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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re K.S. et al., Persons Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. D.S., Defendant and Appellant.	F060527 (Super. Ct. Nos. 515383, 515384 & 515385) **O P I N I O N**

THE COURT*

APPEAL from orders of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

S. Lynne Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J., and Franson, J.

D.S. (mother) appeals from orders terminating parental rights (Welf. & Inst. Code, § 366.26) to her three children.[1] In the juvenile court, mother claimed she maintained regular visitation and the children would benefit from a continued relationship with her so that termination would be detrimental to the children. (§ 366.26, subd. (c)(1)(B)(i).) On appeal, she contends the juvenile court abused its discretion by rejecting her claim. Having reviewed the matter, we disagree and will affirm.

PROCEDURAL AND FACTUAL HISTORY

In the fall of 2008, mother's serious alcohol abuse and resulting neglect of her children led to the underlying juvenile dependency proceedings and a juvenile court order removing them from her custody. The children at that time ranged in age from two to seven years old. Mother also had mental health problems, including bi-polar disorder and depression, but did not take her prescribed medication. Complicating matters further was a history of domestic violence perpetrated by the children's father upon mother and witnessed on several occasions by the children. The eldest reported she was afraid of the father, who no longer lived with the family.

Mother worked hard to recover and regained custody of the children as of June 2009. The father did essentially nothing to reunify, including not visiting with his children, so that the court terminated services for him in June 2009.

By September 2009, however, mother relapsed and was drinking so heavily that she required hospitalization. She also abused her psychotropic medication, taking four to five times the prescribed dose. Mother reported feeling overwhelmed caring for the children, whom she described as having challenging behaviors at times. She felt unable to raise them. The eldest child reported she took care of her siblings when mother was

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

essentially falling down drunk and difficult to awake. Mother's condition scared the child.

This led to the children's redetention and supplemental dependency proceedings (§ 387) in September 2009. Although mother initially resisted and appeared defeated, she returned to alcohol treatment. However, she did not see the children for approximately one month. She claimed she felt unready and believed she was attempting to distance herself from them. When mother resumed seeing the children in October 2009, the visit was upsetting for her and she appeared frantic. The record is silent regarding the children's reaction.

At a dispositional hearing on the supplemental petition in mid-October 2009, the juvenile court once again removed the children from mother's custody in light of her limited progress. It also granted her additional services and set a January 2010 status review hearing.

Mother thereafter decided she did not want to reunify with her children. However, she did not communicate her decision to the agency. She instead expressed a desire that the agency remove the children from their current caretakers, friends of mother's whom she had been involved in identifying and who enabled the children to reconnect with old friends. Mother was suddenly adamant the couple with whom the children lived were "too old." At some point, the couple indicated they would be willing to adopt all three children. It was mother's desire and goal to have the children live with a family of her choosing in another community.

The agency learned of mother's intent not to reunify in late November 2009 before a visit she had with the children. Mother stated she did not want to reunify or have her children back. Told the children might assume they would reunify with her because of their visits with her, mother replied "the court says that I can visit with them up until the January [2010] court hearing." During the November 2009 visit, mother told the children

this would be her last visit with them. She would not see them again until they were teenagers. At the end of the visit, the children appeared devastated in that all three were crying, telling their social worker mother would not see them anymore.

For the next few weeks, mother vacillated over whether she would visit the children again. She acknowledged that to tell the children about no more visits had not been the right thing to do. She claimed she would eventually and slowly break the news to them.

In January 2010, mother submitted to the agency's report of these events and its recommendation to terminate reunification services. The juvenile court followed the agency's recommendation as well as set a section 366.26 hearing to select and implement a permanent plan for the children. It also set visitation at a minimum of once a month.

At this time, the children's placement was about to change to the home of other friends of mother's, the S. family. The couple, who had been caring for the children, were unable to provide a permanent home for the children. However, the S. family was only interested in providing temporary care for the children by way of a guardianship.

After the children were placed with the S. family, Ms. S. reported she was waiting for mother to "get her[self] together" and later be able to care for the children while the children were in the S. family home. According to Ms. S., mother wanted to be with her children and was always over at the S. home visiting with the children. In the agency's view, mother enlisted the S. family so that she could come to visit whenever she wanted and still be part of the parenting structure for the children. The agency foresaw this situation as problematic for the children and the S. family.

Meanwhile, the agency found a potential adoptive family for the children. The potential adoptive family, however, was only interested in adopting the children so that the agency delayed the children's placement with this family pending the outcome of the section 366.26 hearing. The children began visiting with the potential adoptive family in

April 2010. The agency recommended the juvenile court find the children were likely to be adopted and order parental rights terminated.

At the section 366.26 hearing, the court heard testimony from several witnesses including the eldest child, an adoption social worker, a therapist for the children, mother, and Ms. S. It also read and considered the agency's report for the hearing, detailing the case history as described above.

Mother's Eldest Child

The eldest child testified she understood she might never see mother again if she were freed for adoption. That made her feel "sad." She would like to see mother. She did not know how frequently she saw mother, but mother talked to her on the telephone close to every day. The child also testified she saw her father about a month ago and that it would make her "very sad" if she was unable to see him again. According to an offer of proof that the parties and the court accepted, the father's visit in April 2010 had been his first contact with the children in over a year.

The eldest child further testified about having visited the potential adoptive parents and referring to them as "adoption parents" in front of Ms. S. Ms. S. responded, "What? You shouldn't be adopted." Ms. S. told the child, "[adoption] means you won't see your mom anymore, not even visits." The child thought if she lived at Ms. S.'s home, she (the child) would continue to see mother, if not someday go to live with mother. The child knew the S. family was not adopting her. They also told her they would take care of her until mother got better. The child thus thought mother might get better and held out hope of living with her. Asked to describe how she felt about her mother, the child replied, "great" and "wonderful." The child also testified she did not want to be adopted.

Adoption Social Worker

The adoption social worker testified that, in her opinion, the children were likely to be adopted. They were charming children, ages eight-, six-, and four years old, who

did not present with any medical or behavioral concerns.

The adoption social worker was concerned about the permanency of a guardianship with the S. family. On at least two occasions, Ms. S. mentioned the guardianship would be temporary. It was her intent as well as her husband's at some point to return the children to mother, once she was in a position to parent them. Shortly after Easter 2010, the witness had another conversation with Ms. S., which reinforced the adoption social worker's concern that Ms. S. was ambivalent about a permanent guardianship for the children.

Caregiver ambivalence was not in the children's best interests, according to the adoption social worker. If there were a conflict with mother, it gave a caregiver an out, thereby leaving the children with problems. Based on mother's conduct vis-à-vis the children's previous placements and the amount of access mother had to the children in the S. home, the adoption social worker was concerned that a guardianship with the S. family would not be as permanent a placement, as the agency desired for the children and the children deserved.

The Children's Therapist

A therapist for the children since December 2009 testified about her observations of the children. She frequently saw the children due to behavioral problems they exhibited in their prior foster home. The children were diagnosed with post traumatic stress syndrome due to their aggressive behaviors, sad and depressed feelings, and having witnessed violence in the family home. As of April 2010, the children were showing some signs of improvement. She attributed the improvement to the more structured environment in the S. home. Also, she understood that the children previously visited more with mother. The therapist believed that since the children went to live with the S. family, mother had seen the children five times or maybe twice a month. In the therapist's view, the children's contact with mother caused them to disintegrate.

According to the therapist, the children needed a stable, permanent plan. She did not believe that the children would achieve this in the S. home because Ms. S. only wanted a guardianship for the children. The therapist had heard Ms. S. say she would like a guardianship while mother finished her program and got herself together and eventually return the children to mother or possibly have mother move into the S. home. In the therapist's view, placement with Ms. S. would not provide a long-term permanent plan for the children.

The therapist opined the children needed permanency due to their behaviors and in order to make better progress. When mother was not so involved with the children, their behaviors became more stabilized, they made progress in school, and had greater positive interaction with each other and their caretaker. The more mother was involved with the children, the more aggressive the children behaved after visits. On the other hand, they also became sad and depressed when mother did not appear for visits. Mother had missed a visit with the children around Easter. The children had told the therapist they missed mother, and wished to see mother, if not be with her.

At the conclusion of the therapist's testimony, the children's attorney represented that it was her belief the middle child did not want to be adopted because she wanted to continue to see mother.

Mother

Mother testified she wanted a permanent plan of legal guardianship for the children with the S. family. In her view, the children were thriving in the S. family's home. She also testified she did not want to lose her parental rights. It was mother's hope that with a legal guardianship, she might be able to again parent her children.

By this point, mother had been clean for more than eight months. She attributed her earlier statements that she did not want to reunify to the "fog in my head." She

admitted, however, she had been clean and sober for some time when she made her statements.

Currently, mother claimed she had frequent contact with the children. Every night there were phone calls. The children were very excited when she called. Mother added, "I go two times a week. It is 70 hours I get to see the kids. I go Friday, Saturday, Sunday, twice a week." The 70-hour visitation started in February, the month the children were placed with the S. family. When she arrived to visit, the children hugged and kissed her. During the visits, she did homework with the children and read books to her youngest child.

Asked about a missed visit at Easter time, mother testified Ms. S. wanted her to come. However, that weekend mother moved into new housing and did not have access to a phone. She did not call the S. home until the Monday after Easter. Mother felt the planned visit was not "set-in-stone." Mother blamed Ms. S. for not "put[ting] the dates together." Otherwise, mother testified she only missed one visit.

According to mother, from the time of the children's respective births until she started drinking in 2008, she took care of all of their needs. She considered herself a good mother. The children did "really good" then. When she was under the influence, however, she was unable to care for the children at all. She acknowledged she had "messed up," but the bond between her and the children was "so strong."

It was also mother's opinion that to move the children again would mentally and emotionally destroy them. She described them as "so attached" to Mr. and Ms. S.

Ms. S.

Ms. S. testified she was a family friend of mother's and had known her for approximately seven to eight years. She described their friendship as "good" and "close." The children had been placed in her home since February 2010. The children had behavioral issues and were "kind of wild at times." However, she described the

children as loveable children who were making gradual improvement. Since then, mother called the children on a daily basis, except in April 2010, and visited once a month.

The phone calls lasted 20 minutes or less. The children enjoyed talking to their mother. The children talked about their daily activities, asked when they would next see mother, and expressed affection for her. They also talked about wanting to be with mother.

Their first visit with mother after being placed with the S. family was an eight-hour shopping spree in February. Next, sometime in March, mother spent Friday and Saturday with the children. Also, in the end of March, mother came down for a surgery her middle child required. During the week of Easter in April 2010, they did not hear at all from mother. "[The children] were pouty, mopey, [and] crying." Ms. S. was fearful mother was "out using or not wanting to have contact with her children." This lack of contact frustrated Ms. S because she thought mother did not want contact with the children. Ms. S. told the social worker, "I didn't know if I could handle it if [mother] didn't want to see them, maybe adoption would be best." Mother eventually visited later in the month with the children.

Ms. S. also remembered telling a social worker in March 2010 that she was not interested in adopting the children. She said she was "waiting for [mother] to get it together and be able to take care of her kids." Her expectation was that the guardianship would be temporary until mother got her act together.

Ms. S. acknowledged her "guilt" in assuring the children that they would see mother again. When they came to the S. house, they were terrified they were not going to see their mother. "I finally got them to a place where they are not freaked out that they are not going to see their mom, because every time they were seeing her there was crying and crying and upset."

Ms. S. also repeatedly told the children they would return home to their mother. She also told them she believed mother would get better. Ms. S. believed the children "absolutely" could go home to mother. Ms. S. and her husband were committed to being the children's guardians until mother succeeded. Ms. S. also testified she and her husband would commit to the children until they reached 18. However, she saw herself as a fill-in parent temporarily for the children until mother got the children back.

In closing argument, mother urged the court to find the parent/child relationship exception to termination of parental rights applied in this case. The agency and the children's counsel disagreed.

Ruling

The court had no doubt that the children loved their mother and would be sad if they were not to see her again. The court also found mother and Ms. S. repeatedly told all three children that one day mother would or at least hopefully would get better and they would live with their mother again. The children held that hope as well as the belief they would continue to see their mother. The court, however, did not believe it served the children's best interests to be told such things.

In addition, the court did not believe the children's current placement satisfied their need for permanency and therefore their best interests. The court was not convinced the S. family would permanently commit to and raise the children through legal guardianship. The children, however, deserved more stability than they currently had and on a permanent basis. The court also found, based on the therapist's testimony, that contact with the mother caused the children's behavior to disintegrate.

The court further took into account the foster mother's testimony that: the children frequently asked when would mommy get better or would she ever get better? and they panicked if they did not speak with mother. However, based on the history of the case, the court believed that at least the eldest child had been placed in the untenable

position of being the caretaker for her siblings and having to assume the role of parent for mother. The court was also hard pressed to believe that the relationship at that time between mother and the children was actually the type of relationship the court would need to find existed in order to conclude that severing the parent/child relationship would deprive the children of a substantial, positive emotional attachment such that they would be greatly harmed. The juvenile court concluded mother had not met the burden of showing a substantial harm or detriment to the children.

Having found the children were likely to be adopted, the court terminated parental rights.

DISCUSSION

Section 366.26, subdivision (c)(1)(B), acknowledges termination may be detrimental under specifically designated circumstances. A finding of no detriment, however, is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.) The statutory presumption is that termination is in the child's best interests and therefore not detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) It is the opposing party's burden to show that termination would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

As a consequence, when a court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to support the court's rejection of the detriment claim, but whether the juvenile court abused its discretion in so doing. (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351.) For this to occur, the proof offered would have to be uncontradicted and unimpeached so that discretion could be exercised only in one way, compelling a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Based on our review of the record, we conclude the juvenile

court properly exercised its discretion in rejecting mother's argument that termination would be detrimental to the children.

The beneficial parent/child exception in section 366.26, subdivision (c)(1)(B)(i), involves a two-part test: (1) did the parent maintain regular visitation and contact with the children; and (2) would the child benefit from continuing the parent/child relationship. With few, but notable exceptions, mother maintained regular visitation and contact with the children. However, we agree with the juvenile court that she did not show severing their relationship would deprive the children of a substantial, positive emotional attachment such that they would be greatly harmed (*In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342).

For this exception to adoption to apply,

> "the parent-child relationship [must] promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A juvenile court must therefore: 'balance ... 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.' (*Id*. at p. 575.)" (*In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342.)

Mother contends that factors, used to assess a parent/child relationship, weigh in her favor. Citing *In re Angel B.* (2002) 97 Cal.App.4th 454, 466 (*Angel B.*), she argues the children's ages, the portion of their lives spent in her custody, the positive effect of their interaction, and their need for stability and a continued relationship with her establish that the court abused its discretion. We disagree.

The *Angel B.* factors mother cites are based on language from *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576. There, the appellate court identified the age of a child, the portion of the child's life spent in the parent's custody, the "positive" or "negative"

effect of interaction between parent and child, and the child's particular needs as "some of the variables which logically affect a parent/child bond."

Mother points out that the children spent the majority of their lives in her care. However, that portion of their lives is relatively minor compared to the balance of their respective childhoods. Mother overlooks that given the children's young ages, they faced the prospect of spending a majority of their childhoods in less than permanent placement, absent adoption. Certainly, these variables weighed in favor of adoption, rather than a continued relationship with mother. Also, the alternative plan of legal guardianship, which mother endorsed, did not promote their need for stability (*In re Celine R.* (2003) 31 Cal.4th 45, 53). Not only does guardianship deprive children of their best chance of receiving the permanency and stability of a complete commitment from responsible and loving adoptive parents (*ibid.*), the guardianship proposed here was especially unsettling. There was evidence of Ms. S.'s belief that guardianship would only be temporary and her view of herself as only a fill-in parent. She also shared her thoughts with the children. We agree with the juvenile court that telling the children such things was not in their best interests.

Mother also argues that there was no evidence that her interaction with the children was anything other than positive. In large part, she focuses on her testimony and that of her good friend, Ms. S. However, she ignores her negative interactions with the children when she was under the influence as well as the November 2009 incident when she abruptly announced to the children she would not see them again.

In addition, she dismisses the court's finding, based on the therapist's testimony, that mother's contact with the children caused their behavior to disintegrate. Although mother questions the weight the therapist's opinion should be afforded, she ignores the law, which prohibits us, as a reviewing court, from reweighing or expressing an independent judgment on the evidence. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.)

Instead, issues of fact and credibility are matters for the trial court alone. (*In re Amy M.* (1991) 232 Cal.App.3d 849, 859-860.)

Mother further minimizes the juvenile court's finding that there was not a substantial, positive emotional attachment between her and the children. She assumes the court reached its conclusion by inappropriately focusing on her inability to provide a stable and permanent home. We are not persuaded that this is what the juvenile court did.

Mother testified she had only started drinking in 2008 and until then had taken care of all the children's needs, she was a good mother, and the children did well in her care. However, as the court found, mother's alcoholism had placed the eldest child in the untenable position of being her siblings' caretaker and a parent to mother. Even mother had to admit that once she was under the influence, she was unable to care at all for the children. Also, the children had been traumatized by the violence they had experienced in the home with mother and their father.

The evidence following mother's relapse also supported more than a reasonable inference that her relationship with her children was not a positive one for the children. Instead, it was based more on her wishes and needs, than the children's best interests. First, mother did not want to reunify with the children. She would visit because the court ordered that she could. She even stayed away from the children for a month. Yet she wanted the children placed so that she could see them when she wished. Then, after identifying and advocating for one couple with whom the children were placed following her relapse, mother claimed that couple was too old to care for the children and was adamant that the agency move them. The juvenile court could reasonably infer from this evidence mother was prompted not by the couple's age or abilities and therefore the children's interests, but rather by their expressed interest in adopting the children. Mother also wanted the children placed with yet another family of her choosing in another community, away from the children's old friends. To make matters worse, she

abruptly and without warning or preparation told the children she would not see them again for years. She thereafter vacillated between deciding whether to visit and giving them unrealistic hope that they would return to her care one day. She even enlisted the S. family, who were only interested in temporary placement, to suit her needs. Later still, she missed an Easter 2010 visit with the children and took no responsibility for it. It is little wonder that the children would panic at times in such an uncertain and unstable environment.

Thus, the record contained conflicting evidence regarding the nature of the parent/child relationship. The evidence did not compel a finding in mother's favor. (*Roesch v. De Mota, supra,* 24 Cal.2d at pp. 570-571; *In re I.W., supra,* 180 Cal.App.4th at p. 1528.)

Latching on to a social worker's statement that the children appeared "devastated" in that they were crying after the November 2009 visit and Ms. S.'s testimony that the children were "terrified" they would not see mother again, mother further argues the children needed to maintain contact with her. The juvenile court, however, could look past the hyperbole and consider the actual evidence of the children's behaviors. As young children, they cried. They were also pouty and mopey. As the juvenile court noted, there was no doubt that the children loved their mother, would like to continue seeing her, and would be sad if they could not. However, there was no evidence that the children would be greatly harmed if their relationship with mother were severed.

At most, there was mother's testimony that the children were so attached to Mr. and Mrs. S. that to remove the children from their care would be mentally and emotionally destructive to the children. However, the issue was not the children's attachment to the S. family, but rather was there compelling evidence that their relationship with mother should continue.

Finally, mother argues the juvenile court should have focused on the long-term effects that termination would have on the children (*In re Amber M.* (2002) 103 Cal.App.4th 681, 691). She overlooks, however, that it was her burden to establish detriment (*In re Zachary G., supra,* 77 Cal.App.4th at p. 809) and she introduced no evidence of any long-term ill effects. On the record before it, the juvenile court did not abuse its discretion.

DISPOSITION

The orders terminating parental rights are affirmed.