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**COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re D.M. et al., Persons Coming Under the Juvenile Court Law. FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. S.E., Defendant and Appellant.	F065360 (Super. Ct. Nos. 0083677-3, 0083677-4, 0083677-5, 0083677-6, 0083677-7) <u>OPINION</u>
In re I.C. et al., Persons Coming Under the Juvenile Court Law. FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. A.C., Defendant and Appellant.	F065400 (Super. Ct. Nos. 0083677-4, 0083677-5, 0083677-6, 0083677-7)

THE COURT*

APPEAL from orders of the Superior Court of Fresno County. Brian M. Arax, Judge.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant and Appellant S.E.

* Before Levy, Acting P.J., Gomes, J., and Detjen, J.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant A.C.

Kevin Briggs, County Counsel, William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

S.E. (mother) and A.C. (father) appeal from the juvenile court's orders failing to find that the beneficial parent-child relationship exception to adoption is applicable to their case and terminating the parental rights of both parents to D.M., I.C., K.C., J.C. and S.C., pursuant to Welfare and Institutions Code section 366.26.¹ We reject parents' contentions and affirm the juvenile court's orders.²

FACTS AND PROCEEDINGS

Background

On May 21, 2010, a petition was filed by the Fresno County Department of Social Services (department) pursuant to section 300 alleging that mother abused and neglected her five children, ranging between 12 and five years of age, by leaving them in an unsanitary and unsafe environment. The petition alleged mother's residence had no running water, the overflowing toilet was filled with feces, bags outside the home were filled with feces, the kitchen sink was full of dirty dishes, and there was spoiled food in the refrigerator. The petition alleged mother failed to provide proper medical care for K.C., who had recently undergone a procedure placing tubes in her ears. The petition alleged that father's whereabouts were unknown.

¹ All statutory references are to the Welfare and Institutions Code.

² Father filed briefs joining mother's arguments on appeal. On November 21, 2012, mother and father's appeals were consolidated by order of this court. The oldest child in these proceedings, D.M., had a different biological father, R.M. R.M.'s reunification services were eventually terminated. R.M. is not a party to this appeal.

In 1995, mother had two young children, L.A. and Alexis C. That year mother gave birth to a third child, Arthur C. Alexis died in 1995 under suspicious circumstances with bruise marks on her head. The coroner ruled that the cause of death was unknown. L.A. disclosed that he and his deceased sister were physically abused by mother. Arthur was later adopted and L.A. lived with a relative until he reached the age of 18.

According to the social worker's report prepared for the disposition hearing, investigating Officer Hill found mother's apartment without running water and in the squalid state described in the petition. In addition, Hill found the grass around the home uncut. Trash, full of moldy food and beset with flies, surrounded the perimeter of the house. A swamp cooler without any panels, exposing various moving parts including sharp, metallic fan blades, was located in the center of the living room. Although there was no mattress in the living room, it was clear to Hill that people lived there. Clothing, food and trash lined the walls of the room.

The dishes stacked up in the kitchen sink appeared to have old, not freshly prepared, food on them. There were bowls and plates with moldy food on them. There were empty cans and bottles across the kitchen counters. There were empty pizza boxes on top of the stove. A microwave oven sat on the edge of a short table. The electrical cord to the microwave oven stretched across the room and made contact at several points with the gas stove. There was a child's potty chair within arms' reach of the stove, microwave oven and electrical cord. The refrigerator contained moldy food and a nearly empty and expired container of milk.

The bathroom had toilet paper on the floor that was soiled with blood and fecal matter. The floors and surfaces in the bathroom were dirty. The toilet was filled to the brim with fecal matter and insects. The oldest child, D.M., told investigators that the children bathed about four times a week, but not every day. I.C. explained that the children were often left home alone. Mother told investigators that the water had been shut off for a month.

At the jurisdiction hearing on August 19, 2010, mother waived her right to a contested hearing and admitted the allegations in the petition based on the social worker's report. The disposition hearing was held on November 4, 2010. The court found that mother had only made minimal progress toward alleviating or mitigating the causes necessitating detention of the children. The court ordered reunification services.

The social worker's report prepared in May 2011, stated that mother was participating in the aftercare phase of her treatment program with Spirit of Woman, after completing a 90-day inpatient treatment program. Mother had been consistent with liberal visitation with her children.

In aftercare, however, mother began missing treatment sessions and tested positive for alcohol consumption. Mother's visits with the children were set back to unsupervised visits instead of liberal visits until she could show progress again and remain drug free. Staffing meetings with mother in March and May of 2011 dealt with her need to continue drug testing and attendance of Narcotics Anonymous/Alcoholics Anonymous meetings, as well as going back into therapy and seeing a substance abuse specialist.

On May 3, 2011, mother tested positive for methamphetamine. The department postponed visits with the children to ensure the safety of the children and to prevent them from having visits with their mother while she was under the influence of drugs and/or alcohol. The social worker noted that the children had a strong bond with their mother, hoped to be returned to her, and were disappointed they could not see mother.

Mother demonstrated the ability to complete objectives of her case plan by completing parenting and anger management classes and a substance abuse program. The department recommended further reunification services for mother but more limited, unsupervised visits due to mother's positive drug tests.

An addendum report by the department indicated that father had been on an Immigration and Naturalization Service (INS) hold as of March 2011, and was being held in an INS detention facility in Sacramento. In June 2011, mother tested positive for

alcohol while in the aftercare phase of her treatment program. The department concluded mother was not benefiting from the treatment program. The department recommended supervised visits for mother and termination of her reunification services. The court terminated mother's reunification services on September 22, 2011. A bonding study was ordered by the juvenile court on November 3, 2011.

Section 366.26 Hearing

The department's report for the section 366.26 hearing was prepared in January 2012 and recommended a plan of adoption for the four younger children by the current caregivers, who were the prospective adoptive parents. After March 2011, mother had supervised visits with the children once a week. The social worker noted that although I.C., K.C., S.C., and J.C., were not generally adoptable due to their ages, the prospective adoptive parents were willing to provide a permanent plan of adoption for all four children. None of the children had any major medical or behavioral issues. The prospective adoptive parents had cared for the four younger children, as well as D.M., since January 4, 2011.

The four younger children all appeared to have a parent-child relationship with their prospective adoptive parents. The prospective adoptive parents provided appropriate tasks and challenging activities for the children, who sought out the prospective adoptive parents for company and comfort.

The bonding study noted that mother appeared to have a strong attachment bond to her children, but demonstrated a lackadaisical approach to adhering to the requirements set forth by the court for the bonding study. Mother was difficult to contact, lacked motivation, and showed an inability to maintain sobriety, indicating a high risk of future neglect of her children. The children were doing very well in their current, nurturing environment.

An additional section 366.26 report was prepared by the department in June 2012 and focused on D.M., who was 14 years old when the report was prepared. The prospective adoptive parents wanted to adopt D.M. along with her other siblings. The department acknowledged that due to her age, D.M. was not generally adoptable, but her

current caregivers were interested in adopting her with her four siblings. The prospective adoptive parents were ready and able to provide for D.M.'s physical, emotional, and social needs. D.M. looked to her prospective adoptive parents to meet her needs. The department recommended adoption as D.M.'s permanent plan.

The section 366.26 hearing began on July 17, 2012, and concluded on July 19, 2012. Dr. Laura Geiger testified that she was a licensed psychologist and had conducted over one hundred bonding studies. Dr. Geiger supervised a bonding study on mother performed by a psychology intern. The study involved the four youngest children. Mother arrived for the bonding study and took some tests but did not finish them due to a transportation issue. Dr. Geiger's office attempted to get mother to return for further testing, including the Stress Inventory for Parents of Adolescents (SIPA), but mother's telephone was disconnected and she did not appear for her next scheduled visit.

Dr. Geiger advised the intern to close the evaluation. Dr. Geiger did not believe the SIPA evaluation was necessary to complete the bonding study because there was a substantial amount of data from the social workers' reports, interviews, and the completed portions of the testing. Based on the data that she had available, Dr. Geiger was very comfortable completing the bonding study and making recommendations.

Dr. Geiger explained mother took a parental role, guided play, was verbally rewarding, gentle in redirecting her children, and that the children followed mother's directions. In assessing the overall bond between parent and children, Dr. Geiger stood by the evaluation that mother's bond was fair to adequate.

Although mother had a "substantial positive emotional attachment" with her children, mother failed in her family reunification services by testing positive for two different substances during her treatment phase and exposing her children to domestic violence. Dr. Geiger concluded that these negative exposures would harm the children if the parental relationship was to be maintained. There was a probability that mother's substance abuse would reoccur should the children be returned to mother. Also, the prognosis was poor of adults over the age of 25, who still struggled with substance dependence.

Dr. Geiger believed the best plan for the children was a permanent home with adoptive parents. A guardianship for the children would, in Dr. Geiger's opinion, be the most harmful situation because the children would not have the ultimate stability of being adopted by their guardians. There would still be a window of possibly being returned to their mother's custody with the prospect of constant disappointment.

D.M. testified that she did not always live with her mother prior to entering the foster care system and stayed at times with father (her stepfather). During some of the visits with mother, mother would say inappropriate things. Mother would whisper to D.M. and her siblings that if mother did not get the children back, she would kill herself or do some other harm to herself. Mother would tell the children to say that they wanted to live with mother rather than a foster parent. D.M. remembered one visit with mother when she told mother she wanted to live with mother and she began to cry.

D.M. stated that she wanted to be adopted as her permanent plan. As to whether she wanted continued contact with mother after she was adopted, D.M. said that sometimes she felt like she wanted to have such contact and other times she did not. D.M. understood that adoption would mean that mother's parental rights would be terminated. D.M.'s caregivers and the social workers explained a guardianship to her. D.M. did not want to be placed in a guardianship because she did not want her mother to try to get her back.

I.C., who was 13 years old at the time of the hearing, also testified. I.C. understood that if he was adopted, his foster parents would be his parents for the rest of his life, not mother. I.C. understood that in a guardianship, he would still have visitation with mother. I.C. preferred adoption. I.C. explained that if he went back with mother, he knew she would not get better, she would stay the same. I.C. noted that although she could have called often, mother called only a few times.

The court found that despite their ages, the children were adoptable and likely to be adopted. The court did not find any evidence that the beneficial parental relationship exception applied to father. As for mother, the court also did not find the exception applicable. The court found that although mother regularly visited the children, the

benefit of the relationship did not outweigh the benefits of adoption. The court noted that although there was a definite parent-child bond between mother and the children, the children would not be greatly harmed by severance of the parent-child relationship.

The court found that mother's involvement with the children was emotionally inconsistent and was troubled that mother whispered to D.M. that she would kill herself if she did not reunify with the children. The court found this statement to be highly emotionally damaging. The court found that the preference for adoption was not overcome by mother and it terminated mother and father's parental rights with a permanent plan of adoption.

DISCUSSION

The parents argue that because of the close relationship mother had with her children, the parental benefit exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) should have been applied in this case. Parents contend terminating their parental rights would be detrimental to the children. They maintain mother was involved with the children and that the juvenile court abused its discretion in failing to apply the beneficial parent-child relationship exception. Parents also argue that the trial court applied the wrong legal test in denying the beneficial relationship exception to adoption based on the best interests of the children. We disagree.

Appellate courts have interpreted the phrase "benefit from continuing the relationship" to refer to a parent-child relationship that promotes the wellbeing of the child to such an extent as to outweigh the benefits the child would gain in a permanent home with adoptive parents. Courts balance the strength and quality of the natural parent-child relationship against the security and sense of belonging the new family would provide. If severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment so that the child would be greatly harmed, only then is the preference for adoption overcome and the parents' rights are not terminated. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954 (*L.Y.L.*); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

To meet the burden of proof for this exception, the parent must show more than frequent and loving contact or pleasant visits. (*L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-954.) The relationship arises from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child's life that results in a significant, positive, emotional attachment from child to parent. (*Id.* at p. 954.) We review the juvenile court's findings concerning the parental benefit exception under the deferential abuse of discretion standard.³ (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*))

Where the issue on appeal turns on a failure of proof, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. The issue is whether the appellant's evidence was uncontradicted, unimpeached, and of such weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*))

We review the record in the light most favorable to the judgment. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) When a court rejects a detriment claim and terminates parental rights, the appellate issue is whether the juvenile court abused its discretion in so doing. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) To conclude there was an abuse of discretion, the proof offered must be uncontradicted and unimpeached so that discretion could be exercised in only one way, compelling a finding in the appellant's favor as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which supports the conclusion reached by the trier of fact. When two or more inferences can be

³ We reject the parents' assertion that we apply a substantial evidence standard of review rather than an abuse of discretion standard of review. Although we do not apply the substantial evidence standard of review, we note that there is substantial evidence to support the juvenile court's rejection of the parental benefit exception.

reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1251-1252.) This is the rule even if the reviewing justices may have ruled differently or reached a different result. (*People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal.App.4th 24, 36; *Hales v. Snowden* (1937) 19 Cal.App.2d 366, 371.)

The parents argue mother had a strong relationship with her children, exercised regular visitation, and that the children loved mother. In parents' view, mother's maintenance of a true parent-child relationship with her children warranted a finding that termination would be detrimental. The parents rely on their reading of *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) and *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*) to support their claim. We are neither factually nor legally persuaded by the parents' argument.

Neither *S.B.*, nor *Amber M.*, stand for the proposition that a parent's effort to reunify, coupled with regular, pleasant, and affectionate visits, compels a finding that termination would be detrimental to the child. The appellate court, in both cases, did mention the parent's effort as evidence of his or her devotion to the children. (*S.B.*, *supra*, 164 Cal.App.4th at p. 300; *Amber M.*, *supra*, 103 Cal.App.4th at p. 690.)

The parent's effort and devotion, however, was not the linchpin to either *S.B.* or *Amber M.* Notably, in both cases, there was uncontroverted third-party evidence, including expert opinion, of a strong attachment between the parent and the children and the potential for harm to the children. (*S.B.*, *supra*, 164 Cal.App.4th at pp. 295-296; *Amber M.*, *supra*, 103 Cal.App.4th at pp. 689-690.) In this case, the parents presented no such evidence.

Mother had a prior child welfare history, dating back to the 1990's, that involved the death of one child, the guardianship of another child until he became an adult, and the adoption of a third child. Mother had a long history of drug abuse and relapse. The children were found in horrendous squalor at a time when mother was caring for them and when mother was abusing substances. The children had no immediate access to

running water or basic sanitation. Mother was unable to end her substance abuse during the reunification period. Father was completely uninvolved with the children.

There is little doubt from the record that mother loves her children and, as the juvenile court observed, had a bond with them. The parent-child relationship, however, must arise from day-to-day interaction, companionship, and shared experiences. The parent must show that he or she occupies a parental role in the child's life that results in a significant, positive, and emotional attachment from child to parent. (*L.Y.L., supra*, 101 Cal.App.4th at p. 954.)

We agree with respondent that mother failed to demonstrate evidence at the hearing that the children would benefit from maintaining a relationship with her. The two oldest children, D.M. and I.C., expressed a preference for adoption by their foster parents over guardianship with the possibility that mother could regain custody over them. Although mother asserts that she was involved with her children's lives, her drug addiction dominated her relationship, or absence of a relationship, with the children in a dependency proceeding that lasted for over two years.

Mother failed to demonstrate at the section 366.26 hearing that she occupied a true parental role with her children that resulted in a significant, positive emotional attachment of them to her. Mother did not show that the juvenile court abused its discretion in rejecting the application of the parental benefit exception to this case. We reject mother's contention that the juvenile court erred in considering the best interests of the children when it did not find the parent benefit exception to adoption applicable in this case or in ordering termination of the parents' parental rights.

DISPOSITION

The juvenile court's orders denying mother's motion to apply the parent-benefit exception and terminating the parental rights of mother and father pursuant to Welfare and Institutions Code section 366.26 are affirmed.