by K.H.’s prospective adoptive family was the preferred permanent plan.

Furthermore, when DPSS removed K.H. from mother on September 23, 2013, grandmother was appropriately assessed as a preferred relative under section 361.3. Placement with grandmother was initially found to be inappropriate. Upon reassessing grandmother when K.H. was removed from mother a second time, DPSS complied with the section 361.3 relative preference by placing K.H. with grandmother on December 19, 2014, the day after the disposition hearing. The only time thereafter K.H. was removed from her caretaker was when DPSS removed K.H. from grandmother’s home on April 21, 2015, because DPSS determined K.H.’s placement in grandmother’s home placed

K.H. at risk and placement with grandmother was not in K.H.'s best interests. Of course, the section 361.3 preferred relative preference did not apply to grandmother at that time, since K.H. was being removed from grandmother's home.

After ordering parental rights terminated at the section 388/366.26 hearing, the section 361.3 relative preference privilege did not apply. At that point, the section 361.3 relative preference privilege was superseded by section 366.26, subdivision (k). "[T]he statutory preference for placement of a dependent child with a relative (Welf. & Inst. Code, § 361.3) does not apply to a placement made as part of a permanent plan for adoption. Once the juvenile court determines that reunification efforts have failed, the only statutory preference in the adoption process is for a 'relative caretaker or foster parent' as provided in subdivision (k) of section 366.26." (*In re Sarah S.* (1996) 43 Cal.App.4th 274, 276.)

Subdivision (k) of section 366.26 states: "Notwithstanding any other law, the application of any person who, *as a relative caretaker or foster parent*, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent *and removal from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being.*" (Italics added.)

At the time of the section 388/366.26 hearing, grandmother did not qualify as a "relative caretaker" under section 366.26, subdivision (k), because K.H. was not living

with grandmother. Instead, K.H.'s prospective adoptive parents, with whom she had been living for the past four months, were entitled to placement preference under section 366.26, subdivision (k).

Mother's reliance on *In re R.T.* (2015) 232 Cal.App.4th 1284 (*R.T.*), for the proposition the juvenile court erred in not considering the relative preference privilege under section 361.3, is misplaced. In *R.T.*, the court reversed the juvenile court's order terminating parental rights on the ground the court and SSA failed to apply the relative placement preference and consider the child's aunt and uncle for placement. (*R.T.*, at p. 1293.) After termination of reunification services, the aunt and uncle filed a section 388 petition, seeking to set aside the disposition order and modify placement on the ground they were denied preferential consideration for placement. The juvenile court denied the section 388 petition. The court in *R.T.* held the juvenile court's failure to apply the relative placement preference under section 361.3 constituted prejudicial error. (*R.T.*, at p. 1300.) The *R.T.* court concluded the relative placement preference could be considered postdisposition because the aunt invoked the preference by filing her section 388 petition for modification of placement before the dispositional hearing.

*R.T.* is inapposite. Grandmother filed her section 388 petition invoking the relative preference after the disposition hearing, on the eve of the section 366.26 hearing, over four months after DPSS removed K.H. from grandmother. Unlike in *R.T.*, the section 388 petition was based on the failure to apply the preferential placement privilege postdisposition. Furthermore, grandmother did not timely object to or appeal K.H.'s removal from grandmother. Also, unlike in *R.T.*, the record shows that DPSS followed

the relative placement preference by initially placing K.H. with grandmother but later removing the child from grandmother upon determining K.H.'s placement with grandmother placed K.H. at risk of harm. Mother has failed to demonstrate the DPSS or juvenile court erred in not applying the relative placement preference to grandmother.

In a letter brief, mother requested this court to consider the recent decision of *In re Isabella G.* (2016) 246 Cal.App.4th 708 (*Isabella G.*). In *Isabella G.*, the court held that “when a relative requests placement of the child prior to the dispositional hearing, and the Agency does not timely complete a relative home assessment as required by law, the relative requesting placement is entitled to a hearing under section 361.3 without having to file a section 388 petition.” (*Id.* at p. 712.)

*Isabella G.* is not on point. In *Isabella G.*, Isabella's grandparents were closely bonded to Isabella and had cared for her during most of Isabella's life. From the inception of the juvenile dependency proceedings, grandparents consistently requested placement of Isabella. The Health and Human Services Agency (Agency) ignored the grandparents' request for placement until after the court terminated reunification services and set a section 366.26 hearing. The Agency also misled the grandparents into acquiescing to Isabella's current placement by incorrectly telling the grandparents Isabella could not be moved from her current placement more than twice in one year.

After the grandparents retained an attorney and filed a section 388 petition seeking placement, the Agency completed a relative home assessment and found the grandparents' home suitable for placement. Nevertheless, the juvenile court denied the grandparents' section 388 petition. The juvenile court in *Isabella G.* rejected the relative

placement preference (§ 361.3) because reunification services had been terminated. The court further concluded the caregiver adoption preference (§ 366.26, subd. (k)) applied. The parties agreed on appeal the juvenile court erred in prematurely applying the caregiver adoption preference before formal approval of a plan of adoption and termination of parental rights. (*Isabella G.*, *supra*, 246 Cal.App.4th at p. 718.)

*Isabella G.* is distinguishable because in the instant case the DPSS did not ignore grandmother's request for placement. K.H. was placed in grandmother's home and DPSS initiated a relative home assessment. The assessment was not completed because DPSS appropriately removed K.H. from grandmother's home upon determining that the placement was unsuitable and it was not in K.H.'s best interests to remain in grandmother's home. This occurred after DPSS discovered a man had been clandestinely staying in grandmother's home. He had not been approved to be in the home while K.H. was residing there. Grandmother had lied to the social worker and had attempted to conceal the presence of the inappropriate house guest. As a consequence of this incident, K.H. was removed from grandmother's home. Thereafter, the juvenile court appropriately denied grandmother's section 388 petition on the ground grandmother had not met her burden of proving changed circumstances or that it was in K.H.'s best interests to remove K.H. from her current home and place her with grandmother.

In *Isabella G.*, on the other hand, the court held a section 388 petition was not required because DPSS had ignored the grandparents' placement request since the inception of the juvenile dependency proceedings, which was not the case here. Unlike in *Isabella G.*, a section 388 petition was necessary for grandmother to seek placement

because K.H. had been removed from grandmother's care based on a finding of unsuitability. The juvenile court did not abuse its discretion in denying grandmother's section 388 petition based on findings that there were no changed circumstances and it was not in K.H.'s best interests to be removed from her prospective adoptive family and placed with grandmother.

## VI

### GRANDMOTHER'S SECTION 388 PETITION

Mother contends the juvenile court abused its discretion in denying grandmother's section 388 petition. We disagree.

Section 388, subdivision (a)(1), provides in part: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . ." A section 388 petition may be filed "to change or set aside any order of the juvenile court in the action from the time the child is made a dependent child of the juvenile court [citations]." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415 (*Jasmon O.*))

The standard of review for an order denying a section 388 petition is abuse of discretion. "The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. [Citations.]" (*Jasmon O., supra*, 8 Cal.4th at pp. 415-416.)

When a section 388 petition is brought after the termination of reunification services, to change an earlier placement order, “the predominant task of the court [is] to determine the child’s best interests . . . .” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 320.) “After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’ [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*Id.* at p. 317.)

In *Stephanie M.*, the court ruled that, even assuming the section 361.3 relative placement preference applied at a late stage of the dependency proceedings, after termination of reunification services, “on the [section 388] motion for change of placement, the burden was on the moving parties to show that the change was in the best interests of the child *at that time*. Evidence that at earlier proceedings the court had not sufficiently considered placement with the grandmother was not relevant to establish that at the time of the hearing under review, placement with the grandmother was in the child’s best interests.” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 322, fn. omitted; *id.* at p. 320.)

The court concluded in *Stephanie M.* that “[t]he Court of Appeal erred in giving too great weight to the grandmother’s interest in maintaining a family tie with the child and substituting its judgment for that of the juvenile court. Putting aside the question

whether the grandmother had any cognizable interest at all, and treating her as a parent, her interests were not significant compared to the need of the child for stability. [Citation.]” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 324.) The court concluded, “[t]he Legislature has declared that a dependent child has an interest in continuity and stability in placement. [Citations.] This interest was served by the order denying change of placement.” (*Id.* at p. 326.) “[A]fter reunification services have terminated, a parent’s petition for either an order returning custody or reopening reunification efforts must establish how such a change will advance the child’s need for permanency and stability.” (*In re J.C.* (2014) 226 Cal.App.4th 503, 527; see *In re Edward H.* (1996) 43 Cal.App.4th 584, 594 [on eve of .26 hearing, children’s interest in stability was court’s foremost concern and outweighed any interest in reunification].)

Here, the record supports the juvenile court’s determination that it was in K.H.’s best interest to deny grandmother’s section 388 petition and leave K.H. in her prospective adoptive home. Mother and grandmother failed to object timely to K.H.’s removal from grandmother, and grandmother delayed four months filing a section 388 petition requesting return of K.H. to grandmother. By the time of the section 388/366.26 hearing, K.H. had bonded with her prospective adoptive family. DPSS reported that removal could potentially cause irreparable harm to her. Under such circumstances, the juvenile court reasonably found it was not in K.H.’s best interests to remove K.H. from her prospective adoptive family and place her back with grandmother.

As in *Stephanie M.*, “[t]he juvenile court . . . properly focused on the child’s interests, rather than the grandmother’s interest. From the point of view of the child, the

grandmother’s intervention did come too late; the child was already bonded to foster parents.” (*Stephanie M., supra*, 7 Cal.4th at p. 323.) The juvenile court therefore did not abuse its discretion in denying grandmother’s section 388 petition.

VII

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

MILLER  
Acting P. J.

SLOUGH  
J.