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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re JACOB S., a Person Coming Under the Juvenile Court Law.	B268773 (Los Angeles County Super. Ct. No. DK07171)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RYAN S. et al., Defendants and Appellants; JACOB S., Appellant.	

APPEALS from an order of the Superior Court of Los Angeles County. Rudolph A. Diaz, Judge. Affirmed.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

Law Offices of Vincent W. Davis & Associates and Stephanie M. Davis for Defendants and Appellants Ryan S. and Paula S.

Deborah Dentler, under appointment by the Court of Appeal, for Appellant Jacob S.

Ryan S., maternal grandfather (MGF), and Paula S., maternal grandmother (MGM) (collectively, MGPs) of Jacob S., and Jacob S. (the child) (collectively, appellants) appeal an order denying MGPs' Welfare and Institutions Code section 388[1] petition to have the child placed in their custody. Appellants argue the juvenile court erred in refusing to remove the child from the foster parents with whom he had been placed and place him instead with MGPs under their interpretation of the "relative placement preference" of section 361.3. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of September 12, 2014, mother arrived at the home of MGPs unannounced and left the child, then eight months old (born December 2013), in his car seat on the front steps, rejecting MGF's statements to her that MGPs were too busy to care for the child that weekend and mother should make other arrangements for his care. MGPs called the Los Angeles County Department of Children and Family Services (DCFS), which responded, interviewed them, and, after MGPs told DCFS they could not care for the child at that time, commenced this juvenile dependency proceeding, with the court placing the child in a foster home.

Because neither parent has challenged the order terminating parental rights, we focus our factual and procedural statement on those facts and circumstances relevant to the contentions raised by appellants.

DCFS filed a section 300 petition on behalf of the child on September 17, 2014, alleging the child had been left on the doorstep of MGPs, mother had departed even though MGF had told her he was tired and his

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

wife had paperwork to do that evening and they could not then care for the child. The petition also alleged mother's care plan for the child was inappropriate and endangered his physical health and safety; and that mother had a 10-year history of illicit drug use, including methamphetamines and marijuana, which rendered her incapable of providing regular care and supervision for the child and which placed his health and safety at risk. An amended petition later added the allegation that father's whereabouts were unknown other than he was somewhere in Mexico; it also alleged he had not provided for the child from birth.

In the first detention report, DCFS wrote that the child had been placed in a licensed foster home, mother had a history of drug use, and mother was transient. Law enforcement confirmed the events leading to the child being on MGPs' doorstep; that when mother left the child on the doorstep, she had rung the doorbell and gone to her car and left when MGF opened the door even though he had told mother that he and his wife could not care for the child that evening. Mother had lived with her parents from December 2013 until May 2014. Mother's departure with the child from the home followed MGF telling her he thought mother had stolen his guitar, wedding ring and some checks. MGF thought mother had then moved to the homes of different friends, and that she now was transient. He suspected mother was doing drugs. In May 2014, when mother was tested for drugs, DCFS was of the opinion that she had brought the urine of another person to the testing facility.

MGF advised DCFS that he wanted to take care of the child but without mother coming to the home under the influence and taking the child from them. MGM said they were willing to take care of the child, but not on the night mother left him there, as she then had work to do. MGPs had cared

for the child on weekends in the past and were willing to arrange for child care when they went to work if they became foster parents for the child. They also stated there was a paternal aunt Angie who might care for the child.

When a social worker spoke with mother on September 13, 2014, mother was in custody on outstanding warrants. Mother said she had left the child because she had nowhere to stay and was then living in her car, leaving him on the doorstep rather than have him sleep in the car. She denied drug use currently, but admitted she had been in a drug treatment facility in 2013 because she had used methamphetamines. She stated MGF was the only relative she had. The child's father had been deported to Mexico when mother was about five months pregnant. Mother was released from custody on September 15.

At the detention hearing on September 17, the juvenile court found a prima facie case for detaining the child from the mother, detained him in shelter care and set the petition for adjudication on October 22, 2014. MGF attended this hearing (and most subsequent hearings).

MGPs had been together for 10 years and married for four years. MGM had no children of her own. MGF had two children, mother and Ryan S., Jr. (Junior). Junior was living in the home of MGPs at the time the child was dropped off and continued to live there for several more months.

In 1999, MGF had had a physical altercation with Junior, who was then a minor. MGF was then arrested for inflicting injury on a child under Penal Code section 273d. There also was a substantiated child abuse dependency petition that resulted from this incident. Junior had a criminal conviction for unlawful sexual intercourse with a minor. (Pen. Code, § 261.5, subd. (b).) DCFS reported it could not place the child with MGPs until it

obtained waivers pursuant to the Adoption and Safe Families Act of 1997 (ASFA). Such waivers had been denied on October 7, 2014. The report to the court noted that a social worker had gone to the home of MGPs on October 2 to obtain documents needed to obtain ASFA waivers and that review of those documents indicated MGF had not been convicted of any crime. DCFS also reported that a higher level of approval was still required within the department to authorize the child being placed in the home of MGPs because the 1999 petition had been sustained and because Junior was continuing to live there. The report noted Junior would move out if that were required. DCFS reported that a "safety plan" would still need to be in place and that would require determining how often Junior could visit if the child were to be placed there. Junior also would not be permitted to have a key to the house.

MGPs' home was neat and adequately furnished; the lower kitchen cabinets had safety locks and MGM had promised to child-proof the entire house if the placement were made. The child would have a room to himself, although Junior's clothes were in one side of the closet in that room. MGM advised that when the child had stayed overnight before the juvenile proceedings had been instituted, Junior would stay overnight with a friend.

DCFS advised the court that there were "some concerns/hindrances with placement with [MGF] given the pending ASFA approval, the prior substantiated [petition for] physical abuse [by] [MGF] [of] the maternal uncle as a minor child with behavior/psychological challenges at the time." DCFS also reported that Junior would have to relocate for the placement to occur because of his criminal record of unlawful sex with a minor. Junior also had outstanding warrants related to this conviction in 2008 and 2011.

MGPs had notified DCFS that they had been involved with the child's care since his birth, and were willing to care for the child and wanted him

placed in their home. They were willing to adopt him if they needed to do so, but they only had "means to care for the child [ ] for about two to three months on their savings pending activation of placement funding and day care assistance." During the interview with the social worker, MGF said "in a slightly raised voice that the system is working against the mother" because of the distances she must travel to attend the programs she must complete. MGF also questioned why Junior would have to move out as a condition of placement of the child. MGF stated he was frustrated at the department's safety concerns arising out of Junior's record, stating it was only "puppy love" and that the families had known each other for years when Junior and the underage girl had had sex.

Junior said in his interview that he and the underage female had had "consensual sex," and it was not sexual abuse. In his opinion, it was the State of California that prosecuted him, not the girl's family. He acknowledged that the girl's father had obtained a restraining order against him. The police report for the incident stated that Junior and the girl had had consensual anal sex and multiple instances of sexual intercourse at MGF's home while MGF was asleep; and that both of the girl's parents had wanted Junior prosecuted. Junior stated he was not a sexual predator and did not understand why his contacts with the child would need to be monitored. He also said it would be a hardship for him to move out of his father's house, but he was willing to do so so the child could be placed in the home. He and MGF both asked if there were a way for the child to be placed in the home without Junior moving out.

DCFS recommended the court give it discretion to place the child in the home of MGPs contingent on several conditions, including Junior having moved out and verification that his belongings were no longer there. DCFS

also asked that MGPs enroll in a substance abuse support group to help MGPs deal with mother's substance abuse.

On October 15, 2014, the juvenile court gave DCFS discretion to place the child with MGPs (subject to obtaining the ASFA waivers) and ordered DCFS to file a supplemental report addressing placement by October 22, 2015. In the requested report, DCFS advised that the child remained in the foster home, the foster parents had fallen in love with the child, he had no stranger-danger behaviors and became excited when the foster parents enter the room. DCFS reported MGF had expressed "second thoughts" about the current dependency case, stating he did not want to enable mother any longer and he was tired of her behaviors. He noted mother had struggled with caring for the child and there had been four DCFS referrals since the child was born.

DCFS reported that mother had told the foster mother she wanted the child placed with MGPs. DCFS reported that a paternal aunt was also willing to care for the child, and DCFS would continue to seek to place the child with relatives.

The Last Minute Information for the court prepared for the November 24, 2014 hearing (to which matters had been continued) indicated the ASFA waiver for MGF remained pending. It also reported Junior had agreed to move out because of his non-exemptible criminal history. At the hearing, the juvenile court sustained the petition and continued the disposition hearing to December 15, 2014, to address the issue of placement with MGPs. The court had previously ordered that MGF could visit if his visitation were monitored; the foster parents agreed to monitor such visits.

In the Last Minute Information report prepared for the court for the December hearing, DCFS reported the ASFA assessment for MGF's home

was not approved because of MGF's 1999 child abuse referral and because Junior was still in close proximity to MGPs' home, both attending school and working nearby; these circumstances would make it difficult to monitor the frequency of his visits and assure he would not have unmonitored contact with the child. The ASFA division supervisor indicated that "extreme caution should be taken when considering the prospective placement . . . given the significant risk that exists in the home due to the history of abuse. . . ." The supervisor also urged caution because Junior would still present "significant contact and risk/safety issues" "to any dependent child placed in the home."

At the jurisdiction/disposition hearing on December 15, 2014, the juvenile court declared the child a dependent of the court and declined to place the child in the home of MGPs, instead continuing his placement with the foster parents. Mother was given reunification services and ordered to drug test, to complete parenting classes and obtain individual counseling. Mother was given monitored visits twice a week for two hours each. The court ordered DCFS to assess the residence of mother and her now-roommate for possible placement, and set the matter for a six-month review hearing on June 15, 2015, and a progress hearing on January 12, 2015. At that January hearing, the court addressed issues regarding mother, including that she was not staying in contact with the department and that the residence where she was now residing was not a suitable living arrangement for the child. The court ordered DCFS to continue to assess placement, continuing the matter to June 15, 2015.

MGPs' Petition

On June 15, 2015, MGPs filed a petition under section 388 in which they asked the juvenile court to either (1) change its December 15, 2014 order and now place the child in their home or (2) give them liberal visitation,

including overnight visits with the child in their home. They also filed a request for de facto parent status.[2] In support of their petition, MGPs alleged their home was safe for the child and the reasons for the court's December 2014 order no longer existed, as Junior had moved out in December 2014 and did not spend much time there, as he went to school, worked and now had a child of his own. They provided evidence to the court that the charge that MGF had physically abused Junior had been dismissed, and MGF promised that he would obey any order the court might make regarding contact by Junior with the child.

MGPs also argued that placing the child with them was in the best interests of the child; he had lived with them from his birth until May 2014; they were able to meet all of his needs and have the ability to care for him; it was in his best interests to grow up with family members who love and care about him; indeed, his "blood" relatives cared enough about him to hire counsel to represent them. The court set a hearing on the petition for July 9, 2015.

In a June status review report, DCFS stated the child was well adjusted in the home of the foster parents. DCFS also reported (as it had in late 2014) that the circumstance that MGF had been arrested for the Penal Code section 273d offense triggered a department policy that would not recommend placement in a home in which a caregiver had been arrested for willfully inflicting corporal punishment on a child. In a later report, DCFS advised the court that, in a July 1, 2015 visit to MGPs' home, the department learned that Junior was continuing to visit, but was told that if the child were placed there, Junior would then cease to visit and he would not have

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[2] The foster parents also filed a request for de facto parent status on this date. Neither request was granted.

access to the home or to the child. In DCFS's view, Junior's stated willingness to absent himself from the home did not fully address the significant risk to the child that he presented. DCFS assessed the conditions of MGPs' home, noting there was a room containing a crib and toys.

From the time the court had granted MGPs visits with the child, which were ordered to be on Saturdays, MGM had consistently visited each week for one to one and a half hours. MGF had not visited consistently. Even though the foster parents had offered to accommodate him by having him visit on Sundays, as that did not conflict with his work schedule, and had asked him on numerous occasions if he would like to do so, he did not visit except infrequently. Although MGPs were asked to bring snacks, diapers, and wipes to their visits, they never did; the visits themselves went well.

DCFS also advised the court that mother was not visiting as scheduled, would not attend even after confirming her visits, when she did visit would arrive late and fail to bring diapers or food for the child as she was supposed to do, and occasionally called the child a "jerk." DCFS recommended termination of reunification services for mother.

DCFS recommended that the court deny the section 388 petition and allow MGPs continued monitored visits, and allow DCFS to liberalize them as circumstances warranted.

On July 9, the date set for the hearing on the section 388 petition, counsel for MGPs asked that the matter be continued so she could examine the preparer of the report which DCFS had filed prior to that hearing. Due to schedule conflicts among counsel, the hearing on the petition was continued to August 19, 2015. The court also addressed issues with respect to the child and mother's failures to comply with court orders, setting a hearing to select

a permanent plan of placement for the child for November 5, 2015. The court ordered the department to initiate an adoptive home study.

In a Last Minute Information in advance of the August 19 hearing, DCFS advised that the ASFA report stated that ASFA approval was no longer required because Junior had vacated the home. A new assessment for MGF was also requested. When the court indicated it could not devote sufficient time to the matter that day and suggesting a date the following week, counsel conferred, and the parties and the court agreed on a new date for the hearing, September 21, to accommodate the schedules of counsel.

DCFS reported prior to the September hearing that the ASFA request for the home was approved, but DCFS did not agree that the child should be allowed to live there because of its policy against placing children in homes in which a caregiver had been arrested for inflicting injury on a child and who had been the subject of a sustained petition. DCFS recommended the court deny the section 388 petition.

On September 21, the court heard witness testimony on MGPs' section 388 petition. Junior testified he had moved out of the home in December 2014 and does not have a key to the house; if he wanted to visit he would first call his father to get permission. He understood DCFS had concerns about any contact he might have with the child and he agreed to comply with any order the court might make.

MGF confirmed that Junior no longer had a key to the home of MGPs and that MGF would comply with any orders the court made. He denied the DCFS version of facts concerning his 1999 altercation with Junior, saying he had slapped Junior in the back of the neck rather than punching him; MGF explained that Junior had Tourette's Syndrome and attention deficit disorder, and MGF had been under stress as a single parent at the time. He

pointed out he had complied with all DCFS orders at the time and there had been no DCFS referrals after that matter was concluded.

MGF testified he had visited the child approximately every two weeks, but did not visit more regularly because the foster parents cancelled visits. He denied telling the social worker who had come to their home the evening on which mother had left the child on their doorstep that MGPs could not care for the child that evening. He testified he and MGM were ready to adopt the child and had the financial ability to raise him. He was sure that what had happened between him and Junior would not happen with the child because MGF was 15 (*sic*) years older and he would not be a single parent of the child as he had been of Junior and of mother.

The hearing concluded with the court stating it was concerned about removing the child from the home in which he had been cared for for the past year, and continued the matter to the section 366.26 date[3] so that MGF could attend a parenting class to learn how to deal with an infant who would be placed in his care after being removed from the environment in which he had lived for a year. The court also wanted to be assured MGF was visiting the child regularly. There were no objections to the continuance.

DCFS filed two reports prior to the next hearing date, November 5, 2015. The section 366.26 report noted the child had lived with the foster parents continuously since September 14, 2015, he was closely bonded with them and they had an approved adoption home study. It also noted that MGF had not visited the child consistently, but MGM had. DCFS

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[3] Section 366.26 contains procedures for conducting hearings to terminate parental rights or determine adoption, guardianship, or placement of children who have been adjudged dependent children of the juvenile court.

recommended termination of parental rights and adoption of the child by the foster parents.

In its Last Minute Information report, DCFS advised that MGF had been given referrals for parenting classes on September 24, and on October 2, 2015, he had enrolled in a 26-week parenting class. MGPs had visited the child on September 27 and October 11, but had brought the mother and a half sibling of the child with them without DCFS's knowledge or approval. They also had had video chats with the child on two other dates.

DCFS noted mother had been terminated from her drug treatment program and had failed to remain in contact with DCFS. For this reason DCFS considered it to be poor judgment for MGF to allow the mother to visit without first advising DCFS. MGF had also been attempting to arrange for visits directly with the foster parents instead of going through DCFS. DCFS reported it had learned that MGF had stated that if a problem were to arise once the child came to live with him, he would handle it himself rather than calling "law enforcement."

The foster parents reported that MGF interacted with the child on only one occasion during his visits. Otherwise, he sat and watched MGM interact with the child. If the child required assistance, MGF looked to the foster parents to provide it. The child and MGF interacted in a friendly manner, but there did not appear to be a strong bond between them; there was such a bond between the child and the foster parents. DCFS continued to have concerns about MGF's judgment, including allowing mother, and potentially Junior, to have contact with the child. At the November 5, 2015 hearing, the court ruled that the child had a constitutional right to permanency and stability, MGPs had not met their burden of demonstrating that it would be in the best interests of the child to remove him from placement with the

foster family, and that MGF still had issues in relating to the child and was in continuing need of individual counseling. The court then denied the section 388 petition.

As the hearing on the section 388 petition had been continued to the date also set for the section 366.26 hearing, the court next addressed permanency and placement issues for the child. Neither mother nor counsel for the child offered evidence or argument. The court found the child was adoptable and terminated parental rights.

MGPs and the child filed timely appeals.

CONTENTIONS

MGPs contend the juvenile court did not hold a hearing and assess the propriety of placing the child with relatives (pursuant to section 361.3) when it addressed their section 388 petition, failed to analyze and apply the factors to be assessed pursuant to section 361.3, and committed prejudicial error requiring reversal. They also contend the court erred by placing the evidentiary burden on them to establish that a change in placement for the child was in his best interests. Counsel for the child joined in the contention that "the juvenile court abused its discretion when it declined to apply retroactively the statutory 'relative placement preference'" and denied the MGPs' section 388 petition.[4]

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[4] Counsel for the child also anticipated MGPs would be appealing the denial of the de facto parent request MGPs had filed and that respondent would challenge the standing of MGPs to appeal. As MGPs present no argument with respect to denial of their request for de facto parent standing on this appeal, and as respondent did not challenge MGPs' standing to appeal, we do not address either potential issue.

DISCUSSION

A. Applicable law

To prevail on a section 388 petition, the party must show: (1) new evidence or changed circumstances; and (2) the proposed change would promote the child's best interests. (*In re D.B.* (2013) 217 Cal.App.4th 1080, 1089.) Additionally, when the section 388 petition seeks to move a child to a relative's custody, this two-prong test must be considered in conjunction with the statutory relative placement preference set forth in section 361.3.[5] (*In re*

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[5] At the time of the trial court's ruling, section 361.3 stated in relevant part: "(a) In any case in which a child is removed from the physical custody of his or her parents . . . preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative . . . . In determining whether placement with a relative is appropriate, the county social worker and court shall consider, but shall not be limited to, consideration of all the following factors: [¶] (1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs. [¶] (2) The wishes of the parent, the relative, and child, if appropriate. [¶] (3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement. [¶] (4) Placement of siblings and half siblings in the same home . . . . [¶] (5) The good moral character of the relative and any other adult living in the home . . . . [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] . . . [¶] (F) Facilitate visitation with the child's other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) Provide legal permanence for the child if reunification fails. [¶] However, any finding made with respect to the factor considered pursuant to this subparagraph and pursuant to subparagraph (G) shall not be the sole basis for precluding preferential placement with a relative. [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8) The safety of the relative's home. For a relative to be considered appropriate to receive

Isabella G. (2016) 246 Cal.App.4th 708, 719–723 (*Isabella*).) Under section 361.3, the Legislature intended "'relatives be assessed and *considered* favorably, subject to the juvenile court's consideration of the suitability of the relative's home and the best interests of the child.'. . . [¶] . . . When considering whether to place the child with a relative, the juvenile court must apply the [section 361.3] placement factors, and any other relevant factors, and exercise its independent judgment concerning the relative's request for placement." (*Isabella*, at p. 719.) Section 361.3 seeks to implement the public policy goal of preserving families during the dependency process. (See *In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1112.)

Despite the strong relative placement statute, there is no guarantee that a relative will be granted custody; the focus must remain on the child's best interests. (*Isabella, supra*, 246 Cal.App.4th at p. 723; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 317-320 (*Stephanie*).) When considering a relative's placement request, the child's best interests are paramount, and the court must consider the statutory factors that seek to ensure the child's interests are promoted and protected. (§ 361.3, subd. (a)(1); *Stephanie,* at p. 320 [even if the relative placement preference applies, it does not "overcome the juvenile court's duty to determine the best interests of the child"]; see *In re Lauren Z., supra*, 158 Cal.App.4th at p. 1112; see also *In re Joshua A.* (2015) 239 Cal.App.4th 208, 218–219.) "[R]egardless of the relative placement preference, the fundamental duty of the court is to assure the best

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placement of a child under this section, the relative's home shall first be approved pursuant to the process and standards described in subdivision (d) of Section 309."

The statute was later amended, but those changes are not material to the issues presented in this appeal.

interests of the child, whose bond with a foster parent may require that placement with a relative be rejected." (*Stephanie,* at p. 321.)

Accordingly, when a party brings a section 388 petition seeking to move a minor's custody to a relative's home after the disposition hearing or after a section 366.26 reference, the court must give preferential consideration to the request, but this consideration must include an assessment of the child's current circumstances and whether the new placement would be in the child's best interest. (*Isabella, supra*, 246 Cal.App.4th at p. 723; see *Stephanie, supra*, 7 Cal.4th at pp. 317–320, 322.)

A juvenile court has broad discretion in making these determinations. (*Stephanie, supra*, 7 Cal.4th at p. 318; accord, *In re Amber M.* (2002) 103 Cal.App.4th 681, 685–686.) """[A] reviewing court will not disturb that [custody] decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination."" (*Stephanie,* at p. 318.) When reviewing the juvenile court's conclusion on this issue, we may not substitute our judgment for that of the court. (*Id.* at p. 319.) We must view all evidence in the light most favorable to the ruling, indulging in all reasonable inferences to support the decision, and keeping in mind the principle that issues of fact and credibility are matters to be determined by the juvenile court. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733–734.)

B. Application

MGPs make several arguments concerning the section 388 hearing. First, they argue that "the trial court erred in denying [their] modification petition and thereby[] [failed] to conduct a relative placement preference hearing pursuant to [ ] section 361.3." This contention is without merit. We

have set out above the procedural history of this matter which shows that the hearing was held and their concerns were addressed.

Second, they contend the trial court erred in placing the burden "to prove that a change in [the child's] placement was necessary and in his best interests" on them. To support this claim, they assert the court should not have placed this burden on appellants because DCFS failed to properly complete the relative home assessment as required by law in the fall of 2014. Factually, there is no basis for this claim, as discussed above. The single case which MGPs cite in support of their claim, *Isabella, supra,* 246 Cal.App.4th 708, does not address this particular issue. Child's counsel correctly states that on a section 388 petition, the moving party, here MGPs, "had the burden of proving that circumstances have changed or new evidence exist[ed] . . . and that it would be in the child's best interests to modify the order based on the changed circumstances or the new evidence . . . ." In support, the child's counsel cites California Rules of Court, rule 5.570(d)(1), and *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526–527, footnote 5. The cited footnote explains both that the moving party on a motion under section 388 has the burden of proof, and that to sustain that burden, the moving party must establish that the modification proposed is in the best interests of the child, citing *In re Jasmon O.* (1994) 8 Cal.4th 398, 415. (Accord, *Stephanie*, *supra*, 7 Cal.4th at pp. 317–320; *Isabella*, at p. 723.)

Next, they argue the court erred in denying their section 388 petition because MGPs established at the hearings which the court did hold that the court had erred in late 2014 in evaluating relative placement. They argue that because the court erred then, it must grant them custody now. They base this contention on their argument that DCFS had mistakenly thought, when the court placed the child with a foster family and reaffirmed that

placement in 2014, that MGF had been *convicted* of the Penal Code section 273d charge for which he had been arrested in 1999, rather than ultimately having obtained a dismissal of the charge.[6] In MGPs' view, this "error" required correction by granting the section 388 petition and placing the child with MGPs. MGPs do not mention that Junior's conviction was an independent and sufficient basis for the court to decline to place the child in the home of MGPs. Nor do they address the DCFS policy, stated in reports filed in 2014, that it objected to home placements where one of the parents had been arrested for inflicting injury on a child and had been the subject of a previously sustained juvenile petition.

The fact that Junior no longer resided in the home was not a sufficient basis to change the placement order for the child; the child would still have been in the care of MGF. Thus, there was ample evidence to support the court's determination in 2014 on continued placement of the child with the foster parents.

Appellants also argue the court had wrongly "prolong[ed] determination of the petition for months" before denying it. Setting aside the timing issue inherent in this claim—the petition was not filed until 10 months after the court had made the initial placement of the child in foster care (the petition was filed in June 2015), this claim is not borne out by a fair reading of the reporters' transcripts of the hearings held. Rather than the court prolonging the hearing on MGPs' petition, the record of oral

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[6] Although counsel for MGPs and for the child argue that DCFS had taken the view in 2014 that MGF had been *convicted* of the charge of violating Penal Code section 273d, DCFS points out that it held this view only until October 15, 2014, when, in its Prerelease Investigation Report, it notified the court that the charges against MGF had been dismissed. It again made the error in a November 24, 2014 report, correcting it in its report dated December 15, 2014.

proceedings establishes the court timely set the petition for hearing and only continued the matter from that date to accommodate counsel for MGPs when she asked to obtain a date to examine the author of a DCFS report. Then, when that date arrived and counsel advised the court it would take more time than the court had that day to conduct those examinations and the court offered a date the following week, it was counsel collectively who, with their calendar conflicts, caused the setting in the matter to be continued for hearing to September 21, 2015.

At the conclusion of the September 21 hearing, the court did continue the matter, doing so for the express purpose of allowing MGF additional time to demonstrate his commitment to raising the child in his household. The court stated: "I'm concerned also about [MGF's] reaction when the child was left with him and he was not quite ready to assume the responsibility for care of the child, for whatever reasons he explained. What I'm willing to do is, [on] your request that the court reconsider this matter by trailing it, and I'm going to trail it to the .26 date. And I do—I would—I think I would be able to feel more comfortable if [MGF] were in a parenting class so that I know that he's prepared to deal with an infant, basically, who is being removed from a stable and permanent placement, because I'm sure there's going to be reaction. So we'll come back . . . . I do want to [be assured] that he is visiting on a regular basis, and the department can have discretion to liberalize those visits, even to unmonitored, when appropriate, and we'll get an update and see . . . on November the 5th. So we'll continue the 388 for further hearing and argument on that date."

Given the evidence then before the court, including that when MGF had visited the child prior to the September hearing, MGF did not significantly interact with the child and the child did not demonstrate any

significant bond with him, as well as MGF deferring to MGM or the foster parents on the occasions when MGF did attend the visits, this continuance would allow MGF additional time to increase his interactions with the child and become prepared to take on the care of this infant. This was a sound exercise of the trial court's discretion and enabled MGF additional time to demonstrate his commitment to the best interests of the child. The trial court clearly signaled what it was looking for to assist it in ruling on MGPs' motion. The DCFS report for the November 2015 hearing, described in detail above, documented a reluctance on the part of MGF to attend to the needs of the child on the two visits MGF had with the child in the two months following the September hearing, and what DCFS considered an error on MGF's part in bringing the mother, who had dropped out of her drug treatment program and had ceased to maintain contact with DCFS, to one of those visits without first informing DCFS. After hearing arguments from all counsel at the November 5, 2015 hearing, the court denied MGPs' section 388 petition.

Appellants also argue that the court misapplied the law, contending that two cases, *Isabella*, *supra*, 246 Cal.App.4th 708, and *In re R.T.* 2015) 232 Cal.Ap.4th 1284, compelled the granting of the section 388 petition.[7]

In re R.T. is factually inapposite and legally unpersuasive. There, the relatives' (two paternal aunts) requests for placement of the child with one of them based on their status as relatives was made early in the proceedings,

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[7] Although appellants also raise contentions concerning whether it is appropriate to consider the relative placement preference in connection with a section 366.26 hearing, as the section 361.3 issue was resolved in a separate hearing, and only by coincidence on the day of the section 366.26 hearing, resolution of that contention is unnecessary to the decision we reach in this case.

and both of their homes were approved. When the child was four months old, one aunt filed a petition to modify the child's placement, claiming that her earlier request for placement had been denied improperly. The hearing on her petition stretched over 10 months, and ultimately was denied; by that time the child was 14 months old. The Court of Appeal determined the trial court had committed prejudicial error by failing to timely consider the relative placement option, also finding error because the parents had asked that the petitioning aunt (and uncle) be given preference in adoption of the infant, pursuant to Family Code section 8700, subdivisions (a) and (f). The court determined that the relatives' home was never given good faith consideration. (*In re R.T.*, *supra*, 232 Cal.App.4th at pp. 1293–1295, 1297.)

In the present case, the family situation was considerably different. MGPs had initially rejected placement of the child with them, and when they advised the court they would be willing to take custody of the child, they faced two significant inherent obstacles to doing so. First was the continued presence at the residence of Junior; so long as he either resided in or had unapproved access to the residence, the court could not and would not consider placing the child there. Second, MGF's prior arrest and juvenile court involvement created a circumstance contrary to DCFS policy on placement of infants, a policy that was communicated to the court in conjunction with the decision it made on placement in late 2014 and in 2015. Third, MGPs did not seek to change the child's placement until they filed their section 388 petition on June 15, 2015, 10 months after the child had been placed with the foster family.

In re R.T., supra, 232 Cal.App.4th 1284, does hold that the grant or denial of a section 388 petition is reviewed for abuse of discretion. (*Id.* at pp.

1300-1302.) In this case, the circumstances discussed above make clear that the trial court did not abuse its discretion in denying this late-filed petition.

The other case upon which appellants rely, *Isabella*, *supra*, 246 Cal.App.4th 708, also does not aid appellants. In that case, the social services agency did not conduct any assessment of the paternal grandparents' residence until after that case was referred for a section 366.26 hearing. (*Id.* at p. 723.) In this case, DCFS conducted an evaluation of MGPs' circumstances in the fall of 2014 and continued to evaluate their residence and the occupants thereafter. In particular, once DCFS had made its initial evaluation, it renewed its inquires, particularly the ASFA inquiry, to update the information on MGF.

Isabella, supra, 246 Cal.App.4th 708, also makes clear that, in applying the relative placement preference, while the juvenile court must consider all of the factors listed in section 361.3, "[w]hen considering whether to place the child with a relative, the juvenile court must apply the placement factors, and any other relevant factors, and exercise its independent judgment concerning the relative's request for placement. [Citation.]" (*Id.* at p. 719.) The court in *Isabella* makes clear that: "'Section 361.3 gives "preferential consideration" to a relative request for placement, which means "that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).)' (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1033 . . . .) The intent of the Legislature is 'that relatives be assessed and *considered* favorably, subject to the juvenile court's consideration of the suitability of the relative's home *and the best interests of the child.*' (*Stephanie M., supra,* 7 Cal.4th at p. 320.)" (*Isabella,* at 719, italics added.)

In this case, at the final hearing on MGPs' petition under section 388, the juvenile court made clear that the overriding consideration was the best

interests of the child. The court had continued the hearing so that MGF could improve his contacts with the child and take parenting classes to prepare himself for what the court stated could be a stressful period were the child removed from the home of the foster family in which he had been cared for for over a year. Yet, MGF only had contact with the child twice between the hearing in September 2015 and the final hearing on the petition on November 5, 2015. And, when he did have contact, it was only brief, and when the child needed something, MGF deferred to MGM or the foster parents rather than help the child himself. The record in this case also indicates that DCFS continued to be opposed to placing the child in the home of MGPs due to his prior arrest. More recently, MGF had expressed that if he faced difficulties with the child, he would not contact "law enforcement" for assistance in resolving them. The juvenile court applied section 361.3 in the proper manner, considering its several elements and weighing them together with the best interests of the child, which the cases hold to be paramount. (*Stephanie, supra,* 7 Cal.4th at pp. 317–320; *Isabella, supra*, 246 Cal.App.4th at p. 719.) Giving consideration to all of the evidence before the juvenile court relating to the child and to MGPs, we conclude the juvenile court did not abuse its discretion in denying MGPs' section 388 petition.

DISPOSITION

The juvenile court's order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

CHAVEZ, J., Acting P.J.

HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.