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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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

H041219
(Santa Clara County
Super. Ct. No. JD21214)

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

Plaintiff and Respondent,

v.

R. S. et al.,

Defendants and Appellants.

I. INTRODUCTION

This appeal questions the placement of D. S. (Minor), a child who needs to wear a leg and arm brace and to have regular physical and occupational therapy to combat the effects of cerebral palsy.

Minor was removed from the physical custody of her mother Nicole (usually Mother)¹ by the Santa Clara County Department of Family and Children's Services (Department) a month before her sixth birthday due to parental neglect attributable to

¹ We will use the first names of parties both to avoid confusion over common surnames and to afford them some privacy, intending no familiarity or disrespect. (Cal. Rules of Court, rule 8.401(a)(3).)

Mother's use of drugs. The Department placed Minor with experienced foster parents who were too old to become her adoptive parents. Almost 14 months after Minor's removal, the juvenile court ordered termination of reunification services for her biological father (Father), who had been incarcerated throughout the dependency proceedings and whose release from prison was not anticipated for five more months.² A little over 18 months after removal, the court ordered termination of reunification services to Mother. A little over five months after the termination of Mother's reunification services, the parents filed a joint Welfare and Institutions Code section 388³ petition seeking to change Minor's placement to her maternal great aunt Gayle, the sister of Mother's mother. One month later and shortly before Minor's eighth birthday, the court held a five-day trial on the issue of whether Minor should be placed with Gayle or with Pamela and David, a couple in the same community as the foster parents. A hearing on termination of parental rights (§ 366.26) was postponed pending this determination.⁴

Mother and Father challenge the juvenile court's decision to place Minor not with Gayle but with Pamela and David, whom the court found to be nonrelative extended

² Father appealed from the termination of services to him and this court affirmed the order in an unpublished opinion (H040034) filed on July 11, 2014 after finding that Father had been provided reasonable services in prison and that terminating further services was not an abuse of discretion. On October 3, 2014, on our own motion we took judicial notice of the record in that appeal.

³ Unspecified section references are to the Welfare and Institutions Code. Unspecified rule references are to the California Rules of Court.

⁴ On October 23, 2014, over four months after the placement decision challenged by this appeal, the juvenile court terminated parental rights and selected adoption as the permanent plan. Mother and Father have appealed from that order in case number H041611. On April 2, 2015, this court granted Mother's request to take judicial notice of that pending appeal.

family members.⁵ Mother asserts that the Department and the juvenile court repeatedly breached statutory duties to identify and locate relatives as placement options and to notify them about participating in the dependency proceedings. Mother also argues that, in deciding to place Minor with Pamela and David, the juvenile court: conducted an unauthorized comparison of Gayle against Pamela and David; improperly relied on the testimony of Minor's therapist and other testimony expressing Minor's wishes; and failed to recognize that placement with a relative was presumptively in Minor's best interests.

We will affirm the placement order after concluding: the juvenile court appropriately applied the limited relative placement preference in section 361.3; any omission by the Department in locating and notifying relatives did not affect the outcome of the placement trial; the juvenile court did not improperly compare placement alternatives in denying parents' section 388 motion; and the juvenile court was entitled to rely on the therapist's opinions about Minor's best interests and other testimony describing Minor's wishes.

II. FACTUAL CHRONOLOGY

Our review of the facts integrates the placement trial testimony credited by the juvenile court with the reports of the social workers and the court orders based on those reports. We have resolved factual conflicts among the reports and testimony consistently with the express and implied findings in the court's extensive oral decision.

Minor was born in June 2006. Mother and Minor lived in Salinas for four or five years with Aurora, Mother's grandmother and Gayle's mother, and Gayle saw them at gatherings of their large family when she visited her mother from San Jose. Before

⁵ We refer to the arguments on appeal as made by Mother, noting that Father's opening brief adopts the factual statement and arguments in Mother's opening brief, as authorized by rule 8.200(a)(5).

Minor's removal from Mother's custody, Gayle did not babysit Minor or take her on outings or to school or medical appointments, even when they lived in San Jose.⁶

In May 2012, the Department filed a petition asking that Minor be adjudicated a dependent of the court (§ 300) and also applied for a protective custody order. The Department alleged that Minor is a special needs child with mild cerebral palsy. Minor was at substantial risk of physical harm or illness because Mother, then 31 years old, was unable or unwilling to either supervise or protect her adequately. According to the petition, Mother is a registered narcotics offender with a history of methamphetamine use dating to 1999 and convictions including storing controlled substances in 2000, willful cruelty to a child in 2006, and transporting controlled substances in 2008. The child cruelty conviction arose from Minor being in the back seat of Mother's car when she intentionally rammed Father's car. Mother had a history of Child Welfare Services referrals dating to 1999 concerning her older daughter, generally related to drug use. Mother appeared to have resumed using drugs. She left Minor with a roommate and regularly brought her to school up to an hour late without her arm and leg support braces and picked her up about three hours after school ended. Mother also evaded drug tests by social workers. Minor was taken into protective custody pursuant to a warrant and placed in a foster home.

An amended petition also filed in May 2012 added allegations of Father's history of substance abuse and criminal convictions, including domestic violence and possession of a controlled substance for sale, and pending charges for transporting a controlled substance. Father was incarcerated in the Monterey County Jail at that time.

⁶ The court found that a report by social worker Bobby Nguyen dated March 4 and an addendum dated March 18, 2014 were mistaken in saying that Gayle took care of Minor before she was taken into protective custody.

An initial hearing report stated that the Department would investigate an offer by Mother's mother, Kathleen, to care for Minor. The report paraphrased Mother as saying that she remained in a relationship with Father, whom she and Minor had visited in Salinas until his arrest in January 2012.

At the initial hearing, the court determined that Father is the presumed father, appointed counsel for Minor, ordered Minor detained, and delegated the placement of Minor to Department. The hearing was attended by Mother, her older daughter, and her mother Kathleen. The court issued a form order requiring the parents to "immediately disclose to the social worker the names, addresses and other known identifying information of any maternal and paternal relatives of the child[]." The same order authorized "the social worker, while assessing these relatives for the possibility of placement, to disclose to the relative, as appropriate, the fact that the child[] is/are in custody, the alleged reasons for the custody, and the projected likely date for the child[]'s return home or placement for adoption or legal guardianship."

Gayle testified at trial that she did not seek custody of Minor at that time because Kathleen and Aurora, the mother of Kathleen and Gayle, were going to try to get custody.

A jurisdiction/disposition report by social worker Vu and supervisor Patrick explained, among other things, that Vu had met with the maternal grandmother Kathleen and friends of the family to discuss placement options. Kathleen needed a Director's exemption to qualify for placement due to her criminal history, and her home would not meet licensing needs as Mother and her other granddaughter were living in the one-bedroom residence. Kathleen acknowledged she would be unable to meet Minor's medical needs due to her busy work schedule and inability to drive.

Minor remained in the same foster placement. Vu had discussed concurrent planning with Mother, but Mother's position was that adoption was not an option, as she intended to do whatever was required to reunify.

The report described visits between Minor and Mother as going well. Kathleen was supervising visits by Mother, Minor's 15-year-old half-sister, and "other relatives and family friends."

Gayle testified at trial that she often saw Minor during the visits Kathleen supervised. Because she was regularly seeing Minor, she did not ask for separate visitation. She did not ask to be considered for placement when Kathleen's efforts failed because "I didn't know I could."

Robyn, the foster mother, testified that the foster parents always provided Minor with transportation to her visits and appointments. Robyn first met the relatives, including Kathleen and Gayle, at a birthday party for Minor in June 2012.

Father and Mother were both present in court at the jurisdiction/disposition hearing and each agreed in writing to waive their hearing rights and submit the dependency determination based on the social workers' reports. The court found true the allegations in the amended petition and declared Minor a dependent of the court, removing her from Mother's custody. The court ordered Mother and Father, among other things, to submit to random drug testing, to submit an "aftercare relapse prevention plan" to the social worker, and to participate in and complete reunification services including substance abuse counseling, a substance abuse self-help program, and parenting classes. The court continued Minor "under the care, custody and control" of the Department for placement in a foster home.

SIX-MONTH REVIEW HEARING

After disposition, a new social worker (Nguyen) and supervisor (Machado) entered the case and provided updated information for the six-month review hearing. Nguyen had difficulty contacting Father about his case plan because Father had been moved from jail to prison. Mother was living with friends and relatives in Salinas and had not been actively engaged in her case plan. She had canceled numerous appointments with Nguyen to discuss the plan and had not actively sought a bed at an

inpatient program. Mother would have difficulty meeting Minor's medical needs because Mother did not have reliable transportation or a stable home environment. She thought it best for Minor to remain in foster care. She wanted to defer her case plan until she had a stable living situation.

Mother consistently told Nguyen that no relatives were willing to care for Minor. Some might not be able to clear a criminal background check and one unnamed relative lacked transportation for medical appointments.

Minor remained with her foster parents, had bonded with them, and was doing well. She was happy during weekly visits with Mother and her half-sister and appeared to love them very much. She was occasionally sad and worried about Mother's well-being. Minor required knee and arm braces and was receiving weekly physical therapy. She was also receiving weekly counseling from Robert Seymour, a licensed marriage, family, and child therapist (LMFCT).

Seymour testified that the foster parents arranged for him to provide Minor with long-term therapy. Seymour has known the foster parents for 20 years and socialized with them every month or two. He had not provided treatment for any of their previous foster children.

Seymour believed that the State of California has promulgated ethical rules for therapists, including a rule prohibiting a dual relationship with a client. He did not believe he was violating that rule by treating his friends' foster daughter. His evaluation of her best interests was independent of his relationship with them. As was his practice, he regularly obtained information about how the child has been behaving at home, but he did not discuss Minor's therapy sessions with the foster parents.

The six-month review hearing originally scheduled for December 2012 was eventually held in January 2013 after three continuances. The court found that the Department had not provided reasonable services to Father. The court restricted contacts with Father to letters and cards through the social worker and supervised telephone calls.

The court ordered continuation of reunification services for Father and Mother, their completion of their case plans, and Minor's continued placement in foster care.

12-MONTH REVIEW HEARING

Following the six-month review hearing, Mother attended Dependency Wellness Court (DWC) hearings approximately twice each month from February through May 2013. In March 2013, the court granted a request by the foster parents to be deemed de facto parents.⁷

Foster mother Robyn testified that in early February 2013, there was a baby shower for Minor's half-sister at which Gayle asked about visiting Minor. Robyn said that she was open to visits and that Gayle should call the social worker. She did not hear from Gayle after that.

A March 2013 interim review report by social worker Nguyen and supervisor Machado was devoted mostly to Nguyen's communications with father by letter and with prison staff by telephone concerning services available in prison. He also reported that Father's mother had not yet returned a phone message he left. Father's father answered a call to Father's home and told Nguyen he did not want to provide any information about his family, including possible Indian heritage, and did not want to speak with him about Father or the dependency proceedings.

Gayle testified that in March or April 2013, she called Nguyen for information about the dependency proceedings. She learned that Mother was making progress on her

⁷ “‘De facto parent’ means 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.” (Rule 5.502(10).) As will appear, Minor’s location factored into the court’s placement decision, and Robyn, as Minor’s de facto mother, was known to all the parties and was an important witness at the placement trial.

case plan and the prospects for reunification were good. This was not Mother's first time in a rehabilitation program, but it was the first time she was doing well.

Nguyen testified that he was not at liberty to disclose everything about the case, but he asked Gayle when she called if she was interested in having Minor placed with her. Gayle did not follow up with information enabling him to run a background check. Gayle testified that no one from the Department ever asked her about being a placement for Minor, but the juvenile court credited Nguyen's contrary testimony.

Nguyen and Machado provided updated information for the 12-month review hearing in a status report and two addenda.

Minor had bonded with her de facto parents and was doing well. She continued to benefit from weekly physical therapy and had regular meetings with therapist Seymour. She was happy and outgoing during biweekly visits with her mother and half-sister and appeared to love her mother very much. She was no longer worried about Mother because Mother had a place to live and was doing well in treatment. Minor had a great visit with her entire family in Salinas in May. As the foster parents were not planning to adopt Minor or to become her legal guardians, the Department was attempting to find a concurrent home that could meet Minor's special medical needs.

Mother was making progress on her case plan by participating in individual counseling, a parenting class, and a 12-step program; maintaining sobriety and passing weekly drug tests; and receiving outpatient treatment. She was enjoying her time in recovery, and had completed the first phase of DWC.

Due to Father's incarceration, he had made little progress on his case plan, although he was participating in AA/NA meetings. He had had some telephone contact with Minor during five phone calls in March, April, and May. Father would not be attending the next court hearing because he did not want to lose either his prison job or his position on a waitlist for services. His incarceration was expected to continue through the time of the 18-month review hearing. Therapist Seymour told Nguyen that Minor did

not talk about Father and did not know him well. Seymour thought it was a bad idea for her to visit him in prison due to their limited relationship and the physical strain that a long trip would cause her.

Regarding relative placement, the 12-month status report was identical to the 6-month status report, again reporting that Mother could identify no relative placement alternatives. Nguyen recommended continuing reunification services for Mother, terminating them for Father, and continuing Minor in her foster home. At trial Nguyen acknowledged that this report omitted his telephone conversation about placement with Gayle, explaining he has many tasks as a social worker “and often I may not log everything that I need to log.”

The 12-month review hearing originally scheduled for June was held in July 2013 after a continuance. At the conclusion of the hearing, the court adopted the social workers’ recommendations and continued reunification services for Mother while terminating them for Father after finding that both had been provided reasonable reunification services and that there was no substantial probability that Minor would be returned to Father’s custody within 18 months of her removal from Mother’s custody.

18-MONTH REVIEW HEARING

Mother continued to attend DWC hearings in July through November 2013.

A notice of the 18-month review hearing dated October 15 initially recommended continuing reunification services for Mother. However, a notice of the hearing dated October 23 recommended terminating services to her and establishing a permanent plan. Nguyen testified that he continued to attempt to identify prospective adoptive parents. Machado testified that there was no renewed effort in the fall of 2013 to find a relative for placement beyond asking the parents.

Robyn testified that Nguyen had repeatedly asked the de facto parents about their interest in adopting Minor. When they declined, he asked if they knew anyone who

would be interested. A couple in their church came forward, but it did not work out. The de facto parents talked to a group of foster parents.

Pamela and David, the couple with whom Minor was ultimately placed, testified that a friend told them about Minor on October 25, 2013. Pamela called Robyn the next day and they arranged a play date with Minor in a park on October 27.

Pamela and David met in high school, married in 2004, and have two biological children, a four-year-old son and a two-year-old daughter. Pamela is a stay-at-home mother. They had been foster parents for a teenage girl six or seven years earlier. They had enrolled in classes to get their foster parent license.

In reports prepared for the 18-month review hearing, social worker Nguyen and supervisor Machado recommended terminating services to Mother. According to the reports, Minor was doing well and bonded with her de facto parents, calling them “ ‘grandpa’ and ‘grandma.’ ” She received monthly occupational therapy, weekly mental health counseling, and was enrolled in a gymnastics class. Minor was happy and outgoing after twice weekly visits with Mother. Although the de facto parents were willing to provide a long-term placement for Minor, they could not adopt her or become her legal guardians due to their ages.

Mother completed her stay in a transitional housing unit in October 2013. She was employed in San Jose as a waitress with a graveyard shift of 11:00 p.m. to 6:00 a.m. She had relapsed by taking Adderall, a prescription stimulant offered by a coworker to combat fatigue at work. The DWC team praised her honesty when she reported her relapse, but due to her relapse, she was not accepted into a sober living environment. Mother had canceled some visits with Minor due to oversleeping and exhaustion from work. For the same reason, Mother said she had missed four chemical tests in August, September, and October. The tests she did take were negative. Mother attended medical appointments with Minor to learn about Minor’s condition and needed care. Mother said she was not ready to reunify because her recovery was not strong, her housing situation

was unstable, and she was unable to find child care to accommodate her work schedule. She hoped to receive six more months of services.

As to relative placement, the 18-month review report remained identical to the 6- and 12-month reports. It also stated that Mother's mother would be unable to provide overnight child care because she had to leave for work by 6:00 a.m.

A November 2013 adoption matching event identified two prospective foster adoptive homes out of the county. The de facto parents had also identified Pamela and David as a prospective family who lived in their area, which would allow Minor to attend the same school and keep the same friends. Nguyen spoke with Pamela, who expressed interest in adopting Minor and provided Nguyen with information to facilitate his assessment of their home. The adult son of a friend of Pamela had a similar type of cerebral palsy. Pamela talked with her friend about the physical limitations and emotional consequences of the condition for a growing child.

The 18-month review hearing was scheduled for November 7. On that date it was set for an early resolution conference. At a continued hearing on November 21, Mother's reunification services were terminated and the court scheduled a section 366.26 selection and implementation hearing for March 20, 2014. Mother was allowed two visits per week, Minor's half-sister was allowed reasonable visitation, and Minor remained in the de facto parents' home. The court did not again order Mother to provide relative information.

PROCEEDINGS AFTER TERMINATION OF SERVICES

Gayle testified that she learned around Thanksgiving about the termination of Mother's reunification services. She was alarmed that Minor was being put up for adoption and the family talked about what they would do. According to Nguyen, Gayle told him she learned of the termination of services from her sister Kathleen, not Mother, as she did not have a good relationship with Mother.

Pamela testified at trial that Nguyen visited her at home on November 21. She informed Nguyen that she and her husband David had discussed what adopting Minor would mean for their family and they remained interested. After talking with Nguyen, they bought a minivan so they could accommodate three child car seats. They were under the impression that a placement change might occur in January. Pamela and her family had five visits with Minor in December 2013, five visits in January 2014, and five visits in February, including two overnights. Because she was often asked about how many visits they had with Minor, she created a log of visits from emails and texts.

In December 2013, a notice of hearing on selection of a permanent plan (§ 366.26) proposed that the court terminate parental rights and implement adoption as a permanent plan. Mother did not attend DWC hearings in December 2013 or January 2014. She was later discharged from DWC after missing another hearing in February.

Nguyen testified that Gayle presented herself as a placement option to him in January 2014.⁸ His logs reflected an email from her on January 13, 2014, providing personal information to facilitate a criminal records check. Nguyen emailed Pamela on January 14 to inform her that Gayle had come forward.

Nguyen reported that he met with Gayle on January 31 to conduct a home assessment and to advise her about the requirements of the adoption process. She told him she had the same employer for 15 years and her schedule was flexible. She worked mainly from home. She had raised her pregnant 27-year-old daughter by herself and was expecting her first grandchild. She was interested in adopting Minor, but had not offered that kind of help to Mother because she wanted Mother to remain motivated to reunify. She was willing to allow Minor to have contact with her parents if they were clean and

⁸ Gayle testified that it was mid-December 2013 when she contacted Nguyen to offer herself as a placement, but the court credited Nguyen's testimony.

sober. Gayle testified that Nguyen visited her San Jose residence in early February to verify that she had two bedrooms and a safe home. They talked about adoption being a long process that would begin by scheduling visits with Minor through the foster parents. Minor's first visit with Gayle was on March 1. Mother was also present.

In anticipation of the section 366.26 hearing, Nguyen prepared a report dated March 4 that recommended terminating the parental rights of Mother and Father and appointing Gayle as Minor's foster adoptive parent. Another social work supervisor signed the report on behalf of Machado. Significantly, the report discussed Mother, Father, Minor, and Gayle, but made no mention Minor's visits with Pamela and David. Nguyen later explained that he did not mention them because he was assessing Gayle for placement.

Nguyen reported that after Mother's reunification services were terminated on November 21, she had discontinued chemical testing, dropped out of touch with him, and had not kept up with visiting Minor twice a week. Mother told him she was preoccupied with working her graveyard shift in San Jose and coming home to Salinas to sleep.

Nguyen reported that Father was released on parole in December 2013 and had tested positive for methamphetamine that month and in February 2014. His parole agent was going to revoke his parole after another positive drug test. Father had missed a scheduled visit with Minor and tried to attend one of Mother's visits, but was told it was not his turn.

According to the report, Minor was in first grade with many school friends. She was continuing weekly counseling with Seymour and monthly occupational therapy. She was bonded with her foster parents, Robyn and Don, and was more outgoing with Nguyen.

On March 8, a visit between Gayle and Minor involved a visit with her half-sister and lunch with her grandmother Kathleen. On March 13 Nguyen sent an email to Robyn saying that overnight visits with Gayle would commence.

Robyn testified that at her request, a Team Decision Making meeting (TDM) was held on March 14, 2014. In attendance were a mediator, Mother, Father, Gayle, social workers Nguyen and Sara Meendering attending in place of Machado, Bulmaro Tamayo, a social worker for Legal Advocates for Children and Youth, the de facto parents, and Pamela and David. Minor's therapist Seymour provided a letter and participated in the meeting by telephone. Pamela, David, and Robyn recalled the TDM lasting three hours.

At the TDM, Tamayo asked Gayle why it had taken her so long to come forward. Gayle said that she and the family did not want to enable Minor's parents by getting involved in the dependency proceedings. They wanted to teach the parents a lesson because past efforts to get them to change their lifestyles had not worked. Tamayo expressed his concern that they were teaching the parents a lesson at the child's expense. According to Tamayo, he asked Gayle several questions about the level of her interaction with Minor since her removal from parental custody. Gayle perceived Tamayo as accusatory, and her responses seemed defensive to him. Nguyen asked the mediator to end the meeting when Tamayo was questioning Gayle. The conclusion of the TDM was that assessments would continue of both Gayle and Pamela and David as prospective foster parents.

Pamela and David spoke with Nguyen privately after the meeting. They were concerned about potential harm to Minor from being pulled in different directions by continuing visits with them and Gayle. It seemed to Pamela that Nguyen's mind was made up before the TDM. He confirmed that they were not his primary option. Pamela and David told him they still considered themselves the best placement option. Pamela sent him an email after that conversation urging placement with her family and expressing her hope that he would change his mind. Minor continued visiting Pamela and David in March 2014, with two visits before the TDM and three after, including an overnight.

On March 18, Nguyen submitted an addendum to his report for the section 366.26 hearing discussing the recent TDM. Nguyen paraphrased Gayle as saying that she regretted not coming forward sooner, but “she was not aware” of Mother’s involvement in dependency proceedings. Nguyen also purported to quote Pamela and David as saying after the TDM that they had only stepped forward as members of the same church community as the de facto parents because no relative was available to adopt Minor; they did not want to be a roadblock for Gayle’s adoption; they were willing to be “plan B”; and it was good timing that Gayle came forward because they were trying to have a third child. (We note that the parties’ briefs present this report as completely factual, overlooking that the juvenile court concluded that this report “misrepresented their intention or their desire” to adopt Minor.)

The permanency planning hearing on March 20 was attended by Mother, Father, Gayle, Kathleen and other relatives, the de facto parents, and Pamela and David. The court scheduled a mediation for April 23 without terminating parental rights or selecting a permanent plan.

On March 22, Gayle and Kathleen took Minor to a family barbeque where Mother was present. Gayle, Kathleen, and their mother Aurora took Minor out to lunch the following day and then returned to Gayle’s home. Mother arrived just before the visit ended. According to Machado, Gayle repeatedly included other family members in visits that were supposed to be one on one.

For the weekend beginning March 28, the de facto parents had planned a short trip and had arranged for Pamela and David to have Minor overnight for three nights. On March 26 Nguyen called the de facto parents and told them Minor was going to stay with Gayle for those three nights. On the afternoon of March 27, Nguyen notified the de facto parents that Minor was going to stay with Gayle for ten days.

Seymour had told Minor’s counsel by telephone that any overnight visits with Gayle should start slowly with one night, not many nights. On March 27, Minor’s

counsel filed a motion on shortened time opposing the ten-day visit. At a hearing the next day, the court ordered the Department to provide notice to all parties of scheduled overnight visits. Minor stayed with Pamela and David from March 28 through March 31. According to Pamela, Minor was with them for a total of 10 days that month.

Minor visited with Gayle on April 1, Mother's birthday. She had a present for Mother and was disappointed that Mother would not be there. Minor also saw Kathleen that day, and later reported that Kathleen had asked her why she did not want to live with them. Gayle testified she was unaware of that conversation. Gayle did not talk to Minor about placement because the court told them not to. Gayle canceled a visit scheduled for the next day because she had to work.

On April 4, Gayle met with social workers Nguyen and Meendering and their supervisor Machado and Machado's supervisor to discuss her history of child welfare referrals involving her daughter. In recommending adoption by Gayle, Nguyen reported that Gayle had a substantiated allegation of physically abusing her teenage daughter in May 1997 which resulted in Gayle and her daughter receiving a year of informal services short of dependency. Gayle initially denied abusing her daughter and her daughter wrote a letter of support. At the meeting Gayle acknowledged something had happened, but not as presented in Nguyen's report. The outcome of that meeting was that the Department would continue to assess Gayle for placement.

Nguyen testified that in mid-April, while waiting for a supervised visit with Mother, he asked Minor where she would like to be placed. Minor told him she liked visiting with Gayle and "she mentioned to me at that time that she likes the prospective foster home, she wants to live with them"

Meanwhile, Pamela and David obtained a Santa Clara County foster care license in April. Minor had six visits with them that month, none overnight.

April 19 became Minor's last visit with Gayle. For the first time, Nguyen observed one of their visits. He recalled that Minor showed him a room and bathroom in

Gayle's house and he believed that she might have gotten the impression for the first time that the room was supposed to be hers. He reported that Minor appeared comfortable in Gayle's residence.

That night at the de facto parents' house, Minor was upset and cried and would not sleep in her own bedroom. When the de facto parents allowed her to sleep in a bed closer to their bedroom, she woke up at her normal time. Until the time of trial in early June, she remained unwilling to sleep in her bedroom at the de facto parents' home.

Therapist Seymour noticed a regression in Minor's behavior in April and an increase in anxiety about her future. When he asked if she had any visits with her sister, Mother, Father, or Gayle, she covered her ears and said her head was "crazy" and "cuckoo.'" She shut down discussion of that topic. In contrast, Minor was animated when she talked about visiting Pamela's family.

Gayle canceled a visit scheduled for April 21 due to work obligations. Robyn notified Nguyen by email that day of Minor's problems sleeping. Robyn recalled Gayle canceling a third visit because her daughter had gone into labor.

The mediation on April 23, 2014 was attended by Mother and Father, Gayle and Kathleen and their mother Aurora and other relatives, the de facto parents, and Pamela and David. An email letter dated April 19 from Seymour to Minor's counsel was presented during the mediation and Seymour participated by telephone. The letter described Minor as "an intelligent and capable young girl" who was "savvy beyond her years. She is alert and wise to the point of being able to understand most adult conversations and to 'read' people. She is able to assess and evaluate situations, again at a level much higher than her chronological age." Seymour thought that her case had been poorly handled in that the social worker had only been in contact with him once regarding Minor visiting Father in prison. Minor "has recently been very clear about where and with whom she wants to live," namely with Pamela and David, with whom she had established healthy relationships. Minor expressed interest in having contact with

her relatives, but she was adamant about having no overnight visits or living with them. Seymour believed it would not be in Minor's best interests to place her with her biological family.

Mediation was unsuccessful and the court scheduled a long cause trial on placement and a section 366.26 hearing for June 9, 2014. The court established a briefing schedule. The parties stipulated that the parents had made an oral section 388 motion.

After the unsuccessful mediation, Machado granted Nguyen's request that the case be reassigned. The case was assigned to Meendering and the Department postponed visits with Gayle to allow more time to assess Minor's best interests. The Department's position on placement changed after the mediation. Gayle told Machado she thought the Department and the de facto parents were "brainwashing" Minor to not live with her. But Machado concluded that the de facto parents had been facilitating visits with Mother's family.

Mother attended supervised visits on May 9th and 15th, but visits scheduled for the 3rd and 16th were cancelled because she overslept and did not call to confirm.

Minor stayed with Pamela and David every weekend in May and also visited most weekdays. According to Pamela, Minor spent 15 nights with them and saw them on 25 days that month. They bought her a bed to match their daughter's and some smaller items to match what their children had.

Gayle and Kathleen each called Meendering in May requesting visitation. A visit with both was scheduled for May 21. At the time for the visit, Robyn called Meendering from the parking lot saying Minor was crying and did not want to visit. Meendering came out and talked with Minor, who said she felt nervous. Robyn and Meendering proposed different options, such as Robyn being outside the door, or visiting with Gayle or Kathleen separately, or simply saying hello without a visit, or writing them a note. Minor declined all options. Meendering went back inside to explain the situation to the relatives. Gayle and Kathleen asked if Robyn or Seymour was giving Minor negative

messages about them. When Meendering went back outside, Minor was smiling and glad to receive an Easter present from Gayle. She smiled when Meendering said she could go home with Robyn.

Meendering and Machado prepared a second addendum to the section 366.26 report that continued to recommend terminating parental rights, but changed the Department's recommendation to adoption by Pamela and David. The report acknowledged Gayle's continued interest in adopting Minor, but also noted Minor's emotional distress. This report described the interest of Pamela and David in adopting Minor, their awareness of Minor's special needs, and their history of visits with Minor.

Meendering reported that according to Pamela and David, Minor has become increasingly comfortable in their home and called their children her siblings, the room and bed she used hers, and referred to herself as part of the family. She asked them how many more days before she could move in with them.⁹

Meendering scheduled a visit between Minor and Gayle for May 28. After school that day, Robyn called Meendering to say that Minor refused to go. Minor told Meendering by phone that it made her nervous and uncomfortable when Kathleen asked her on April 1 why she did not want to live with Gayle. She refused to visit even if the adults promised to not question her.

On the Friday before trial began, Minor asked Meendering about court. Meendering told her that she was not going to be in court and asked her if there was anything she would like Meendering to tell the judge. Minor said, "I know my family

⁹ Meendering reported, "The NREFMs and the current foster parents state that [Minor] 'knows a big change is coming' and that she has been directly asking the NREFMs when she can move in with them." Meendering testified that she did not know who initially told Minor about court proceedings. The briefs attach significance to this quote, but we cannot tell if it is attributable to Minor, Pamela, David, or either of the de facto parents.

wants me to visit with them and live with them, but I don't want to.'” When asked directly, Minor said, “I want to live with [Pamela's family]. I don't want to visit with Gayle and I don't want to live with her.'”

PLACEMENT TRIAL

Gayle asked for leave to file a complaint in intervention. Gayle sought Minor's placement with her and an order preventing the de facto parents from making negative comments about visiting with her. Gayle was allowed to file a section 388 motion. After a hearing on June 5, the court denied Gayle's section 388 petition and related requests.

The placement trial began on June 9. The juvenile court heard testimony from Machado, Meendering, Gayle, Nguyen, Seymour, Robyn, Pamela, Father, David, Tamayo, LMFCT Lisa Slater, and social worker Emily Zavala. The court accepted Machado, Nguyen, Meendering, Tamayo, Zavala, Seymour, and Slater as experts in risk assessment and placement. The court also accepted as experts on mental health Seymour, Tamayo, Slater, and Zavala. Mother attended about half of the five-day placement trial, but was not called to testify.

Slater and Zavala were undisclosed experts who were allowed to testify solely for impeachment. (Code of Civ. Proc., § 2034.310, subd. (b).) Mother called Slater to rebut the methods and conclusions of Seymour, Machado, and Tamayo. Father called Zavala in rebuttal to express concerns about the testimony of Seymour and Tamayo. Slater and Zavala were concerned that Seymour was in a potentially unethical dual relationship with Minor because of his long friendship with her original foster parents and, as a result, he might have lost some objectivity.

On the morning of the fifth day of trial, the court put on the record that all parties had agreed the court should determine placement as between Gayle or Pamela and David. While the Department could have switched custody under the existing order to Pamela and David, the Department deferred that decision to the pending trial. The parties agreed that the court should consider the matter as a section 388 motion based on changed

circumstances and Minor's best interests. Mother and Father agreed and asked the court to analyze relative placement under section 361.3 and not just section 388.

After the five-day placement trial, the juvenile court gave an extensive oral ruling which we summarize here. The court viewed the issue before it as either a request for a placement change under section 388 or a placement decision under section 361.3. Under both approaches, the ultimate question was the Minor's best interests.

During the placement trial, Mother and Father criticized the Department for breaching its statutory duties to investigate relatives for potential placement and to explain a relative's options in dependency proceedings. The court found no merit in that position for two reasons. First, whether the court should have more closely considered placement with Gayle or another relative earlier in the proceedings and any deficiencies in the Department's investigation of relatives were not relevant to the pending issue of Minor's current placement. Second, Gayle was well aware Minor was in foster care and had her own reasons for not getting involved earlier, namely to motivate the parents' rehabilitation efforts. All participants in dependency proceedings, including the parents, share the responsibility of identifying potential placement relatives. "Here there was no evidence that the parents, their attorneys or other relatives, namely the maternal grandmother or the great-grandmother, ever gave the social worker or the [D]epartment any information about Gayle as a possible placement option for [Minor]." "The parents and aunt Gayle should not now complain when their own efforts fell short."

Gayle, as Minor's "aunt by adoption and her great-aunt by birth," was entitled to placement preference as stated in section 361.3. "This means that aunt Gayle shall be the first placement to be considered and investigated. However, by its own terms the statute does not supply an evidentiary presumption that placement with the relative is in the child's best interests." The court independently evaluated Gayle as a prospective

placement in light of each relevant factor listed in section 361.3, subdivision (a).¹⁰ In considering Minor’s best interests, the court stated:

¹⁰ Section 361.3, subdivision (a), has always required that social workers and courts consider the child’s best interests in evaluating a relative’s request for placement along with certain characteristics of the relative. (Stats. 1986, ch. 640, § 1, p. 2155.)

This nonexclusive statutory list has grown over time. Since 2008, section 361.3, subdivision (a) has required consideration of:

“(1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs.

“(2) The wishes of the parent, the relative, and child, if appropriate.

“(3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement.

“(4) [Placement with sibling]

“(5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect.

“(6) The nature and duration of the relationship between the child and the relative, and the relative’s desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful.

“(7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] (E) Facilitate court-ordered reunification efforts with the parents. [¶] (F) Facilitate visitation with the child’s other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) Provide legal permanence for the child if reunification fails. [¶] However, any finding made with respect to the factor considered pursuant to this subparagraph and pursuant to subparagraph (G) shall not be the sole basis for precluding preferential placement with a relative. [¶] (I) Arrange for appropriate and safe child care, as necessary.

“(8) The safety of the relative’s home. For a relative to be considered appropriate to receive placement of a child under this section, the relative’s home shall first be approved pursuant to the process and standards described in subdivision (d) of Section 309.” (Stats. 2007, ch. 108, § 2, pp. 484-485.)

[Mr.] Seymour, [Minor's] therapist for the past year, explained that [Minor] experienced anxiety and depression when she entered the dependency system due to the trauma of the neglect she experienced that brought her into dependency. No one disputed these facts or that she had been in therapy with Mr. Seymour for over a year for treatment of her condition and that her condition had improved with therapy and due to the stability, love and support that had been provided by her foster family.

After [Minor] began visits with aunt Gayle and when she began to suspect that she might have to live with her aunt Gayle, per her foster mother Robyn, [Minor's] behavioral and sleeping patterns began to change for the worse. She displayed defiant behavior. Her sleeping patterns were disrupted and she experienced nightmares. In addition, she refused to sleep in her own bed and would have to sleep in a small bed outside her foster parents' bedroom, as she had done when she was initially placed with them.

Mr. Seymour attributed this regression to anxiety that [Minor] was feeling due to the visits with her aunt and the possibility that she would be placed with her aunt Gayle and not [Pamela and David], with whom she had bonded and expressed a desire to live with [*sic*]. Mr. Seymour explained that [Minor] is very intuitive and picks up on external cues. The Court finds Mr. Seymour's explanation to be credible and well founded.

This anxiety occurred after Nguyen and Minor's grandmother each asked Minor about her interest in living with Gayle.

The court rejected as exaggerated the characterizations of Seymour by the rebuttal experts as too emotional or involved with the case. "While Mr. Seymour was passionate in his testimony, the Court did not find him to be overly emotional" The suggestion based on his social relationship with the de facto parents "that he was occupying a dual role is unfounded and speculative."

In discussing the wishes of the child, the court stated:

Vicky Machado made a statement that had a profound impact upon this Court. She said that while in dependency the department tries hard to teach children to have and express their voice. If we don't listen to them when they do use their voice, the message we send is that it doesn't matter because nobody hears you. [Minor] has been described to be wise beyond her years. Because she's – just because she is only about to turn eight years old does not discredit her voice. It is highly appropriate for the Court to listen to [Minor's] wishes.

“While [Minor] is not ten years old, the Court does hear her statements made through her actions and statements to Bobby Nguyen, Sara Meendering, Mr. Seymour, [the de facto parents], her attorney, and Pamela and David. She currently doesn’t want to visit with aunt Gayle, she doesn’t want to live with her aunt Gayle and/or the thought of doing so causes her severe emotional distress and anxiety.” The court expressly found no evidence of “any sort of brainwashing” of Minor by the de facto parents, noting that they had facilitated all her family visits and encouraged her to visit with Gayle when she was reluctant to do so.

Continuity and stability favored keeping Minor in the same school and in treatment by same doctors and therapists. Her community is Morgan Hill and Gayle resides in San Jose. The court did not regard the Informal Supervision provided to Gayle and her daughter as a disqualifying factor because it was 17 years earlier.

Considering all of these factors, the Court comes to the conclusion that placement with aunt Gayle is not in [Minor’s] best interests. First and foremost, the behavioral and emotional anxiety that [Minor] is exhibiting due to her visits and the prospect of living with aunt Gayle is a huge reason alone not to place [Minor] in Gayle’s care. It would be unconscionable to put [Minor] through such turmoil, especially given her level of anxiety and depression due to her prior neglect. While aunt Gayle is family, [Minor] does not have an emotional bond with her and they do not have a history of strong familial connection. There were no one-on-one visits between the two while [Minor] was in foster care, and aunt Gayle did not foster an individual relationship with [Minor] before or during dependency despite being given the opportunity to do so by Bobby Nguyen and Robyn. The child does not demonstrate a familial connection with aunt Gayle.

This Court is also not convinced that [a]unt Gayle will be able to foster and maintain the community of support and services that [Minor] has grown to love and rely upon. Moving schools, activities and/or therapists will not provide stability or continuity for [Minor].

[Minor] has grown to love and has clearly bonded with her foster family and her prospective adoptive family. The Court finds it would be detrimental to [Minor] to lose the love and stability they have brought to her life.

The court later reiterated:

And really the biggest concern for the Court is the emotional distress and anxiety that [Minor] has experienced and manifested: her sleeplessness, her anxiety, having to sleep outside her parents' room. If she were placed with her aunt, she would regress and experience that same anxiety and depression that she experienced at the beginning of her dependency. It's unconscionable for me to put her in that situation, for anybody to put her in that situation. She doesn't need to endure that. So on that alone it's not in her best interests to place her with her aunt.

After determining that placement with Gayle was not in Minor's best interests, the court separately evaluated a placement with Pamela and David under the same statutory factors applicable to relatives. The court found that they qualified under section 362.7 as nonrelative extended family members (NREFMs).¹¹ Every factor favored placement with the NREFMs. "I was very impressed by the pro-active nature of Pam and David's involvement with [Minor]." Pamela investigated what is required to raise a child with Minor's special needs and decided to go forward. She understood Minor's needs, including involving her biological parents in her life. They knew Minor's routines and have helped transport her to school, activities, and therapy, providing her continuity and

¹¹ Section 362.7 provides in part: "A 'nonrelative extended family member' is defined as an adult caregiver who has an established familial relationship with a relative of the child, as defined in paragraph (2) of subdivision (c) of Section 361.3, or a familial or mentoring relationship with the child. The county welfare department shall verify the existence of a relationship through interviews with the parent and child or with one or more third parties."

As a child grows and develops over time, various adults may develop a familial or mentoring relationship with the child and some may even become a de facto parent without judicial approval. (*In re Joel H.* (1993) 19 Cal.App.4th 1185, 1196.) When that child is the subject of dependency proceedings, identifying the nature of an adult's relationship is initially a factual question for the Department, but it is ultimately a factual matter for the juvenile court to determine when legal rights attach to that status. (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 539; rule 5.534(e) [court may recognize a de facto parent on a sufficient showing].)

stability. They allowed their relationship with Minor to develop without pressure at Minor's pace. "This slow transition helped with the bonding with Pamela and David." Contrary to misrepresentations in a report by Nguyen, their commitment to adopting her never wavered.

The court concluded it was in Minor's best interests to be placed with the NREFMs. The court found a loving relationship and desire for the placement on both sides. "[T]here has been a demonstration of care and commitment throughout and there will be continuity in community activities, therapy, school for [Minor] and therefore she will have the continuity and stability as contemplated" by case law. In terms of the section 388 motion, the court found "that the parents have not met their burden of proof by a preponderance of the evidence" that placement with Gayle was in Minor's best interest. The motion was denied.

III. DISCUSSION

A. RELATIVE PLACEMENT STATUTES

Mother argues essentially that the juvenile court attached insufficient importance to the statutory preference for relative placement. She also complains that both the Department and the court failed to fulfill statutory obligations to investigate potential relative placements and to encourage their participation in dependency proceedings.

When a child is removed from parental custody by dependency proceedings, social workers and juvenile courts must investigate and consider the child's relatives for potential placement. We quote below the statutes in effect at the time of Minor's removal in 2012.

The Legislature has long expressed a preference for placing children with relatives. Since 1978, section 281.5 has required that "primary consideration" be given to a relative placement "if such placement is in the best interests of the minor and will be conducive to reunification of the family." (Stats. 1977, ch. 236, § 1, p. 1080.) Since its enactment in 1986, section 361.3, subdivision (a) has required that "preferential

consideration shall be given to a request by a relative of the child for placement of the child with the relative.” (Stats. 1986, ch. 640, § 1, p. 2155; Stats. 2007, ch. 108, § 2, p. 484.) “‘Preferential consideration’ means that the relative seeking placement shall be the first placement to be considered and investigated.” (§ 361.3, subd. (c)(1).)¹²

Section 361.3 has always limited the kinds of relatives entitled to preferential consideration to include a grandparent, aunt, uncle, or sibling. At the time of the removal hearing in 2012 subdivision (c) provided (as it does now):

(2) “Relative” means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words “great,” “great-great” or “grand” or the spouse of any of these persons even if the marriage was terminated by death or dissolution. 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.

¹² Since 2001, related section 16000, subdivision (a) has stated that “preferential consideration shall be given whenever possible to the placement of the child with the relative as required by Section 7950 of the Family Code” when a child is removed from parental custody. (Stats. 2000, ch. 745, § 3, p. 4962.)

Since 1996, Family Code section 7950, subdivision (a)(1) has required foster care placements to be “in the home of a relative” if possible, “unless the placement would not be in the best interest of the child.” (Stats. 1995, ch. 884, § 1, p. 6737; Stats. 2003, ch. 469, § 3, pp. 3395-3396.) The statute requires the agency or department to make “[d]iligent efforts ... to locate an appropriate relative” and the juvenile court to find, before a long-term foster care placement, that the agency or department “has made diligent efforts to locate an appropriate relative and that each relative whose name has been submitted ... as a possible caretaker, either by himself or herself or by other persons, has been evaluated as an appropriate placement resource.” Mother looks to a criminal case involving the unavailability of a witness to provide a definition of “due diligence.” (*People v. Linder* (1971) 5 Cal.3d 342, 346-347.) However, since January 2011, rule 5.695(g) has specifically identified examples of diligence in identifying, locating, and notifying a dependent child’s relatives.

The same definition of “relative” appears in section 319, subdivision (f)(2). (Stats. 2011, ch. 471, § 1.)

More recently, the Legislature has assigned the courts and social workers specific duties in service of the objective of relative placement. Since 1998, in cases of a removal from parental custody, “[t]he court shall order the parent to disclose to the county social worker the names, residences, and any other known identifying information or any maternal or parental relatives.” (§ 361.3, subd. (a); Stats. 1997, ch. 793, § 16, p. 5328; Stats. 2007, ch. 108, § 2, p. 485; § 319, subd. (f)(3); Stats. 2001, ch. 653, § 9, p. 5182; Stats. 2011, ch. 471, § 1; rule 5.678(e)(2).)¹³ The legislation that required court-ordered disclosure of relatives also required limited disclosure to some relatives, by adding to subdivision (a) of section 361.3: “The court shall authorize the county social worker, while assessing these relatives for the possibility of placement, to disclose to the relative, as appropriate, the fact that the child is in custody, the alleged reasons for the custody, and the projected likely date for the child’s return home or placement for adoption or legal guardianship.” (Stats. 1997, ch. 793, § 16, p. 5328.)

Since 2009, within 30 days of the child’s removal from parent custody, the social worker “shall use due diligence” (§ 309, subd. (e)(1)(3); rule 5.695(f), (g)) “to identify and locate all grandparents, adult siblings, and other adult relatives of the child, as defined in paragraph (2) of subdivision (f) of Section 319, including any other adult relatives suggested by the parents.” (§ 309, subd. (e)(1); Stats. 2009, ch. 261, § 1; rule 5.637.) The social worker shall provide the identified adult relatives with written notice,

¹³ The same legislation that required court-ordered disclosure also eliminated former statutory provisions that the “social worker shall ask the parents if there are any relatives that should be considered for placement” and “shall further investigate the existence of other relatives for possible placement” (Stats. 1993, ch. 892, § 2.5, p. 4848.)

and oral notice when appropriate, of the child’s removal (§ 309, subd. (e)(1)) and “[a]n explanation of the various options to participate in the care and placement of the child and support for the child’s family, including any options that may be lost by failing to respond.” (§ 309, subd. (e)(1)(B); rule 5.534(f)(3)¹⁴; cf. 42 U.S.C. § 671, subd. (29).)¹⁵

At the initial petition hearing, “[i]f the child cannot be returned to the physical custody of his or her parent or guardian, the court shall determine if there is a relative who is able and willing to care for the child” (§ 319, subd. (d)(2); Stats. 1986, ch. 1122, § 3, p. 3977; Stats. 2011, ch. 471, § 1.)

Relatives do not only deserve attention as a placement alternative upon the child’s initial removal. Since 1994, “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.” (§ 361.3, subd. (d); Stats. 1993, ch. 892, § 2.5, p. 4848; Stats. 2007, ch. 108, § 2, p. 486.)

¹⁴ As amended effective January 2011, rule 5.534(f) provided in part: “(3) When a relative is located through the investigation required by rule 5.637, the social worker must give that relative:

“(A) The written notice required by section 309 and the ‘Important Information for Relatives’ document as distributed in California Department of Social Services All County Letter No. 09-86;

“(B) A copy of *Relative Information* (form JV-285), with the county and address of the court, the child’s name and date of birth, and the case number already entered in the appropriate caption boxes by the social worker; and

“(C) A copy of *Confidential Information* (form JV-287).” The two latter forms allow for the relative to provide information to the court.

¹⁵ Section 309 was amended in 2009 to implement the mandate of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. (Ass. Com. on Judiciary analysis of Ass. Bill No. 938 (2009-2010 Reg. Sess.), as amended March 27, 2009. (<http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0901-0950/ab_938_cfa_20090413_105547_asm_comm.html> [as of May 11, 2015].)

“The appropriateness of any relative placement pursuant to Section 361.3” is one of the topics that should be addressed in every dependency court report by a social worker. (§ 358.1, subd. (h), formerly subd. (e); Stats. 1993, ch. 892, § 1, p. 4846; Stats. 2010, ch. 559, § 12; rule 5.690(a)(1)(C).) Social workers are required to document their efforts in social studies regarding contacting “relatives given preferential consideration for placement” to ascertain their interest in placement. (§ 361.3, subd. (a)(8); Stats. 1997, ch. 793, § 16, p. 5328; Stats. 2007, ch. 108, § 2, p. 485.)

1. Applying the Statutory Relative Placement Preference

In this case, though reunification services were terminated in November 2013, the placement trial in June 2014 was held in advance of a section 366.26 hearing on termination of parental rights and selection of a permanent plan. In its ruling, the juvenile court considered Gayle first as a placement for Minor according to the nonexclusive list of factors enumerated in section 361.3, subdivision (a).¹⁶

On appeal Mother contends that placement with Gayle was presumptively in Minor’s best interests and the court failed to properly apply that principle in performing the best interest evaluation required by section 388. According to Mother, Gayle was entitled to placement as “there was no showing that placement with the maternal [grand] aunt would fail to advance [Minor’s] needs for permanence and stability.” As we will

¹⁶ Mother’s opening brief asks that we not follow authority that has concluded that the relative placement preference loses effect after the termination of reunification services. (E. g., *In re Baby Girl D.* (1989) 208 Cal.App.3d 1489, 1493 (*Baby Girl D.*); *In re Jessica Z.* (1990) 225 Cal.App.3d 1089, 1098, 1100 (*Jessica Z.*); *In re Sarah S.* (1996) 43 Cal.App.4th 274, 276-277 (*Sarah S.*) [discussing adoption application processing preference for caretakers in § 366.26, subd. (k)]; *In re Lauren R.* (2007) 148 Cal.App.4th 841, 854-855 [following *Sarah S.*].) The Department does not question the juvenile court’s application of the relative placement preference. As there is no issue about the statute applying, we proceed to review how the court applied it.

explain, there is no such statutory presumption and the evidentiary burden was on the parents to justify a change in placement to Gayle.

Section 361.3, subdivision (a) commands that a relative requesting placement of a child removed from parental custody be given “preferential consideration” by social workers and juvenile courts. Does this mean that a relative placement is deemed by the Legislature to be inherently in a child’s best interests? The statute has always defined “preferential consideration” the same way, “the relative seeking placement shall be the first placement to be considered and investigated.” (§ 361.3, subd. (c)(1).) In 1994, the California Supreme Court observed that the statute by its own terms does “not supply an evidentiary presumption that placement with a relative is in the child’s best interest.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320 (*Stephanie M.*).

Stephanie M., *supra*, 7 Cal.4th 295 was an appeal challenging the denial of a section 388 petition by a child’s parents and maternal grandmother to change her placement from a foster family to the grandmother after the termination of reunification services but before termination of parental rights. (*Stephanie M.*, at pp. 306-308.) The appellate court had concluded “that the juvenile court failed to give sufficient weight to the relative placement preference set out in section 361.3.” (*Id.* at p. 319.) The Supreme Court reversed the appellate decision, stating:

Assuming without deciding that the statutory preference applied at the late stage of the proceedings that we review here, the juvenile court did not abuse its discretion in failing to give sufficient weight to the grandmother’s request for placement. The statute applicable at the time of the hearing did not operate as an evidentiary presumption in favor of placement with the grandmother that would overcome the juvenile court’s duty to determine the best interest of the child. (*Id.* at p. 320.)

While the Supreme Court’s reasoning was couched in terms of the statute applicable at the time of the hearing in 1991, the limited definition of “preferential consideration” has not changed since. *Sarah S.*, *supra*, 43 Cal.App.4th 274, 286, paraphrased *Stephanie M.*

as saying that the relative preference in section 361.3 “merely places the relative at the head of the line ...” during a placement determination.

Mother acknowledges that there is no evidentiary presumption in favor of relative placement, but she asserts “that the code has been substantially changed since 1992 and, as a result, it is now true ... that there is a presumption that relative placement is in the child’s best interest.” As she did at trial, Mother especially relies on a statement by the Fourth District Court of Appeal in *In re Esperanza C.* (2008) 165 Cal.App.4th 1042 (*Esperanza C.*), “Placement with a suitable relative is presumptively in the child’s best interest.” (*Id.* at p. 1060.) As we will explain, this single sentence did not overrule or undermine *Stephanie M.*

Esperanza C. was an appeal following the denial of section 388 petitions by the mother and child to place the child in the home of a maternal great-uncle and his wife. (*Id.* at pp. 1049, 1051.) The opinion held “[a]s a matter of first impression, . . . the juvenile court has jurisdiction to review the agency’s denial of a criminal records exemption for abuse of discretion.” (*Id.* at p. 1049.) The juvenile court in that case had noted that the human services agency had erred in denying a criminal records exemption to the relative, but determined that it had no jurisdiction to review the agency’s determination. (*Id.* at p. 1051.)

The opinion explained the criminal records review process. Under section 361.4, prior to placing a child with a relative, a social worker must investigate the relative’s criminal history, if any. Under that statute and Health and Safety Code section 1522, subdivision (g), not all criminal convictions preclude placing a child with a particular relative, and the Director of Social Services may grant an exemption. An applicant denied an exemption is entitled to file a grievance and obtain administrative review. (*Esperanza C.*, at pp. 1055-1058.) The court’s statement about a relative placement being presumptively in the child’s best interest was made in the context of evaluating a relative’s criminal history:

Placement with a suitable relative is presumptively in the child's best interest. (§§ 309, 319, 361.3, subd. (a), 16000, subd. (a), 16501.1, subd. (c)(1).) An erroneous classification of an exemptible conviction as nonexemptible offense [*sic*] precludes any possibility of the juvenile court's consideration of the child's interest in relative placement, and prevents the juvenile court from exercising its authority to make "any and all reasonable orders for the care, custody and supervision of the child," including its authority to make placement decisions under section 361.3 and to "guide and direct" the Agency's posttermination placement decisions. (*Esperanza C.*, at p. 1060, quoting *Fresno County Dept. of Children and Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 648.)

Mother acknowledges that *Esperanza C.* does not support her contention that statutory changes have superseded *Stephanie M.* *Esperanza C.* "did not point out the numerous additions made to the statutory scheme regarding relative placement and the importance of the child's relationship with relatives since the 1994 opinion in *Stephanie M.*"

Mother points to amendments to section 361.3 and other statutes after *Stephanie M.* to argue that the law has changed so that relatives seeking consideration for placement now enjoy a favorable presumption that placement is in the minor's best interests. Section 361.3 itself refutes Mother's statutory argument. While the statute establishes a relative's entitlement to "preferential consideration," it also provides a limited definition of that phrase and it directs "the county social worker and the court ... [i]n determining whether placement with a relative is appropriate" to consider a long list of factors (§ 361.3, subd. (a)), expressly including "[t]he best interest of the child" (*Id.* at subd. (a)(1).) If placement with any relative who requests it is presumptively in the child's best interest, then subdivision (a)(1) becomes superfluous. Moreover, social workers and courts must consider a list of factors, including the relative's moral character and any criminal history, the preexisting relationship between the child and the relative, and the relative's abilities to care for the child and to provide a safe, secure, and stable environment. (*Id.* at subd. (a)(5) - (8).) In other words, a court's placement with a relative depends on evidence, not a presumption, that the placement is in the child's best

interest. Although statutory amendments show legislative concern that relatives potentially interested in placement are identified, notified, and educated about pending dependency proceedings, the statutory language analyzed by *Stephanie M.* is unchanged.

Expressly relying on *Stephanie M.*, the juvenile court gave Gayle all the preferential consideration she was due as an aunt and more than she was entitled to as a great aunt.¹⁷ Acknowledging its obligations under section 361.3, the juvenile court evaluated Gayle for placement before considering the merits of placement with Pamela and David. Mother has failed to establish that the juvenile court misunderstood the limited relative placement preference afforded by section 361.3 and related statutes.

2. Alleged Failures to Investigate or Notify Relatives

Mother argued in her trial brief that “the Department had a duty to independently investigate relatives when it knew that a placement change was needed.” (Capitalization omitted.) Father argued in his trial brief that the Department “did not conduct an independent and comprehensive ‘investigation.’ They took the mother’s word that there were no other available relatives.” “The Department failed to perform its statutory duties in this matter.” “[T]here was no due diligence search ever performed in this case to locate available adult relatives. And, there was specifically no renewed effort once the need for replacement arose.” The Department has not produced a form explaining a relative’s options to participate in dependency proceedings, including “‘options that may

¹⁷ One holding in *Baby Girl D.* remains vital. A great aunt is not among the limited degrees of relatives who are entitled to preferential consideration under section 361.3, subdivision (c)(2). (*Baby Girl D.*, *supra*, 208 Cal.App.3d at p. 1494.) The Department’s trial brief argued that Gayle did not qualify for preferential consideration, but the Department has not renewed that contention on appeal, apparently in view of the juvenile court’s finding that Gayle is an aunt rather than a great aunt by virtue of Mother’s adoption by Aurora, her own maternal grandmother and Gayle’s mother. Mother’s reply brief emphasizes this finding as justifying Gayle’s preferential consideration.

be lost by failing to respond.’” (Quoting section 309, subd. (e)(1)(B).) The Department failed “to find and inform relatives of the statu[s] of their young relative and their ability to care for her.”

Mother argued at the conclusion of trial “that the Department as a whole ... failed to follow their statutory obligations to investigate and notice relatives for placement purposes.” The Department should have spoken to other relatives about placement, not just Mother and Father. The Department failed to reach out to relatives and instead “over and over again and in case after case puts the onus on the relatives to come forward ... to seek placement” contrary to the statute. Father argued that the Department no longer had a family-finding unit and had no forms as required by section 309. Under section 309, “the Department has a due diligence [*sic*] to provide and find relatives with the information so they know what to do ... to take care of their relative children that are in the foster care system because it’s a complicated legal system. And it’s not just complicated[, i]t is confidential. [¶] It’s extremely hard to find out information about these cases.”

On appeal Mother renews the parents’ contentions that the Department breached statutory duties and now asserts that the juvenile court also breached statutory duties. In rejecting the parents’ claims, the juvenile court relied in part on a secondary text in saying that “throughout the dependency process the responsibility for identifying potential relative placement is shared by all participants. Parents can and in most instances should voluntarily identify relative[s]” Mother contends that “the court erred by declaring that the responsibility to identify relatives was shared by the relatives.” But the court’s statement was limited to participants, not all relatives. Regardless of a parent’s voluntary obligations, in this case the court ordered the parents to disclose relative identifying information, so the court did not err in saying that the responsibility for identifying relatives was shared by the “participants.”

Mother acknowledges that the parents were ordered at the initial petition hearing in May 2012 to disclose any known information identifying maternal and paternal relatives of the child. (§§ 361.3, subd. (a)(8); 319, subd. (f)(3); rule 5.678(e)(2).) She complains that the court did not repeat this order in November 2013 when her reunification rights were terminated. She bases this argument on provisions in section 361.3, subdivision (d), that “whenever a new placement of the child must be made” after a disposition hearing, “consideration for placement shall again be given as described in this section to relatives who have not been found to be unsuitable”

In re Joseph T. (2008) 163 Cal.App.4th 787 (*Joseph T.*), on which Mother relies, interpreted this subdivision as requiring the juvenile court to again order disclosure of family-identifying information whenever a new placement must be made. (*Id.* at p. 794.) However, this interpretation in *Joseph T.* is dictum for two reasons. First, the parties on appeal in that case had agreed “that within the meaning of section 361.3 no new placement needed to be made ... at the six-month review hearing” (*Id.* at p. 793.) The appellate court viewed the circumstances as “when a relative voluntarily comes forward at a time when a new placement is *not* required ...” and, under those circumstances, “the court need not again order parents to disclose other possible relative placements.” (*Id.* at p. 794) Second, there was no issue raised in that appeal about the juvenile court’s failure to order disclosure. The appellate court concluded that the lower court had failed to apply the relative preference to the child’s paternal aunt at the six-month review hearing, not that the court had failed to repeat a disclosure order. (*Id.* at pp. 790, 798.)

In our view, once a juvenile court has ordered parents to provide relative identifying information, they remain subject to that order throughout the dependency proceeding. There is no reason for the court to repeat an order that imposes a continuing obligation. The Legislature did not mandate such an exercise in redundancy.

Mother relies on the same subdivisions in section 361.3 and implementing court rule 5.678(e)(2) as also imposing on the juvenile court “an affirmative ... duty to see that the Department provided a relative - in this case, Aunt Gayle - with all the necessary information about [Minor’s] status both initially and when the placement change became necessary.” In this case, the juvenile court complied with section 361.3, subdivision (a) by authorizing “the county social worker, while assessing these relatives for the possibility of placement, to disclose to the relative, as appropriate, the fact that the child is in custody, the alleged reasons for the custody, and the projected likely date for the child’s return home or placement for adoption or legal guardianship.” This order was made at the same time as the parents were ordered to disclose relative information.

The case file in a dependency proceeding is confidential. (§ 827.) To the extent section 361.3, subdivision (a) authorizes disclosure of confidential dependency proceedings, disclosure is limited to a relative who is being assessed by the social worker as a possible placement. As Mother notes, section 309, subdivision (e)(1)(A) goes further in requiring social workers to notify all located relatives of the child’s removal from parental custody. However, section 309 does not require social workers to give all known relatives status updates on the progress of dependency proceedings. A status update may be appropriate while a relative is being assessed for possible placement, but on November 21, 2013, Gayle was not being assessed for possible placement. When Mother’s reunification services were terminated, the social worker had no duty to notify relatives like Gayle who were not being assessed for placement of this latest ruling. Accordingly, the juvenile court had no duty to ensure that Gayle was provided with a status update on the dependency proceedings. We conclude that Mother has identified no statutory duty breached by the juvenile court.

Mother argues that “the Department had a continuing statutory duty to identify, locate, and notify maternal relatives.” (Capitalization omitted.) Specifically, Mother argues that Nguyen was required “to continue investigating relative placements” once he

learned that the foster parents would not be adopting Minor and to “conduct a renewed independent search for available relatives” after Mother’s reunification services were terminated. These contentions are predicated on *Joseph T.*, *supra*, 163 Cal.App.4th 787 and 2009 amendments to section 309.

Joseph T. discussed not only the juvenile court’s obligations in light of the 1993 addition of subdivision (d) to section 361.3 but also the social worker’s obligations “when a relative voluntarily comes forward at a time when a new placement is *not* required” (*Joseph T.*, at p. 794.) In that appeal, a child services department argued “that the addition of subdivision (d) to section 361.3 (Stats.1993, ch. 892, § 2.5, p. 4847) eliminated the relative placement preference once the dispositional phase is completed except when the court is required to change the child’s placement.” (*Joseph T.*, at p. 794.)

Joseph T. rejected the department’s restrictive interpretation in light of pre-existing case law, the legislative intent, and “the strong California policy in favor of relative placement.” (*Id.* at p. 794.) The court relied on this court’s dictum in *In re Jessica Z.*, *supra*, 225 Cal.App.3d 1089, 1099, that a juvenile court should have ordered a social worker to assess a maternal grandmother for placement after she requested placement at the six-month review hearing. (*Joseph T.*, at p. 795.) But the appellate court did not fault the department for breaching a continuing duty to investigate relatives. Instead, it concluded that the juvenile court had failed to apply the relative preference at the six-month review hearing. (*Id.* at pp. 790, 798.)

Regarding the existence of a continuing duty to locate and investigate relatives for placement, we note that social workers are required to document in each court report their efforts to locate relatives who may be interested in placement. (§§ 361.3, subd. (a)(8); 358.1, subd. (h).) An initial placement after the detention or disposition hearing does not relieve a social worker of the obligation to evaluate a relative for placement whenever a parent provides *new* identifying information or a relative expresses an interest in

placement. The Department contends that it is too late for Mother to assert nonperformance of the Department's duties to identify and locate relatives within 30 days of removal. We disagree with the assumption that the Department's relative-finding duties expire 30 days after the commencement of dependency proceedings. A relative's ability to fulfill the child's permanent plan must be considered "whenever a new placement of the child must be made" (§ 361.3, subd. (d).) However, social workers are not required to reconsider relatives who have been "found to be unsuitable . . ." (*ibid.*) nor should they have to retrace their steps in identifying and locating potential relative placements. After a parent has been ordered to disclose relative-identifying information, a social worker need not ask that parent in every conversation whether new information has developed. The social worker must notify the juvenile court when a new potential relative placement has emerged, but this does not transform every interim dependency review hearing into a placement hearing.

Mother also contends that the Department breached its duty under section 309, subdivision (e)(1)(B) to notify the relatives "about any options that might be lost by failing to respond" to the dependency proceedings. They were not provided "with any sort of relative information sheet," and as Gayle testified, she "was never given any documentation to understand what the rules and regulations are for beginning to end" of dependency proceedings, although she did receive a pamphlet after the TDM.

At the placement trial, the Department did not claim full compliance with its statutory duties. Department's counsel conceded "[t]he evidence has been somewhat inconclusive regarding the search that was made and whether a letter was sent within the first 30 days." The Department went on to argue, however, that even if it "had failed to send the statutorily required notice or could have searched more diligently for relatives, the evidence shows that Gayle [] knew that [Minor] was in foster care."

On appeal, the Department now asserts that its "relative search efforts were adequate under the facts of this case." (Emphasis omitted.) Alternatively, Mother has

“not identified any other relatives that could have been a placement option for [Minor], so any alleged failure by the Court or Department to continue to search for more relatives must be considered harmless”

If we assume that some of the Department’s efforts in identifying and notifying relatives fell short of the statutory mark, the remaining question is whether there was prejudice requiring a remedy.

As Mother notes in her reply brief, in the recent case of *In re R. T.* (2015) 232 Cal.App.4th 1284, the appellate court found that a social services agency had “failed to provide [two paternal aunts] with written notice that is mandated by the statute to explain ‘the various options to participate in the care and placement of the child’ and the services and support available to them. (§ 309, subd. (e)(1)(B).)” (*In re R. T.*, at p. 1296.) The court rejected the agency’s claim that oral advice was an adequate substitute. (*Ibid.*) But *In re R. T.* involved numerous other errors by the agency and the juvenile court, such that the appellate court did not predicate any relief on the agency’s failure to provide written notice. (*Id.* at p. 1308.)

In our case, the juvenile court ultimately concluded after the placement trial in 2014 that any such dereliction was irrelevant to determining which placement was in Minor’s best interests.

Since 2011, rule 5.695(f)(2)(B) has provided that if the court found at the disposition hearing that the social worker had not used due diligence, “the court may order the social worker to use due diligence . . . and may require a written or oral report to the court at a later time.”¹⁸ The rule does not require postponing disposition or changing placement because the social worker’s relative-finding efforts have been inadequate.

¹⁸ At the time of the placement trial and since January 2014, “exercise” replaced “use” in rule 5.695(f).

The juvenile court recognized that *Stephanie M., supra*, 7 Cal.4th 295 rejected a contention essentially similar to parents’.

The Court of Appeal ... criticized the lower court for failing to give sufficient weight to the relative placement preference from the very outset of the proceedings. However, at the hearing 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.*, at p. 322.)

Even *Joseph T., supra*, 163 Cal.App.4th 787 concluded that a juvenile court’s failure to consider a particular relative placement was harmless.

The relative placement preference, however, is not a relative placement *guarantee* (§ 361.3, subd. (a); *In re Sarah S., supra*, 43 Cal.App.4th at p. 282), and the record contains ample evidence that the preference was overridden in this case. Thus, under the circumstances of this case, the court’s failure to afford the relative placement preference to [the minor’s] aunt and the failure of the court to state on the record its reasons for denying her placement request were harmless errors. (*Joseph T.*, at p. 798.)

Mother’s claim of prejudice is simple. “Aunt Gayle testified that if she had been informed in advance that the likelihood of her being an adoptive placement for the minor was affected by the time she requested it, she would have stepped in earlier.” Mother does not argue that some other relative might have come forward sooner as a placement option.

But the juvenile court did not accept this testimony. Instead, the court found Gayle was well aware of the dependency proceedings at an early stage; she declined Nguyen’s request in around April 2013 to provide information facilitating her assessment for placement; she offered a strategic reason for keeping her distance from the dependency proceedings, namely to motivate the parents to rehabilitate; and even after learning that Mother’s reunification services were terminated, Gayle took six weeks to offer herself as a placement option. The juvenile court was not required to believe

Gayle's late claim that she would have come forward earlier had she been better informed about dependency.

The underlying premise of Mother's prejudice argument is that if Gayle had come forward sooner as a placement option and begun visits with Minor earlier, all the problems that emerged during the actual visits would have disappeared. Although Minor would have had less time to achieve continuity and stability in the Morgan Hill area if she had been spending more time in San Jose with Gayle, we do not know exactly why Minor wanted to stop visiting Gayle once she learned that Gayle's residence was being considered as her permanent home. It is pure speculation that Minor would not have become anxious had Gayle canceled visits due to her work six months or a year earlier.

In making a placement decision under sections 361.3 and 388, the juvenile court was required to determine the Minor's best interests under the prevailing circumstances. The juvenile court found it would be unconscionable to uproot Minor from comfortable surroundings and perpetuate her anxiety about spending time with Gayle, with whom Minor lacked a close familial connection or an emotional bond. Even accepting Mother's implicit contention that the Department is at least partly responsible for the poor relationship between Minor and Gayle, any corrective action against the *Department* should not negatively impact *Minor*.

B. COMPARATIVE ANALYSIS AT A SECTION 388 HEARING

On the final day of the placement trial, the juvenile court announced all parties' agreement "that this Court should determine placement as between the prospective adoptive family, [Pamela and David], and ... the maternal great aunt, Gayle" Mother's attorney agreed with the court's statement, but later asserted that the relative placement preference puts the relative at the head of the placement line, "[a]nd this is precisely why this Court can't look at the [NREFMs] and Gayle and compare who is better."

On appeal Mother contends that the court erred in doing a comparative analysis of the two placement options in evaluating the section 388 petition. This contention focuses on what the court said rather than what it did. After separately evaluating Gaye and Pamela and David according to the factors in section 361.3, subdivision (a), the court commenced its section 388 analysis by stating:

I've already done an exhaustive analysis of the best interests of the child. And in weighing the two, I think here, while I analyzed them independently, one had no effect on the other in the *Cesar V.* analysis.¹⁹ I tried to look at aunt Gayle independently from Pamela and David and didn't try to look at one can do this, one can do that, the pros and cons. But I think in the 388 I can do that.

Despite its reference to possibly comparing the two placements for purposes of the section 388 petition, the record of the juvenile court's analysis reflects no actual comparison of the relative merits of Gayle versus Pamela and David. The court first focused on the predictable emotional distress Minor would suffer if placed with Gayle to support its conclusion that the placement would not be in Minor's best interests. Next the court reviewed the benefits to Minor of a placement with the NREFMs. Minor had bonded with her de facto parents and then with the NREFMs. She would remain in the same community if placed with them and "still could have that structure and stability that she had with her foster mom"

Mother relies solely on *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*) to argue that the juvenile court erred in performing a comparative analysis. In that case, the appellate court noted a "temptation" in dependency proceedings "to simply compare the household and upbringing offered by the natural parent or parents with that

¹⁹ At the outset of its ruling, the court characterized *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023 as authorizing a placement hearing under section 361.3 based on a relative's placement request in advance of hearing a section 388 petition.

of the caretakers. One might describe that approach as the ‘simple best interest test.’” (*Id.* at p. 529.) The court cautioned against a such a simplistic approach.

In statutory terms, the “simple best interest test” provides an incomplete picture of “best interests” under section 388. It ignores all familial attachments and bonds between father, mother, sister and brother, and totally devalues any interest *of the child* in preserving an *existing family unit*, no matter how, in modern parlance, “dysfunctional.” [Fn. omitted.] It fails to account for the complexity of human existence, substituting in its stead a one-dimensional comparison which does not adequately address the child as a whole person, including his or her formative years with a natural parent. (*Id.* at pp. 529-530.)

The *Kimberly F.* court reversed the denial of a mother’s section 388 petition seeking a return of custody of two children for entirely different reasons than a comparative analysis. (*Id.* at pp. 532-535.) There the juvenile court had relied partly on the mother’s psychological disorder of a narcissistic personality to justify a termination of reunification services at the 18-month review hearing. (*Id.* at pp. 524-525.) Finding that “the decision [five months later] not to grant the section 388 motion was largely animated by the judge’s adoption of the ‘narcissistic personality’ rationale” (*id.* at pp. 532-533), the appellate court criticized continued reliance on this rationale. (*Id.* at pp. 527, 532-533.)

We find *Kimberly F.* inapposite. The juvenile court here did not engage in a comparative analysis of two placements, despite saying it could, and it did not succumb to the temptation of applying a simplistic best interest test that ignored family bonds. Instead, the court acknowledged the tenuous nature of the bond between Minor and Gayle. Mother has not identified an error in the analytical approach taken by the juvenile court under section 388.

C. SUFFICIENCY OF THE EVIDENCE

Mother challenges the sufficiency of the evidence supporting two aspects of the juvenile court’s conclusion that placement with Pamela and David was in Minor’s best interests. Mother contends that the juvenile court should have disregarded the testimony of Minor’s therapist Robert Seymour altogether, and should have disregarded her

daughter's wishes to the extent Minor said she liked visiting Pamela and David more than Gayle.

1. Testimony by Minor's Therapist

Mother filed a separate request that we take judicial notice of a part of the code of ethics of a professional association, the California Association of Marriage and Family Therapists (CAMFT), that describes dual relationships and cautions therapists to avoid them. She has also quoted the relevant passages in her opening brief to argue that the juvenile court should not have accepted the testimony of Minor's therapist Robert Seymour, LMCFT. The Department's brief quotes the same part of this code without separately asking for judicial notice.

We deferred this request for consideration in this appeal. We now deny the request to take judicial notice of this publication for two reasons. First, the juvenile court was not asked to take judicial notice of the document. (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 753, fn. 1 [declining to take judicial notice of code of ethics for real estate licensees published by the California Department of Real Estate].) Second, Mother has presented no evidence either that CAMFT is a branch of our state's government, rendering its publications official acts, or that Seymour is bound by CAMFT's code.

We are aware that Seymour testified he followed an ethical rule prohibiting dual relationships that he believed was promulgated by the State of California. Although expert witness Slater testified that California's Board of Behavioral Sciences has an ethical rule prohibiting dual relationships, as far as we can tell, that Board has yet to promulgate an ethical code, despite requiring course work in dual relationships and other concerns of professional ethics. (Bus. & Prof. Code, § 4980.78, subd. (b)(2)(A).)

At trial, both Mother and Father called experts who suggested that Minor's therapist Robert Seymour, LMCFT, might have been too close to the de facto parents and Minor to give an objective opinion about what placement would be in Minor's best interests. The juvenile court found that Seymour was passionate, but not overly

emotional, and found the suggestion that he was compromised by an unethical dual role to be “unfounded and speculative.”

Mother contends that because Seymour “had a direct conflict of interest[,] ... his opinions regarding the minor’s placement and best interest must be disregarded” as a matter of law, “or at the very least, given little weight by the court.” (Emphasis omitted.) Mother supports this contention by reviewing the testimony of the experts that the court rejected. She also argues, as she did not in the juvenile court, that Seymour appeared ignorant of dependency statutes and he arguably violated an ethical rule against dual relationships.

“The existence or nonexistence of a bias, interest, or other motive” is one factor among many that is relevant to evaluating the credibility of a witness. (Evid. Code, § 780, subd. (f).) The existence of a witness’s bias or unfairness goes only the fact-finder’s evaluation of the witness’s credibility and that determination is not reviewable on appeal unless the testimony is impossible or inherently incredible. (*In re Estate of Russell* (1922) 189 Cal. 759, 769; cf. *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1011.)

At trial, the nature of Seymour’s relationship with the de facto parents was explored by Mother and Father. He testified that he followed an ethical rule discouraging dual relationships and that his long friendship with the de facto parents did not influence his opinion of Minor’s best interests. It was for the juvenile court to evaluate whether Seymour’s perceptions and opinions about Minor were influenced to any extent by his friendship with her de facto parents. Mother has provided no authority requiring his testimony to be disregarded as a matter of law.

2. Testimony about Minor’s Wishes

Mother contends that the juvenile court should have given more credit to Nguyen’s observations and reports that Minor enjoyed visiting with Gayle and wanted to be with her and should have discounted reports by Nguyen and others that Minor enjoyed visiting with Pamela and David more than with Gayle.

Mother essentially resurrects an argument that the juvenile court rejected, that Minor began to say she preferred the NREFMs only because they were the choice of the de facto parents and her therapist. Mother contends that the de facto parents sought to restrict Minor's visitation with Gayle. This is directly contrary to a factual finding by the juvenile court that is supported by substantial evidence. The de facto parents took Minor to visits with Mother, Gayle, and the NREFMs as well as school and therapy appointments. They encouraged Minor to visit with Gayle until there was a dramatic adverse change in Minor's behavior. When the visits began causing Minor anxiety, the de facto parents notified the Department.

Mother now contends that Minor "was experiencing stress because of all the adults who were talking to her about where she wanted to live." Minor told Meendering that it made her anxious and uncomfortable when her grandmother, Gayle's sister, directly questioned her lack of interest in living with Gayle during a visit on April 1. The evidence suggests that was the beginning of Minor's growing anxiety about visits with Gayle. It was magnified when Nguyen came to observe Minor's visit with Gayle and Minor understood, perhaps the first time, that her room at Gayle's was supposed to be her permanent room. Mother asserts that during this visit, Minor told Nguyen she wanted to live with Gayle. There was no such testimony. Nguyen testified that Minor said she liked visiting with Gayle, but he also testified that she had told him a few days earlier that she wanted to live with the NREFMs. Mother's brief does not acknowledge that statement attributed to Minor.

Mother questions the juvenile court's conclusion that Minor's anxiety was triggered by the prospect of living with Gayle forever, suggesting there were other causes. But substantial evidence supports this finding. On appeal we do not reweigh the evidence and reassess the credibility of witnesses. (*In re I. J.* (2013) 56 Cal.4th 766, 773.) Section 361.3, subdivision (a)(2) directs social workers and juvenile courts to consider the child's wishes, if appropriate, in evaluating a potential relative placement.

Mother has provided no reason compelling the juvenile court to ignore the bulk of the testimony about Minor's wishes.

IV. DISPOSITION

The placement order is affirmed.

Grover, J.

WE CONCUR:

Rushing, P. J.

Márquez, J.

In re D.S.; DFCS v R.S. et al.
H041219