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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JUSTIN F. a Person Coming Under the
Juvenile Court Law.

TUOLUMNE COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

SEAN F.,

Defendant and Appellant.

In re JUSTIN F. et al., Persons Coming Under
the Juvenile Court Law.

TUOLUMNE COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

STEPHANIE F.,

Defendant and Appellant.

F070469,
F070744, F070745, F070746

(Super. Ct. Nos. JV7449, JV7450,
JV7451)

OPINION

APPEAL from orders of the Superior Court of Tuolumne County. Frank
Dougherty* and Donald Segerstrom, Judges.

* Retired Judge of the Merced Superior Court assigned by the Chief Justice pursuant to
article VI, § 6 of the California Constitution.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant, Sean F.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant and Appellant, Stephanie F.

Sarah Carrillo, County Counsel, for Plaintiff and Respondent.

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Stephanie H. (mother)¹ is the mother of Kyle H., Justin F. and Molly B. (together, the children). Ian H., the presumed father of Kyle H., died during the pendency of this appeal.² Sean F. (father) is the presumed father of Justin. Andrew B. is the alleged father of Molly.³ Mother contends that the juvenile court abused its discretion in denying her Welfare and Institutions Code section 388⁴ petition to grant her reunification services and order placement of the children with a relative. Father contends that the juvenile court abused its discretion by failing to address relative placement as part of the section 366.26 hearing or to grant a continuance of the section 366.26 hearing to order further evaluation of a proposed relative placement. We affirm.

SUMMARY OF FACTS AND PROCEDURE

In January of 2014 the Tuolumne County Department of Social Services (department) received a referral that mother, who had an alleged history of robbery and

¹ In this opinion, certain persons are identified by initials, abbreviated names and/or by status in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

² Ian H. was initially a party to this appeal. Due to his death, we have granted his counsel's request to abate the proceedings and dismiss the appeal as to him. We mention Ian H. in this opinion only when necessary for clarity purposes.

³ Sean F. is the legally presumed father of Molly because he was married to mother at the time of Molly's conception and birth. However, he was incarcerated at the time of her conception and does not claim her as his child. Molly's alleged father, Andrew B., did not participate in the proceedings and has not filed an appeal in this matter.

⁴ All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

methamphetamine and OxyContin abuse, had resumed her use of those substances. Kyle, age 6, was then in the care of maternal grandmother; Justin, age 18 months, and Molly, age 3 months, were in mother's care. In November of 2013, mother had cancelled a scheduled surgery for Justin, intended to prevent further deterioration of his kidneys. Mother was arrested a few days after the referral on felony charges after a traffic stop.

The social worker made multiple attempts to contact mother, but was not able to do so until the beginning of February 2014. At that point, mother, who was living with maternal grandmother, denied current substance abuse allegations and stated she had not used drugs since her participation in drug court from 2010 to 2011. Mother refused repeated requests to drug test and said she would only do so if court ordered. Mother acknowledged that she was in a relationship with Andrew B., Molly's alleged father, and that he "may be using." Mother was uncooperative with proposed safety planning and demanded the social worker leave.

Mother failed to attend her scheduled February 20, 2014, court appearance and a warrant was issued for her arrest. On that same day maternal grandmother reported that mother and Andrew B. left her residence and took Justin and Molly with them. At the beginning of March 2014, the social worker received a call from mother's sister that the children were with her and that they needed to be picked up. When mother's sister took the children at mother's request, mother, who appeared to be under the influence and smelled strongly of marijuana, promised to return to pick up the children the following day, but did not. The children were detained and placed in foster care.

On March 11, 2014, a juvenile dependency petition was filed for each child, alleging each had been left without provision for support by mother and each child's father. (§ 300, subd. (g).) The petition further alleged that mother failed to provide adequate medical care for Justin. (§ 300, subd. (b).) A detention hearing was held March 12, 2014. None of the parents appeared, although counsel was appointed for each. The children were detained and jurisdiction set for April 1, 2014.

When the social worker interviewed mother in jail on March 13, 2014, mother refused to sign court documents, but stated she had arranged “temporary legal custody” of her children as follows: Kyle to Alexandra L; Justin to Esther M.; and Molly to Theresa H. When contacted, Alexandra L. was surprised to learn she had been named a potential guardian of Kyle, but asked to be considered. Alexandra L. lived with her fiancé, Giacchino S. and Kyle’s paternal grandmother. Alexandra L. provided necessary information to complete the application process.

When contacted about placement of Justin, Esther M., a paternal aunt, stated she did not have an ongoing relationship with mother and did not have “much of a relationship” with Justin. She had not seen him in “quite some time” and was not interested in being assessed for placement. The social worker left a message with Molly’s paternal grandmother, about placement of Molly. No response was received. Maternal grandmother expressed an interest in being considered for placement of the children.

Mother was released from jail on March 13, 2014, but did not contact the department to arrange for visitation with the children.

In late March of 2014, an amended petition was filed alleging that the children were at risk of harm due to mother’s substance abuse. (§ 300, subd. (b).) Mother had been arrested in January 2014 for being a felon in possession of a firearm and had a pipe with marijuana in her possession at the time. The person with her in the vehicle at the time was arrested for possession of heroin and two methamphetamine pipes. A later search of the outside of mother’s home revealed beer cans and drug paraphernalia. Since Justin’s kidney surgery was now rescheduled for April of 2014, the allegation of medical neglect was deleted from the amended petition.

Both mother and father attended the scheduled jurisdiction hearing April 1, 2014. A number of relatives attended the hearing as well. A contested hearing was set for

April 15, 2014. Mother's request to be present at Justin's rescheduled surgery was granted.

An April 15, 2014, addendum jurisdiction report stated that mother failed to attend Justin's surgery, which was performed successfully April 9, 2014. Mother called the social worker and asked how the surgery went. She then said she would meet with the social worker, but did not arrive.

Attached to the addendum report was a report from the sheriff's department that mother had been the victim of an assault on March 27, 2014. During the investigation, mother admitted that she had used methamphetamine a few days earlier and marijuana several weeks prior.

Also in the report was sheriff's department information that maternal grandmother's home was burglarized March 30, 2014, and a purse, vehicle keys, checks and a credit card taken. The credit card was used multiple times the following day. Maternal grandmother identified mother's car as being in front of her house at the time of the burglary.

At the contested April 15, 2014, jurisdiction hearing, mother failed to appear. Father was present, but in custody. Neither mother's counsel nor counsel for the department had spoken to mother since the last hearing. It was reported that she had been charged with a new drug case and was to be arraigned the following week. Father waived his rights and submitted on the petition. Mother's counsel asked for a contested hearing, which was set for May 2, 2014.

Mother did not appear at the rescheduled contested hearing May 2, 2014. Maternal grandmother was present and stated she had given mother taxi money the night before to get to court. The juvenile court found the petitions true. Disposition was continued to May 13, 2014.

The report prepared in anticipation of disposition recommended that services be denied mother pursuant to section 361.5, subdivision (b)(13)⁵ and to father pursuant to section 361.5, subdivision (e)⁶. Mother had still failed to contact the department, despite multiple attempts to contact her, and she had made no attempt to visit the children since detention. Father, who was incarcerated, was unable to receive telephone calls from the social worker.

Justin and Molly were adjusting well to foster care and were emotionally stable. Justin scored low on a developmental screening, most likely due to his recent surgery. Kyle was sad but well-behaved in placement. He missed mother and was confused about when he would see her again. He continued to have incidents in which he wet himself, had stomach aches, and vomited. He was being connected with behavioral health services.

Paternal aunt, Esther M., who had previously said she was not interested in placement of Justin, now said she was. Her application was submitted for licensing.

On May 13, 2014, mother and father were both present and requested a contested disposition hearing, which was set for May 30, 2014. At the end of the May 13, 2014, hearing, mother was remanded to custody on an outstanding warrant.

Mother and father both appeared at the May 30, 2014, hearing. Due to a recent incident which occurred while father was in custody, his expected release date was now sometime after December 2014. Mother testified she was now homeless and had not seen the children since the day before they were detained. Reunification services were denied both mother and father and a section 366.26 selection and implementation hearing

⁵ Section 361.5, subdivision (b)(13), provides that reunification services need not be offered a parent with a history of extensive abusive chronic drug or alcohol use who has resisted prior court-ordered treatment.

⁶ Section 361.5, subdivision (e), provides that the juvenile court shall order reasonable services to a parent who is incarcerated unless the court determines those services would be detrimental to the child.

set for September 30, 2104. Mother filed a notice of intent to file writ petition on June 12, 2014, which was dismissed July 25, 2014, after she failed to file a subsequent writ.

The September 30, 2014, report prepared in anticipation of the section 366.26 hearing recommended termination of parental rights for both mother and father and referral of the children for adoption. The department and the State Department of Adoptions found the children to be adoptable, but that the current caretakers did not wish to adopt them.

The children had all been together in the same foster care home since being detained. Kyle, age 7, was described as healthy and emotionally stable, after at first being tearful and not understanding why he was in foster care. He still had some eating and vomiting issues, which were being addressed in counseling. The adoption worker opined that adoption would not be detrimental to his well-being. Justin was described as emotionally stable. His kidney surgery had been successful, but he still had some developmental issues. Molly was a happy, healthy 10-month-old described as emotionally stable and developing at an age appropriate rate. The children interacted well together and the adoption worker hoped to find an adoptive home that would accept all three of them.

Mother visited the children once in June, once in July, and weekly in August and September of 2014. The interactions with the children became more comfortable over time and mother was appropriate in her roll with them. Mother had continued open criminal cases, including allegations of firearm charges, burglary and identity theft. Trial on those charges was scheduled for November 2014 and could result in up to eight years in prison. Mother was currently living with maternal grandmother, participating in substance abuse counseling and attending parenting classes. Maternal grandmother's earlier request for placement of the children had been denied due to her own criminal background.

The application submitted by Kyle's paternal grandmother, Alexandra L. and Giacchino S. for placement of Kyle was withdrawn in June of 2014, because paperwork was not completed. Due to paternal grandmother's criminal background, Alexandra L. and Giacchino S. resubmitted an application not including her in September of 2014. The application was pending.

Justin's paternal aunt Esther M.'s application was denied in August of 2014 due to the criminal background of a person residing with her. Emillie W., mother of Justin's half sibling, began an application but failed to complete the paperwork and it was denied in June of 2014. Sarah G., another of Justin's paternal aunts, submitted and then withdrew an application in July of 2014.

Betty H., father's paternal great aunt, submitted an application for all three children in August of 2014. Betty H. and her husband were licensed foster care providers. The application was denied because the home would exceed the number of allowed children. There is nothing in the record to indicate that Betty H. requested or participated in any visits with any of the children.

On September 25, 2014, mother filed a section 388 motion seeking to have the children placed with maternal grandmother or "other family members"; to have reunification services "reinstated"; to allow unsupervised visits; and to stay the upcoming section 366.26 hearing. According to the petition, mother claimed "changed circumstances" in that she had enrolled in parenting classes; completed an eight-week parenting class on communication; had been attending Alcoholics Anonymous (AA) since June of 2014; was "currently enrolling" in a residential treatment program; was participating in alcohol and drug programs; and was consistently testing "clean."

The section 388 hearing was set to coincide with the section 366.26 hearing on September 30, 2014, before Judge Donald Segerstrom. In addressing the section 388 motion at the hearing, mother's counsel clarified that mother was "trying to enroll in a residential treatment program." The juvenile court described mother's petition as taking

place “one minute to midnight.” All parties agreed to set a combined contested section 388 and section 366.26 hearing.

Before adjourning, father’s counsel clarified that Betty H. and her husband, who had applied for placement of all three children, were “formerly licensed foster parents” who were now no longer subject to a limit on the number of children allowed in the home. According to counsel, Betty H. told him a social worker had come to their home recently, but had not yet had a chance to indicate whether the home would be suitable for placement of the children. The juvenile court noted this information was not in the department’s section 366.26 report. Counsel for the department stated the section 366.26 report was based on information “received from licensing,” but that a social worker would “look into that.” The juvenile court stated that, if there was updated information, that information could be addressed in a supplemental report for the continued section 366.26 hearing, set for November 5, 2014.

The continued combined sections 388 and 366.26 hearing was held before Judge Dougherty⁷. The juvenile court first addressed mother’s section 388 petition. Mother’s counsel submitted on the petition and attached documents. Counsel for the department argued that mother had not met her burden of showing changed circumstances required for a section 388 petition. The juvenile court denied the motion, stating that it had considered the petition, as well as the entire file, and that, while mother had made some changes, they were not significant enough for the court to find that a change of the previous order would be in the best interests of the children.

The juvenile court next addressed the section 366.26 motion. Mother’s counsel requested a continuance because she had not received the November 4, 2014,

⁷ At the earlier September 30, 2014, hearing, Judge Segerstrom explained that he was not a “dedicated dependency department” but “primarily criminal department,” and he had a criminal trial scheduled for November 5, 2014.

section 366.26 addendum report until that day; father's counsel asked for a continuance because father was scheduled for release in a few days or weeks.

Acknowledging that the addendum report was filed late, counsel for the department stated that the original section 366.26 report included information on the status of relative placements and that the addendum report included additional detailed information. Counsel then suggested that, if the juvenile court did not wish to consider the late addendum report, it could be withdrawn and the state adoption social worker could testify to the issue of whether the children were adoptable and whether there were any applicable exceptions to adoption. Counsel reasoned that it was important to continue with the hearing because the children had been out of their home for nine months and needed permanency and stability. The juvenile court agreed, withdrew the section 366.26 addendum report, denied the continuance motion, and continued with the section 366.26 hearing.

Testimony of the adoption worker was that she had met with the children on three occasions in their foster home. Noting the bond between the children, the adoption worker only considered homes that would be able to take all three children. With this in mind, she found an adoptive home for the children which consisted of a "mom-and-dad family" without children; mother was a school psychologist and father a special education teacher. The couple was aware of Justin's previous health concerns and needs for language and speech assistance as well as Kyle's counseling needs. The adoption worker opined that there was nothing to prevent the children from being adopted and recommended adoption for them, noting their young age and the fact that they were adoptable. She did not think it would be detrimental to terminate mother and father's rights to the children. The adoption worker's goal was to get the children "moved and settled before Thanksgiving."

The social worker for the department then testified and was asked about the various placements that had been considered for the children, beginning with the

maternal grandmother. Before the social worker could answer, counsel for father interjected that at the September 30, 2014, hearing, the juvenile court had asked that the issue of placement with Betty H. be addressed in the supplemental report. Counsel for the department stated that the issue was addressed in the now withdrawn report. Noting that there was now no report to address the issue that the juvenile court “ordered at the last hearing,” counsel for father again requested a continuance.

After some back and forth between the parties and the juvenile court as to what was actually “ordered” at the last hearing and what effect the issue of possible placement with Betty H. had on the current hearing, the juvenile court noted that, although the supplemental report had been withdrawn, the issue of whether Betty H. was approved for placement was “still being reviewed.” The juvenile court questioned whether the section 366.26 hearing should be continued, noting the uncertainty of when and whether the placement would be approved. The juvenile court then reiterated that the issue before the court was “whether these children are adoptable” and it did not see how the potential approval of Betty H. affected the section 366.26 hearing.

The hearing then continued with the social worker also recommending that adoption be the permanent plan for the children. The social worker opined that it would not be detrimental to the children to terminate the parents’ parental rights.

Mother testified in her own behalf that she had recently been actively attending AA meetings and participating in parenting classes. According to mother, the children should be placed with her because she was their mother and they have “always been right there” with her and she had “always taken care of them.” She claimed to be able to provide them with a stable home, that she was currently in drug counseling, and that having the children taken from her was “a big eye-opener.” According to mother, she loved her children “more than anything in the world.”

On cross-examination, mother claimed not to remember maternal grandmother calling law enforcement with the complaint that mother had stolen items from her. She

acknowledged having been in drug treatment previously and relapsing and that Kyle had previously been in guardianship when she could not care for him. Mother acknowledged having three separate pending felony cases. Mother claimed to have been sober since the end of May 2014, but acknowledged that she could have used drugs during her current pregnancy; she was six months pregnant. Mother was living with maternal grandmother, who had a DUI and positive drug test history; mother was not currently paying rent or working. Mother, who at 26 had used drugs “on and off” for half of her life, opined that five months of sobriety was enough to take care of three children and a newborn.

Father testified in his own behalf that he was currently incarcerated for vehicle theft and possession of stolen property. He anticipated being released within 90 days, if not sooner. Father did not think adoption was in Justin’s best interests and wished that Justin be placed with mother, or paternal aunt and uncle, Betty and Tim H. Father acknowledged that with his various incarcerations, he had only seen Justin during the one month he was out of custody.

In closing, counsel for the department argued that it was in the best interests of the children to remain as a sibling set and to provide them with a permanent home through adoption. Counsel for the children agreed. Counsel for father submitted. Counsel for mother argued that, although the children were adoptable, they had special needs which mother was more able with which to deal.

The juvenile court stated it had read and considered the original section 366.26 report, had heard from all of the witnesses, and was familiar with the documents submitted as part of the section 388 hearing. The juvenile court found that the children had been detained for some time and had excelled while being in foster care. The juvenile court noted that, while the home they had been in was not a preadoptive home, there was the possibility of such a home and there was nothing in the record to suggest that the children could not adjust to an adoptive home and do well. The juvenile court

found the children adoptable and found no applicable exception to them being adopted.

The juvenile court then terminated mother and father's parental rights, stating:

“I'm aware that the burden of proof in this case is by clear and convincing evidence, and I'm going to find that ... it would not be detrimental to the children to have their relationship with their parents terminated. The children are clearly adoptable and parental rights are terminated. The Court makes this finding even though the children are not yet placed in a preadoptive home.”

DISCUSSION

In this consolidated appeal mother and father each raise one issue which overlap somewhat. Mother contends that the juvenile court abused its discretion in denying her section 388 petition to grant her reunification services and order placement of the three children with a relative. She raises no issues stemming from the findings and orders after the section 366.26 hearing. Father contends that the trial court abused its discretion by failing to address Betty H.'s placement request as part of the section 366.26 hearing or to grant a continuance of the section 366.26 hearing to order further evaluation of that proposed relative placement. We affirm.

I. Section 388 Petition

Mother contends the juvenile court abused its discretion in denying her petition under section 388. According to mother, she demonstrated changed circumstances because she consistently visited the children and had been drug free for four and a half months without the help of department provided reunification services. We disagree.

Appealable Motion

Respondent first argues that mother's appeal should be dismissed because, in her notice of appeal, she states she is appealing from the orders terminating her parental rights under section 366.26 and makes no mention of the order denying her section 388 petition. We will deem the notice of appeal amended to include the section 388 ruling for the following reasons. First, the denial of a section 388 petition is an appealable order.

(§ 395.) Second, a parent's notice of appeal is entitled to our liberal construction. (*Vibert v. Berger* (1966) 64 Cal.2d 65, 67–68.) Third, appellate jurisdiction to review an appealable order depends upon a timely notice of appeal. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 340.) Fourth, notice of appeal would be timely as to the denial of a parent's section 388 petition, provided the juvenile court denied the parent's section 388 petition within 60 days of when the parent filed the notice of appeal. (Cal. Rules of Court, rule 8.104.) And, finally, respondent is not prejudiced. (*Vibert v. Berger, supra*, 64 Cal.2d at p. 68.) Thus, while it is true that the juvenile court conducted two distinct hearings on November 5, 2014, and mother made no reference to the denial of the section 388 hearing in her notice of appeal, we “liberally construe a parent's notice of appeal from an order terminating parental rights to encompass the denial of the parent's section 388 petition, provided the trial court issued its denial during the 60-day period to filing the parent's notice of appeal.” (*In re Madison W.* (2006) 141 Cal.App.4th 1447, 1451.)

Procedural Background

Mother's section 388 motion sought to have the children placed with maternal grandmother or “other family members”; to have reunification services “reinstated”⁸; to allow unsupervised visits; and to stay the upcoming section 366.26 hearing. According to the petition, mother claimed “changed circumstances” in that she had enrolled in parenting classes; completed an eight-week parenting class on communication; had been attending AA meetings since June of 2014; was “currently enrolling” in a residential treatment program; was participating in alcohol and drug programs; and was consistently testing “clean.”

⁸ Reunification services were bypassed due to mother's previous drug use and resistance to prior court ordered treatment (§ 361.5, subd. (b)(13)).

At the section 388 hearing November 5, 2104, mother’s counsel argued that mother had tested and remained “clean” and had visited the children consistently since June 1, 2014, and was now “willing and ready” to take care of her children. She also noted that mother had recently completed another parenting class, this time on parenting a spirited child. When asked if mother was participating in “Progress House,” a residential substance abuse treatment facility, counsel explained that mother was not because of the distance to upcoming court hearings and her children.⁹

In denying mother’s petition, the juvenile court considered the seriousness of the facts underlying the need for intervention, detention and jurisdiction; the problems that existed and were not addressed; the passage of time since the children’s removal; and the relative strength of the bond between the children. The juvenile court noted that the purported changes made by mother were very recent, and while there was some evidence of genuine change, the totality of what mother had done was not significant enough for the court to change the previous order and it would not be in the best interests of the children to do so.

Applicable Law and Analysis

Under section 388, a parent may petition the court to change, modify or set aside a previous order on grounds of changed circumstances or new evidence and that the proposed changes is in the “best interests” of the dependent child or children. (§ 388, subd. (a); *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The moving party here, mother, has the burden of making the required showings by a preponderance of the evidence. (*In re Stephanie M., supra*, at p. 317.) The denial of a section 388 petition is reviewed under the abuse of discretion standard. (*Id.* at p. 318.) ““The appropriate test for abuse of discretion is whether the trial court

⁹ Mother entered Progress House on October 3, 2014, but left voluntarily on October 11, 2014.

exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.””” (Id. at pp. 318–319.)

Mother asserts on appeal that she demonstrated changed circumstances because she addressed the issues which stood in the way of reunification and that she further demonstrated her children’s best interest would be promoted by the grant of the petition. According to mother, while she may not have initially complied or cooperated with the department, by the time of the section 388 hearing, she had accessed services on her own, visited the children regularly, and was appearing at her court hearings. She had completed an eight-week parenting class on communications, attended sessions on discipline and parenting goals, completed a class on parenting a “spirited child,” regularly attended AA meetings, and explained that the reason she was no longer in the residential treatment program was because “the distance interfered with her visitation with the children.”

We find the juvenile court did not abuse its discretion in denying mother’s petition filed on the eve of the originally scheduled permanency planning hearing. Mother’s petition claimed she had been drug free only since June of 2014, but provided no evidence to support that claim. The evidence before the juvenile court was that mother had a 13-year “off and on” drug habit and had acknowledged that she may have used drugs during her current pregnancy (she was now six months pregnant with another child, whose father “may” be Molly’s father). Also before the juvenile court was the fact that mother had left a substance abuse program recently after only one week. Mother had multiple criminal charges pending, with a trial date of November 12, 2014, and possible prison time if convicted. Mother was living with maternal grandmother, who had her own history of alcohol and substance abuse related issues, including a positive test for alcohol when visiting the children at the department in September of 2014. And although mother claimed to be regularly visiting the children since June, she made no effort to visit

them during the three months after they were detained, a particularly long time in light of how young the children were. Mother's efforts, while mostly positive, do not constitute changed circumstances; at most, they show "changing circumstances" regarding mother's ability to remain drug free and to safely parent a child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) "[C]hildhood does not wait for the parent to become adequate." (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

Furthermore, at this point in the proceedings, on the eve of the section 366.26 permanency planning hearing, "the children's interest in stability was the court's foremost concern and outweighed any interest in reunification." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) "It is not enough for a parent to show just a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529, italics omitted.)

In light of mother's history and the children's need for a stable and permanent home, the juvenile court was entitled to conclude that granting mother's request for a stay on the permanency planning hearing or placing the children with maternal grandmother or an unnamed "relative," none of whom had been approved as possible placement, was not in the children's best interests.

Consequently, we conclude that the juvenile court did not abuse its discretion in denying mother's section 388 petition. Because mother makes no arguments challenging the order terminating her parental rights, we affirm that order as to her.

II. Section 366.26 Hearing

Father argues that, at the section 366.26 hearing, the juvenile court erred by precluding him from presenting evidence regarding placement with his paternal aunt and uncle, Betty and Tim H., under section 361.3. He further asserts that failure of the juvenile court to continue the section 366.26 hearing to further address the possible placement was prejudicial because it deprived him of the possibility that a permanent

plan that did not require termination of his parental rights would be ordered. We review the juvenile court's determination for abuse of discretion. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1065 [abuse of discretion standard applies to court's ruling on request for continuance].)

Procedural Background

The first time Betty and Tim H.'s application for placement was raised in the juvenile court was at the scheduled section 366.26 permanency planning hearing September 30, 2014.¹⁰ The section 366.26 report for that hearing recommended that mother and father's rights be terminated and the juvenile court order a permanent plan of adoption for the children. In addressing the various relative placements that had been considered by the department, the report stated that a completed application and fingerprinting document were submitted to the licensing department on August 4, 2014, on behalf of father's paternal aunt Betty H., for placement of all three children. The report stated the application was denied on August 14, 2014, because Betty H.'s home did not meet health and safety requirements because the number of children for whom the home "is licensed to provide care and supervision exceed the number of children allowed."

At the September 30, 2014, scheduled section 366.26 hearing, counsel for father raised the issue, stating that he believed the information in the report was "not complete," as Betty and Tim H. had recently "adopted some other children" and were no longer subject to the limitation on the number of foster children "because I think they are no longer a foster home." Counsel also stated that, according to Betty H., "social workers" had recently been to her home, but there was no indication as yet whether or not the home would be suitable for placement of the children.

¹⁰ Mother's section 388 petition had requested placement of the children with grandmother or "other family members, which a list has been provided . . .," but she did not name Betty and Tim H. specifically.

The juvenile court noted this was new information not included in the report. According to counsel for the department, the report was current at the time it was written, but suggested that the social worker “look into that pending the contested hearing.” The juvenile court then stated, “that’s something that could be addressed if there’s a supplemental report for the continued .26 hearing.” The social worker affirmed that she would look into it.

At the subsequent November 5, 2014 hearing, the juvenile court first addressed mother’s section 388 petition. That petition, as discussed, *ante*, included a request for relative placement of the children without specific mention of Betty and Tim H. But counsel for mother did point out that Betty H. and her husband had applied and were willing to take all three children and that their home had been “rechecked” and was currently pending. Given the opportunity by the juvenile court to address the issue further, counsel merely submitted. Following the denial of the section 388 petition, the juvenile court moved on to the section 366.26 hearing.

Counsel for mother then requested a continuance based on the purportedly late receipt of the section 366.26 addendum report, although she had allowed the same report be admitted into evidence moments earlier for purposes of the section 388 hearing. Father’s counsel requested a continuance because father might have upcoming changing circumstances, i.e., he might be out of custody soon.

Counsel for the department suggested that, because the first addendum report was late, it be withdrawn and the hearing continue with the social worker and state adoptions worker testifying as to whether the children were adoptable or if any exceptions to adoption applied. The juvenile court agreed to withdraw the report, proceed to testimony, and then denied the motion for continuance.

After testimony by both the adoption worker and the social worker, counsel for father “renewed” his request for a continuance, stating that the issue of relative placement with Betty H. was supposed to have been addressed in the supplemental report, which

was now withdrawn. Counsel for the department stated updated information about placement was included in the now withdrawn addendum report but that, in any event, the issue at the hearing was whether the children were adoptable and whether there were any exceptions to adoption.

Counsel for father noted the information in the withdrawn addendum report was that Betty H.'s application was still being reviewed. The juvenile court questioned whether it was to continue the hearing to see whether or not Betty H.'s placement was approved as the issue at the current hearing was whether the children were adoptable. The juvenile court then proceeded with the hearing in which father testified in his own behalf that he did not think adoption was in Justin's best interest and wished that he be placed with mother or Betty and Tim H.

The juvenile court found the children adoptable and terminated both mother and father's parental rights.

Applicable Law and Analysis

Father now argues that the juvenile court abused its discretion when it failed to address relative placement or continue the section 366.26 hearing in order to address relative placement with his paternal aunt and uncle, Betty and Tim H., pursuant to section 361.3. We will assume father has standing to raise the issue on appeal. (See *In re K.C.* (2011) 52 Cal.4th 231, 236–239; *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1053–1054; *In re H.G.* (2006) 146 Cal.App.4th 1, 10.) However, his argument is nonetheless without merit.

Family preservation is the first priority when dependency proceedings are commenced. (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787.) For this reason, section 361.3 provides that, in any case in which a child is adjudged a dependent of the court and removed from the physical custody of a parent, “preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative.” (§ 361.3, subd. (a).) “‘Preferential consideration’ means that the relative

seeking placement shall be the first placement to be considered and investigated.” (§ 361.3, subd. (c)(1).) Subdivision (a)(8) further states that when a child is removed from his parents’ physical custody “[t]he court shall order the parent to disclose to the county social worker the names, residences, and any other known identifying information of any maternal or paternal relatives of the child” and that the county social worker “shall initially contact the relatives given preferential consideration for placement to determine if they desire the child to be placed with them.” (§ 361.3, subd. (a)(8).) Those relatives “desiring placement shall be assessed according to the factors enumerated in [subdivision (a)(8) and the] county social worker shall document these efforts in the social study prepared pursuant to Section 358.1.” (*Ibid.*) The relatives entitled to preferential consideration for placement are “an adult who is a grandparent, aunt, uncle, or sibling.” (§ 361.3, subd. (c)(2).)

The relative placement also applies after the disposition hearing when a new placement must be made. Section 361.3, subdivision (d), states:

“Subsequent to the hearing conducted pursuant to Section 358 [the dispositional 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.” (§ 361.3, subd. (d).)

Appellate courts have consistently held that the relative placement preference applies at least as long as reunification efforts are ongoing. (*In re Sarah S.* (1996) 43 Cal.App.4th 274, 285; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1064; *In re Jessica Z.* (1990) 225 Cal.App.3d 1089, 1098–1099; *In re Baby Girl D.* (1989) 208 Cal.App.3d 1489, 1493–1494.) As stated in *In re Sarah S.*, *supra*, “[T]he preference afforded by section 361.3 applies to placements made before the juvenile court has terminated reunification services. When reunification has failed, however, and the juvenile court has

before it a permanent plan for adoption, the only relative with a preference is a “relative caretaker” (if there is one seeking to adopt) and the only preference is that defined by subdivision (k) of section 366.26¹¹ (that is, a preference to be first in line in the application process).” (43 Cal.App.4th at pp. 285–286, fn. added; see *In re Lauren R.* (2007) 148 Cal.App.4th 841, 855 [“[t]here is no relative placement preference for adoption”].) Because there is nothing in the record to suggest that Betty and Tim H. were ever Justin’s caretakers, it follows that they were not entitled to any statutory preference for adoption of him.

Father relies on *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, which found section 361.3, subdivision (d) applicable “when a new placement becomes necessary after reunification services were terminated but before parental rights are terminated and adoptive placement becomes an issue.” (*Cesar V.*, *supra*, at p. 1032.) In *Cesar V.*, the father raised the placement issue after reunification services had been terminated and the children needed a temporary placement pending the section 366.26 hearing.

Father contends section 361.3, subdivision (d) and the reasoning in *Cesar V.* is applicable in his situation because Justin was in need of a new placement before father’s parental rights had been terminated. But father was never afforded reunification services due to his incarceration and the detriment those services would cause Justin. By the time of the section 366.26 permanency planning hearing, emphasis on reunification was long past and adoption was the recommended permanent placement. *Cesar V.* simply did not

¹¹ Section 366.26, subdivision (k), provides: “Notwithstanding any other provision of 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.”

hold that section 361.3's relative placement preference would apply when, as in this case, the placement issue is not raised until the parties convene for a section 366.26 hearing, at which time adoption has been identified as the proposed permanent plan.

The issue before the juvenile court at the section 366.26 hearing was: (1) whether the children are adoptable; and (2) whether any exceptions to adoption apply. (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 160; accord, § 366.26, subd. (c).) We find the relative preference of Section 361.3 was no longer applicable at the time of the section 366.26 hearing. Section 361.3 cannot be used in a last minute attempt to stymie a planned adoption, at the final stage of termination of parental rights under section 366.26, after reunification efforts have failed. (See *In re Sarah S.*, *supra*, 43 Cal.App.4th at pp. 285–286.) We find no abuse of discretion on the part of the juvenile court in failing to further consider the Betty and Tim H. placement request at the section 366.26 hearing or in denying the request for a continuance of the section 366.26 hearing for the purpose of obtaining further information on the issue.

DISPOSITION

The orders are affirmed.

HILL, P. J.

WE CONCUR:

GOMES, J.

FRANSON, J.