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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re L.J.S., et al., Persons Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JEROME S., SR.,

Defendant and Appellant.

D062622

(Super. Ct. Nos. SJ11279A, D)

APPEAL from an order of the Superior Court of San Diego County, David D.

Oberholtzer, Judge. Affirmed.

Jerome S. (Father) appeals an order issued at a contested 12-month permanency hearing placing two of his four children with their mother, Lu. S. (Mother). He contends the juvenile court violated his right to substantive due process when it failed to return all four children to his care. He also asserts the juvenile court erred when it failed to

terminate jurisdiction under Welfare and Institutions Code section 364. (Undesignated statutory references are to the Welfare and Institutions Code.) We reject his assertions and affirm the order.

#### FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother never married, but have four children together: daughters A.S. (born 2001), L.J.S. (born 2004) and L.S. (born 2007); and son J.S. (born 2006). Father and Mother have a history of drug use and domestic violence. A.S., L.J.S. and L.S. had open cases with the San Diego County Health and Human Services Agency (Agency) between 2002 and 2008. Ultimately, jurisdiction was terminated and these three children were placed with Father.

In April 2011, protective custody warrants were issued for all four children based on allegations of neglect and abuse by Father. The Agency filed dependency petitions under section 300, subdivision (b) as to A.S. and L.J.S., the two children at issue in this appeal. The petitions were based on allegations of domestic violence between the parents, and alcohol abuse and mental health concerns regarding Father. (The record does not contain any records pertaining to L.S. or J.S.; however, they are reflected as being dependent children in all subsequent Agency reports.)

A.S. and L.J.S. were placed in the home of a paternal aunt. They were later moved to a foster home. The juvenile court made true findings on amended versions of the petitions. At the contested disposition hearing in July 2011, the juvenile court declared A.S. and L.J.S. dependents, ordered them placed in the care of relatives, and ordered the

parents be provided with supervised visits. By February 2012, A.S. and L.J.S. were living in a foster home.

A June 2012 status review report stated that Mother had graduated from a residential substance abuse treatment, was actively participating in therapeutic groups and Narcotics Anonymous, submitted negative drug screen tests, and had moved to McAllister Sober Housing, after a transition stay with Father. Meanwhile, Father moved into a new apartment and had full-time, flexible hour employment at a shipyard. He also submitted negative drug screen tests. A.S. and L.J.S. were living in a foster home, L.S. and J.S. were living with the paternal aunt and both parents had weekly, unsupervised overnight visits with the children.

At a Team Decision Meeting in July 2012, Mother indicated that reunification with all four children would be overwhelming. Mother suggested she reunify only with A.S. and L.J.S., and that L.S. and J.S. be reunified with Father. Father wanted all four children placed with him. The Agency recommended that all four children remain together and reunify with Father.

At the contested 12-month permanency hearing in August 2012, the juvenile court received into evidence Father's stipulated testimony and several agency reports. It also heard testimony from A.S. (then 11 years old) and L.J.S. (then 8 years old). The juvenile court ordered A.S. and L.J.S. placed with Mother, and the two younger children, J.S. and L.S., placed with Father, with the understanding there would be "a great deal of interchange."

While the court believed both parents were capable of taking care of all of the children, A.S. and L.J.S. indicated that they wanted to live with Mother because it would be fairer to the parents. Because the four children had been split up for quite some time, the court stated, ". . . their bonding ha[d] been modified, to a certain extent. I'm not splitting them, I'm just keeping the status quo." The court concluded this arrangement was in the children's "better interest," to alleviate any tension the children felt about being fair to both parents. It ordered counsel to submit a visitation proposal to the court. It also found the case plan update to be appropriate, and ordered the parents to comply with the case plan. Father timely appealed.

#### DISCUSSION

Father asserts the juvenile court erred when it found that it would be in the best interests of the children to place A.S. and L.J.S. with Mother, while returning L.S. and J.S. to his care while continuing services to both parents. He first contends that the juvenile court's order violated his right to substantive due process because it unduly interfered with his fundamental parental rights. We reject this argument.

Parents have a fundamental liberty interest in the care, custody, and management of their child. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) "Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 306.) However, "[t]he doctrine of substantive due process 'does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due

process prevents "governmental power from being used for purposes of oppression," or "abuse of governmental power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." ' ' "

(*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 856.)

Father's conclusory argument fails to show that the juvenile court's order violated his right to substantive due process. Moreover, his contention fails to recognize that children "have fundamental interests of their own that may diverge from the interests of the parent." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) In a situation where a child has been abused or neglected by a parent, "the child's interest must be given more weight." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.)

The juvenile court was required to order that the children be returned to the physical custody of their parent unless it found that the return of the children to their parent would "create a substantial risk of detriment to the[ir] safety, protection, or physical or emotional well-being." (§ 366.21, subd. (f).) Father essentially argues that because he was the previous custodial parent, the juvenile court had no choice but to return A.S. and L.J.S. to his care after finding it would not be detrimental to do so. Father, however, presented no authority to support this assertion and we have found none. Upon a finding of no detriment, the juvenile court had the authority to return the child "to the physical custody of his or her parent." (§ 366.21, subd. (f).) The statute does not specify that the child must be returned to the prior custodial parent.

Here, the juvenile court expressly found that both parents were capable of taking care of all of the children; nonetheless, it found that it was in the best interests of the children to place the two older girls with Mother and the two younger children with Father. Father does not challenge the juvenile court's finding that the children would not suffer detriment if placed with Mother. Accordingly, the only issue before us is the trial court's decision to split the children between the parents. We review the issue of placement at a section 366.21 review hearing to see if substantial evidence supported the juvenile court's finding. (See *In re Alvin R.* (2003) 108 Cal.App.4th 962, 974.) We must consider the record most favorably to the juvenile court's order and "affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

We note that this case presents a rare situation where *both* parents were able to overcome substance abuse issues. Accordingly, we join the juvenile court and counsel in commending the parents for the positive changes they appear to be making for the benefit of their children. Under these circumstances, the testimony of the two eldest daughters that they wanted to live with Mother, while not determinative, constituted "powerful demonstrative evidence" that it would be in their best interest to allow them to do so. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087.) The trial court's statements at the hearing indicate that it placed a great deal of thought into its decision to split the children between the parents. On this record, there was substantial evidence to support the juvenile court's finding that placing A.S. and L.J.S. with Mother was in their best interest. Finally, should the circumstances change, section 388 provides the substantive due

process mechanism to address a change in placement. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.)

Citing *In re Gabriel L.* (2009) 172 Cal.App.4th 644, Father next argues that when children are returned to their parents at a 12-month review, the court must proceed pursuant to section 364. He contends that all four children should have been returned to him and dependency jurisdiction should have been terminated under section 364. We disagree.

Section 364 applies when a child is placed under the supervision of the juvenile court but "is not removed from the physical custody of his or her parent." (§ 364, subd. (a); *In re Gabriel L.*, *supra*, 172 Cal.App.4th at p. 649.) Where, as here, children are removed from parental custody, the court must schedule a hearing under section 366.21. (§ 366.21, subd. (f); *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 305.)

In any event, even assuming without deciding that the juvenile court was required to proceed under section 364, the question under this statute is "whether continued supervision [was] necessary." (§ 364, subd. (c).) Under this statute, the court is required to "terminate its jurisdiction unless the social worker or his or her department establishe[d] by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn." (*Ibid.*)

Notably, the juvenile court found the case plan update was appropriate and ordered that both parents comply with it. Father did not challenge this order on appeal, nor did he argue below that the juvenile court should terminate jurisdiction. The case

plan update required that both Mother and Father continue participating in individual therapy, receive parenting education through therapy and participate in substance abuse testing. Mother had the additional requirement that she continue substance abuse services. Thus, even if section 364 applied, the juvenile court impliedly found that while the parents had progressed, they required continuing supervision.

#### DISPOSITION

The order is affirmed.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.