Filed 12/29/16 S.G. v. Superior Court CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

S.G.

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

B272203

(Los Angeles County Super. Ct. No. CK86538)

ORIGINAL PROCEEDING; petition for extraordinary writ. Stephen C. Marpet, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition denied.

Law Offices of Vincent W. Davis, Vincent W. Davis and Stephanie M. Davis, for Petitioner.

No appearance for Respondent.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Kim Nemoy, Deputy County Counsel, for Real Party in Interest.

Petitioner S.G. is the former prospective adoptive parent of minor E.G., who was placed in S.G.'s home days after his birth. E.G. was born with fetal alcohol syndrome and struggled with failure to thrive. Citing concerns over E.G.'s persistent lack of appropriate weight gain and S.G.'s apparent noncompliance with his doctors' recommendations, the Los Angeles County Department of Children and Family Services (DCFS) removed E.G. from S.G.'s home when E.G. was 22 months old and placed him with another family, the E.s.

Because DCFS did not conduct the removal in accordance with the procedures mandated by Welfare and Institutions Code section 366.26, subdivision (n) (366.26(n)),[1] S.G. was unable to challenge the removal contemporaneously. S.G. instead filed a section 388 petition alleging that DCFS abused its discretion when it removed E.G. from her care. By the time S.G.'s petition was heard approximately nine months later, E.G. had gained almost 8.5 pounds and formed a strong bond with the E.s. After a hearing best described as procedurally muddled, the dependency court ruled it was in E.G.'s best interest to remain with the E.s under both sections 366.26(n) and 388. The court denied S.G.'s petition and ordered her to have no further contact with E.G.

In the instant petition for extraordinary writ relief, S.G. argues that the dependency court denied her an opportunity to

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

present evidence regarding her section 388 petition and made incorrect findings under section 366.26(n). She contends it was not in E.G.'s best interest to be removed from her care and asks this court to vacate all of the findings and orders made pursuant to sections 366.26(n) and 388 and remand the matter back to the dependency court.

DCFS did not comply with the procedural requirements set forth in section 366.26(n). S.G. does not seek redress for these violations, and indeed, meaningful redress for the noncompliance is not possible on the record before us. The hearing S.G. eventually received satisfied the requirements of due process, and the dependency court's findings were appropriate and supported by the record as it stood at the time of the hearing. Accordingly, the petition is denied.

FACTUAL AND PROCEDURAL BACKGROUND

I. *E.G. is Placed with the G.s and Struggles to Grow*

E.G. was born in July 2013. S.G. and her then-husband, A.G. (collectively the G.s), had entered into a private agreement to adopt E.G. and were present at his birth. Unbeknownst to A.G. and S.G., E.G.'s biological mother consumed alcohol and used drugs during her pregnancy with E.G., who tested positive for illicit substances at birth. DCFS intervened, detained E.G. from his biological mother, and placed him with the G.s on July 9, 2013. He was declared a dependent under section 300 in September 2013, and a permanent plan of adoption was ordered at the same time.

E.G. was diagnosed with fetal alcohol syndrome (FAS) and failure to thrive (FTT) in August 2013. By September 2013, E.G.'s pediatrician, Dr. Xiuli Xu, noted that E.G. was "falling off [the]weight curve." E.G.'s height was at the 44th percentile for

children his age, but his weight of just under 10 pounds placed him at only the third percentile for weight. Dr. Xu advised the G.s to increase E.G.'s formula intake.

E.G.'s failure to thrive persisted. In November 2013, his weight was at the second percentile, and Dr. Xu noted that he had "inadequate intake." She advised the G.s to increase E.G.'s formula again and referred them to a nutritionist. E.G. had a "complete lab study" in January 2014 "which resulted in normal levels." E.G. saw a nutritionist in March 2014; she recommended that the G.s increase his calorie intake and prepare a food diary documenting his eating habits.

By April 2014, E.G.'s weight had fallen to the zero percentile. His failure to gain weight continued into July 2014, when Dr. Xu noted, "Not gaining weight—probably result of [FAS]." At E.G.'s next medical appointment, in September 2014, Dr. Xu noted, "Persistent failure to thrive without significant catch up." She advised the G.s to encourage E.G. to eat "3 regular meals and 2 snacks, educated meal portions." Dr. Xu further recommended that the G.s "Start Pediasure 1-2 cans per day or Carnation Instant Breakfast 1-2 times per day," and reiterated the nutritionist's instruction to "Keep Food Diary before next visit." She ordered lab tests, including a complete blood count, urinalysis, and testing for lead exposure. The results of these tests were largely unremarkable and did not suggest any specific metabolic disorder.

II. *The G.s Separate*

DCFS approved an adoption home study for the G.s in July 2014 and scheduled an October appointment for them to sign adoptive placement documents. One week prior to that appointment, the G.s informed DCFS that they planned to

dissolve their marriage. Both A.G. and S.G. "expressed an interest in pursuing the adoption of [E.G.] with joint custody."

E.G. saw Dr. Xu in November 2014 and again in December. Between those two visits, E.G. lost 0.75 pounds. Dr. Xu noted that E.G. continued to struggle with FTT; he had both "persistent" low weight for his height and poor appetite. At the December appointment, Dr. Xu advised S.G. to continue feeding E.G. three meals per day but to replace his snacks with either Boost Kids or Carnation Instant Breakfast and increase those supplements to twice daily. Dr. Xu's notes further state, "consider nutritionist consult on calorie intake," and "[c]onsider GI consult for poor appetite."

The G.s filed for divorce after E.G.'s December appointment. By January 2015, S.G. reported that she was having "safety issues" with A.G. when they exchanged custody of E.G., which prompted DCFS to change the exchange location to a neutral one. DCFS nonetheless opined, in the status review report it submitted for a January 14, 2015 section 366.3 hearing, that the G.s "continue to provide a safe, secure, nurturing home environment" for E.G. DCFS further noted that both A.G. and S.G. "treat the child with respect, kindness, and love," and had "a strong bond" with E.G. Despite these family strengths, DCFS reported that it had "some reservations toward the couple's ability to co-parent effectively after their divorce is finalized." According to DCFS's report, A.G. and S.G. were attending therapy to address these issues "as part of the up-date of their Homestudy." DCFS requested more time to assess the G.s' "ability to meet the long term needs of the child." The court calendared the matter for further review on July 15, 2015.

E.G. continued to visit the doctor regularly. On January

22, 2015, he weighed just over 19 pounds, which was a gain of more than a pound since his December visit but below the third percentile on the growth curve. Dr. Xu nonetheless noted that E.G. was "[m]aking good progress." One week later, however, S.G. reported to DCFS that E.G. had begun to wake up in the middle of the night. "[S]uch was attributed to the changes in the home environment."

III. *DCFS Becomes Concerned and Removes E.G.*

By the middle of February 2015, E.G. had lost more than half a pound and was consuming only one can of Boost per day rather than the recommended two. Dr. Xu's notes indicate that she again advised the G.s "to take 2 full days intake diary and e mail," so that a nutritionist could perform a calorie count.

Public health nurse Margaret Medrano reviewed E.G.'s medical records on April 14, 2015. She noted that E.G. continued to have poor weight gain and that "it did not appear as if [S.G. and A.G.] had yet responded to the request" that they complete and submit to Dr. Xu a food diary recording E.G.'s eating habits. Medrano telephoned S.G., who "reported that she had just completed the food log and was in the process of emailing it to Dr. Xu." When Medrano questioned S.G. about E.G.'s eating habits, S.G. stated that E.G. "is not a picky eater, he just eat [*sic*] small portions." S.G. further stated that she had stopped providing E.G. with PediaSure, which Dr. Xu prescribed, in favor of PediaSmart, an organic product without high fructose corn syrup that she ordered from Amazon.com. Medrano explained to S.G. "that she should follow the doctor's recommendations and explained the importance of providing a diet with high calories and informed her that she should be using butter, creams, gravy on his food as well as powdered milk, Carnation Instant

Breakfast etc." She also provided S.G. "with information on food choices and tips for nutritious high calorie options" and emphasized the importance of completing a food log or diary. Medrano noted that S.G. "sounded receptive" to the recommendations. The next day, S.G. ordered "Boost Very High Calorie Nutrition Beverages" from Amazon.com.

In light of its concerns about the lack of a food diary, DCFS scheduled a "joint home visit" for April 17, 2015. Medrano spoke to S.G. and A.G. about the importance of providing high calorie foods for E.G. and keeping a log of his eating habits. She also advised S.G. that she had referred E.G. to the FTT Clinic at UCLA and made an appointment for him at a county medical center. At his April 20, 2015 visit to the county center, E.G. weighed around 19 pounds, roughly the same as he weighed in January.

E.G. had his appointment at the FTT clinic on April 28, 2015. The notes from that visit document a "long history of FTT" and show a small uptick in his weight, to 19.58 pounds. DCFS later added, "FTT clinic coordinator reported that [S.G.]'s "affect was very flat and she appeared depressed."

On May 1, 2015, A.G. called Medrano to tell her that E.G. "was not eating for several days." Medrano recommended that A.G. seek medical attention for E.G. immediately. She also convened a telephone conference with two social workers and E.G.'s child care provider—but not S.G. or A.G. E.G.'s child care provider reported that she had informed S.G. that E.G. had not been eating well over the last few days and advised her to take him to the emergency room. S.G. took E.G. to urgent care on April 30, but did not tell A.G. she had done so. The child care provider also told Medrano and the social workers that she

believed the G.s' separation and divorce was adversely affecting E.G. According to DCFS, the child care provider "appears to be the mediator between the couple and heard all the problems and conflict that were occurring." The child care provider expressed further concern about E.G.'s diet and told Medrano that S.G. "instructed her to give [E.G.] water." Medrano instructed the child care provider to increase E.G.'s calorie intake and specified foods he should be eating. This apparently was new information to the child care provider; DCFS reported that, "The Department was astonished that [A.G. and S.G.] never provided important medical information to child care provider who is supervising [E.G.] five days a week full time."

On May 4, 2015, DCFS had an emergency Team Decision Making meeting to create a safety plan for E.G. Per that plan, E.G. would remain in S.G.'s home, and S.G.'s mother would stay at the home to "support family." E.G. would stay in the care of his child care provider during lunch time, and S.G. would "try to participate in lunch with child [and] childcare provider." S.G. also was supposed to continue taking E.G. to all of his medical appointments and "work on child's medical needs (gain weight)."

On May 7, Medrano contacted Dr. Lyn Laboriel at the UCLA FTT clinic and sent her E.G.'s medical records to review. Dr. Laboriel sent back the following note: "Discussion with PHN Margaret Medrano and review of extensive notes that she forwarded including food diaries, weight checks, etc. from past weeks. Became very clear that the issue in this case is not simply that of weight gain but of clear underfeeding of this child while in custody of fo[ster] parents with marked contrast to normal feeding while being fed by day care provider. Ms. Medrano reviewed with me the extensive efforts that have been made to

assist fo[ster] mo[ther] with menus, recipes, advise [*sic*] to use Pediasure, Instant Breakfast, etc. most of which have been dismissed out of hand by mother. . . . The problem here is failure to feed and not simply failure to gain weight. The strife between parents compounded by parents' inability vs. refusal to properly feed child is cause for serious concern. Whereas I was reluctant to see the placement terminated solely for poor weight gain in a child with Fetal Alcohol Syndrome, failure to properly feed and care for the child is quite a different matter and I concur in the reluctant decision of DCFS to consider detention of the child to another placement altogether. I have communicated this to Ms. Medrano in conversation today."

On the morning of May 8, a DCFS social worker made an unannounced visit to S.G.'s home. The social worker observed that S.G. had fed E.G. breakfast, but "a lot of the food was still there." The social worker asked S.G. to show her the high-calorie foods she had been instructed to provide E.G. S.G. did not have any such foods in her refrigerator; she told the social worker she had purchased some ice cream but left it at her mother's house. The social worker reminded S.G. that she needed to provide E.G. with high-fat and high-calorie foods. S.G. responded, "is that OK to give him that food." The social worker interpreted S.G.'s comment to mean that S.G. "did not get the importance of feeding [E.G.] a high calorie diet."

Later that day two social workers removed E.G. and placed him in a different foster home. For reasons unclear from the record, E.G. was removed from that foster home a few weeks later and placed in the approved adoptive home of the E.s.

The E.s took E.G. to the FTT clinic on June 16, 2015. His weight at that time was below the second percentile for children

his age. The doctor noted that it was "hard to evaluate progress" since E.G. had just been placed with the E.s the day before. A clinical dietician instructed Mrs. E. about an "age appropriate diet" for E.G.

IV. *S.G. Files a Section 388 Petition*

On June 24, 2015, S.G. filed a "Request to Change Court Order" pursuant to section 388, which permits persons having an interest in a dependent child to seek modification or set aside of previous court orders. (See § 388, subd. (a).) She alleged that "Social Service abused their discretion by removing the minor" from her care and requested that E.G. be "immediately re-placed" with her, or, in the alternative, that she receive "frequent and continued contact" with him. S.G. alleged, "The Agency did not conduct or have conducted a complete a full [*sic*] assessment of all factors potentially contributing to the minor's failure to thrive (FTT). It is well established that fetal alcohol syndrome (FAS) causes FTT symptoms. The minor was diagnosed with FAS and was under the strick [*sic*] care of medical professionals and therapists."

S.G. attached numerous exhibits to her petition. Among them were letters from her family, friends, coworkers, and estranged husband A.G.[2] describing S.G. as a loving and devoted mother to E.G. A letter from E.G.'s former occupational therapist, Desiree Gapultos, was similarly laudatory. S.G. also provided letters from Dr. Xu and Dr. Thomas J. Grogan, an orthopedic surgeon. Dr. Xu's letter stated that she had been

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[2] A.G.'s letter also stated that he "removed [him]self from the adoption process and gave up any rights [he] had on May 4, 2015, [s]o that DCFS would allow [S.G.] to adopt [E.G.] on her own."

seeing E.G. regularly since infancy and had been following his "poor weight gain since 2 months of age." It further stated, "At this time, a medical reason for his failure to thrive has not been found." Dr. Grogan, who had never seen E.G. but reviewed his medical records, opined that E.G.'s "presentation fits within the spectrum of fetal alcohol spectrum disorder" and "the most likely cause of his failure to thrive is the fetal alcohol syndrome." S.G. also attached her own declaration, certificates of completion for medical foster care training and a parenting class, a WIC program appointment log, excerpts from E.G.'s medical records, and several articles about FAS and FTT. The court granted a hearing on the petition and set it for the already scheduled court date of July 15, 2015.

On the same day E.G. filed her petition, June 24, 2015, DFCS filed an ex parte application seeking appointment of an educational surrogate for E.G. and approval of his "planned placement." In that filing, DCFS described the various medical appointments and conferences outlined above, and attached E.G.'s full medical records. It also stated, "The Department has made extensive efforts in assisting [S.G. and A.G.] to help [E.G.] gain weight. The Department made the decision to remove [E.G.] from the home of [S.G. and A.G.]. It is the Department's assessment that the caregivers refused to communicate among each other and are not feeding [E.G.] accordingly. The Department made the decision to move [E.G.] from the caregiver's home on the base [*sic*] that [S.G. and A.G.] were not following doctor's recommendation regarding the appropriate feeding of [E.G.]. The Department had serious medical concerns for [E.G.]'s physical well being with regarding [*sic*] his lack of weight gain. Several medical professional [*sic*] made it clear to

the caregivers to increase [E.G.]'s daily calories but caregivers failed to follow medical professional's recommendation." DCFS further reported, "The Department would like to respectfully inform the Court that the Department also determined that the emotional distress of the couple's divorce highly contribute [*sic*] to the neglectful feeding of [E.G.]. Furthermore the Department made the decision to move [E.G.] as Adoption has rescinded the adoption home study of [A.G.] or [S.G.]. . . . [¶] As of the writing of this memo Mrs. E. reports that [E.G.] is eating small portions all day long. Mrs. E. is a stay at home parent and has committed assuring [*sic*] that [E.G.]'s physical, health and emotional needs are met."

V. *E.G. Thrives While the Hearing is Delayed*

DCFS filed a status review report on July 15, 2015, the date of the scheduled hearing. In that filing, DCFS reported that E.G. was "thriving in his new adoptive placement" and already had gained three pounds. DCFS further noted, "It is interesting to note that since the child's removal from [S.G. and A.G.] the current report from Harbor UCLA, Failure to Thrive clinic . . . indicates that [E.G.]'s medical diagnosis [*sic*] is excellent." DCFS also reported that a social worker spoke to Dr. Xu on July 9, 2015. "Dr. Xu, MD stated that one of her concerns was the food logs. . . . [Dr. Xu] stated at every appointment she asked the parents to show her the food log. She stated they would tell her, 'They forgot it at home.' Dr. Xu stated she asked the parents to fax it or to email to her. She reported that even with the technology of email [S.G.] failed to submit the food log. She stated it wasn't until the department was thinking about removing the child from the parents did they finally provide her with a food log. . . . Dr. Xu further stated when she finally

received the food log (upon the request from PHN M. Medrano) the log was incomplete. Dr. Xu gave this CSW an example of an entry. She reported after reading the food log she had RED FLAGS about the family."

The status report included an additional section titled, "Why the Court and the child's attorney were not notified of [E.G.]'s replacement."[3] There, DCFS explained, "The court is respectfully informed that on 5/11/15 at [*sic*] notification to attorney was faxed to minor's attorney. Attach [*sic*] is the fax confirmation. With regards to notifying court, the Department was not aware of the new policy of Notice of Replacement to Court. The Department respectfully apologizes for the oversight."

DCFS filed a last-minute information on July 15. In that filing, DCFS reported that E.G. visited the FTT clinic the previous day and weighed over 22 pounds. The last-minute

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[3] Section 366.26(n), which took effect in 2005, requires DCFS to notify the court, any caretaker who is or may be a prospective adoptive parent, the child's attorney, and the child, if he or she is 10 years of age or older, *before* removing a child. (§ 366.26(n)(3).) The notice requirement is waived if the removal is necessitated by an emergency, but, even in that situation, "the agency shall notify the court, the caretaker who is or may be a designated prospective adoptive parent, the child's attorney, and the child, if the child is 10 years of age or older, of the removal" as soon as possible and not more than two court days after the removal. (§ 366.26(n)(4).) The Judicial Council has approved mandatory forms to be used for notification purposes. Proof of service of the notice—also a Judicial Council form—also must be filed with the court. (Cal. Rules of Court, Rule 5.727(d).) The record in this case does not contain any form notices or proof of service of notice.

information also included a second explanation for DCFS's failure to provide statutorily required notice of E.G.'s removal to the court and, possibly, S.G. "The child was initiall [*sic*] replaced from the care of [S.G. and A.G.] who were identified as Non Related Extended Family Members (NREFM). According to DCFS Policy, a Notice of Replacement Report is not required when replacing a child from the home of a NREFM."

The court held a brief hearing on July 15, 2015. S.G. was represented by a stand-in attorney, as her regular counsel was in trial. The court continued S.G.'s 388 petition to August 28 and denied her apparent oral motion for de facto parent status. S.G.'s counsel later filed a motion to continue, and the hearing on the section 388 petition was continued to October 22, 2015.

VI. *S.G. Awarded Visits; DCFS Seeks to Terminate Visits*

On August 12, 2015, S.G. filed a section 388 petition seeking visitation with E.G. The court granted that petition the same day, over DCFS's objection. The court stated S.G. was to receive "monitored visits, at least, once a week for two hours." S.G. had her first visit with E.G. on August 19, and had additional visits on August 26, September 3, September 9, September 23, September 30, and October 7.

On October 13, 2015, DCFS filed an ex parte application and order seeking to terminate S.G.'s visitation with E.G. DCFS reported concern that the visits "have resulted in adverse effect on [E.G.]. Since the initial visit on 8/19/15, [E.G.] has lost 1lb. . . . In addition to the weight loss, [E.G.] has been exhibiting behaviors indicative of emotional distress (not previously present) that surfaced when monitored visits with [S.G.] began." The behaviors included difficulties eating and refusal to eat, making himself vomit by stuffing his hands in his mouth, and waking up

screaming several times a night.

DCFS supplemented its ex parte application with an addendum report filed the next day. That report described each of S.G.'s visits in detail. DCFS reported that E.G. did not engage well with S.G., who "spends a lot of time around the issue of food" by bringing food-themed toys, books, and activities, as well as snacks, to the visits. DCFS also elaborated on E.G.'s behaviors after some of the later visits, stating that he had "difficulties eating" and was "smearing his food on himself" and smearing and eating his feces. DCFS reported that these behaviors began after E.G. began visiting with S.G. It also noted that E.G.'s "whole mood changes" when Mrs. E. picked him up from the visits: "He goes from having no affect to being very happy and excited."

S.G. filed an opposition to DCFS's ex parte application on October 14, 2015. In her attached declaration, S.G. stated that she could not "believe there is any reasonable correlation between my 1.5 hour visit per week and [E.G.] continuing to lose weight (FTT) other than a medical reason, including, but not limited to his FAS. . . . There is absolutely nothing that I could have done during our brief weekly visits that would cause [E.G.] to lose weight." She stated that she believed DCFS sought to terminate her visits because it had "formed a bias against" her when she made the agency's job more difficult by filing for divorce in the middle of the adoption process.

S.G. further disputed DCFS's descriptions of the visits. She reported that the visits "have been extremely positive and beneficial to [E.G.]'s welfare and they have cemented our existing and strong bond as mother and son." S.G. described E.G. as excited and engaged during the visits, and stated that he told her, "I love you" during the last three visits. S.G. also stated that

the monitors remarked how comfortable E.G. was with her, and commented "on the rich environment that I provide for [E.G.] and how he participates and engages with me."

The parties appeared for a hearing on October 14, 2015. S.G.'s counsel argued against termination of her visits and asked the court to keep the current order in effect until the hearing on her initial section 388 petition, which was scheduled for the following week. The court agreed and put over resolution of the ex parte application to October 22, 2015.

In advance of the October 22, 2015 hearing, S.G. filed an exhibit list and a witness list. The witness list included seven witnesses: S.G.; E.G.'s treating physicians, Dr. Xu and Dr. Laboriel; a consulting physician from the FTT clinic, Dr. Berkowitz; E.G.'s former occupational therapist, Galpultos; his former child care provider; and Dr. Grogan, the author of the letter opining that E.G.'s FTT was due to his FAS.

DCFS filed a last-minute information on October 22. In that document, DCFS reported that S.G. had a visit with E.G. the day before. Although "there was little to no direct eye contact made by [E.G.] to [S.G.]," E.G. "was observed smiling on at least one occasion" and engaged in various activities with S.G., including dancing to a video she played him on her cell phone. E.G. gave S.G. a hug and a kiss at the end of the visit, but refused to call S.G. "mama." He called Mrs. E. "mama" when she arrived. DCFS reiterated its recommendations that E.G. remain with the E.s and that his visits with S.G. cease.

VII. *The Court Frames the Issues*

At the October 22, 2015 hearing, S.G.'s counsel requested another continuance and asked that the visitation order remain in effect in the meantime. DCFS asked the court to terminate

the visits, citing E.G.'s post-visit weight loss and regressive behaviors. In his reply argument, S.G.'s counsel argued that he had "medical evidence to the contrary" of DCFS's contentions. The court told him, "I'm not expecting to have a full medical trial on a 388 to replace . . . . So I'm not going to hear all the witnesses that I was looking at a witness list. Period. That won't happen." The court stated that it did not "see any need for medical testimony," because the only issue to be addressed that day was S.G.'s visitation with E.G. "between now and the hearing date." S.G.'s attorney attempted to explain why he believed the witnesses were important: "It is a medical causation issue. How could a one-and-a-half-hour visit cause this child to lose weight." The court responded, "I don't think that's what they're saying. They're saying, as a result of these visits, that the child is acting out and, as a result of that, hasn't been eating properly and, therefore, loses weight."

S.G.'s counsel asserted that the causation issue was "all connected" to E.G.'s initial removal as well. He explained that there never had been any allegations that S.G. emotionally or physically abused E.G., and suggested that the medical evidence would show that E.G.'s persistent FTT was attributable not to S.G. but to his FAS. The court asked S.G.'s counsel if he was familiar with a recent case, *In re F.A.* (2015) 241 Cal.App.4th 107 (*F.A.*). The court noted that *F.A.* held that even when DCFS admitted that a removal was uncalled for, the question for the court was whether re-placing the child with the original family after she had been with the second family for an extended period was in the child's best interest. The court told counsel, "So that's the issue. I'm telling you right now the issue is not failure to thrive." The court further asked S.G.'s counsel, "Let's assume

you're right. It wasn't a failure to thrive but they detained and took [E.G.] from her and placed with another foster parent. What's the difference between that case and [*F.A.*]? Nothing."

S.G.'s counsel asserted that the difference was that E.G. lived with S.G. for his entire 22-month life before being removed, and only had lived with the E.s for 3.5 months. The court responded, "It doesn't matter. . . . At this point, I'm looking at what's in the best interest. I have a child that's thriving with the caretaker now and doing well except for the visits that have occurred which seem to be causing some delay in the growth of this child. So the question, today, is - - two things. We're going to continue it but should I allow [S.G.] to continue with visits? That's really what I'm facing today and I have some very big concerns about whether I should allow it." Without further discussion, the court reduced the frequency of S.G.'s visits from once per week to once per month.

The court continued S.G.'s original section 388 petition to January 13, 2016, and told her she could present testimony from one doctor at that time. E.G.'s counsel then asked the court to clarify "what kind of hearing we're going to have on the 13th." She explained that although S.G. had filed a section 388 petition, "it's a really a removal hearing. When the department removes from a prospective adoptive parent there's supposed to be a removal hearing within five days of the removal. We're still - - we haven't gotten to that part yet so, I mean - -" She explained that the issue was whether the removal was in E.G.'s best interest, and argued that S.G. should be treated as a prospective adoptive parent (PAP) entitled to such a hearing even though she filed a section 388 petition and never was formally designated as

a prospective adoptive parent.[4]

The court said that, at the January hearing, "we're going to resolve [the] removal order, however you want to classify it. I'm looking at a 388 but it is in fact - - there was no issue of removal and it probably should have been done at a statutory time so counsel didn't - - he picked up the case, filed a 388, that's where we're at." Counsel for DCFS interjected to dispute that S.G. qualified as a PAP entitled to a section 366.26(n) hearing. She continued, "the department gave her notice. She filed a grievance, that grievance was denied because she was not designated a PAP. . . . I don't know that the department consulted with county counsel but that was the procedure that was followed because she had not been designated. Since then, [S.G.'s counsel] and [E.G.'s counsel] neither one asked for that statutory hearing."

At that point, S.G.'s counsel accused DCFS counsel of "misstat[ing] my 388." In his view, a claim that DCFS committed legal error by not holding a timely removal hearing was encompassed within the section 388 petition's sole allegation that DCFS abused its discretion by removing E.G. from S.G.'s home. The court initially disagreed—"That's not the same"—but

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[4] A court may designate a caretaker a prospective adoptive parent "if the child has lived with the caretaker for at least six months, the caretaker currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoptive process." (§ 366.26(n)(1).) A designated PAP is entitled to notice of removal and other procedural protections under section 366.26(n). (See § 366.26(n)(3), (4); *F.A.*, *supra*, 241 Cal.App.4th at p. 121, fn. 12.) A caretaker who has not been designated a PAP but otherwise satisfies the criteria for such designation is entitled to the same protections. (See § 366.26(n)(3),(4).)

ultimately said, "[i]n any event, it's a 388. I'm hearing it on the 13th. And, as indicated, if you want a witness, have him in here in the afternoon on the 13th. . . . "

VIII. *E.G. Continues to Thrive*

DCFS filed an interim review report on January 13, 2016, the day on which the hearing was scheduled. DCFS reported that E.G. visited Dr. Laboriel at the FTT clinic on November 9, 2015, and had improved his weight to the 25th percentile. According to DCFS, Dr. Laboriel described E.G.'s "weight gain velocity" as "spectacular." She further stated, "[E.G.] is doing very well and gaining weight and height and head grown [*sic*] since being transferred to Ms. E. and since visitation with [S.G.] has been curtailed. The current placement seems a much better one for him and I recommend that he continue in the care of Ms. E. Warm and attached interaction with [Ms. E.]." DCFS reported that Dr. Berkowitz, who saw E.G. on November 10, 2015, expressed similar sentiments. "[P]atient is doing incredibly well with current foster home situation, significant improvement in growth and weight. Past feeding difficulties likely anxiety induced . . . stress of interactions with former foster mom." Dr. Berkowitz provided a follow-up letter on December 21, 2015, in which she reported that E.G. continued to do "remarkably well" and was "thriving" with the E.s. DCFS also reported that, after his December 16, 2015 visit with S.G., E.G. refused to eat for two days and became "extra-clingy" with the E.s. DCFS continued to recommend that E.G. remain with the E.s.

On January 13, 2016, all counsel agreed to continue the matter to February 9, 2016. All counsel also stipulated, at S.G.'s request, that all of S.G.'s section "388 documents come into evidence and that the only witness on [S.G.'s] part will be [S.G.]."

On February 9, 2016, DCFS introduced nine reports and other filings discussed above into evidence. The court continued the matter to February 16, 2016 to allow S.G.'s counsel to review several of those documents. The matter later was continued again, to March 17, 2016.

On March 16, 2016, S.G. filed two supplemental documents in support of her section 388 petition: a letter from Dr. William Sears, and Dr. Sears' curriculum vitae. Dr. Sears' letter stated, in pertinent part, that he had reviewed "some" of E.G.'s records and concluded that "to remove an infant with FAS from his 2-year attachment caregiver is certainly not in the best interest of the child." Dr. Sears also opined that E.G.'s physicians should have tracked his growth on a special growth chart for children with FAS, not the standard growth chart. He did not provide any information about where E.G.'s growth or weight would have placed him on such a growth chart.

DCFS filed an interim review report on March 17, 2016. According to the report, E.G. weighed over 30 pounds at his most recent visit with Dr. Laboriel, which placed him at nearly the 50th percentile for weight. DCFS reported that Dr. Laboriel described E.G.'s weight gain as "outstanding" and attributed it to "normalization of his food intake and [Mrs. E.'s] patient pursuit of needed assistance with his eating." Dr. Laboriel further noted that E.G.'s "eating is also much better especially since visitation with . . . [S.G.] has been decreased from weekly to monthly. [Mrs. E.] does report that [E.G.] continues to be very distressed after meeting with [S.G.] and eats and sleeps poorly for 3-4 days after visit. Also has sharp increase in separation anxiety. Concur with letter reportedly written by Dr. Berkowitz recommending termination of these visits altogether and moving on to

permanency placement with [Mrs. E.] who is taking excellent care of [E.G.]." DCFS recommended that E.G. remain with the E.s.

IX. *The Court Hears and Denies S.G.'s Petition*

On March 17, 2016, the court opened the hearing by announcing that the matter was "here on calendar pursuant to a hearing under 366.26 subsection (n)." The court invited DCFS, which bears the burden of proof during a section 366.26(n) hearing (Cal. Rules of Court, Rules 5.727(g) & 5.728(f)), to begin. DCFS counsel stated, "[j]ust to clarify," that the matter was here on S.G.'s section 388 petition—on which the petitioner bears the burden of proof (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317). She nevertheless stated that she did not "object to going forward considering it" a section 366.26(n) hearing, and reintroduced the previously introduced nine reports and filings into evidence, plus a tenth, the March 17, 2016 interim report. The court admitted S.G.'s section 388 exhibits as stipulated, and also admitted the recently filed materials from Dr. Sears over DCFS's and E.G.'s objections.

The court refused to admit "one final document which dealt with the grievance review hearing." S.G.'s counsel argued that the document, which is not in the record, "goes to the way my client was not afforded the appropriate due process and fighting the removal goes to abuse of discretion on 388." The court ruled that the document was irrelevant; "the issue today is whether or not it's in the minor's best interest to remain removed or not and whether there's a basis to return the child, not any administrative hearings that were done by the department." S.G.'s counsel protested, arguing that the document was relevant "to the abuse of discretion on the agency, the 388." The court told

him, "This is not a 388. Let me be clear. This is - - even though you filed a 388 - - your client is a PAP. . . . The department, pursuant to 366.26 subsection (n), made a determination that it was an emergency situation to detain the child from your client. You filed a 388 but actually it was just like an objection to the removal and we're here today pursuant to that issue, not necessarily a 388. . . . Even though it is - - you filed a 388. The issues are very similar."

S.G.'s counsel explained that he filed the section 388 petition because S.G. did not receive the proper section 366.26(n) forms from DCFS, and he believed that his abuse of discretion argument was pertinent to both statutes. The court told him that abuse of discretion is "not even a vehicle under 388. It's whether or not there's a change of circumstance and it's in the minor's best interest." S.G.'s counsel responded that he was going to argue best interest and "keep it to one argument."

Counsel for DCFS said that she would go first under section 366.26(n). In a reversal from her previous argument, she conceded that S.G. was a PAP. She further asserted that the lack of a formal designation to that effect was "why the department did not give [S.G.] notice."[5] "Regardless," she continued, "I think it's clear that it was in the child's best interest that he be removed and it's clear today that it's in his best interest to remain where he's placed and it would be extraordinarily detrimental to remove him from this home and return him to the

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[5] DCFS and S.G. both provide conflicting information about whether DCFS provided S.G. with notice of E.G.'s removal; at some points they say she received something, and at other times they say she did not. The record does not contain any notice or proof of notice and accordingly does not alleviate the confusion.

home of [S.G.] at this point."

E.G.'s counsel agreed with DCFS's counsel that S.G. should have been designated a PAP. She argued that, "although this trial has not conformed with the timeliness of Welfare and Institutions Code 366.26(n), [S.G.] has been given, by this court, a meaningful opportunity to present evidence as to the best interest of E.G." E.G.'s counsel argued that removing E.G. from S.G.'s home was in his best interest and was "necessary to prevent further deterioration of his health." She also analogized the case to *F.A.*, the case the court invoked at the October 22, 2015 hearing. In both cases, she contended, "there was an allegation to remove the child from the home due to abuse/neglect. The agency failed to follow the correct procedure for removing the child and the child was then placed in a[ ] . . . home where the child thrived and bonded to the current caretakers." She asked the court to find that DCFS's procedural errors at the removal stage were harmless and that the removal was in E.G.'s best interest. She also argued that S.G.'s section 388 petition should be denied, because all of the changes in E.G.'s circumstances since his removal were positive ones, and staying with the E.s would be in his best interest.

S.G.'s counsel agreed with DCFS and E.G. that S.G. should have been designated a PAP. He disputed, however, that any procedural error during the removal was harmless. He asserted that S.G. "did not get proper legal notice" and was not afforded her opportunity for a pre-removal hearing under section 366.26(n). He further argued that S.G. had been very involved in E.G.'s health and tirelessly promoted "the child's best interest related to occupational therapy, physical therapy, play therapy,

regional center, dental." He pointed to medical evidence that E.G. had gained some weight "and was on an upward schedule" while living with S.G., and contended that it would not be logical for S.G., a college professor who spent a lot of time and money on a private adoption and cooperated with DCFS, to neglect or underfeed E.G. Moreover, he emphasized, S.G. loved E.G. and had a strong bond with him. S.G.'s counsel did not call S.G. or any of the doctors on his exhibit list as witnesses.

The court told S.G. that it did not "think that there is any negligence on your part." It nonetheless found that the current placement was in E.G.'s best interest under both sections 366.26(n) and 388. "I think we're talking about your inability to properly diet this child caused this child to have a flat growth period where he just didn't grow enough and there was - - this goes back actually to the time when you and your husband decided to divorce. It all started there. In terms of the conflict that was going on between the two of you it was interrupting this child's life. But there's no question that the department acted appropriately, even though they didn't act, maybe, legally correct to detain this child because there's clearly an emergence [*sic*] situation. They tried, and tried and tried to provide you with additional information regarding the failure to thrive and what to feed, follow ups on logs of foods, and all of the things they tried and, clearly, at this point, for purposes of the 388, the change of circumstance this court sees is that the child did nothing but grow and that inures to your detriment because that's why the child was detained because he wasn't growing. And I can only find that it's in this child's best interest to remain with the current caretakers. They've done a good job but, more importantly, what they've done is allowed this child to grow from

less than one percentile to close to 50 percentile. It's a very large jump and it shows the court that it is in this child's best interest, the child's best interest is to remain with the current caretakers. And that is the same standard that the court uses for purposes of .26(n) as well. So, I'm denying the 388 and ordering that the child remain with the current caretakers, pursuant to 366.26(n), as it is in the minor's best interest to remain with the current caretakers," whom it designated as E.G.'s PAPs. The court also found that it would be in E.G.'s best interest not to have further contact with S.G. The court denied S.G.'s request for a stay.

S.G. timely filed notice of intent to petition for writ relief. After several delays associated with transmittal of the record to S.G.'s counsel, S.G. filed the instant petition on October 24, 2016. We issued an order to show cause on October 27, 2016, and placed the matter on our December oral argument calendar. No party requested oral argument. The matter accordingly was deemed submitted on December 19, 2016.

DISCUSSION

S.G. presents two arguments in support of writ relief. First, she contends that the trial court violated her due process rights by declining to hear all of the issues presented in her section 388 petition and by "believing it could rule only one way based solely on the passage of time." Second, she argues that the court erred under section 366.26(n) by focusing on E.G.'s interest in remaining with the E.s rather than his interest in not being removed from S.G.'s care in the first place.

S.G. does not directly challenge the significant procedural defects underlying and complicating the proceedings in this case—namely, DCFS's noncompliance with the notice and hearing requirements mandated by section 366.26(n). DCFS

apologized to the court for its "oversight" in failing to notice the court in two separate filings. First, it claimed that it was unaware of a new, unspecified "policy" requiring notice to the court. This claim is not well taken; whatever the agency's internal policies, section 366.26(n) had imposed clear and specific notice obligations on DCFS for approximately ten years at the time of E.G.'s removal. (See *State Dept. of Social Services v. Superior Court* (2008) 162 Cal.App.4th 273, 284 (*State Dept.*).) Second, DCFS claimed that it misclassified the G.s as "non-related extended family members," and that its policy was not to provide notice when caregivers have that classification. This excuse is equally unpersuasive. Section 366.26(n) requires DCFS to provide notice when caregivers meet the criteria for PAP status, even if no formal PAP designation has yet been made. (See § 366.26(n)(3) & (4).) S.G. plainly met the PAP criteria, and the record reflects that DCFS knew that. E.G. lived with her for well over six months with DCFS's knowledge, S.G. expressed to DCFS a commitment to adopt E.G. even after her marriage dissolved, and S.G. had taken several steps, with the aid of DCFS, to facilitate the adoption process. (§ 366.26(n)(1).)

Regardless of the reasons underlying its actions, it is clear that DCFS did not timely notify the court about E.G.'s removal or evidently provide S.G. with the proper forms to challenge the removal and seek designation as a PAP. These missteps were not, as DCFS now asserts, a mere excusable failure to "follow[ ] removal procedures to the letter." They were violations of DCFS's statutory obligation to ensure that PAPs receive the procedural protections to which they are entitled. We do not condone such conduct.

Nevertheless, the issues presented by S.G.'s petition do not

turn on the procedural errors at the notice stage. We accordingly consider the substantive issues presented.

I. *The Court did not violate S.G.'s due process rights.*

S.G. contends that the court violated her due process rights in two interrelated ways. First, she argues, the court "had so clearly made up his mind he found it completely unnecessary to hear portions of S.G.'s section 388 petition." She contends that the court's reference to *F.A.* at the October 22, 2015 hearing evinced its belief that no relief was available to S.G. "simply because of the amount of time the child had been in the new foster home, which at the time had only been four months." Building on that allegation, S.G. further argues that the court denied her a meaningful opportunity to be heard by preventing her from presenting evidence or calling witnesses "on vital contentions in her section 388 petition." Neither of these arguments is persuasive.

Section 388 permits any person with an interest in a dependent child to, "upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (§ 388, subd. (a)(1).)

The court may summarily deny a section 388 petition if the petitioner fails to make a prima facie showing that a change in circumstance or new evidence requires a changed order or that the requested change would promote the child's best interest. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.) However, the court must conduct a hearing on a section 388 petition if it appears from the face of the petition that the child's best interest may be promoted by the proposed change, modification, or set

aside. (§ 388, subd. (d).) At that hearing, the petitioner bears the burden of showing, by a preponderance of the evidence, that there is new evidence or changed circumstances that make a change of placement in the best interest of the child. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

Here, the court granted a hearing on S.G.'s petition, which alleged that DCFS abused its discretion by removing E.G. from her care before ruling out the possibility that his persistent failure to thrive was due to his fetal alcohol syndrome. In advance of the hearing, S.G. submitted a list of seven witnesses whose testimony she wanted to present; four of them were doctors. In her view, their testimony was necessary to establish that organic factors, rather than S.G.'s care, were the cause of E.G.'s FTT, and that DCFS therefore erred in removing E.G. from her care. The court correctly informed her, however, that medical causation was not the relevant question on either of her then-pending section 388 petitions. The ultimate question presented by such petitions is whether new evidence or changed circumstances render a change in placement in the child's best interest. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The underlying cause of E.G.'s FTT was only tangentially relevant to that query.

In any event, the court did not bar S.G. from presenting evidence on the causation issue; it simply limited her to one medical witness. Limits on the scope or duration of a party's evidentiary presentation do not necessarily violate that party's due process rights. "Due process includes the right to be heard, adduce testimony from witnesses, and to cross-examine and confront witnesses." (*In re Armando L.* (2016) 1 Cal.App.5th 606, 620.) Even in criminal cases, however, "[t]he general rule

remains that "'the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'" [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 155.) The juvenile court is no exception. (See *In re Matthew P.* (1999) 71 Cal.App.4th 841, 851 [noting that the juvenile court has "wide latitude to control dependency proceedings"].) Section 352 of the Evidence Code vests the court with discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time or . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The court did not abuse its discretion by ruling that S.G. could present one medical witness instead of the four she proposed. It is reasonable to conclude that four witnesses testifying to the same tangentially relevant issue would "necessitate undue consumption of time" or create a substantial risk of confusing the issues disproportionate to the probative value of the evidence. Additionally, S.G. later stipulated that she would not call any doctors as witnesses, which undermines her suggestion that the court denied her the opportunity to present their testimony.

S.G. also contends that the court "made it clear it had no intention of hearing evidence or witnesses on vital contentions in S.G.'s section 388 petition believing it could rule only one way based solely on the passage of time." This argument appears to rest on the questions the court asked about *F.A.* at the October 22, 2015 hearing. In *F.A.*, the Orange County Social Services

Agency ("the agency") removed a seven-week-old infant from the foster home she had been in since birth and immediately placed her in another foster home. (*F.A.*, *supra*, 241 Cal.App.4th at pp.109, 111.) After the original foster family lodged a complaint against the agency, the agency investigated the matter and concluded that the infant should not have been removed from their home. (*Id.* at p. 112.) When the agency tried to remove the child from the second home to return her to the first, the second family filed an administrative grievance. (*Ibid.*) State policy mandated that the infant remain with the second family while their grievance was pending. (*Ibid.*) The grievance proceedings took nine weeks, and the hearing on the first family's section 388 petition was continued several times. By the time the petition was heard, the infant had been with the second family for about four months, approximately 80 percent of her life. (See *id.* at pp. 114-116.) The trial court relied heavily on that fact when considering whether placement with the first or second family was in the infant's best interest. (See *id.* at pp. 115-116.) The court "greatly sympathized" with the first family, but reasoned that the infant's best interest would be served by remaining with the second family, which had been approved to adopt her and with whom she had "flourished" for roughly 100 days. (*Id.* at p. 115.)

Here, the court brought up *F.A.* in the context of framing the issues presented by S.G.'s section 388 petition. The court told S.G. that, in that case also involving two competing placements, the question the court had to resolve was not whether the removal from the first home was correct but rather which placement would be in the minor's current best interest. The court was correct that this case involving section 388 petitions

presented a similar question about E.G.'s current best interest. Regardless of the circumstances underlying a child's removal, or the protracted nature of the proceedings, "the court must consider the minor's current circumstances." (*State Dept., supra,* 162 Cal.App.4th at p. 286.) "A primary consideration in determining the child's best interest is the goal of assuring stability and continuity of care. [Citation.] This can occur only by considering all the evidence available to the court at the time the court makes its decision regarding removal of child." (*Id.* at p. 287.)

The court did not say that the facts in this case were indistinguishable from *F.A.* Nor did its reference to *F.A.* demonstrate a "lack of neutrality." To the contrary, the court continued the matter for a full hearing at S.G.'s request, and did not rely upon *F.A.* at all in its final ruling, which properly considered the evidence and circumstances as they stood at the time. It is an unfortunate truth that juvenile dependency proceedings do not stay childhood. "'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' [Citations.]" (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The outcome of this case undoubtedly was influenced by the duration of time E.G. spent with the E.s, but there is no evidence to support S.G.'s argument that the court decided at the October 22 hearing that it would deny her petition based upon *F.A.* or any other particular factor.

II. ***The court made the proper section 366.26(n) finding.***

S.G. also argues that the court made an incorrect finding to

the extent it construed her hearing as arising under section 366.26(n). She contends that, "instead of making the required finding of whether removal from S.G.'s home was in E.G.'s best interest, the trial court found it was in the best interest to remain with the current caretakers." That is, she claims the court was required to consider whether the removal in May 2015 was in E.G.'s best interest and erred by focusing instead on whether it was in E.G.'s best interest in March 2016 to stay with the E.s. We disagree. Although S.G.'s requested finding should have been made contemporaneously with E.G.'s removal, the court properly considered E.G.'s current circumstances when evaluating his best interest at the time of the hearing.

Section 366.26(n) "provides for a hearing to review an agency's decision to remove a child from the home of a prospective adoptive parent." (*State Dept.*, *supra*, 162 Cal.App.4th at p. 284.) If the removal is undertaken under emergency circumstances, to alleviate an immediate risk of physical or emotional harm, the agency may remove the child prior to holding the hearing. (§ 366.26(n)(4).) Otherwise, the agency is required to provide notice to the PAP, court, child's attorney, and the child, if he or she is 10 or older, prior to the removal. This procedure allows the PAP to maintain custody of the child in non-emergency situations, at least until any petition "objecting to the proposal to remove the child" is adjudicated. (§ 366.26(n)(3)(A).) The hearing adjudicating such a petition "shall be held as soon as possible and not later than five court days after the petition is filed with the court or the court sets a hearing upon its own motion, unless the court for good cause is unable to set the matter for hearing five court days after the petition is filed, in which case the court shall set the matter for

hearing as soon as possible." (§ 366.26(n)(3)(B).)

"With the exception of the notice requirements, the same hearing procedures apply to both types of removal and, in each case, the agency 'must prove by a preponderance of the evidence that the removal is in the best interest of the child.'" (*State Dept.*, *supra*, 162 Cal.App.4th at p. 285.) "Further, 'the child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child's best interest.' (§ 366.26, subd. (n)(3)(B); see also *id.*, subd. (n)(4).)" (*State Dept.*, *supra*, 162 Cal.App.4th at p. 286.)

It is undisputed that no such finding was made at or near the time of E.G.'s removal. However, as we noted above, time does not stand still during dependency proceedings. "It is well recognized that dependency proceedings, despite statutory guidelines, may be protracted and, when delays occur, it is likely that the circumstances of the case change." (*State Dept.*, *supra*, 162 Cal.App.4th at p. 286.) Neither we nor the trial court can "simply unwind a juvenile case and presume that circumstances cannot have changed in the interim. They always do." (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1083.) Thus, when making a best interest finding, the court should consider the child's current circumstances as well as the past history of the case. "[T]he court not only may, but should, consider both the facts that led to the . . . removal and evidence of the minor's and the prospective adoptive parents' circumstances up to and including the point in time when the court decides whether the removal should be made permanent." (*State Dept.*, *supra*, 162 Cal.App.4th at p. 287.) "The juvenile court has the discretion to decide that the emergency removal was justified, but that circumstances at the

time of the hearing are such that it is in the best interests of the minor to return to the prospective adoptive parents." (*Ibid.*) Conversely, as in *F.A.*, a court may decide that even though removal was improper or erroneous, it is in a child's best interest to remain in his or her current placement. A finding that the court would not have removed a child at an earlier proceeding does not necessarily establish that returning the child to that home now would be in his or her best interest.

In re M.M. (2015) 235 Cal.App.4th 54 is instructive. In that case, child M.M. was placed with a non-relative PAP prior to termination of her biological parents' parental rights. Shortly before the hearing to terminate those rights, a section 366.26 hearing, the Sacramento County Department of Health and Human Services (DHHS) began a placement assessment for M.M.'s great aunt. The court expressed confusion about the belated kinship assessment. "'All of the information in the report that was prepared for the 366.26 hearing indicates that the child is stable in the child's current placement, that the child has been there the entire child's life, that the child is. . . on track in her emotional development [but] shows some stranger anxiety around new people; and although we know these new people are relatives, the child does not necessarily know that these people are relatives. The only mother child has ever really known is the current caretaker. The report indicates that she desires to provide permanency through adoption, that she has begun an adoptive home study. And at this point in time the law prefers the current caretaker to relatives. That's the way the Court reads the law.'" (*In re M.M.*, *supra*, 235 Cal.App.4th at p. 58.) The court continued the 366.26 hearing.

At the continued hearing, a substitute judge was assigned

to the calendar. Neither DHHS nor the aunt told the new judge about the court's previous comments. Instead, DHHS recommended that M.M. be placed with the aunt. Although the PAP was present at the hearing, she was only in the audience; she "was not asked to join the parties at the counsel table, or asked her position on the proposed change of placement." (*In re M.M.*, *supra*, 235 Cal.App.4th at p. 59.) DHHS did not present any evidence in favor of changing M.M.'s placement, but the court nonetheless ordered her placed with the aunt—and effectively removed from the PAP. (*Ibid.*)

The PAP appealed on the ground that she was deprived of the notice and hearing to which her PAP status entitled her under section 366.26(n). (See *In re M.M.*, *supra*, 235 Cal.App.4th at pp. 59-60.) She further argued that the trial court relied erroneously on relative preference and did not hear evidence regarding the minor's best interests. (*Ibid.*) The court of appeal agreed. (*Ibid.*) It emphasized that the PAP "had no notice, or even reason to suspect, that DHHS intended to continue to pursue its request to remove the minor from her home. [The PAP], although previously designated a de facto parent, was not included at the counsel table, but instead remained in the audience. She was not represented by counsel." (*Id.* at p. 63.) The court of appeal declined to find forfeiture by virtue of the PAP's silence while seated in the audience. (*Ibid.*) It also rejected DHHS's contention that the error was harmless. (*Ibid.*) The court of appeal noted that the evidence in the record showed that both the PAP and the aunt were suitable caregivers, and that there was no evidence showing that removing M.M. from her PAP's home was in her best interest. (See *id.* at p. 64.) The court vacated the placement order and remanded for notice and a

proper hearing. (*Id.* at p. 65.) Notably, however, it directed that, on remand, "DHHS has the burden to prove by a preponderance of the evidence that removal from [the PAP] is in the minor's best interests, *based on the state of the evidence at the time of the hearing*." (*Id.* at p. 65, emphasis added.)

Here, S.G. received a removal hearing, albeit a substantially delayed one. Just as in *In re M.M.*, the proper question at that hearing was whether removal was in E.G.'s best interest at the time of that hearing, and DCFS bore the burden of showing that it was. We review a juvenile court's decision to authorize (or not) a change in placement for abuse of discretion, and its best interest finding for substantial evidence. (*In re M.M.*, *supra*, 235 Cal.App.4th at p. 64.) Those standards are satisfied here.

At the hearing, DCFS presented evidence that E.G. had gained approximately 8.5 pounds and reached nearly the 50th percentile on the growth curve. He was bonded to the E.s and thrived in their care. He called Mrs. E. "mama" and was affectionate with her. Even though E.G. interacted and engaged with S.G. during their visits, he exhibited emotional and physical regressions after almost every visit. These emotional and eating problems abated when his visits with S.G. were limited. Two doctors opined (in reports) that removal from S.G. and continued placement with the E.s were in E.G.'s best interest. This evidence is substantial and amply supports the trial court's finding.

S.G. points to *In re Isabella G.* (2016) 246 Cal.App.4th 708, 724 in support of her contention that a court prejudicially errs by making findings under an incorrect statute, even when the statute requires similar findings. That case is inapposite,

however. In *In re Isabella G.*, the trial court made a generic best interest finding rather than evaluating a relative placement using factors enumerated in section 361.3. (See *In re Isabella G.*, *supra*, 246 Cal.App.4th at p. 724.) Here, both sections 388 and 366.26(n) use a generalized best interest test. The child's current circumstances are pertinent to both statutes. The burden of proof under the statutes is different, but the trial court conducted the hearing in such a manner as to place the burden on DCFS (per section 366.26(n)) rather than on S.G. (per section 388). More importantly, the record reflects that the court evaluated all of the circumstances surrounding E.G.'s removal and placement; that is what it was required to do under both statutes.

DISPOSITION

We recognize, like the trial court, that this is an atypical case inasmuch as there is no evidence that S.G. was a negligent caregiver. We hope it is equally atypical with respect to DCFS's lack of compliance with section 366.26(n). Nevertheless, we are not persuaded that the court erred in conducting the hearing as it did or making the finding it did. We accordingly deny the petition for extraordinary writ relief.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.