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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

K.B.,

Defendant and Appellant.

H037873
(Santa Clara County
Super. Ct. No. JD20380)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

A.M.,

Objector and Appellant.

H037945
(Santa Clara County
Super. Ct. No. JD20380)

I. INTRODUCTION

In this juvenile dependency matter, K.B, the mother of the dependent child, and A.M., the child's paternal grandmother, separately appeal from the orders denying the

paternal grandmother's petition under Welfare and Institutions Code section 388¹ and her motion for change of placement.² In both her section 388 petition and her motion, the paternal grandmother sought to remove the 18-month old child from placement with her foster parents, who had provided the child's home for nearly all her life and who wished to adopt her. The paternal grandmother also requested that the child be permanently placed with her.

Appellants contend that the juvenile court violated the statutory requirements that relatives be given notice that the child has been removed from the parents (§ 309, subd. (e)(1)) and their requests for placement assessed under the preference for relative placement (§ 361.3). They also contend that the trial court erred in failing to hold an evidentiary hearing on the section 388 petition and in denying mother's request for a continuance of the section 366.26 permanency planning hearing. The mother additionally argues that since the order denying the section 388 petition must be reversed and the matter remanded for assessment of the paternal grandmother's request for relative placement, the judgment terminating her parental rights under section 366.26 must also be reversed. For the reasons stated below, we determine that none of the juvenile court's rulings constitute an abuse of discretion, and therefore we will affirm the challenged orders.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Original Placement in Foster Home

The mother, age 22, gave birth to her second child in May 2010 at a hospital where the medical social worker determined that the mother had not received any

¹ All further statutory references are to the Welfare & Institutions Code unless otherwise indicated.

² On May 9, 2012, this court on its own motion ordered that appellate case numbers H037873 and H037945 be considered together for the purposes of briefing, oral argument and decision.

prenatal care, had no place of residence, and lacked the items needed for the child's immediate needs, such as baby clothes, diapers, a crib, and formula.³ While she was in the hospital, the mother told a social worker that the baby's father was a college student she met on Facebook and with whom she had "casual sex." The mother told another social worker that she did not know the identity of the father.

A referral was made to the Department of Family and Children's Services (the Department) and two days after the birth, the mother signed a voluntary placement agreement allowing the child to be placed in a foster home when the child was released from the hospital.

The child was returned to the mother on June 12, 2010. At the mother's request, the child was left with the foster mother for several days in June 2010 while the mother attended to other activities. On July 19, 2010, a family conference was held regarding alternative placement plans with relatives in case the mother could not care for the child. At that time, the child's paternity was not established since the alleged father had not been in contact with the child, the mother, or the Department. The mother indicated that the maternal grandparents would not be appropriate caregivers (the record reflects that when the mother was a minor, the maternal grandparents were investigated by the Department due to reports regarding their inadequate care of the mother). The mother suggested her cousin as a possible placement, but she did not have any of the cousin's contact information.

B. Return to the Foster Home

On July 22, 2010, the child was placed in the original foster home after the mother signed an informal supervision agreement in which she agreed to visit the child twice a week in the foster home, submit to weekly random drug testing, complete a drug

³ This court on its own motion took judicial notice of the record in H037305, *K.B. v. Superior Court*.

assessment, attend parent education classes, and participate in parent orientation classes. The mother's subsequent conduct caused the Department to have a number of concerns about her. Among other things, the mother had not complied with the terms of the informal supervision agreement, since she had failed to visit the child as scheduled and failed to submit to drug testing. Additionally, during one visit with the child, the mother stole money from the foster mother's purse. The mother's whereabouts became unknown in October 2010. The Department also learned that the mother's first child resided with the child's father, who had full physical and legal custody, and the mother never visited her first child.

C. Section 300 Petition

On November 3, 2010, the Department filed a section 300 petition asserting that the child came within the jurisdiction of the juvenile court on the grounds of the parent's failure or inability to adequately supervise or protect the child. The Department's jurisdiction/disposition report stated that as of November 4, 2010, the child remained in the foster home where she was originally placed. The social worker had visited the foster home and found that that child was clean and appeared healthy and well cared for. The report further stated, "Since [the child's] return to the current foster mom on 7/22/10, [she] has been adjusting well. [She] has since grown an attachment with her foster mom, she appears to be happy, she presents as being content at her placement, she is eating well, and she interacts well with other children at her placement."

At the initial/detention hearing held on November 8, 2010, the court determined that the risk of harm to the child was sufficient to justify the child's detention and that continuance in the parent's home was contrary to her welfare. On November 11, 2010, the Department attempted without success to contact the alleged father via Facebook. However, contact was made at some point and the alleged father appeared in court on December 2, 2010, at the jurisdictional/dispositional hearing. A continuance of the hearing was granted to allow paternity testing.

The Department received the results of the paternity test on January 5, 2011, which confirmed that the alleged father was the biological father of the child. After informing the biological father of the results of the paternity test, the Department discussed relative placement options with him. He advised the Department that “he would speak to the paternal grandmother to see if she would be willing to be a placement,” but his other relatives lived outside the United States. On January 6, 2011, the father met with the Department regarding the child. He stated that his circumstances would not allow the child to live with him and he approved of her current placement in the foster home. He was also interested in visitation. However, the father tested positive for marijuana the same day, January 6, 2011.

On January 12, 2011, the court sustained the section 300 petition after finding the allegations were true and set a disposition hearing for January 26, 2011. Also on January 12, 2011, the court found that the biological father was the presumed father. At the disposition hearing, the court ordered reunification services for both the mother and the father.

D. Reunification Efforts

The father visited the child once in January 2011. The mother did not visit the child after February 2011. As of March 3, 2011, the father had not followed through with the reunification services offered by the Department and had not responded to the Department’s multiple attempts to contact him. The mother informed the Department in April 2011 that she was not participating in reunification services. By May 2011, the whereabouts of both parents were unknown.

The Department reported in May 2011 that the child was bonded with the foster mother, who wanted to adopt the child if reunification failed. On April 13, 2011, the

foster parents' request to become de facto parents was granted.⁴ The child's parents continued their non-participation in reunification services.

In July 2011, the Department determined that the mother had been incarcerated since June 2011 and her expected release date was in February 2012. The Department stated in its August 18, 2011 status review report that the father had not responded to any of the Department's attempts to contact him and his whereabouts remained unknown. In the six months preceding the August 18, 2011 status review report, the child had no contact with any grandparents or extended relatives, and none of them had contacted the Department to inquire about the child.

The Department also reported that the child had continued to live in the same foster home and was bonded with the foster parents, who had provided "the only consistent, permanent and stable home" and were committed to adopting the child if she could not reunify with her parents. The child was described as healthy and happy in the foster home. The Department therefore recommended in its August 18, 2011 status review report that reunification services be terminated and a section 366.26 hearing be set to establish a permanent plan for the child.

At the six-month review hearing held on August 18, 2011, the court terminated reunification services and set a section 366.26 hearing for December 14, 2011.⁵ On September 1, 2011, the court ordered that the mother be permitted contact visits with the

⁴ "A de facto parent is "a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period. . . ." [Citations.]' " (*In re Bryan D.* (2011) 199 Cal.App.4th 127, 141.) "De facto parent status 'provides a nonbiological parent who has achieved a close and continuing relationship with a child the right to appear as a party, to be represented by counsel, and present evidence at dispositional hearings.' " (*Ibid.*)

⁵ The mother filed a notice of intention for a writ petition challenging the court's order setting a section 366.26 hearing, but our records reflect that no writ petition was filed in this court.

child if the mother became eligible for the in-custody visitation program where the mother was incarcerated.

E. Paternal Grandmother's Section 388 Petition and Motion for Change of Placement

The paternal grandmother contacted the Department for the first time on October 14, 2011, "to [i]nquire about the child." At that time, the paternal grandmother told the social worker that "she did not have any information about [the father] for a long period of time and finally he called her recently." The paternal grandmother provided the father's telephone number but she did not have an address for him. The social worker then telephoned the father, but he hung up. Despite multiple attempts, the Department was unable to locate the father.

On December 5, 2011, the de facto parents filed a caregiver information form in which they stated that the child, now 18 months old, was bonded with them and called them "Mom" and "Dad." They wanted the child to remain part of their family and were willing to maintain contact with her biological family members.

The paternal grandmother filed a section 388 petition to change the child's placement on December 9, 2011, in which she stated that she had "recently found out about [the child] . . . being under the jurisdiction of the court." She requested that the child be permanently placed with her because, as her paternal grandmother, "I love and care deeply about [her], and believe it would be her best interest to live with me. I can provide a loving and stable family environment, strong ethnic/cultural roots, and excellent educational opportunities for her future." No other evidence was submitted with the section 388 petition.

On December 13, 2011, the court denied the paternal grandmother's section 388 petition without a hearing, on the ground that she had failed to state the requisite new evidence or a change of circumstances. In its written order filed on December 14, 2011, the court further explained that "Petitioner alleges no change of circumstances or new

evidence to warrant new or different court orders regarding the child's current placement. In addition, the court has received ample evidence of the stability the minor has in her current placement. Petitioner provides only conclusory statements, not credible evidence, to suggest that removing the minor from this placement and placing her with petitioner at this stage in the proceedings would promote the best interests of the minor. [¶] The petition fails to make a prima facie showing via credible evidence of changed circumstances or new evidence and that the requested changes or modifications would promote the best interests of the child.”

On December 13, 2011, the paternal grandmother filed a motion to terminate the foster home placement and place the child with her. In her motion, the paternal grandmother stated that she had never been notified of any proceedings in the case, she was interested in adopting the child, and she wanted the child to be placed with her forthwith. The paternal grandmother also stated that she was a professor of education at Stanford University and “a world-renowned expert in child development and mathematics education in elementary and early-childhood classrooms. . . . She would be fully qualified and capable [of] caring for her granddaughter.” The paternal grandmother also argued that she was entitled to have the child placed with her under the relative placement preference set forth in section 361.3.

On December 14, 2011, the court set a contested section 366.26 hearing for January 23, 2012. The court also granted the paternal grandmother's request for visitation and ordered that she be allowed a minimum of one supervised visit every other week for one hour.

F. Section 366.26 Report

The Department filed its section 366.26 report on January 23, 2012. In the report, the Department noted that the paternal grandmother had contacted the social worker on October 14, 2011, and stated that her son, the presumed father, had told her the day before that he had a child in foster care. The paternal grandmother also said that she

would like to pursue legal adoption. The social worker arranged for the paternal grandmother to have three supervised visits with the child.

However, the social worker determined that “in light of the fact that Family Reunification Services were terminated, and the lack of relationship with the biological family, it is in the best interest to maintain [the child] in her fost/adopt home.” The social worker “strongly” recommended that the child be adopted by her foster parents, “[s]ince [the child] has been living with this family for almost all her life and she has developed a strong relationship with this family.” The social worker therefore recommended that parental rights be terminated and the child freed for a permanent plan of adoption.

G. The Contested Section 366.26 Hearing

The only witness at the section 366.26 hearing held on January 23, 2012, was the mother. She testified that she objected to the termination of her parental rights because the child should be kept in the family and “not with like other people.” The Department’s representative responded that neither parent had a relationship with the child, who was healthy, happy, and stable, as well as “highly adoptable” and “developmentally on track.”

After the mother testified, her attorney objected to going forward with the section 366.26 hearing and requested a continuance “to allow the social worker to investigate the paternal and maternal grandparents for placement.”

The child’s attorney agreed with the Department’s recommendation that parental rights be terminated, and objected to a continuance, stating: “My client is in the only home she has ever known. She actually came to this placement from the hospital. And only if something should happen to the placement that she’s in right now would the relative preference be reopened. Once we terminated reunification services the time for relative preference has ended. And it is not in my client’s best interest to continue this case further to look at relatives. ¶¶ I believe the current caregivers are very appropriate and they have been allowing the grandparents to visit as this Court has ordered.” The

mother's attorney disagreed, arguing that the relative placement preference never "disappears."

The court denied the mother's request for a continuance, finding that the request had come at the conclusion of the proceedings and there was no good cause for a continuance. The court stated, "To the contrary I believe under [section] 352, the best interest of the child in moving the matter forward to a permanency outweigh at least any of the statements that have been made to me today"

The court also invited the paternal grandmother's attorney to address her request for placement. In support of changing the child's placement to the paternal grandmother, her attorney argued that the paternal grandmother had not received timely notice of the dependency proceedings; the priority was to preserve family relationships; the paternal grandmother was able to provide "emotionally, culturally, [and] financially" for the child; and both the child and the paternal grandmother would suffer detriment absent placement in the paternal grandmother's home.

At the conclusion of the section 366.26 hearing, the court made several rulings. First, the court found "by clear and convincing evidence that it is likely that the child will be adopted both specifically and generally." Second, the court adopted the findings proposed by the Department in its section 366.26 report and terminated parental rights based on that evidence. Finally, the court freed the child for adoption, ordered adoption as the permanent plan, and designated the foster parents as the prospective adoptive parents.

Regarding the paternal grandmother's request for placement, the court ruled as follows: "At the time that [the paternal grandmother] filed her [section] 388 petition requesting an immediate change in placement from who are now the de facto parents to [the child], the Court reviewed that [section] 388 petition and found that it did not state a prima facie case that there were changed circumstances and that the requested change in court order would be in the child's best interests. . . . [¶] The Court has heard nothing

subsequently to change its analysis on that ruling. . . . [¶] . . . The Court has reviewed the evidence that has been submitted by the Department for the statutory hearings . . . and recognizes that the Department has given some consideration to [the paternal grandmother] and has expressed in a variety of places in the evidence that has been received by the Court the Department's belief that continued placement of the child with the de facto parent is in the child's best interest and that any disruption in that would be detrimental to the child. [¶] . . . [¶] And the Court also believes that there is a substantial amount of evidence before the Court that the current caretakers and caregivers provide the best prospective placement, prospective adoptive home for the child”

The paternal grandmother filed a notice of appeal on February 10, 2012, from the order denying her section 388 petition and the order denying her motion for change of placement. The mother filed an amended notice of appeal on February 14, 2012, from the order terminating her parental rights and the order denying the paternal grandmother's section 388 petition.

III. DISCUSSION

Since both appellants challenge the trial court's order denying the paternal grandmother's section 388 petition to change the child's placement, we will begin our evaluation of their contentions on appeal with an overview of the pertinent provisions of section 388.

A. Section 388

Section 388, subdivision (a)(1) provides: “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. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall

[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 interest of the child.” (*Id.* at p. 317.)

Thus, “when a court has made a custody determination in a dependency proceeding, ‘ “a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].” ’ [Citations.]” (*Stephanie M., supra*, 7 Cal.4th at p. 318.) “ ‘The appropriate test for abuse of discretion is whether the trial court 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.’ ’ [Citations.]” (*Id.* at pp. 318-319.)

B. The Parties’ Contentions

On appeal, the paternal grandmother contends that the juvenile court erred in denying her section 388 petition because she is entitled to a full assessment of her placement request under the relative placement preference set forth in section 361.3. We also understand the paternal grandmother to argue that the Department and the court are estopped from denying her relative placement consideration due to their combined failure to give her the notice mandated under section 309, which would have allowed her to more promptly seek the child’s placement in her home.

The paternal grandmother also asserts that the Legislature favors placement with relatives and the court’s failure to give her the benefit of the relative placement preference constitutes a miscarriage of justice. She requests a remand directing the court to (1) require the Department to provide a written assessment of her placement request; and (2) hold a hearing on whether she is entitled to preferential placement.

The mother’s contentions on appeal are similar. In addition, the mother argues that the relative placement preference under section 361.3 should have applied, even though reunification services had been terminated by the time the paternal grandmother

filed her section 388 petition for a change in placement, because the relative placement preference continues until the time of the section 366.26 hearing.

The mother also contends that the trial court's summary denial of the paternal grandmother's section 388 petition is subject to do novo review. She maintains that under that standard, the juvenile court erred in denying the petition because the paternal grandmother made a prima facie showing of new evidence (that the paternal grandmother had just learned of the child's existence) and because placing the child with her grandmother is presumptively in the child's best interest. The court's error was prejudicial, according to the mother, because "[p]resented with the grandmother's educational and professional background, it was clearly an abuse of discretion for the trial court to deny the grandmother a hearing on her petition." Finally, the mother contends that the trial court abused its discretion in denying her request for a continuance of the section 366.26 permanency planning hearing.

In response, the Department argues that the trial court did not err in summarily denying the section 388 petition because the paternal grandmother failed to allege new evidence or changed circumstances, as required by section 388, since there was no allegation that the child needed a new placement. The Department also argues that the paternal grandmother failed to show that removing the child from de facto parents and the only home she has ever known would be in the child's best interests. As to the court's denial of the mother's request for a continuance of the section 366.26 hearing, the Department asserts that the court did not abuse its discretion because "[t]he mother's hope that a different adoptive placement would be chosen if the hearing was continued was irrelevant to the issues at a section 366.26 hearing," since the only issue to be decided at the hearing was whether there was clear and convincing evidence that the child was adoptable.

In their respondent's brief, the de facto parents argue that the court properly denied the paternal grandmother's section 388 petition and motion to change placement

because a new placement was not necessary and therefore the section 361.3 relative placement preference did not apply. Additionally, the de facto parents contend that the Department complied with the notice requirements of section 309 by diligently attempting to locate and contact members of the mother's family when the child was first removed from the mother in May 2010, pointing out that the father's paternity was not established until late December 2010. They also challenge that the paternal grandmother's claim that the Department had her address prior to the January 2011 dispositional hearing. Although the de facto parents acknowledge that address given by alleged father as his own address was actually the paternal grandmother's address, they note that the alleged father has a different surname than the paternal grandmother.

The de facto parents also argue that the court was bound by the standard that the child's best interest is the primary consideration in determining custody. Under that standard, according to the de facto parents, the court properly determined that maintaining placement with the de facto parents was in the child's best interest. Alternatively, the de facto parents assert that even assuming that the paternal grandmother did not receive the statutorily required notice of the dependency action, the error was harmless. They explain that even if the Department had conducted an assessment of the paternal grandmother pursuant to section 361.3 and had found her to be an acceptable caregiver, the outcome would remain the same: placement with the de facto parents was in the child's best interest and removal from the only home the child has ever known would be detrimental to the child.

The child, in her minor's brief, agrees with the Department and the de facto parents and asserts that "[e]ven if placement with a relative is presumptively in the minor's best interest [citation], the presumption is overcome here because [the child] is bonded with her de facto parents, stable in their home, no change in placement is needed, and a placement change to the grandmother would cause great emotional upheaval and disruption to the child." The child also asserts that the paternal grandmother may be

considered for placement in the event that her current prospective adoption by the de facto parents fails at some time in the future.

To evaluate these contentions, we next turn to an overview of section 361.3, which provides the relative placement preference that is the subject of the parties' dispute.

C. Section 361.3

Section 361.3, subdivision (a) provides in part: "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." Subdivision (a) also enumerates the factors that the court and social worker must consider in determining whether the child should be placed with a relative. (§ 361.3, subs. (a)(1)-(8).)

The terms "preferential consideration" and "relative" are defined in the statute. Section 361.3, subdivision (c) provides: "For purposes of this section: [¶] (1) 'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated. [¶] (2) 'Relative' means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including . . . all relatives whose status is preceded by the words 'great,' 'great-great' or 'grand' However, only the following relatives shall be given preferential consideration for the placement of the child: an adult who is a grandparent, aunt, uncle, or sibling."

Section 361.3 expressly provides that the relative placement preference also applies when a new placement must be made. Subdivision (d) of section 361.3 states: "Subsequent to the hearing conducted pursuant to Section 358,^[6] whenever a new

⁶ Section 358, subdivision (a) provides in part: "After finding that a child is a person described in Section 300, the court shall hear evidence on the question of the proper disposition to be made of the child."

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."

Thus, "when a child is taken from his [or her] parents' care and requires placement outside the home, section 361.3 assures an interested relative that his or her application for placement will be considered before a stranger's request. [Citations.]" (*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 also *Stephanie M., supra*, 7 Cal.4th at p. 321 [construing former section 361.3].)

This court has stated that the relative placement preference 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 also *In re Jessica Z.* (1990) 225 Cal.App.3d 1089, 1098 (*Jessica Z.*) [the child's best interest may require that placement with a grandmother be rejected].)

D. Analysis

In the present case, the juvenile court summarily denied the paternal grandmother's section 388 petition, which sought a change of placement from the de facto parents to the paternal grandmother, on the ground that the petition failed to make a prima facie showing that there were (1) changed circumstances; and (2) the requested change in court's placement order would be in the child's best interests. The juvenile court also denied the paternal grandmother's subsequent motion to terminate placement and place the child with her, finding that the evidence presented in connection with that motion did not alter the court's prior determination that a change in placement was not in the child's best interest. We first consider whether the court abused its discretion.

1. Abuse of Discretion

Even assuming, as the mother argues on appeal, that the appearance of the paternal grandmother in the case and her interest in providing a home for the child constitutes a change of circumstances within the meaning of section 388, we determine that appellants have not shown that the juvenile court abused its discretion in denying the paternal grandmother's section 388 petition and motion for change of placement under section 361.3. Our analysis is guided by the California Supreme Court's decision in *Stephanie M.* and this court's prior decision in *Jessica Z.*

In *Stephanie M.*, the maternal grandmother requested placement after Stephanie was detained and placed in foster care. (*Stephanie M.*, *supra*, 7 Cal.4th at pp. 303-304.) The social worker recommended against placement with the grandmother because the grandmother did not believe that the parents had abused Stephanie. As the case progressed, Stephanie remained with the foster parents, who had applied for de facto parent status and who wished to adopt her. (*Id.* at pp. 305-306.) After the juvenile court set a section 366.26 permanency planning hearing, the court heard a contested section 388 petition regarding whether Stephanie's placement should be changed from the foster parents to the grandmother. The juvenile court denied the section 388 petition

on the ground that the change of placement was not in Stephanie's best interest. (*Id.* at pp. 307-308.)

On appeal, the appellate court reversed the order, finding that the juvenile court had failed to give sufficient weight to the relative placement preference set forth in section 361.3. The California Supreme Court disagreed, stating that "the issue being litigated at the hearing was whether a change of placement to the grandmother's home would be in the best interest of the *child*. The juvenile court, unlike the Court of Appeal, properly focused on the child's interest, 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 *Stephanie M.* court also ruled that even assuming that the relative placement preference set forth in section 361.3 applies at a late stage of the dependency proceedings, "on the motion for change of placement, the burden was on the moving parties to show that the change was in the best interest 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 interest." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 322, fn. omitted; *id.* at p. 320.)

Our Supreme Court therefore 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.)

In *Jessica Z.*, this court considered the mother's contention that Jessica should have been placed with her grandmother pursuant to section 361.3. (*Jessica Z.*, *supra*, 225 Cal.App.3d at p. 1095.) At the 12-month review hearing, the juvenile court terminated reunification services and adopted the social worker's recommendation that Jessica remain in her foster placement and a section 366.26 permanency planning hearing be set. (*Ibid.*) Although this court determined that the juvenile court should have ordered an assessment of the grandmother's suitability as a placement at the earlier six-month review hearing, the juvenile court's order was upheld. This court stated, "Given that by the time of the 12-month review hearing the chances of reunification were becoming increasingly diminished, and that Jessica had lived with her foster family for almost a year—almost her entire life—we cannot fault the juvenile court for determining at this hearing that it would have been detrimental to remove Jessica from her foster placement. Under these facts, at that juncture, it would have been inappropriate for the juvenile court to have afforded Jessica's grandmother a relative placement preference under section 361.3. We therefore conclude it was not error for the trial court to order Jessica continued in foster care at the 12-month review hearing." (*Id.* at p. 1100.)

Following the decisions in *Stephanie M.* and *Jessica Z.*, we determine that even assuming that the section 361.3 relative placement preference applied to the paternal grandmother's request for a change of placement in her section 388 petition and her subsequent motion, the juvenile court could reasonably find that the paternal grandmother had failed to make the necessary prima facie showing: that it was in the child's best interest *at the relevant time*—December 2011, when she filed her section 388 petition and motion for change of placement—to remove the child from her stable, long-term placement with the de facto parents and place her with the paternal grandmother, who was a virtual stranger. (See *Stephanie M.*, *supra*, 7 Cal.4th at p. 326.)

The evidence before the juvenile court showed that by December 2011, the 18-month-old child had been living with the de facto parents for nearly her whole life since

her birth in May 2010 (except for a few weeks in the summer of 2010 when she was unsuccessfully returned to the mother). It was undisputed that the child was healthy and happy in the de facto parents' home and that she had bonded with them, calling them "Mom" and "Dad," and that the de facto parents wanted to adopt her. Additionally, the juvenile court had terminated reunification services in August 18, 2011, after the parents failed to participate. It was therefore apparent that reunification was unlikely and the child was doing very well in the long-term, stable home provided by the de facto parents.

Although we recognize the paternal grandmother's sincere interest in her grandchild, under these circumstances we find, as did the California Supreme Court in *Stephanie M.*, that "[t]he juvenile court . . . properly focused on the child's interest, 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.)

For these reasons, we determine that the juvenile court did not abuse its discretion in denying the paternal grandmother's section 388 petition and motion for a change of placement, or in denying the petition without an evidentiary hearing. (See *Jasmon O.*, *supra*, 8 Cal.4th at pp. 415-416; *Aaron R.*, *supra*, 130 Cal.App.4th at p. 705.)

2. Section 309, subdivision (e)(1)

The paternal grandmother argues that *Stephanie M.* does not govern this case because the decision issued in 1994, well before the notice provisions set forth in section 309, subdivision (e)(1) were enacted. In her view, and in the view of the mother, due to the lack of section 309, subdivision (e)(1) notice to the paternal grandmother both the Department and the juvenile court are estopped from denying her a full assessment under the section 361.3 relative placement preference. We disagree.

Section 309 provides in part: "(a) Upon delivery to the social worker of a child who has been taken into temporary custody under this article, the social worker shall immediately investigate the circumstances of the child and the facts surrounding the

child's being taken into custody and attempt to maintain the child with the child's family through the provision of services. . . . [¶] . . . [¶] (e)(1) If the child is removed, the social worker shall conduct, within 30 days, an investigation in order to identify and locate all grandparents, adult siblings, and other adult relatives of the child The social worker shall provide to all adult relatives who are located, except when that relative's history of family or domestic violence makes notification inappropriate, within 30 days of removal of the child, written notification and shall also, whenever appropriate, provide oral notification, in person or by telephone, of all the following information: [¶] (A) The child has been removed from the custody of his or her parent or parents . . . [¶] (B) An explanation of the various options to participate in the care and placement of the child”

The notice provisions of section 309, subdivision (e) became effective in January 2010. (Stats. 2009, ch. 261, § 1; see also Gov. Code, § 9600, subd. (a) [effective date of non-urgency legislation].) On the record before us, we discern no failure to comply with section 309, subdivision (e) after the child was initially removed from the birth mother in May 2010. Only the identity and location of the child's maternal grandparents could be confirmed by the Department within the mandated 30-day period after the child's removal, and the Department provided timely notice to them. The paternal grandmother does not contend otherwise.

However, the paternal grandmother asserts that the Department had her address by the time it filed the section 300 petition on November 3, 2010, since the Department's November 24, 2010 jurisdiction/disposition report states, “During the Voluntary Family Maintenance (VFM) portion of this case, the previous social worker . . . completed a search for [the alleged father] through the District Attorney's Office. A last known address . . . was provided for [the alleged father] as well as an address for his mother” According to the paternal grandmother, the record therefore shows that “the Department and court could have readily obtained the address of [the paternal

grandmother], and given her notice of the proceedings and inquired whether she would be interested in placement of her granddaughter.” She also emphasizes that when the alleged father appeared in court on December 2, 2010, and December 22, 2010, the juvenile court failed to inquire about his relatives.

We observe that no authority has been provided to establish that (1) the Department has an obligation to provide notice to a grandparent under section 309, subdivision (e)(1) before the father’s paternity has been established; and (2) the notice obligation continues after the 30-day period expressly stated in the statute. The paternal grandmother and the mother also fail to provide any authority to establish that where notice under section 309, subdivision (e) was not given to a grandparent, the lack of notice obviates the grandparent’s burden to make a prima facie showing on a section 388 petition or a motion requesting a change of placement to the grandparent that the change is in the child’s best interest. The decision on which the paternal grandmother relies, *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy W.*), is inapposite.

Manzy W. is not a juvenile dependency case; the issue was whether the juvenile court was required under section 702 to declare that the juvenile offender’s methamphetamine possession offense was a misdemeanor or a felony. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1210.) Since the record did not show that the juvenile court knew it had the discretion to sentence the offense as a misdemeanor, the California Supreme Court remanded the case for an express declaration under section 702 and possible recalculation of the period of confinement. (*Id.* at p. 1211.) No issue was raised as to the notice requirement of section 309, subdivision (e).

The paternal grandmother also relies on the decision in *Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, which states, “We read *Manzy W.* as holding that even a lack of literal compliance with a mandatory duty may be harmless error, so long as the record affirmatively reflects that the protections intended to be afforded to private parties through the exercise of that duty has been otherwise provided.” (*Id.* at

p. 608.) We understand the paternal grandmother to claim that the lack of compliance with the mandatory notice provisions of section 309, subdivision (e)(1) does not constitute harmless error since her interest in having the child placed with her was not protected.

We reiterate that the California Supreme Court ruled in *Stephanie M.* that even assuming that the relative placement preference set forth in section 361.3 applies at a late stage of the dependency proceedings, “[e]vidence 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 interest.” (*Stephanie M., supra*, 7 Cal.4th at p. 322, fn. omitted; *id.* at p. 320.) Accordingly, even assuming in the present case that the paternal grandmother was not considered for placement early in the dependency proceedings due to the Department’s failure to give her the notice mandated by section 309, subdivision (e), the error was harmless. Whether notice was properly given, or whether placement with the grandmother was properly assessed at an earlier date, are not matters that were relevant to the juvenile court’s determination in December 2011 that the paternal grandmother had failed to make a prima facie showing in either her section 388 petition or her motion for change of placement that placement with the paternal grandmother was in the child’s best interest *at that time*. (See *Stephanie M., supra*, at pp. 320, 322.)

Having determined that the juvenile court did not abuse its discretion in denying the paternal grandmother’s section 388 petition and motion for a change of placement, we find no merit in the mother’s additional argument that since the court erred in denying the section 388 petition, the judgment terminating her parental rights under section 366.26 must also be reversed.

3. Request for a Continuance

Finally, the mother contends that the trial court erred in denying her request for a continuance of the section 366.26 permanency planning hearing to allow the Department to investigate all of the grandparents for possible placement.

During the section 366.26 hearing held on January 23, 2012, the juvenile court denied the mother's request for a continuance on the grounds that the request had come at the conclusion of the section 366.26 proceeding and there was no good cause for a continuance. The court stated: "To the contrary I believe under [section] 352, the best interest of the child in moving the matter forward to a permanency outweigh at least any of the statements that have been made to me today. . . ."

Section 352 governs continuances in a juvenile dependency matter, and provides in part: "(a) Upon request of counsel for the parent, guardian, minor, or petitioner, the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance. . . ." "The trial court's ruling on whether a request for a continuance came within those guidelines is reviewed for abuse of discretion. [Citation.]" (*In re B.C.* (2011) 192 Cal.App.4th 129, 143-144.)

On appeal, the mother argues that the juvenile court abused its discretion because a continuance would have allowed the juvenile court to receive information regarding the paternal grandmother's three visits with the child and and, after an investigation, reach

the possible conclusions that either placement with the paternal grandmother, a guardianship, or a post-adoption contact agreement was in the child's best interest.

The Department responds that since the only issue at a section 366.26 hearing is whether there is clear and convincing evidence that the child is adoptable, "[t]he identification of who will adopt a child is not a relevant inquiry at the section 366.26 hearing."

We find that the mother failed to make a showing of good cause for a continuance of the section 366.26 hearing. The California Supreme Court has stated that "the sole purpose of the section 366.26 hearing is to select and implement one of the listed permanent plans." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 304.) At the section 366.26 hearing the juvenile court does not have the option of removing the child from the current foster home and placing the child with a relative with whom the child is not presently residing, since that is not one of the plans listed in the statute.⁷ Here, the mother's

⁷ The juvenile court's options at the section 366.26 hearing include the following, as stated in section 366.26, subdivision (b): "At the hearing, . . . the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, 366.22, or 366.25, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference: [¶] (1) *Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set.* The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted. [¶] (2) *Order, without termination of parental rights, the plan of tribal customary adoption, as described in Section 366.24, through tribal custom, traditions, or law of the Indian child's tribe, and upon the court affording the tribal customary adoption order full faith and credit at the continued selection and implementation hearing, order that a hearing be set pursuant to paragraph (2) of subdivision (e).* [¶] (3) *Appoint a relative or relatives with whom the child is currently residing as legal guardian or guardians for the child, and order that letters of guardianship issue.* [¶] (4) *On making a finding under paragraph (3) of subdivision (c), identify adoption or tribal customary adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.* [¶] (continued)

request sought a continuance in order to obtain a change of placement to the paternal grandmother, with whom the child did not reside. Her request therefore failed to show good cause for continuance of the section 366.26 hearing, since the hearing was set for the proper purpose of determining whether parental rights should be terminated and adoption selected as the permanent plan.

Moreover, the juvenile court determined that a continuance would be contrary to the best interest of the child in moving towards a permanent plan, which was consistent with the factors set forth in section 352, subdivision (a) for ruling on a request for a continuance: “the court shall give substantial weight to a minor’s need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.” We therefore conclude that the mother has not shown that the court abused its discretion in denying her request for a continuance of the section 366.26 hearing.

IV. DISPOSITION

The order of December 14, 2011, denying the section 388 petition, and the order of January 23, 2012, denying the motion for a change of placement and the request for a continuance of the section 366.26 hearing, are affirmed.

(5) Appoint a nonrelative legal guardian for the child and order that letters of guardianship issue. [¶] (6) Order that the child be placed in long-term foster care, subject to the periodic review of the juvenile court under Section 366.3.” (Italics added.)

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.