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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

Guardianship of T.G., a Minor.  
MATTHEW S.,  
Petitioner and Respondent,  
v.  
PAUL G., et al.,  
Objectors and Appellants.

A142850  
(Solano County  
Super. Ct. No. FPR041718)

Paul and Claire G. (the Grandparents) appeal from the trial court's judgment terminating their guardianship over their granddaughter T.G. (T.) and placing her in the custody of her biological father, respondent Matthew S. (Matthew S.). Because the Grandparents have failed to show the court abused its discretion in concluding that termination of the guardianship is in T.'s best interest, we affirm.

**BACKGROUND**

T. was born in May 2003 in Washington. Her parents, Alecia G. and respondent Matthew S. were not married. Matthew S. moved to Oregon in March 2004. By March 2005, T. was living in California with her mother's parents, the Grandparents.

In February 2006, T.'s mother was killed in a helicopter crash during a military training exercise. Matthew S. had had no contact with T. from September 2004 until after T.'s mother's death. Matthew S. obtained a court order and took T. into his custody.

Subsequently, in March 2006, the Grandparents filed a petition seeking their appointment as temporary guardians.

In January 2007, the trial court granted the petition and appointed the Grandparents as T.'s guardians. The court's decision stated that, although it was in T.'s best interest that she be returned to the custody of the Grandparents, it was also in her best interest to have an "unobstructed" opportunity to strengthen her relationship with Matthew S. The court granted Matthew S. two six-day visits per month, as well as time during school vacations and holidays. The court also directed the parties to undertake counseling and directed Matthew S. and Claire G. to take an anger management class.

In November 2008, Matthew S. petitioned for termination of the guardianship. In an October 2009 minute order, the trial court denied the petition. Among other things, the court directed that "neither party shall make derogatory comments about the other party in the presence of the minor." In a written and detailed July 2010 order, the court repeated that warning and set forth a detailed visitation schedule and orders regarding communications and exchanges.

In May 2012, Matthew S. filed a second petition to terminate the guardianship; this is the petition at issue in the present appeal. In July 2012, the trial court's investigator submitted a report recommending the petition be denied. The court took evidence on the petition on three court dates between September and December 2013.

#### Matthew S.'s Evidence

Matthew S. testified on his own behalf. He lives in Oregon and has worked for the Oregon National Guard CounterDrug Task Force since 2009. He completed the anger management and parenting classes required by the trial court, and participated in counseling. He testified his bond with T. is stronger than it was at the time of his first petition to terminate the guardianship, and T. is happy when she visits Oregon. He said he was "very confident that [the] bond is completely there and completely strong that [T.] would do well and thrive in my household." He introduced photographs of T. with various family members in Oregon.

At the time of the evidentiary hearing, Matthew S. was living with his two teenage daughters from a prior marriage. He is married to, but living apart from, Alicia S. (Alicia), who has two children, including a teenage son named Brandon. Brandon lived with his father, but sometimes visited. Matthew S. and Alicia also adopted a four year-old boy, who spent most of the time with Alicia. Matthew S. explained that if he had custody of T., her sisters would care for her before and after school, because he gets home from work between 4:30 p.m. and 5:30 p.m.

Matthew S. and his wife began living apart in January 2010, after a December 2009 incident in which Alicia's then 16 or 17 year-old son, Brandon, tried to have sex with Matthew S.'s then 15 year-old daughter after she fell asleep. Law enforcement authorities became involved after Matthew S.'s daughter disclosed the incident to friends at school. Subsequently, it was revealed that Brandon had also molested Matthew S.'s then 12 year-old daughter. Brandon eventually pled guilty to attempted rape in the first degree and attempted sexual abuse in the first degree. At the time of the hearing below, Brandon was out of jail, but was prohibited from being around Matthew S.'s daughters or T. as a condition of his probation. Matthew S. did not put his older daughter in therapy despite it being recommended that he do so, because she did not want to see a therapist and refused to participate. He testified the likelihood Brandon did anything to T. is "very slim to none" because he was not over often and never alone with her.

Matthew S. testified to continued conflict between him and the Grandparents. Matters had improved in comparison to the situation at the time of the hearing on his prior petition, although the most marked improvement was only after he filed the second petition. It was still sometimes necessary for him to seek court orders to resolve disagreements, and the Grandparents sometimes failed to share important information about T. In February 2012, the Grandparents refused to let T. go to Oregon for her scheduled visit because Matthew S. failed until the last moment to provide his wife's current address. The Grandparents also refused to allow T. to go to Oregon in March 2012, and Matthew S. had to go to the court to get his April visit. Matthew S. expressed concern about the utility of T.'s counseling and reported that T. told him she thinks she is

supposed to go there and say bad things about Matthew S. and his family in Oregon. He testified the Grandparents had over the years made many unfounded reports of people abusing T.

Finally, Matthew S. expressed concern about T.'s emotional development. He said she had terrible table manners, seemed immature, and did not pay attention to her surroundings. He commented, "I wouldn't feel comfortable at all letting her walk down the street by herself." He also testified to his perception that the Grandparents had created a situation where T. gets rewarded for lying or telling stories to "get[] some kind of pity." He explained that he told T. she should feel free to love the Grandparents, and should not feel a need to hide it or tell bad stories about the Grandparents when visiting him.

#### The Grandparents' Evidence

T.'s therapist, Robert Bobsin, testified as an expert in the field of marriage and family therapy. He had been T.'s therapist since January 2010. He testified the relationship between T. and the Grandparents was one of "nurturing parents and loving daughter." She suffered from attachment disorder, and if she were removed from the Grandparents' custody, "it would be another traumatic event for her" which would likely lead to regression and "[s]he would have serious relationship issues" as an adult. He opined, "She needs to feel secure in her home. She needs to identify with the Grandparents as her parent figures, and she has to believe that there's less conflict between the Grandparents and Mr. [S]." He recommended the guardianship not be terminated.

Bobsin also testified the Grandparents had made derogatory comments about Matthew S.; T. had been present when some of the comments were made. Generally, T. did not say negative things about Matthew S. She was attached to him, "very loving" in talking about him, and wants to spend time with him. T. understands Matthew S. is her biological father, but identifies the Grandparents as her parents. T. once told him she wanted to live with Matthew S. because she thought it would be more fun and she liked

being with her siblings. In the next session she told him she did not really want to live with Matthew S.; she had been mad at the Grandparents.

Paul G. testified he believed both Matthew S. and the Grandparents had an equal role in creating the conflict between them. He and his wife had engaged in therapy and coaching to minimize their own roles in the conflict with Matthew S., and their communications with Matthew S. had improved. The missed visits in February and March 2012 totaled seven days, and the Grandparents “made up” that time by allowing T. to visit with Matthew S. an additional seven days at other times.

Finally, the Grandparents introduced a photo album showing T. in various aspects of her life with the Grandparents.

#### The Trial Court Investigator’s Report

The trial court investigator submitted a report, which has been filed under seal on appeal. (See Probate Code, § 1851, subd. (e).) The investigator recommended that the guardianship not be terminated, based on the disruption of removing T. from a stable placement, Matthew S.’s unstable life circumstances, and how Matthew S. handled the sexual abuse of his daughters. Those matters were also the subject of testimony from witnesses at the evidentiary hearing, as summarized above.

#### The Trial Court’s Ruling

In March 2014, the trial court met alone with T. in chambers. The court announced its ruling that the guardianship be terminated, and directed counsel for Matthew S. to prepare a statement of decision. On September 23, 2014, the trial court filed its Statement of Decision (“Decision”), explaining its finding that it is in T.’s best interest for the guardianship to be terminated.<sup>1</sup> Subsequently, the court entered a judgment terminating the guardianship. The Grandparents appealed, and, on October 8, 2014, this court granted the G.’s petition for writ of supersedeas, staying the transfer of custody pending resolution of the appeal.

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<sup>1</sup> The trial court’s decision is summarized below.

## DISCUSSION

### I. *Legal Background*

Under section 1601 of the Probate Code, “Upon petition of the guardian, a parent, [or] the ward, . . . the court may make an order terminating the guardianship if the court determines that it is in the ward’s best interest to terminate the guardianship.” The best interest determination is guided by the provisions of the Family Code regarding custody determinations, both in the original appointment and in proceedings to terminate a guardianship. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1123 (*Ann S.*); *Guardianship of L.V.* (2006) 136 Cal.App.4th 481, 491 (*L.V.*).

Section 3041 of the Family Code<sup>2</sup> establishes a presumption that removal of a child from the care of a nonparent who has assumed a parental role is detrimental and not in the best interest of the child. (*Ann S.*, *supra*, 45 Cal.4th at p. 1123; *L.V.*, *supra*, 136 Cal.App.4th at p. 491.) Section 3041, subdivision (c) states, “ ‘detriment to the child’ includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time.” The Legislature specified that the removal of a child from such a placement may be found to be detrimental even if the child’s parents are fit to care for the child. (§ 3041, subd. (c) [“A finding of detriment does not require any finding of unfitness of the parents.”]; see *Ann S.*, at p. 1123.) The presumption against removal is established by section 3041, subdivision (d), which provides that “if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.”

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<sup>2</sup> All undesignated section references are to the Family Code.

The parties agree the section 3041, subdivision (d) presumption was applicable in the present case, due to the many years the Grandparents cared for T. on a daily basis. Thus, under section 3041, subdivision (d), there was a “rebuttable presumption that it would be detrimental to place” T. in Matthew S.’s custody. (*H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, 1137–1138.) In other words, “in the absence of proof to the contrary,” the trial court was obligated to conclude that removing T. from her “stable, continuous, and successful placement” would be detrimental to her and not in her best interest. (*L.V., supra*, 136 Cal.App.4th at p. 491.) That obligated Matthew S. to present evidence to rebut the presumption of detriment. (*Guardianship of Vaughan* (2012) 207 Cal.App.4th 1055, 1073; *H.S. v. N.S., supra*, 173 Cal.App.4th at p. 1137.) Matthew S. was not, contrary to language in the Decision (see page 8, *post*) and in the parties’ briefs on appeal, required to show that remaining in the Grandparents’ custody would be detrimental to T. (*A.H. v. Superior Court* (2013) 219 Cal.App.4th 1379, 1391 (*A.H.*.)

The ultimate question under Probate Code section 1601 is whether termination of the guardianship is in the minor’s best interest. (*Guardianship of A.L.* (2014) 228 Cal.App.4th 257, 268 [“The best interest of the child is the sole criterion governing guardianship termination proceedings”]; see also *Ann S., supra*, 45 Cal.4th at p. 1134; *A.H., supra*, 219 Cal.App.4th at pp. 1391–1392.) Where section 3041, subdivision (d) applies, a necessary corollary to a trial court’s finding that termination of a guardianship is in a minor’s best interest is that the presumption of detriment has been overcome. If not, then section 3041, subdivision (d) would mandate a finding that termination is *not* in the minor’s best interest. (See § 3041, subd. (d) [describing presumed finding as “that the custody is in the best interest of the child and that parental custody would be detrimental to the child”].) We review the trial court’s best interest determination for an abuse of discretion. (*A.H.*, at p. 1392.) Because that review necessarily encompasses the no detriment finding, no separate review of that finding is necessary.<sup>3</sup>

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<sup>3</sup> At least one court has suggested the findings regarding detriment and best interest are reviewed for substantial evidence. (*L.V., supra*, 136 Cal.App.4th at p. 484 [holding substantial evidence supported trial court’s finding that termination would be

## II. *The Trial Court's Reasoning*

The trial court's Decision properly identifies "[t]he issue before the Court" as "whether it is [in] [T.]'s best interests for the guardianship to be terminated." The Decision then states, "[t]he burden lies with Mr. [S.] to demonstrate by a preponderance of evidence that maintaining the guardianship is detrimental to [T]."

At the outset, we note that the Decision's framing of Matthew S.'s burden actually put an *additional* burden on him not required under section 3041, subdivision (d). As explained previously, that statute created a presumption that termination of the guardianship would be detrimental, and required Matthew S. to show by a preponderance of evidence that termination would *not* be detrimental to T. Section 3041, subdivision (d) did not obligate Matthew S. to show that *maintaining* the guardianship would be detrimental; it is possible for a guardianship to be beneficial for a child, but for termination to be non-detrimental and in the child's overall best interest. In any event, because the trial court found termination of the guardianship is in T.'s best interest, and a finding of lack of detriment from the termination was a necessary corollary to that finding, any error in the court's failure to make an express finding of no detriment from the termination was harmless. (*S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1016 [where trial court fails to exercise its discretion, reversal is not required if "it is not reasonably probable that the appellant would have obtained a more favorable result had the court exercised its discretion"].) The Decision, described below, makes clear the court imposed the burden of proof on Matthew S. and found termination would not be detrimental, even if it did not frame the issue precisely in that manner.

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detrimental].) However, the Grandparents argue the trial court's decision to terminate the guardianship is reviewed for abuse of discretion and do not argue a different standard of review applies to the finding of no detriment. In any event, "[t]he practical differences between the two standards of review are not significant." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) Our conclusion the trial court did not err in terminating the guardianship would be the same under either standard of review. Further, our conclusion would also be the same were we to separately analyze the finding that Matthew S.'s evidence was sufficient to overcome the section 3041, subdivision (d) presumption.

We now proceed to summarize the trial court's reasoning in finding termination of the guardianship is in T.'s best interest. Regarding Matthew S., the court found there was "persuasive evidence that [T.]'s bond with her father and his family is positive and emotionally healthy." The court recognized terminating the guardianship would be disruptive, but found "[T.] and her father are emotionally equipped to overcome any inherent trauma that results" from termination. The court found Matthew S. is a "capable" father, and found "satisfactory" Matthew S.'s explanations regarding alleged "instability due to frequent moves and his marital status, and financial irresponsibility." The court considered but declined to follow the court investigator's findings on those issues and the investigator's recommendation to continue the guardianship. The court also concluded Matthew S. had provided a "satisfactory" explanation for how he responded to the sexual abuse perpetrated by his stepson Brandon.

Regarding the Grandparents, the court found, "while, in many ways, the Grandparents are to be commended in their role as guardians, there was also clear evidence of ways in which they have fallen short of meeting [T.]'s emotional needs." The court found the Grandparents had been "sheltering and over-protecti[ng]" T., and putting her through therapy that was not in her best interest. Further, the court found that, due to the Grandparents' conduct, "[T.] is being alienated from her father." The court found "persuasive" Matthew S.'s evidence that "the Grandparents were continuing to interfere with his contact and with his relationship with [T.]" Matthew S. had found it difficult to communicate with the Grandparents about T.; although the conflict had "lessened more recently," it was apparently in response to Matthew S.'s filing of the termination petition. The underlying problem is the Grandparents do not think Matthew S. is a capable father, and Mrs. G. "does not seem able to respect Mr. [S.] as a father." On that topic, the Decision concludes, "The Court finds that it is essential that [T.]'s relationship with her father be maintained and that it will be compromised if the guardianship is continued."

### III. *The Grandparents Have Not Shown the Trial Court Abused Its Discretion*

The Grandparents argue, “In terminating the guardianship, the trial court failed to appreciate the presumption in favor of [T.]’s stability and the significant burden Matthew S. faced in overcoming it. Had the Court applied the proper standard, it would not have terminated the guardianship, as Matthew S. did not rebut the presumption of detriment sufficient to show that termination was in [T.]’s best interests.” As explained above, the trial court actually imposed an additional burden on Matthew S., by requiring him to show continuation of the guardianship was detrimental to T. Accordingly, to the extent the Grandparents contend the trial court erred by applying the wrong legal standard, the claim fails because the court’s mistake in characterizing Matthew S.’s burden actually benefitted the Grandparents.

In any event, the heart of the Grandparents’ claim on appeal appears to be that the trial court abused its discretion in finding terminating the guardianship is in T.’s best interest, because the evidence overwhelmingly supported continuation of the guardianship. The Grandparents rely on portions of the trial court’s oral ruling in arguing that, among other things, the court terminated the guardianship merely because Matthew S. is now capable of parenting T., without taking into considering the presumption against termination. However, the Decision cannot be impeached by use of the trial court’s prior statements. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268 [“a trial judge’s pre-judgment oral expressions do not bind the court or restrict its power to later declare final findings of fact and conclusions of law in the judgment”]; see *Taormino v. Denny* (1970) 1 Cal.3d 679, 684 [“ ‘ ‘No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final conclusion . . . .’ ”]; *Visini v. Visini* (1963) 212 Cal.App.2d 183, 186 [“It is the established rule that an oral opinion or other antecedent expression of a trial judge may not be used to modify or impeach his findings.”].) In any event, the Decision makes it clear the trial court found termination of the guardianship was in T.’s best interest *both* because of the quality of her relationship with Matthew S. *and* because continuation of the guardianship threatened to undermine the relationship.

The Grandparents also emphasize the well-established proposition that, “ ‘the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements.’ ” (*L.V., supra*, 136 Cal.App.4th at p. 495.) The trial court’s Decision recognized that presumption, stating “[Matthew S.] did not dispute applicable law and acknowledged he had a significant burden in attempting to terminate a guardianship of long duration.” The trial court found Matthew S. met that burden by presentation of evidence showing it would be detrimental to T. *not* to terminate the guardianship (which was, again, an additional burden not required by section 3041, subdivision (d)). The Grandparents also point to T.’s therapist’s testimony that termination of the guardianship would likely “be a big setback” for T. that could cause “serious relationship issues” in the future. But the trial court was entitled to reject that testimony; the Decision’s finding the therapy was not in T.’s best interest suggests the court did not fully trust the therapist’s judgment.

The Grandparents argue the trial court’s reliance on the alienation of T. from Matthew S. as a basis for termination was improper because Matthew S. testified and the court found that T. and Matthew S. have a strong relationship. It is true the record does not show T. is currently alienated from Matthew S. However, the Grandparents present no reason why the trial court could not consider the Grandparents’ interference with T.’s relationship with Matthew S. as a factor weighing in favor of termination of the guardianship. Even though the Grandparents’ conduct had not yet resulted in alienation, there was a risk T. could become alienated from Matthew S. in the future. Although the showing of harm to T. in the guardianship might have been stronger had she actually become alienated from Matthew S., in that event it would have been more difficult to terminate the guardianship and send T. to live with Matthew S. We conclude the court properly considered the Grandparents’ alienating and interfering conduct as a factor weighing in favor of termination. (See *In re Marriage of Abargil* (2003) 106 Cal.App.4th 1294, 1299 [custody award to parent who “respected [the other parent’s] relationship

with [the minor] and was likely to foster continuing contact between them”]; *In re Marriage of Roe* (1993) 18 Cal.App.4th 1483, 1490, disapproved on another ground in *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 38, fn. 10 [custody award to parent who “would not attempt to thwart [the minor’s] relationship with his noncustodial parent”]; *Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 932 [one parent’s pattern of interfering with visitation relevant to custody determination].) Moreover, although the Grandparents’ conduct may not have been as extreme as it had been in the past and may have improved after the filing of Matthew S.’s Petition, the trial court could still properly consider the overall pattern and history of the Grandparents’ conduct in making its determination of T.’s best interest.<sup>4</sup>

Finally, the Grandparents argue the trial court abused its discretion in concluding termination of the guardianship is in T.’s interest, in light of what the court investigator characterized as Matthew S.’s unstable housing, marital status, home life, and financial situation. They also criticize Matthew S.’s response to the sexual abuse of his daughters by his stepson, which was also a concern raised by the court investigator. However, it was the trial court’s function to assess the evidence and weigh all the relevant factors regarding T.’s best interest; it is not this court’s role to second-guess the court’s findings absent clear error. “The decision whether to terminate a guardianship . . . is an inquiry that is particularly founded on application of the trial court’s experience with human conduct.” (*L.V., supra*, 136 Cal.App.4th at p. 488.) Although another court might reasonably have reached a different conclusion, the trial court’s application of the law to the facts was not “arbitrary and capricious.” (*Haraguchi v. Superior Court* (2003) 43 Cal.4th 706, 712.) The Grandparents have not demonstrated the court abused its discretion in terminating the guardianship.<sup>5</sup>

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<sup>4</sup> The Grandparents argue “the finding that [T.] was being alienated from [Matthew S.] is not supported by substantial evidence.” However, the trial court found that the Grandparents’ conduct created a risk T. would become alienated from Matthew S., not that T. is presently alienated from Matthew S.

<sup>5</sup> The Grandparents contend Matthew S. was required to show changed circumstances in order to support termination of the guardianship. That is not the law; termination may be

DISPOSITION

The trial court's judgment is affirmed. Matthew S. is awarded his costs on appeal.

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SIMONS, J.

We concur.

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JONES, P.J.

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BRUINIERS, J.

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granted based on the best interest of the child without a showing of changed circumstances. (*In re Angel S.* (2007) 156 Cal.App.4th 1202, 1208.) In any event, Matthew S.'s stronger relationship with T. was a changed circumstance supporting termination of the guardianship.