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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re N.C., a Person Coming Under the Juvenile Court Law.	B236968 (Los Angeles County Super. Ct. No. CK78948)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. PATTY C., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, D. Zeke Zeidler, Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Patty C. (Mother), the mother of a child declared a dependent of the juvenile court in 2009, appeals from an order terminating her parental rights, arguing that the court should have found that the beneficial parental relationship exception applied and precluded termination of parental rights. Specifically, Mother argues that the juvenile court erred by refusing to allow her to testify regarding the reasons she missed visitation. She also contends the court erred by failing to ensure that all available evidence was admitted, namely, the reports prepared by a visitation monitor or the live testimony of that monitor. Mother also assigns as error the failure to consider placement of the child with her partner or with a maternal uncle.

We affirm. The trial court properly concluded that Mother failed to demonstrate that the beneficial parental relationship exception applied such that her parental rights should be preserved. In addition, the court did not err by approving the child's continued placement with his foster parents. The child's interests were best served by that placement and the request for relative placement was made when family reunification services were being terminated and there was no justification for changing the child's placement.

FACTUAL AND PROCEDURAL BACKGROUND

Initiation of Dependency Proceedings

The Los Angeles County Department of Children and Family Services (DCFS) received a referral regarding N.C. (born Sep. 2008) in July 2009. The referral alleged that Mother suffered from bipolar disorder and, as a result of her failure to take her medication and her abuse of other prescription medication, she was in an unstable condition that caused her to neglect N.C. A voluntary family maintenance case was initiated with the family.

In September 2009, a case manager from a facility at which Mother was receiving counseling reported to the children's social worker that Mother and her partner, Ingrid, yelled repeatedly at one another in N.C.'s presence during a conjoint counseling session. Even though N.C. appeared to be upset due to the fighting, Mother and Ingrid continued to yell. Mother stated she would be moving out of the home she shared with Ingrid.

The social worker visited Mother's home. Mother was distressed, and told the social worker she had injured her back in a car accident and was unable to care for N.C. Nonetheless, she stated that she needed to move immediately because the conflict with Ingrid was not good for her.

A team decisionmaking meeting was held the following day to discuss Mother's condition and the disputes she had with Ingrid. Mother appeared to be sedated and was unable to focus. She also became aggressive, and began saying she would move to Georgia with N.C. or would put him up for adoption before allowing DCFS to remove him from her custody. Based on Mother's instability and irrational behavior, the social worker placed N.C. in protective custody.

On September 14, 2009, DCFS filed a petition pursuant to Welfare and Institutions Code section 300, subdivisions (a) and (b).[1] The petition alleged that Mother and Ingrid's domestic disputes (counts (a)(1) & (b)(3)), Mother's substance abuse (count (b)(1)), and Mother's failure to take proper medication to control her mental illness (count (b)(2)) placed N.C. at substantial risk of serious physical and emotional harm. At the detention hearing, the juvenile court found there was a prima facie case to detain N.C. He was placed in a foster home.

In a pre-release investigation report for October 2009, DCFS stated that the home Mother shared with Ingrid appeared likely to be approved, but Mother indicated she planned to move out of that home in November. In addition, Ingrid needed to obtain a criminal waiver and address an outstanding warrant before her home could be approved for placement of N.C.

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

Mother and Ingrid denied their arguments were ever physically violent. Mother's case manager agreed, but said the arguments were heated. She observed that N.C. became anxious during these arguments. Mother later called DCFS and told the social worker she was leaving Ingrid and did not want her to have contact with N.C. Mother reported that she would no longer attend the mental health clinic and would not comply with DCFS.

At the adjudication hearing in December 2009, Ingrid testified that she and Mother were good friends, not lovers, and that when Mother was pregnant they had decided to co-parent N.C. together. Mother and Ingrid had been living together in Ingrid's home until November 2009, when Mother moved out because Ingrid's home was designated as section 8 housing, and she was not permitted to have anyone living with her. Ingrid's lease would end in March 2010, and they planned to live together again after that.

The juvenile court sustained the section 300 petition as amended and declared N.C. a dependent of the court. DCFS was ordered to provide Mother with family reunification services. Mother filed a notice of appeal from the orders of December 9, 2009.

While that appeal was pending, DCFS prepared a pre-release investigation report dated January 5, 2010. The report noted that Ingrid would not be able to assume custody of N.C. until March or April when her lease ended. In addition, Ingrid had not yet completed the paperwork necessary to address her outstanding warrant and obtain a criminal waiver, although she promised the social worker she would address these matters. DCFS stated that Ingrid could be an appropriate placement, although Mother's relationship with Ingrid also needed to be assessed before such a placement decision could be made.

In late January 2010, Ingrid provided DCFS with dispositions for four prior arrests, but still needed to provide the paperwork for four other arrests and resolve the outstanding warrant. DCFS reported that Mother was not in compliance with her treatment program, drug testing, parenting classes, individual counseling, or domestic violence counseling.

In February 2010, Ingrid was granted de facto parent status.

The Six-Month Status Review

In its six-month status review report dated May 25, 2010, DCFS reported that N.C.'s foster parents were providing a nurturing environment and the child was forming a strong attachment to them and developing well. Mother still was not in compliance with her court-ordered services. DCFS recommended termination of family reunification services.

At the six-month review hearing, counsel for DCFS stated that Ingrid's criminal waiver could not be completed as she had not provided all of the required paperwork; Ingrid disagreed and said she had submitted everything necessary. The matter was continued for one month to permit investigation of this issue, but DCFS again reported that Ingrid still needed to resolve the warrant and provide disposition for four out-of-state criminal matters.

Four of Mother's visits during May 2010 were canceled due to N.C.'s illness, but the remaining twice weekly visits went well. In June, Mother missed two visits with N.C. and did not call the social worker in advance to cancel the visits. N.C.'s therapist expressed concern that after visits with Mother and Ingrid, the child had difficulty regulating his behavior for about 24 hours. He would be easily agitated, act aggressively, and have difficulty sleeping. The therapist recommended that Mother and Ingrid not visit at the same time. The therapist opined that it was in N.C.'s best interest to minimize the strain on the foster parents by minimizing his emotional dysregulation, in order to avoid his having to endure multiple foster placements.

At the continued review hearing on June 25, 2010, the social worker testified that Ingrid's criminal waiver had not been processed because she was living with Mother and needed to provide three personal reference letters. The court ordered DCFS to immediately process the waiver, have it approved or denied, and then determine whether the placement would be appropriate. The court declined to terminate family reunification

services in order to give Mother the opportunity to participate in a dual diagnosis program more suitable to her needs.

The Appeal From the Jurisdictional and Dispositional Orders

In her appeal from the jurisdictional and dispositional orders, Mother argued that, absent some evidence of physical violence between her and Ingrid or involving N.C., there was insufficient evidence presented to the juvenile court to support a finding that N.C. was at risk of "serious physical harm inflicted nonaccidentally" by a parent or guardian, pursuant to section 300, subdivision (a). In a nonpublished opinion filed on August 5, 2010, this court agreed with Mother on that point. (*In re N.C.* (Aug. 5, 2010, B220969 [nonpub. opn.].) We concluded, however, that the remaining jurisdictional findings under section 300, subdivision (b) were supported, and affirmed the order finding N.C. was properly subject to juvenile court jurisdiction.

The 12-Month Status Review

For its September 17, 2010 interim review report, DCFS reported that Ingrid's criminal waiver was approved on August 30, 2010. DCFS did not consider it appropriate to place N.C. in Ingrid's custody, however, because she and Mother were living together. Mother said she would be enrolling in an inpatient substance abuse program, but had failed to enroll in one. Mother had five positive drug tests and three missed tests over the previous three months. DCFS therefore recommended that N.C. remain suitably placed with his foster parents.

In late September, DCFS requested that the court order a psychological assessment of N.C. because his foster parents were concerned about sexualized behavior he had begun displaying. The court granted the request.

At the 12-month review hearing (§ 366.26, subd. (f)) on November 3, 2010, the court found that Mother was in compliance with the case plan and ordered DCFS to continue providing her with family reunification services, including assisting her in enrolling in a dual diagnosis program. The court set a hearing date in early December

2010 to consider the results of N.C.'s psychological assessment. On that date, the assessment had not been completed. However, the court considered and granted a request by N.C.'s foster parents to be considered his de facto parents.

In a report dated December 21, 2010, the psychologist who assessed N.C. stated that she did not see N.C. engaging in any sexualized behavior during the three hours she observed him. Indeed, the foster parents reported that he had stopped engaging in the behavior when they showed disapproval. While the intensity of the masturbatory behavior the foster parents described N.C. as engaging in was outside the norm of what she would expect, the psychologist did not feel that the foster parents had abused him. She also did not think the behavior was caused by Mother's or Ingrid's conduct, since the behavior began after visits with them had been infrequent.

The psychologist reported, however, that "it was quite obvious that [Mother] has a difficult time fitting into [N.C.]'s rhythm. She was rarely in sync with him. She tends to be very intrusive, both emotionally and physically, with [N.C.]. At times she would hug and kiss him, talk to him about missing him, try to feed him simultaneously. She would pick him up or put him down at times when that wasn't what he was signaling that he wanted. At one point, she said that [N.C.] had to sit on her lap to eat, but he didn't want to. There were many attempts at kisses when he didn't want to. She tried to hug him when he didn't want to be hugged. She was quite mentally scattered in her presentation and was physically shaking most of the time. Overall her interactions with him indicate she requires increased help with her parenting ability." Two individuals who were monitors for Mother's visits with N.C. (Gina Sparks and Angela Nestlehutt) had made the same observation of Mother as being quite intrusive and out of sync with the child. They observed that Mother changed N.C.'s diaper much more frequently than was necessary. Mother also had difficulty following the monitoring rules, such as not talking about the case in front of the child. On one occasion, Mother seemed to be very emotional and was attempting to gain sympathy from the child. During another visit, Mother took six to eight Tylenol with codeine within 45 minutes, although the prescription indicated she could take only one every four hours. Mother did not notice

when N.C. ran into the path of other children on the swings, and only prevented him from falling down the stairs when prompted by the monitor.

The psychologist observed that Ingrid had "far greater skills with children than [Mother]." She was more consistent in setting limits on N.C.'s behavior. She was very good at seeing what he wanted and following his lead and engaging in child-friendly play activities. Ingrid was helpful to Mother in assisting her to be more successful in her interactions with N.C.

The 18-Month Status Review

In its March 14, 2011 report, DCFS stated that Mother and Ingrid continued to reside together, but Mother was not in compliance with the case plan. She had failed to enroll in a residential drug treatment program and had missed drug tests on four occasions since January 2011. Mother did not visit N.C. between January 13, 2011, and March 3, 2011. She failed to keep two scheduled appointments with the child's therapist. The foster mother reported that N.C. said on numerous occasions that he did not want to see "Auntie Ingrid." DCFS recommended termination of Mother's family reunification services.

DCFS informed the court that Mother and Ingrid had registered as domestic partners on March 4, 2011.

At the review hearing, the court continued the matter for a contested hearing two weeks hence. On that date, March 28, 2011, Mother testified that she had completed numerous programs, but presented only a certificate of completion for parenting classes. Mother's counsel stated that if the court was not considering returning N.C. to Mother's custody, then she requested that her relatives be assessed for placement. Mother indicated that her brother in Georgia had mailed a letter to the social worker in July 2010 asking to be assessed for placement. Counsel asked the court to initiate an Interstate Compact on the Placement of Children (ICPC).

The court responded that it would not order an ICPC at an 18-month review hearing at which it was terminating family reunification services; at that point, relative

placement would be considered only if a need arose for N.C. to be moved from his current setting. The court then proceeded to find that Mother had partially complied with her case plan, and ordered family reunification services terminated.

The Section 388 Petition

Mother filed a section 388 petition in late July 2011, asking that N.C. be returned to her custody or that she be granted additional reunification services based on her enrollment in an inpatient substance abuse treatment program. The court found that participation in a program for two months after nearly 24 months in the dependency system was inadequate to show a sufficient change in circumstances, and Mother had not shown the requested modification would be in N.C.'s best interest. The court set the matter for a section 366.26 hearing, and asked DCFS to prepare a report regarding the frequency and nature of Mother's visits with N.C.

The Section 366.26 Permanency Planning Hearing

On August 8, 2011, DCFS reported that Mother's visits with N.C. had been sporadic. She was required to call to confirm visits in advance, but she often failed to call; she also failed to attend visits despite having confirmed she would do so. She missed one visit in March, five in April, and three in May. During visits, Mother sometimes promised N.C. he would be coming home with her. She allowed him to make a mess and not clean it up; she often needed to be directed to set limits for the child. She was not receptive to feedback or instruction regarding the need to engage N.C. On one occasion, she threw him into the air and nearly fell when she tried to catch him. Mother began crying during one visit and the child attempted to console her. DCFS recommended that the court terminate Mother's parental rights.

Mother's counsel asked that the matter be set for a contested hearing. The court noted that it did not seem Mother's visits with N.C. were regular and consistent, but granted Mother a hearing nonetheless. Mother stated the reasons she had missed visits included that she was in a rehabilitation program, she had a doctor's appointment, or N.C.

was sick. Mother's counsel asked that the court order N.C.'s foster mother and the preparer of the section 366.26 report be present at the contested hearing. Mother also asked the court to ensure that Gina Sparks, one of the monitors for Mother's visits, was present at the hearing because "[s]he ask[ed] her supervisor to please let her say something on behalf of my relationship with my child. She was not allowed to." The juvenile court set the hearing for August 22, 2011, and ordered the social worker to be present. In the minute order, the court noted that counsel for DCFS was to attempt to have both current and previous monitors available for the contest date.

At the contested section 366.26 hearing on August 22, 2011, Mother testified that N.C. enjoyed visits with her. When he arrived, he ran to her and they would play ball or she would read to him. She fed him and changed his diaper. They enjoyed watching the Metrolink train together. She said N.C. was very intuitive, "where he can tell when I'm sad and he often just grabs my face and he asked me, Mommy are you okay[?]" Mother said she missed several visits with N.C. because she had medical appointments to get clearance to enter the residential rehabilitation program. The court sustained its own objection, stating that the reasons she did not visit were not relevant. Rather, it was relevant whether she had regular and consistent visitation, to what extent she occupied a parental role, and to what extent continuing their relationship outweighed the benefit of the permanence of adoption.

Counsel for Mother did not call any additional witnesses. He argued that Mother and N.C. had a beneficial relationship and that terminating Mother's parental rights would be detrimental to the child. He acknowledged Mother did not visit frequently for a period of time, but noted that she was in a parenting program and then an inpatient program.

Counsel for N.C. and for DCFS argued that the child was adoptable and Mother had not established that her parental relationship with the child was so beneficial that it outweighed the benefit he would gain from being adopted. N.C. was less than one year old when he began living with the foster parents and had been in their care for two years.

The court found that the bond Mother described was one in which the child was taking care of Mother's needs—as when she was trying to hold back tears during visits and he asked if she was okay—rather than the other way around. The court found that N.C. was adoptable, that reasonable efforts had been made by DCFS to facilitate reunification, but it would be detrimental to N.C. to return to Mother's care. Mother had not maintained regular and consistent visitation and contact such that she occupied a parental role in the child's life. Accordingly, the court terminated Mother's parental rights and stated that adoption would be the permanent plan for N.C.

This appeal followed.

DISCUSSION

I. The Beneficial Parental Relationship Exception to Termination of Parental Rights Does Not Apply Here

At a section 366.26 hearing, the court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it *must* select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one of the exceptions set forth in section 366.26, subdivision (c)(1). One such exception is the beneficial parental relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206 [discussing former § 366.26, subd. (c)(1)(A)].) This exception applies when the parents "have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The phrase "benefit from continuing the relationship" refers to a parent/child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the

strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) It is the parent's burden to show that the beneficial parental relationship exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345.)

A. Error in Not Letting Mother Testify Regarding Why She Missed Visits

Mother contends that in finding that the beneficial parental relationship exception did not apply here, the juvenile court committed prejudicial error because it refused to allow Mother to explain the reasons why she missed visits with N.C. Mother argues that a court must not simply engage in a mechanical counting of visits, but instead must evaluate the consistency of visitation in relation to the number of visits *available* to the parent. She argues that "[b]ut for the court's refusal to consider the reasons for nonvisits, it is reasonably probable that the court would have found Mother's visitation satisfied the subdivision (c)(1)(B)(i) test." We disagree.

In the first place, Mother explained to the court at the hearing on August 8, 2011, that she missed visits because she was in a rehabilitation program, she had a doctor's appointment, or N.C. was sick, so the court had before it the evidence that Mother now says it excluded from consideration. More importantly, as the court correctly stated, the crucial inquiry was whether Mother had maintained regular and consistent visitation through which she formed a parental relationship and bond with N.C., such that he would be harmed by severance of the relationship. It is clear from the record that the court was taking into consideration the whole picture before it, including Mother's consistency in taking advantage of the visitation available to her and the resulting bond she had formed with N.C. It did not engage in a simple mechanical counting of visits, find the number lacking, and leave it at that. Mother had been provided with almost two years of

reunification services by the time her parental rights were terminated. Ultimately, over the course of that two-year period, she did not manage to maintain a parental relationship with N.C. While it is clear that Mother loves N.C. very much, the court reasonably concluded based on the available evidence that the benefit to him of continuing his relationship with her did not outweigh the benefit to him of being adopted. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418 [level of attachment required to overcome presumption in favor of adoption is not the frequent and loving contact of a pleasant visitor]; see also *In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) Additional detailed evidence about why she missed recent visits would not have made any difference in the court's conclusion, so even if the court erred by limiting the testimony it received, any such error was not prejudicial.

B. DCFS's Purported Failure to Disclose Material Evidence

Mother further contends that DCFS failed to fulfill its obligation to disclose material evidence regarding the nature and quality of Mother's visits with N.C., thus violating Mother's right to due process. Specifically, Mother assigns as error DCFS's failure to make available the reports allegedly prepared by a Human Services aide, Gina Sparks, who monitored Mother's visitation, or to ensure Gina Sparks was available to testify at the permanency planning hearing. Indeed, Mother suggests that DCFS acted deliberately to withhold crucial evidence, saying that "DCFS's own documents confirm the apparent suppression of this social worker's perspective." According to Mother, DCFS "had an obligation to provide all material evidence about Mother's visitation, and even unintentional nondisclosure creates prejudicial error. (See *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215].)"

We acknowledge that a parent in a dependency proceeding is entitled to discovery and that there is an affirmative duty to disclose favorable evidence. (*Michael P. v. Superior Court* (2001) 92 Cal.App.4th 1036, 1042.) As respondent points out, however, Mother has forfeited this argument by failing to adequately pursue it in the juvenile court. Her counsel did not object to the purported withholding of reports or Gina Sparks's

absence from the hearing on August 22, 2011. If counsel had objected, the juvenile court would have had the opportunity to develop a factual record regarding the existence (or lack thereof) of any reports authored by Gina Sparks. Mother cannot raise this issue now, when the juvenile court had no opportunity to address it below. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

Mother has cited no authority which applies *Brady* principles to juvenile dependency proceedings. As Mother acknowledges, juvenile dependency proceedings are not criminal proceedings. (See *In re M.C.* (2011) 199 Cal.App.4th 784, 812.) They are special proceedings of a civil nature, governed by their own rules and statutes. (*In re A.Z.* (2010) 190 Cal.App.4th 1177, 1180-1181, citing *In re R.R.* (2010) 187 Cal.App.4th 1264, 1275.) In the absence of a dispositive provision in the Welfare and Institutions Code, we look to the Code of Civil Procedure for guidance. (*In re R.R.*, *supra*, at p. 1275.) In so doing, we conclude that *Brady* principles do not apply to dependency proceedings.

More to the point, Mother can only speculate as to what Gina Sparks would have said at the hearing or in any reports she might have prepared. Mother's self-serving suggestion that Gina Sparks wanted to testify but was not "allowed to" is insufficient to support her argument that the absence of this evidence was prejudicial to Mother's case. Instead, the record demonstrates that Gina Sparks apparently shared the opinion held by the other social workers and monitors involved in this case, that Mother's visits were loving and for the most part enjoyable for N.C. But Gina Sparks told the psychologist who evaluated N.C. in December 2010 that Mother was quite intrusive and out of sync with the child. She observed that Mother changed N.C.'s diaper much more frequently than was necessary and wanted a lot of kisses and hugs, which were not always well-received by the child.[2] Thus, even if Gina Sparks had positive comments to offer regarding Mother's visitation, the record shows she also would have had negative things to say. We find that there is not a reasonable probability that Gina Sparks's statements

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[2] We observe that the record does not contain any notes by the other monitor mentioned by the psychologist, Angela Nestlehutt.

would have produced a different outcome had they been introduced. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *In re Celine R.*, *supra*, 31 Cal.4th 45, 59-60 [harmless error test].)

The record demonstrates that Mother did not occupy a parental role in N.C.'s life. Her visitation remained monitored for the two-year duration of the case, and it was noted that Mother required assistance during the visits with keeping N.C. safe from harm, feeding him appropriate foods for his age, setting limits on his behavior, and understanding his needs and reactions to her requests for physical affection. As the juvenile court noted, Mother said that she received comfort from N.C., rather than emphasizing the comfort she provided to him. In summary, while Mother's visits with N.C. were loving and pleasant, Mother did not demonstrate that she occupied a parental role in N.C.'s life such that terminating her parental rights would be detrimental to him.

II. DCFS's Failure to Consider Ingrid or Maternal Uncle for Placement

Finally, Mother contends that it constituted reversible error for DCFS to fail to consider Ingrid or the maternal uncle for placement of N.C., which she maintains was required pursuant to the relative placement preference. (§ 361.3.) Section 361.3 gives "preferential consideration" to placement requests by certain relatives upon the child's removal from the parents' physical custody at the dispositional hearing.[3] (§ 361.3, subds. (a), (c); *In re Lauren R.* (2007) 148 Cal.App.4th 841, 854.) The relative placement preference also applies "[s]ubsequent to the [dispositional] hearing . . . whenever a new placement of the child must be made." (§ 361.3, subd. (d); *Lauren R.*, *supra*, at p. 854.)

Of course, we consider on appeal whether the *juvenile court* committed error; the actions of DCFS are subject to our review, but only in the context of determining whether the trial court abused its discretion by accepting or rejecting a party's challenge to

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[3] "'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).)

DCFS's actions. With that in mind, we briefly recount the facts regarding DCFS's consideration of N.C.'s placement throughout the proceedings.

A. Factual Background

When N.C. was originally detained in September 2009, DCFS considered Ingrid a likely suitable placement, although she was not a "relative" at that time; she disavowed that she and Mother were partners.[4] However, DCFS could not place N.C. with her because she had to obtain a criminal waiver and was not permitted to have anyone living with her in her section 8 housing. Therefore, N.C. was placed with a foster family. As of May 2010, the paperwork remained incomplete for Ingrid's criminal waiver. The juvenile court ordered DCFS to investigate the issue and process the waiver. The waiver was approved in late August 2010. However, at that time DCFS considered it unsuitable to place N.C. with Ingrid (who had moved out of section 8 housing) because she and Mother were living together and Mother had had numerous positive drug tests and was not in compliance with her case plan. By that time, N.C. had been living with his foster parents for one year—half of his young life. At the 12-month review hearing on November 3, 2010, the subject was not raised by Mother or Ingrid, who had been granted de facto parent status in February 2010 and was represented by counsel.

At the 18-month review hearing on March 28, 2011, Mother's counsel requested that Mother's relatives be assessed for placement. Mother indicated that her brother in Georgia had mailed a letter to the social worker in July 2010 asking to be assessed for placement. Counsel asked the court to initiate an ICPC. The court declined to do so, noting that it was terminating family reunification services; at that point in the proceedings, relative placement would be considered only if a need arose for N.C. to be moved from his current setting, and there was no such need.

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[4] Mother and Ingrid were registered as domestic partners, but not until March 4, 2011.

B. Discussion

Regarding placement of N.C. with Ingrid, Mother does not dispute that N.C. could not be placed with her until she had obtained a criminal waiver, which did not occur until almost one year after N.C. was detained. The court and DCFS recognized that Ingrid had a bonded relationship with N.C.; in fact, she had been granted de facto parent status early in the proceedings.[5] As soon as the criminal waiver was approved, DCFS assessed the situation and concluded that Ingrid's home was not a suitable placement because Mother was residing there. It is true that this court found insufficient evidence to support the allegation that N.C. was at risk of physical harm because of Ingrid's and Mother's verbal altercations. However, it does not follow that DCFS's assessment that N.C.'s best interest would not be served by living with Ingrid and Mother was inaccurate. Mother was not in compliance with the case plan, she had had several positive drug tests, and there is no indication that the conflict between Mother and Ingrid had been adequately addressed. It was therefore reasonable for DCFS to conclude that Mother's presence in the home could pose a risk of detriment to N.C. In addition, by that time N.C. had been placed with his foster parents for almost half of his life and was thriving in their care. Changing his placement at that point was not advisable. The juvenile court did not abuse its discretion by accepting DCFS's assessment of the best placement for the child. Thereafter, neither Mother nor Ingrid actively brought to the court's attention the placement issue. The parties dispute whether Mother lived with Ingrid most of the time, but regardless of their living situation, the fact remains that DCFS reasonably determined that it was in N.C.'s best interest to remain placed with foster parents who were providing him with excellent care and continuity. "The overriding concern of dependency

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5 A person seeking to prove he or she is a de facto parent must show by a preponderance of the evidence that "(1) the child is 'psychologically bonded' to the adult; (2) the adult has assumed the role of a parent on a day-to-day basis for a substantial period of time; (3) the adult possesses information about the child unique from the other participants in the process; (4) the adult has regularly attended juvenile court hearings; and (5) a future proceeding may result in an order permanently foreclosing any future contact with the adult." (*In re Patricia L.* (1992) 9 Cal.App.4th 61, 66-67.)

proceedings . . . is not the interest of extended family members but the interest of the child. '[R]egardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected.' (*In re Stephanie M.* (1994) 7 Cal.4th 295, 321.) Section 361.3 does not create an evidentiary presumption that relative placement is in a child's best interests. ([*Stephanie M.*, *supra*,] at p. 320.) The passage of time is a significant factor in a child's life; the longer a successful placement continues, the more important the child's need for continuity and stability becomes in the evaluation of her best interests. (*Id.* at p. 319.)"[6] (*Lauren R.*, *supra*, 148 Cal.App.4th at p. 855.)

Regarding placement of N.C. with a maternal uncle in Georgia, we find no abuse of discretion in the court's rejecting consideration of such a placement at the 18-month review hearing at which it terminated family reunification services.

In *In re Joseph T.* (2008) 163 Cal.App.4th 787 (*Joseph T.*), the Court of Appeal considered the scope of section 361.3, subdivision (d), and held that, at the six-month review hearing (§ 366.21, subd. (e)), a father was entitled to request evaluation of a relative's home for the placement of his dependent child even if a new placement was not required. The court explained that, "*at least through the reunification period*, when a relative voluntarily comes forward at a time when a new placement is *not* required, the relative is entitled to the preference and the court and the social worker are obligated to evaluate that relative (but the court need not again order the parents to disclose other possible relative placements)." (*Joseph T.*, *supra*, at p. 794, first italics added.) Accordingly, "[d]uring the reunification period, the preference applies regardless of whether a new placement is required or is otherwise being considered by the dependency court." (*Id.* at p. 795.) The court explained the relative placement preference continues

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6 We note that for purposes of this discussion and for the sake of argument we are treating Ingrid as a relative. We do not find it necessary to decide whether she was in fact a "relative" within the meaning of section 361.3, where she and Mother registered as domestic partners only shortly before family reunification services were terminated.

to apply "while reunification efforts are still ongoing" because "relative caregivers are more likely to favor the goal of reunification and less likely than nonrelative caregivers to compete with the parents for permanent placement of the child." (*Id.* at p. 797.)

Thus, even if we give to Mother's argument the benefit of the doubt and determine that the relative preference must be considered any time a relative comes forward—even at a time when a new placement is not required—that preference would be required only during the reunification period. Here, Mother raised *with the court* the issue of placement with the maternal uncle for the first time at the 18-month review hearing, when family reunification services were being terminated. Even if the maternal uncle had in fact written a letter to DCFS in July 2010 inquiring about placement, the uncle had since done nothing to follow up on the inquiry or request visitation. At no time prior to the section 366.26 hearing did Mother bring the issue of N.C.'s placement with the uncle to the court's attention and request that it direct DCFS to pursue the matter. When she finally did so, it was too little, too late. Under these circumstances, we readily conclude that the court did not abuse its discretion by refusing to consider the relative placement issue at that late date or at any time beyond the termination of reunification services.

DISPOSITION

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J. MANELLA, J.