IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| **IN RE JULIET C.**,<br>A person Coming Under Juvenile Court Law.<br>_____<br>**LADY C.**<br>Petitioner,<br><br>v.<br><br>**FREDONIA COUNTY SUPERIOR COURT,**<br>Respondent;<br><br>**FREDONIA COUNTY CHILD PROTECTIVE SERVICES, et al.**,<br>Real Parties in Interest. | H_____<br><br>(Fredonia County Superior Court No. 19JP911) |

The Honorable Solomon Wisdom, Judge

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION AND REQUEST FOR STAY

SIXTH DISTRICT APPELLATE PROGRAM

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PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION AND REQUEST FOR STAY

TO: The Honorable Mary G. Greenwood, Presiding Justice, and to the Honorable Associate Justices of the Court of Appeal:

1. In this dependency matter, the child was removed from the father. At the disposition hearing, the juvenile court failed to place the child with petitioner, the noncustodial parent, and it failed to consider placement with relatives because, in part, Child Protective Services failed to assess them. Because the court failed to act as required by law, this Court should issue a writ of mandate and/or prohibition.

2. A stay is requested because ***

3. The respondent is the Superior Court of the State of California, in and for the County of Fredonia, sitting as a Juvenile Court, which has been exercising judicial functions in connection with the proceedings described in this petition in Santa Clara County Superior Court case numbers 19JD911.

4. The real parties in interest are the child, Juliet C., the Fredonia County Child Protective Services, represented by county counsel, and the father, Lord C.

5. All parties and their representative attorneys are properly joined herein as parties directly affected by the present proceeding now pending in respondent court. All the proceedings about which this petition is concerned have occurred within the jurisdiction of the Court of Appeal of the State of California, Sixth Appellate District.

6. Petitioner has a clear, present, and fundamental right to the care, custody, and control of her child as well as a fundamental and prior right to the child's comfort and society. As such, petitioner has a beneficial interest in the proceedings.

7. A chronology of the pertinent facts are as follows:

a. On October 2, 2019, Juliet was detained, and a dependency petition was filed on October 3, alleging that the juvenile court should assume jurisdiction under subdivisions (b)(1) and (c) of section 300.[1] (Exhibit A, at pp. 4-7 [dependency petition].)

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[1] Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

b. Specifically, it was alleged petitioner and the father were separated, and the father had primary custody over the child, Juliet. Petitioner and the father were involved in the Capulet gang, which endangered the safety of Juliet. (Exhibit A, at p. 6.) Further, the father planned to marry 13 year-old Juliet to a man, Paris E. (*Ibid.*) Finally, Juliet told the social worker that the father threatened to throw her out of the house and she would be a "street urchin" if she refused to marry Paris. She exhibited symptoms of emotional distress as a result. (Exhibit A, at p. 7.)

c. According to the social worker report for the jurisdictional and disposition hearing, petitioner wanted placement, but she was not ready to receive Juliet into her home due to her poverty. Juliet had not lived with her for six years and did not have a close relationship; Juliet expressed a desire not to be under petitioner's care. Further, there was a concern that placement with petitioner could make reunification efforts with the father more difficult. (Exhibit B, at pp. 21-22 [social worker report].)

d. At the jurisdictional and disposition hearing, held on November 5, 2019, petitioner submitted on the social worker report. She moved to have Juliet placed in petitioner's home. She objected to the failure to evaluate relatives for placement. She also objected to placing Juliet in the home of the foster parents in Other County, the Montagues, because they were from a rival gang and the distance of the placement interfered with visitation and reunification services. Petitioner further expressed a concern that the son of the foster parents, Romeo, was wooing Juliet.

(Exhibit C, at p. 36 [Nov. 5, 2019 minute order]; exhibit D, at pp. 54-56 [Nov. 5, 2019 transcript].)

e. On the same day, the court sustained the petition, overruled petitioner's objections, approved placing Juliet in foster care in Other County, and ordered reunification services be offered to the parents. (Exhibit C, at p. 36-44; exhibit D, at pp. 66-68.)

8. Respondent court's actions were contrary to law, a prejudicial abuse of discretion, and in excess of its jurisdiction because the juvenile court was required to place the child with the noncustodial parent unless it would be detrimental and to consider placement with relatives and family friends. The Legislature has required that the relatives be assessed within one month of detention for this very reason, but the department failed to do so. The Legislature has also required that children not be placed out of county unless certain requirements are met, which were not met here.

9. Petitioner has no plain, adequate, remedy at law because time is of the essence on the questions of removal and placement.

10. This petition is timely, as it is being filed within a few weeks of the challenged order as soon as the transcript of the hearing has been made available.

11. Under article VI, section 10 of the California Constitution, this court has original jurisdiction over a petition for writ of mandate and/or prohibition. Petitioner has filed this petition in this court in the first instance because she seeks review of the actions of the Superior Court.

12. Petitioner has exhausted all available remedies required to be pursued.

13. No prior petition for extraordinary writ has been filed by petitioner relating to the issue raised in this petition.

14. Petitioner incorporates the accompanying memorandum of Points and Authorities and attached exhibits by reference as if fully set forth herein.

WHEREFORE, petitioner prays that:

1. An immediate stay be ordered to * * * ;

2. An alternative writ of mandate and/or prohibition issue commanding respondent court to return the child to petitioner's home or alternatively to order the department to evaluate relatives for placement and for the court to hold a new hearing concerning placement

3. A peremptory writ in the first instance issue directing the above-stated relief (*Palma v. U.S. Indus. Fasteners, Inc.* (1984) 36 Cal.3d 171);

4. A peremptory writ of mandate and/or prohibition issue directing the above stated relief be given;

5. Any other relief be granted as this court may deem proper.

Respectfully submitted,

By: */s/ Jonathan Grossman*
Jonathan Grossman
Attorney for Petitioner
Lady C.

## VERIFICATION

I, Jonathan Grossman, declare:

1. I am an attorney admitted to practice law in the State of California. My office is located in San Jose, California. I am the attorney for petitioner, Lady C.

2. I am authorized to file this petition for writ of mandate and/or prohibition on Lady C.'s behalf. I make this verification because the facts upon which this petition are based are discernable by reviewing court documents in the Fredonia County Superior Court.

3. I have read the foregoing petition for writ of mandate and/or prohibition and declare that the contents of the petition are true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this November 15, 2019 at San Jose, California.

*/s/ Jonathan Grossman*
Jonathan Grossman
Attorney at Law

## MEMORANDUM OF POINTS AND AUTHORITIES

### SUMMARY OF THE CASE AND EVIDENCE

On October 2, 2019, Juliet was detained, and a dependency petition was filed on October 3, alleging that the juvenile court should assume jurisdiction under subdivisions (b)(1) and (c) of section 300. (Exhibit A, at pp. 4-7.)

Specifically, it was alleged petitioner and the father were separated, and the father had primary custody over the child, Juliet. Petitioner and the father were involved in the Capulet gang, which endangered the safety of Juliet. (Exhibit A, at p. 6.) Further, the father planned to marry 13 year-old Juliet to a man, Paris E. (*Ibid.*) Finally, Juliet told the social worker that the father threatened to throw her out of the house and she would be a "street urchin" if she refused to marry Paris. She exhibited symptoms of emotional distress as a result. (Exhibit A, at p. 7.)

According to the social worker report for the jurisdictional and disposition hearing, petitioner wanted placement, but she was not ready to receive Juliet into her home. Juliet had not lived with her for six years and did not have a close relationship; Juliet expressed a desire not to be under petitioner's care. Further, there was a concern that placement with petitioner could make reunification efforts with the father more difficult.(Exhibit B, at pp. 21-22 [social worker report].) The department had placed Juliet with the Montagues in Other County at detention. (Exhibit B, at p. 14.) The social worker reported the assessment of relatives or for possible placement had not been completed. (Exhibit B, at p. 18.) The Montagues said Juliet was "thriving" in

her new home. (Exhibit B, at p. 14.)

At the jurisdictional and disposition hearing, held on November 5, 2019, petitioner submitted on the social worker report. She moved to have Juliet placed in petitioner's home. She objected to the failure to evaluate relatives for placement. She also objected to placing Juliet in the home of the foster parents in Other County, because they were from a rival gang and the distance of the placement interfered with visitation and reunification services. Petitioner also expressed a concern that the son of the foster parents, Romeo, was wooing Juliet. (Exhibit D, at pp. 54-56.)

Petitioner said that while she is on the verge of homelessness, she could take legal custody of Juliet while having Juliet live with a relative or friends, most likely with Mercutio. (Exhibit D, at p. 55.) Mercatio had been a friend of petitioner for more than 20 years and has known Juliet since she was a baby. He successfully raised three children of his own and had a home with enough space and provisions to care for Juliet. (Exhibit D, at p. 55.) Alternatively, the maternal grandmother or several relatives and family friends in the county were available for placement. (Exhibit D, at p. 56.)

Petitioner also expressed problems with placement in Outer County. She said she was indigent and was required to spend a great part of the day traveling to the visits. Consequently, visits were limited. It also interfered with her ability to schedule the programs required by the case plan. (Exhibit D, at p. 57.)

On the same day, the court sustained the petition,

overruled petitioner's objections and approved placing Juliet in foster care in Other County. (Exhibit C, at pp. 36-44.) Agreeing with the department, the court said it was not comfortable placing Juliet with petitioner because petitioner was not ready to receive Juliet into her home, Further, Juliet had not lived with her for six years and did not have a close relationship; Juliet expressed a desire not to be under petitioner's care. The court also expressed concern that placement with petitioner could make reunification efforts with the father more difficult. (Exhibit D, at pp. 66-67.) Finally, it said that it would not disturb where Juliet has been since the beginning of the dependency and thus would not order the department to evaluate Mercatio for placement. (Exhibit D, at p. 67.) The court ordered reunification services be offered to the parents. (Exhibit D, at pp. 66, 68.)

## ARGUMENT

### I. The Remedy Available by Way of Extraordinary Writ Is Proper in this Case.

Even if an appellate court has jurisdiction to consider an appeal, a petition for writ of mandate and/or prohibtion is appropriate when the delays from appeal would prejudice the petitioner. The placement of a child at the disposition hearing often affects the entire dependency. A parent has a constitutional right to the care and custody of her own child, and placement away from her home and in another county has caused limited visitation and interferes with reunification services. As a result, it is less likely that reunification efforts would be successful and more likely that parental rights would be terminated and the

child adopted by a stranger.

"When a petition is filed seeking a writ commanding the respondent superior court to act in a certain manner, such as by vacating or revising an interim order, an appellate court may (1) summarily deny the petition, (2) issue an alternative writ or an order to show cause pursuant to [Code Civil Procedure] section 1087, or (3) issue a peremptory writ in the first instance, pursuant to [Code Civil Procedure] section 1088 and the procedure set forth in *Palma,*" *supra,* 36 Cal.3d 171. (*Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1241.)

Placement decisions are generally reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) Even when the abuse of discretion standard applies, the court does not have discretion to depart from the governing legal standards. (*People v. Reardon* (2018) 26 Cal.App.5th 727, 737.)

It is sometimes said a writ is not available to compel a court or agency to perform a "discretionary" act. More accurately, a writ will issue when respondent has failed to act as prescribed by law. (*People v. Superior Court (Mitchell)* (2010) 184 Cal.App.4th 451, 456; see, e.g., *Shorts v. Superior Court* (2018) 24 Cal.App.5th 709, 719.) The juvenile court failed to act as prescribed by law by placing the child out of home and out of county, without proper consideration of placement with petitioner or relatives, and by limiting visitation, despite the statutory requirement.

## II. The Court was Required to Place the Child with the Petitioner, Relatives, or Friends of the Family.

### A. The Court was Required to Place the Child with Petitioner.

Petitioner moved to have Juliet placed in petitioner's home. (Exhibit D, at p. 54.) The court, however, ordered that Juliet remain in foster care. (Exhibit C, at p. 37.) Even without an objection, the claim is cognizable so long as the petitioner does not submit on the social worker's recommendations. (Cf. *In re Richard K.* (1994) 25 Cal.App.4th 580, 589-590.)

There was insufficient evidence to support the order removing legal custody of Juliet from petitioner.

Although removal requires clear and convincing evidence in the juvenile court; the order will be upheld on appeal if there is substantial evidence. (*In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262.) When the court is "presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof." (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005.)

#### 1. The Statutes and Due Process Favor Placement with the Noncustodial Parent.

The Legislature has determined that there is a priority for the placement of children. The first option is the noncustodial parent. "If that parent requests custody, the court shall place the

child with the parent[2] unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subds. (a) & (e)(1); see, e.g., *In re Adam H.* (2019) 43 Cal.App.5th 27, 31-32.) The court may then terminate the dependency, order family reunification to that parent, or order reunification services for the offending parent as well. (§ 361.2, subd. (b); *In re Abram L.* (2013) 219 Cal.App.4th 452, 461; *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1134-1135.)

The lack of a relationship between the parent and the child or the child's desire to be with others does not in itself constitute detriment. (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1402; *In re John M.* (2006) 141 Cal.App.4th 1564, 1571; see also *In re K.B.* (2015) 239 Cal.App.4th 972, 979 [the statute states "the court *shall* place the child with the parent *unless* it finds that placement with that parent would be detrimental" to the child (emphasis in original)].) Nor is detriment established if placement with the noncustodial parent would make reunification with the custodial parent more difficult. (*In re M.C.* (2011) 195 Cal.App.4th 197, 223-224.)

It is not necessary for the child to physically live with the noncustodial parent. The court can "place" the child with the a parent who can arrange to have an appropriate caretaker. (*In re*

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[2] This assumes the parent is a presumed parent. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 454; *In re A.J.* (2013) 214 Cal.App.4th 525, 536.)

*Patrick S., supra,* 218 Cal.App.4th at pp. 1263-1265 [father deployed in the navy]; *In re V.F.* (2007) 157 Cal.App.4th 962, 970, superseded by statute on other grounds as discussed in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57-58 [parent incarcerated]; *In re Isayah C.* (2004) 118 Cal.App.4th 694, 700.)

Section 361.2, subdivision (a) applies even if the noncustodial parent is an 'offending' parent. (*In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 299 ["the word 'nonoffending' is not found in the text of section 361.2."]; *In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1504-1505; *In re V.F., supra,* 157 Cal.App.4th at p. 970; contra, *In re A.A.* (2012) 203 Cal.App.4th 597, 608.) The presumption under Family Code section 3044, that a child should not be placed with a parent who engaged in domestic violence, does not apply to the juvenile court. (*In re C.M.* (2019) 38 Cal.App.5th 101,109-110.)

It violates due process (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) not to place the child with the noncustodial parent if it would not be detrimental to the child. "A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood." (*In re Abram L., supra,* 219 Cal.App.4th at p. 461, internal quotation marks omitted.) "[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." (*Santosky v. Kramer*

(1982) 455 U.S. 745, 760; *In re C.M., supra,* 232 Cal.App.4th at p. 1400; *In re Z.K.* (2011) 2011 Cal.App.4th 51, 64.) "California's dependency system comports with *Santosky's* requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court must have made prior findings that the parent was unfit." (*Z.K.,* at p. 65, internal quotation marks omitted.) "California's dependency scheme no longer uses the term ' "parental unfitness," ' but instead requires the juvenile court make a finding that awarding custody of a dependent child to a parent would be detrimental to the child. [Citations.] Due process requires that a finding of detriment be made by clear and convincing evidence before terminating a parent's parental rights. [Citation.]" (*Ibid.*)

Petitioner said that while she is on the verge of homelessness, she could take legal custody of Juliet while Juliet lives with relatives or Mercutio, a family friend who had known Juliet since she was a baby. (Exhibit D, at p. 55.) The court said it was not comfortable placing Juliet with petitioner because petitioner was not ready to receive Juliet into her home. (Exhibit D, at p. 66.) This was contrary to the law for three reasons.

First, petitioner had a due process right to the custody of her child unless she was unfit. (See *Santosky v. Kramer, supra,* 455 U.S. at p. 760; *In re Z.K.*, *supra*, 2011 Cal.App.4th at p. 64.) The court's reasoning was not a comment on petitioner's fitness as a parent.

Second, the statutory requirement for placement with the noncustodial parent unless it would be "detrimental to the safety,

protection, or physical or emotional well-being of the child." (§ 361.2, subds. (a) & (e)(1).) While the court adopted the department's recommendations, which included such a finding (exhibit C, at p. 40), the court's actual comments showed it was more concerned about where Juliet would actually be housed and not whether this arrangement would be detrimental to her safety, protection, or physical or emotional well-being.

Third, there is not a requirement that the parent exercise physical custody over the child (*In re Patrick S., supra,* 218 Cal.App.4th at pp. 1263-1265; *In re V.F., supra,* 157 Cal.App.4th at p. 970.) The fact that the department had not yet completed its assessment for relative placement (exhibit D, at p. 48) did not lead to affirmative evidence that petitioner's arrangement for caring for Juliet would be detrimental.

The court expressed concern that there was not a close relationship between petitioner and Juliet. (Exhibit D, at pp. 66-67.) Again, the court acted contrary to law. The lack of a relationship between the parent and the child or the child's desire to be with others does not in itself constitute detriment. (*In re C.M., supra,* 232 Cal.App.4th at p. 1402.)

The court also said placement with petitioner might hinder the father's reunification efforts. (Exhibit D, at p. 67.) Again, its reasoning was contrary to the law. (*In re M.C.* (2011) 195 Cal.App.4th at pp. 223-224.)

There was not a legal basis for the court's decision not to place Juliet with petitioner. Because the court acted contrary to the law, the decision must be reversed.

### 2. The Court Acted Contrary to Law by Focusing on not "Disturbing" Juliet's Emergency Placement.

Under section 361.2, subdivision (b), placement means the place where the child is during the dependency (*In re Austin P., supra,* 118 Cal.App.4th at p. 1131 & fn. 2), even if the child is ordered to live with the noncustodial parent (*id.*, at pp. 1133, fn. 4, 1134).

Emergency placement in foster care is not the same as a court-ordered placement at the disposition hearing. (*In re M.L.* (2012) 205 Cal.App.4th 210, 224.) The standard for emergency placement is different than for placement at the disposition hearing, and there is not a requirement for a full background check. (*Id.* at p. 225; *In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1414-1415.) Thus, the placement before the disposition hearing does not dictate the placement order at the disposition hearing.

In rejecting Petitioner's request to return Juliet or to place her with relatives in the county, the court said that it would not disturb where she has been since the beginning of the dependency. (Exhibit D, at p. 67.) While the stability of the child is an important objective, the court' s focus on where the department happened to place Juliet when she was detained from her father was contrary to the law. The Legislature recognized that an emergency placement is sometimes necessary before there can be a full assessments of better alternatives. The court, not the department, was tasked with the duty to determine the

placement at the disposition hearing after receiving a more complete picture of the alternatives. Because the court failed to exercise its discretion as required by statute, it acted contrary to law.

### B. Alternatively, the Court was Required to Place the Child with Relatives or Family Friends.

Petitioner objected to the failure to evaluate relatives for placement. She also objected to placing Juliet in the home of the foster parents in Other County. (Exhibit D, at pp. 54-56.) The court overruled the objections. (Exhibit C, at pp. 36-37) The court acted contrary to the law in failing to place Juliet with a relative or nonrelative extended family member.

#### 1. Relative Placement Is Preferred.

If placement with the noncustodial parent is not an appropriate option, then "the home of a relative" is next in line. (§ 361.2, subd. (e)(2).) "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative, regardless of the relative's immigration status." (§ 361.3, subd. (a).) The relative placement preference does not constitute a relative placement guarantee. (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 798.) Nor does it create an evidentiary presumption that relative placement is in a child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320; *In re Lauren R.* (2007) 148 Cal.App.4th 841, 855.) But it does require that "the relative seeking placement shall be the first placement to be

considered and investigated." (§ 361.3, subd. (c)(1).) " 'Relative' means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons even if the marriage was terminated by death or dissolution." (§ 361.3, subd. (c)(2).) If the court does not place the child with a relative who has been considered for placement pursuant to this section, the court shall state for the record the reasons placement with that relative was denied. (§ 361.3, subd. (e).)

The Legislature has repeatedly said the relative placement is preferred, starting at the time of an emergency placement. (§§ 281.5, 306.5, 309, subds. (d)(1) & (e)(1), 319, subd. (h)(2), 361.3, 361.45, subd. (a), 366.26, subd. (k), 16000, subd. (a).) Accordingly, the department is required to identify, locate, and assess relatives for possible placement within 30 days of removal. (§ 309, subd. (e)(1).) While input from the parents is always important, the responsibility rests with the department. "The social worker shall use due diligence in investigating the names and locations of the relatives . . . , including, but not limited to, asking the child in an age-appropriate manner about relatives important to the child, consistent with the child's best interest, and obtaining information regarding the location of the child's adult relatives." (§ 309, subd. (e)(3).) If the court removes the child from the parents' custody at the disposition hearing, it "shall make a finding as to whether the social worker has

exercised due diligence in conducting the investigation . . . to identify, locate, and notify the child's relatives." (§ 358, subd. (b)(2); *In re S.K.* (2018) 22 Cal.App.5th 29, 37; *In re Isabella G.* (2016) 246 Cal.App.4th 708, 720-721, 723; *In re R.T.* (2015) 232 Cal.App.4th 1284, 1299-1301.)

Here, the department failed to complete its investigation of possible relative placement. (Exhibit C, at p. 40.) This deprived the juvenile court of a fair opportunity to judge whether placement with a relative, instead in foster care, would be appropriate. "Section 361.3 requires the juvenile court to evaluate a number of factors, including the child's best interest. Here, the court failed to apply those factors, 'instead applying a generalized best interest test unguided by the relevant statutory criteria.' (*In re R.T., supra*, 232 Cal.App.4th at p. 1300.) 'When the proceedings take place under an inappropriate statute, even one requiring similar findings, the parties are not afforded the opportunity to tailor their case to the correct statute, and the trial court cannot fulfill its responsibility to make findings of fact within the provisions of that statute.' [Citation.]" (*In re Isabella G.* (2016) 246 Cal.App.4th 708, 724.) The same occurred here.

Failure to consider family preference for placement was prejudicial. Reversal is not required unless the error amounts to a miscarriage of justice. (*In re Isabella G., supra,* 246 Cal.App.4th at p. 724; see generally *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Under *Watson*, " 'a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is

reasonable probable that a result more favorable to the appealing party would have been reached in the absence of the error.' (*Id*. at p. 836.) 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

While the court impliedly did not credit some of petitioner's concerns about Romeo wooing Juliet, it was undisputed that the Montigues were involved in gangs and made visitation and reunification efforts more difficult due to their distance from Fredonia County. Relatives lived in the county, and there were no obvious reasons why they would not be appropriate for placement. There was a reasonable probability the court would have made a different placement order had the department complied with its statutory requirement to assess them in timely fashion.

When the court fails to consider relative placement, especially in light of the failure of the department to assess relatives, the appropriate remedy is to reverse the order and direct the juvenile court to hold a new placement hearing after the department has assessed the relatives. (*In re R.T., supra,* 232 Cal.App.4th at p. 1308.)

### 2. Placement with a Nonrelative Extended Family Member is Preferred Over Placement with Strangers.

If the child cannot be placed with the noncustodial parent or with a relative, the court shall consider placement at the home of a "nonrelative extended family member." (§ 361.2, subd. (e)(3).) A NREFM is "an adult caregiver who has an established familial relationship with a relative of the child . . . , or a familial or mentoring relationship with the child." (§ 362.7, ¶ 2.) Until 2013, a familial or mentoring relationship was a prerequisite to being recognized as a NREFM. (See, e.g., *In re Michael E.* (2013) 213 Cal.App.4th 670, 675-676; *Samantha T. v. Superior Court* (2011) 197 Cal.App.4th 94, 109-110.) The statute has been expanded, however, to include anyone who has a relationship with the child's family, even if the individual lacks a relationship with the child. (*In re Joshua A.* (2015) 239 Cal.App.4th 208, 217.)

Mercutio has a long-standing relationship with Juliet. Although he is not a blood relative, he would qualify as a NREFM. (Exhibit D, at p. 55.) But the department would not consider him, and the court declined to order the department to have him evaluated (Exhibit D, at p. 68.) This was contrary to the statutory requirement.

Failure to consider NREFM placement was prejudicial. Mercatio had been a friend of petitioner for more than 20 years and has known Juliet since she was a baby. He successfully raised three children of his own and had a home with enough space and provisions to care for Juliet. (Exhibit D, at p. 55.) The

Montagues, because they were from a rival gang and the distance of the placement interfered with visitation and reunification services. (*Ibid*.) There was a reasonable probability that had he been assessed, the court would have placed Juliet with him.

### C. Placement out of the County was Inappropriate.

Petitioner objected to placing Juliet in the home of the foster parents in Other County, the Montagues, because they were from a rival gang and the distance of the placement interfered with visitation and reunification services. (Exhibit D, at pp. 54-56.) The court overruled the objection. (Exhibit C, at p. 36-37.) The court acted contrary to the law in placing Juliet out of the county.

Special procedures and considerations apply for placements outside the county. The Legislature has required that "if the social worker must change the placement of the child and is unable to find a suitable placement within the county and must place the child outside the county, the placement shall not be made until the social worker has served written notice . . . at least 14 days prior to the placement, unless the child's health or well-being is endangered by delaying the action or would be endangered if prior notice were given." (§ 361.2, subd. (h)(1).) If an objection is lodged within seven days of receiving notice, the court shall hold a hearing within five days of the objection and prior to the placement. (*Ibid.*) "The court shall order out-of-county placement if it finds that the child's particular needs require placement outside the county." (*Ibid.*) The child should not be

placed with a non-relative out of county without a showing of a need to do so. (§ 361.2, subd. (g).)

There are additional considerations in determining whether to place a child out of the county. As in any placement decision, the court must also consider keeping siblings together (see generally *Abraham L. v. Superior Court* (2003) 112 Cal.App.4th 9, 14) or at least maintaining contact among siblings (see generally *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1003 [" '[m]aintaining [sibling] relationships, under the right circumstances, is imperative for the emotional well-being of the [dependent] child' "]). It is often important for the child's well-being to maintain and build ties with the extended family as well.

Further, frequent visitation with the parents is necessary for there to be reasonable services. "An obvious prerequisite to family reunification is regular visits between the noncustodial parent or parents and the dependent children 'as frequent[ly] as possible, consistent with the well-being of the minor.' " (*In re Julie M.* (1999) 69 Cal.App.4th 41, 49.) Reunification services can be unreasonable when visitation is unduly limited. (*In re T.W.-1* (2017) 9 Cal.App.5th 339, 346-348; *Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1425-1427; *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 508-509 [services were unreasonable when a planned trial visit with the parent never occurred].)

The evidence was that the distant placement interfered with visitation and reunification services. Petitioner, who was indigent, was required to spend a great part of the day traveling

to the visits. Consequently, visits were limited. It also interfered with her ability to schedule the programs required by the case plan. (Exhibit D, at p. 57.)

Error was prejudicial. Again, while the court impliedly did not credit some of petitioner's concerns about Romeo wooing Juliet, it was undisputed that the Montigues were involved in gangs and made visitation and reunification efforts more difficult due to their distance from Fredonia County. Relatives lived in the county and there were no obvious reasons why they would not be appropriate for placement. There was a reasonable probability the court would have made a different placement order had the department complied with its statutory requirement to assess them in timely fashion.

## CONCLUSION

For the foregoing reasons petitioner, Lady C., respectfully requests that this court issue an extraordinary writ and direct that Juliet be placed with petitioner or alternatively remand the matter for a new hearing concerning placement.

DATED: November 15, 2019

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: */s/ Jonathan Grossman*
Jonathan Grossman
Attorney for Petitioner
Lady C.

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached Petition for Writ of Mandate And/or Prohibition and Request for Stay contains 5,822 words.

Executed under penalty of perjury at San Jose, California, on November 15, 2019.

*/s/ Jonathan Grossman*
Jonathan Grossman

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within *PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION AND REQUEST FOR STAY*
to the following parties hereinafter named by:

_X_ BY ELECTRONIC TRANSMISSION - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

Served electronically via TrueFiling.com:

Office of County Counsel
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_X_ BY MAIL - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

Clerk of the Superior Court
1 Courthouse Drive
Fredonia, CA 99911

Clarence Darrow
160 Capitol Street
Fredonia, CA 99111
[attorney for Lord C.]

I declare under penalty of perjury the foregoing is true and correct. Executed this 15th day of November 2019, at San Jose, California.

*/s/ Jonathan Grossman*
Jonathan Grossman