Filed 2/6/13 In re E.A. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re E.A., a Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Michael A., Defendant and Appellant.	B241202 (Los Angeles County Super. Ct. No. CK77073)

APPEAL from an order of the Superior Court of Los Angeles County, Amy Pellman, Judge. Reversed and remanded with directions.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Michael A. appeals the order terminating parental rights over his daughter, E.A. (E.), under Welfare and Institutions Code section 366.26.[1] Appellant contends that due process required a finding supported by clear and convincing evidence that he was an unfit parent or that return of the girl to his custody would create a risk of harm or detriment to the girl, and that the absence of such a finding or substantial evidence to support it precluded the court from terminating his parental rights. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of the Department of Children and Family Services (DCFS) in April 2009, when 10-year old E. called 911 after finding her mother, F.A. (Mother), unconscious. Mother was taken to a hospital. The family home, where E. and Mother lived with five-year old half-sister, R.H., and 18-year old half-brother, D.K., was dirty and in disarray, with dangerous chemicals placed in locations easily accessible to the children. E.'s hair was uncombed, her face was not clean, and she was wearing dirty clothing. E., who is mildly mentally impaired, had been enrolled in special education classes. Her school reported that she was often absent. Mother reported being in and out of the hospital since R.H.'s birth in 2004 due to numerous medical problems. Mother was taking multiple prescription drugs, including hydrocodone and Seroquel.

E. and half-sister R.H. were detained and placed with relatives. In May 2009, the girls were moved, with the acquiescence of their parents, to the home of S.K., who was D.K.'s older half-sister, but not a direct relative of E. or R.H.

Appellant, who lived in Las Vegas, learned of the proceedings and appeared at the DCFS office for an interview on May 19, 2009. He denied knowing

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

anything about the condition of Mother's home and claimed to have sent Mother up to $200 "when [he] had extra money to pay." He said he had visited E. three or four times in the preceding year. He admitted using cocaine from 1978 until 1999, but said he had been clean since 2001. He was receiving disability and living in a board and care facility.

Mother reported that appellant had sent her $10 or $20 whenever she called him and requested funds and came to visit E. "every once in a while." The most recent visits were in September and December 2008, when he bought clothing and a backpack for E. and gifts for her and R.H. Mother reported appellant was living in a drug rehabilitation house and had used crack cocaine off and on for many years, which had been the cause of the couple's 1999 divorce.

The May 2009 jurisdictional/dispositional report does not indicate that DCFS made any arrangements for appellant to visit E., although schedules for monitored visitation were set up for Mother and R.H.'s father, Rafael H. At a June 2009 hearing, appellant reported he was having difficulty obtaining visitation. He had called S.K. and arranged a visit while he was in town for the hearing, but S.K. had not brought E. to the designated location as promised and then failed to return his calls. The court advised him to contact the caseworker for assistance in securing visitation.

At the July 16, 2009 jurisdictional/dispositional hearing, which appellant attended, the parties stipulated that if appellant testified, he would say that he had lived with E. and Mother for the first two years of the girl's life, that he sent payments of $95 per month to the Department of Support Services until 2006,[2] that he occasionally sent Mother money in amounts of $100 to $200, and that when he came to see E., he took her shopping for shoes, backpacks and school supplies.

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[2] Appellant produced receipts for some of these payments.

The court found true that Mother physically abused the girls by striking them with an extension cord and belt, that she was an abuser of prescription medication, that she had mental and emotional problems, and that Mother's home was in a "filthy, unsanitary and hazardous" condition.[3] The court struck the only count pertaining to appellant -- that he failed to provide the necessities of life for E. -- finding that appellant had provided "somewhat" for his child. The court ruled, without objection from counsel for DCFS, that as a non-offending parent, appellant need not participate in reunification services. At the August 24 dispositional hearing, the court granted appellant unmonitored visitation, stating: "I can't find any cause to restrict [appellant's] visitations with [E.]. There's nothing in any of the reports indicating E. would be at risk with unmonitored visits with [appellant]." At that hearing, the court found "by clear and convincing evidence, there's a substantial danger if the children were returned home to the physical health, safety, protection or physical or emotional well-being of the children," referring to the home of Mother, "the parent[] with whom the children resided at the time the petition was filed."

In September 2009, Mother died. Sometime between that date and February 2010, appellant informed DCFS that he had moved to a one-bedroom apartment and would be able to care for E. In the February 2010 report, the caseworker expressed concern because appellant had not seen or called E. since Mother's funeral. DCFS recommended continued placement with S.K. because E. was well

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[3] The court also sustained allegations of physical abuse pertaining to R.H.'s father, Raphael, and half-brother, D.K., not pertinent to this appeal. Rafael completed the services required under his reunification plan and in February 2012, on the eve of the section 366.26 hearing, the court issued an order granting him custody of R.H.

cared for, attending school, receiving Regional Center services,[4] and did not wish to be separated from R.H. At the February 22, 2010 six-month review hearing, which appellant attended, his counsel asked that appellant be permitted to take E. to Las Vegas for a visit. DCFS's counsel stated there must first be a home investigation by Nevada's Child Protection Services (CPS). The court instructed DCFS to arrange a courtesy visit of appellant's home by CPS and to then consider a week or weekend visit. The court found "by a preponderance of the evidence, that return of the children to the physical custody of their fathers [referring to both appellant and Rafael] would create a substantial risk of detriment to the safety, protection or physical, or emotional well-being of the children."[5]

Between February and August 2010, appellant had no visits with E. He stated he called every month, but was not always successful in reaching the girl. The caregiver reported that appellant had called three times during that period. In June 2010, a CPS caseworker visited appellant's apartment and found it safe. The caseworker reported that she had attempted to arrange a visit, but E. said she did not want to visit appellant in Las Vegas. The caseworker "completed an

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[4] See *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 486, quoting section 4620, subdivision (b) ["Under the Lanterman Developmental Disabilities Services Act [§ 4500 et seq.], care for the developmentally disabled is provided by private contractors operating, among other services, residential care facilities. The coordination of the delivery of such direct services is the responsibility of 'private nonprofit community agencies' called 'regional centers.' [Citation.]"]; § 4512, subd. (a) [defining "'[d]evelopmental disability'" as "a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual," and stating that the term includes mental retardation, cerebral palsy, and other "disabling conditions found to be closely related to mental retardation"].)

[5] The majority of the hearings in this matter involved matters pertinent to both E. and R.H. As custody of R.H. is no longer an issue, our summary focuses on matters pertinent to E. only.

assessment and determined that the risk for E. to return home with [appellant] would be low." However, "due to a lack of visitation and telephone contact with [E.]," DCFS recommended termination of reunification services and parental rights. At an August 2010 hearing, at which appellant was present, his counsel reported that appellant was considering moving to California to facilitate visitation due to E.'s reluctance to visit him in Las Vegas. The court again found "by a preponderance of the evidence that return of the children to the physical custody of the fathers would create a substantial risk of detriment to their safety, protection, or physical or emotional well-being."

In October 2010, the caseworker reported that appellant had visited with E. when he was in Los Angeles for hearings and called her on her birthday. Appellant had not moved to Los Angeles, and the caseworker had made no further efforts to persuade the girl to visit him in his home in Las Vegas. The caseworker again stated she had "completed an assessment and determined the risk for [E.] to return home with [appellant] would be low," but DCFS continued to recommend termination of reunification services and setting a section 366.26 hearing to terminate parental rights "due to a lack of visitation and telephone contact." At the 12-month review hearing on October 29, 2010, at which appellant was present, his attorney asked the court to address placing E. in appellant's home as part of the upcoming 18-month review hearing. The court stated that because E. was a Regional Center client, "the burden kind of slightly shifts," and that appellant would have to "demonstrate . . . that [he could] provide a safe home for the child," including services "to provide for all of her special needs." The court advised appellant to call DCFS "to try to arrange a visit" while he was in the area. The

court gave DCFS "discretion to allow for a holiday visit, over the minor's objection."[6]

In January 2011, the caseworker reported that appellant was in the area for Thanksgiving and had scheduled a visit through the caseworker. However, when the time came, E. said she did not want to go and no visit took place. E.'s therapist reported that the girl was thriving in S.K.'s care, noting she had attained a more appropriate weight and was doing well in school, and stated that it would be "in the best interest of the child for the court to deny [appellant's] request and to allow [S.K.] full legal guardianship of [E.] and the opportunity to adopt." DCFS continued to recommend termination of reunification services and setting a section 366.26 hearing.

In March 2011, the caseworker reported that appellant had not visited E. or maintained telephone contact and had moved to a new residence. E. said she was willing to visit appellant, but was happy in S.K.'s home. No inspection of appellant's new home took place because CPS no longer had the staff to conduct courtesy inspections. At a hearing on March 3, at which appellant appeared, his counsel informed the court that appellant was not getting requested visitation and his calls to the girl were not being returned. The court instructed appellant and his counsel to have a "meet and confer" to set up a visitation schedule. A visit was scheduled for March 4. Shortly before the scheduled visit, E. told the caseworker she did not want to visit appellant and the caseworker cancelled the visit.

At the March 28, 2011 contested 18-month review hearing, which appellant attended, his counsel reported that appellant had been frustrated in his efforts to see

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[6] The minute order stated: "Visits are to be arranged [by DCFS] between [E.] and [appellant] with discretion to allow overnights, holidays, and extended visits as [appellant] is non-offending in the petition. [Appellant] is advised by the court to contact the [caseworker] to arrange visitation with [E.] while he is [in] town."

his daughter and that he was receiving little support from DCFS or S.K. to make her available. The court advised appellant to "work a little harder," to "call every day and say 'hi,'" to "spend time with [E.] where she lives," and to "go to her school [and] her school activities." The court stated to appellant "it's you who has to make the effort." By order dated March 28, the court granted appellant "reasonable visits with an overnight once each month," but did not specify a schedule or state where the visits were to occur.

At a hearing in July 2011, appellant's counsel informed the court in appellant's presence that appellant had four pages of notes documenting his efforts to contact S.K. to set up visits or to speak to E. on the phone. In August 2011, after taking testimony in connection with a section 388 petition filed by Rafael, who had also complained about S.K.'s lack of cooperation with his attempts to visit his daughter, the court ordered the children's fathers -- both of whom were present -- and S.K. to mediation. The mediation did not result in a resolution of any issues.

In September 2011, the caseworker reported that appellant had had no visits with E. outside of the visits that took place when they attended court hearings. Appellant had attempted to schedule visits at the beginning of the review period but "[E.] was not interested in having a visit with [him] at those times." In addition, appellant had initially maintained telephone contact but had made no recent calls. In March 2012, the caseworker reported that E. had not received any telephone calls from appellant and saw him only when they attended court hearings.[7]

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[7] We note that appellant attended court hearings on May 18, 2009, May 22, 2009, June 30, 2009, July 16, 2009, February 22, 2010, August 16, 2010, October 29, 2010, January 11, 2011, March 3, 2011, March 28, 2011, July 18, 2011, August

(Fn. continued on next page.)

The section 366.26 hearing was held May 8, 2012. E. testified she had not visited appellant for a while and that he "hardly" called her. Appellant testified that he had called on multiple occasions since September 2011, but was not always put through to E. He further testified he had kept a phone log recording his attempts, although the log was not introduced. Appellant had offered to have overnight visits with E. at his mother's house in Los Angeles. The caseworker had inspected the house and found it safe, but informed him that everyone living there would need to be fingerprinted, which his family was unwilling to do. Appellant further testified he had located a school for E. in Las Vegas. S.K. initially denied that appellant had called at all since January, but then stated "he might have called once, but . . . [E.] didn't want to pick up the phone," and also testified "when he does call, he calls at eight o'clock at night and, maybe, sometimes she will be either getting ready for bed or showering." S.K. further testified that E. was no longer receiving Regional Center services.

Counsel for DCFS and counsel for E. argued that parental rights should be terminated because appellant had not maintained sufficient contact with E. since proceedings began. Appellant's counsel argued that it would be a denial of due process to terminate appellant's parental rights because there had never been a finding of his unfitness as a parent. She further contended there was ample evidence that appellant did try to stay in contact with E. throughout the proceedings, but that his efforts were not supported. The court found that DCFS had met its burden of establishing that E. was adoptable and that appellant had failed to establish one of the exceptions to termination under section 366.26, subdivision (c). With respect to appellant's contention that his visitation had been

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25, 2011, August 26, 2011, January 11, 2012, February 8, 2012, and May 8, 2012. The record reflects that E. was present at all but four of those hearings.

thwarted, the court found appellant had not presented persuasive evidence, and that "all I have today is [appellant's] word against [S.K.'s]." The court stated there was "nothing in [the] evidence which shows that [appellant] affirmatively . . . attempted to make more contact than an occasional contact [with E.]," "attempted to . . . visit E. in her area, in her territory," or sought the intervention of the court after being denied visitation or telephone calls. The court also found that it would be detrimental to return E. to appellant because E. did not know him very well, and appellant had not developed a strong relationship with her. In this regard, the court stated: "[E.] needs special attention. She goes to special classes. She has to have a parent who goes to school and watches her school work. She's had special health needs at the time. [¶] She needs someone who is there 24/7. And for the court to deny her that and to release her to you today would be extremely detrimental to her." Based on these findings, the court terminated appellant's parental rights. This appeal followed.

DISCUSSION

Appellant contends the juvenile court violated due process by terminating his parental rights because he was a nonoffending parent and no finding was ever made by clear and convincing evidence that he was unfit or that return of E. to his custody would create a risk of detriment or harm to the girl. Appellant further contends that the court's finding at the section 366.26 hearing that returning E. to him would be "extremely detrimental" was not supported by substantial evidence. For the reasons discussed, we agree that due process requires a finding of parental unfitness or detriment, made by clear and convincing evidence, and that to the extent the court's finding at the section 366.26 hearing was intended to operate as the necessary finding, it was not supported by the evidence in the record. Accordingly, we reverse the order terminating parental rights.

"A parent's interest in the companionship, care, custody and management of his or her children is a fundamental civil right." (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1210; accord, *In re Gladys L.* (2006) 141 Cal.App.4th 845, 848.) In *Santosky v. Kramer* (1982) 455 U.S. 745 (*Santosky*), the United States Supreme Court held that before infringing or severing the parent-child relationship, a state must establish parental unfitness by clear and convincing evidence. (*Id.* at pp. 747-748.) The court further explained that the process of determining parental fitness "does not purport -- and is not intended -- to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or . . . foster parents would provide the better home." (*Id.* at p. 759.) The court made clear that "until the State proves parental unfitness, *the child and his parents* share a vital interest in preventing erroneous termination of their natural relationship." (*Id.* at p. 760, italics added; see *In re Dakota H.* (2005) 132 Cal.App.4th 212, 223 ["Children, too, have a compelling independent interest in belonging to their natural family."].)

The California Supreme Court has held that California's dependency system comports with *Santosky*'s requirements "because the 'precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents.'" (*In re Dakota H., supra*, 132 Cal.App.4th at p. 224, quoting *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256 (*Cynthia D.*).) Generally, "by the time parental rights are terminated at a section 366.26 hearing, the juvenile court [has]

made prior findings that the parent was unfit."[8] (*In re Gladys L.*, *supra*, 141 Cal.App.4th at p. 848.) The existence of grounds for removal of the child from the parent's home and custody are typically resolved at the jurisdictional/dispositional hearings, where removal cannot take place absent a finding by "clear and convincing evidence" of abandonment, serious abuse or a substantial risk of physical or emotional harm. (§ 361, subd. (c); see *Cynthia D.*, *supra*, 5 Cal.4th at p. 253; *In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1211.) This is followed by "a series of hearings involving ongoing reunification efforts and, at each hearing, . . . a presumption that the child should be returned to the custody of the parent." (*Cynthia D.*, *supra*, at p. 253; *In re G.S.R.*, *supra*, 159 Cal.App.4th at p. 1211.) The "'number and quality'" of these judicial findings "'convey very powerfully to the fact finder the subjective certainty about parental unfitness and detriment required before the court may even consider ending the relationship between natural parent and child.' [Citation.] The linchpin to the constitutionality of the section 366.26 hearing is that prior determinations ensure 'the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must align itself.' [Citation.]" (*In re Gladys L.*, *supra*, at p. 848.)

Here, due to the atypical circumstances of the case, the "'precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination'" did not occur. No judicial finding of unfitness or detriment was made with respect to appellant during the initial phase of the proceeding. When E. and her half-sister were detained and

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[8] As explained in *In re Dakota H.*, California's dependency scheme no longer uses the term "'parental unfitness,'" but requires courts to make the functionally equivalent finding that "an award of custody to the parent would be '"' detrimental to the child.'"'" (*In re Dakota H., supra, 132* Cal.App.4th at p. 224, fn. 3.)

jurisdiction established, appellant was nonoffending and noncustodial. The minors were removed from Mother's home due to Mother's actions and to physical abuse the girls suffered at the hands of other relatives. The court found by clear and convincing evidence that returning them to *Mother's* home would be detrimental, but found that appellant posed no risk of harm to E. -- and specifically ruled that he could not be limited to monitored visitation or be required to participate in reunification services designed to rectify parental deficiencies.

Appellant did not immediately seek custody, as he lived out of the area and had no suitable housing. However, after Mother's untimely death in September 2009, appellant obtained an apartment and contacted DCFS with the intention of obtaining transfer of custody from S.K. DCFS did not assert that appellant was or would be an unfit parent, or that he posed a risk of harm to E.; to the contrary, the caseworker repeatedly opined that the risk to E. of allowing her to be placed with appellant was "low." DCFS recommended continued placement with S.K. based on a best interest analysis, concluding that S.K. offered a superior home because she had helped E. succeed in school, lived in California where Regional Center services were available, and had custody of E.'s half-sibling, R.H.[9] Although the court ultimately found that return of E. to appellant would be "extremely detrimental," the court's conclusion was based in large part on its findings that appellant, unlike S.K., would not be the kind of parent "who goes to school and watches [E.'s] school work" and who would be there "24/7." That this type of parenting would be best for [E.] is undeniable. However, due process requires more than the court's conclusion that someone else would provide a better home or

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[9] We note that at the time of the section 366.26 hearing, E. was not receiving Regional Center services, and the court had ordered R.H. transferred to the custody of her father.

be a superior parent. (*Santosky, supra*, 455 U.S. at p. 759.) "[T]he existence of a successful relationship between a foster child and foster parent cannot be the sole basis for terminating parental rights or depriving the natural parent of custody in a dependency proceeding." (*In re Jasmon O*. (1994) 8 Cal.4th 398, 418.)

The court also found that appellant had no real relationship with E. and that E. did not know him very well. This finds some support in the record. Appellant lived with Mother and E. for only two years after the girl's birth in 1998 and paid child support for an indefinite period thereafter. He visited two to four times in 2008. Once dependency proceedings began, contacts were not substantially increased. Prior to his initial request for custody, he and E. had visited in May, June and July 2009, when they attended the multiple court hearings that occurred during that period, and in September 2009, when he traveled to Los Angeles for Mother's funeral. In the two years that followed, appellant visited E. at the court hearings they both attended -- approximately ten during this period -- and called her three times between February and August 2010, on her birthday in October 2010, sporadically throughout 2011, and once in January 2012.[10] We do not doubt that lack of significant parental contact, particularly where the child is mentally or emotionally fragile, could lead to a reasonable finding that return to the parent would be so detrimental to the child as to pose a risk of emotional damage under section 300, subdivision (c). (Cf. *In re Gladys L*., *supra*, 141 Cal.App.4th 845 [where noncustodial, nonoffending father appeared at detention hearing and disappeared for the three years that followed, court reversed order terminating parental rights and remanded for finding of unfitness under clear and convincing

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[10] These contacts were established by undisputed evidence. As it was supported by substantial evidence, we accept for purposes of our analysis the court's finding that appellant's claim of making many more calls to E. that were unanswered or unreturned lacked credibility.

evidence standard]; *In re Frank R.* (2011) 192 Cal.App.4th 532 [court presumed that father's "sporadic visits with the [minors] and lack of telephone contact during the dependency" could support valid basis for court to make finding of unfitness or detriment and remanded for court to make such finding under required standard].) However, such finding must be supported by evidence of serious emotional detriment. (Compare *In re Jasmon O.*, *supra*, 8 Cal.4th at pp. 416-418 [psychologists' opinion testimony that minor developed "'high intensity' anxiety" and "depression" when court attempted to transition her from foster home to father's home, and that transfer of custody would cause her "serious lifelong emotional detriment" supported juvenile court's decision that placement with father would be detrimental], with *In re Rodrigo S.* (1990) 225 Cal.App.3d 1179, 1186-1187 [although minor was "psychologically fragile" and evidence was undisputed that foster care placement had been "highly successful," absence of evidence that minor would suffer "psychological or emotional harm other than that inherent in any move from one home to another" led appellate court to reverse finding of detriment].) The sole evidence presented by DCFS to address this point -- the letter from E.'s therapist -- did not support a finding of serious emotional detriment or risk of harm, as the therapist addressed only "the best interest" of the child.

Moreover, a court may not terminate parental rights based on the lack of a relationship where visitation was effectively out of the hands of the parent. (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504-1505 (*Hunter S.*); see *In re Z.K.* (2011) 201 Cal.App.4th 51, 69-70.) It was undisputed that appellant scheduled additional visits in June 2009, June 2010, November 2010, March 2011, and during the review period that proceeded September 2011. On each of these occasions, E. announced a disinclination to attend and no apparent efforts were made to persuade her to change her mind or to schedule visits over her objection.

Similar conduct on the part of the child occurred in *Hunter S.*, where the Court of Appeal explained that due process is violated where the juvenile court leaves complete discretion over visitation with the minor and thereafter terminates parental rights based on the absence of a parent-child relationship: "The Supreme Court has held the statutory procedures used for termination of parental rights satisfy due process requirements only because of the demanding requirements and multiple safeguards built into the dependency scheme at the early stages of the process. [Citations.] If a parent is denied those safeguards through no fault of her own, her due process rights are compromised. Meaningful visitation is pivotal to the parent-child relationship, even after reunification services are terminated. . . . A visitation order which fails to protect a parent's right to visit is illusory." (*Hunter S., supra,*142 Cal.App.4th at pp. 1504-1505.) The Court of Appeal faulted the juvenile court for failing to ensure that visitation at the minimum level determined by the court's order occurred: "While the court granted visitation in theory, none was permitted in reality. . . . In the end, . . . [the minor] himself was given virtually complete discretion to veto visitation, and indeed all contact, with his mother, a discretion he exercised without any oversight or direction by the court. This was clearly improper. The juvenile court cannot impermissibly delegate to the child's therapist, DCFS or any third person, unlimited discretion to determine whether visitation is to occur. [Citation.] In no case may a child be allowed to control whether visitation occurs. [Citations.]" (*Ibid.*)

The court below attempted to address *Hunter S.* in its ruling, stating there was "nothing in evidence which shows that [appellant] affirmatively . . . attempted to make more contact than an occasional contact [with E.]," "attempted to . . . visit [E.] in her area, in her territory," or sought the intervention of the court after being

denied visitation or telephone calls. The record demonstrates otherwise.[11] Appellant made multiple requests for visitation and set up numerous visits with E., only to have them cancelled when E. expressed her unwillingness to attend. Appellant's counsel repeatedly informed the court that appellant was not getting the visitation to which he was entitled. At various points during the proceedings, different judicial officers advised appellant to call the caseworker or DCFS to arrange visits, to meet and confer with S.K., or to "work . . . harder." It was not until March 2011 that the court issued an order theoretically granting appellant visitation two weekends a month, but the order did not specify which weekends or establish a place for visitation to occur. On this record, the court's finding that that lack of visitation and contact were the fault of appellant and justified a finding of detriment and termination of parental rights is not supported.

Respondent contends that we should follow *In re P.A.*, *supra*, 155 Cal.App.4th 1197, where the Court of Appeal concluded that the juvenile court's findings of detriment sufficiently protected the absentee father's due process rights. There, the father deserted the family when his child was six months old, more than two years prior to the initiation of dependency proceedings. He did not make an appearance in the proceedings for more than a year and a half, although paternal relatives had appeared at the early hearings, and the father had knowledge of his child's situation. While the case was ongoing, he made only perfunctory requests for custody, and police found a large quantity of drugs in his car. The juvenile court had not sustained any allegations pertaining to the father, but found by clear and convincing evidence at the dispositional hearing that there was no reasonable

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[11] We note that the judge who presided over the final hearings in this matter was not assigned until March 2011, and that two different judicial officers had presided over the earlier proceedings.

means to protect the child without removal from *both parents'* custody. The juvenile court subsequently made a second finding that return of the child to the father would be detrimental when it denied the father's request for reunification services. On these facts, the Court of Appeal concluded the findings of detriment were sufficient to support the order terminating the father's parental rights. (*Id.* at p. 1212.)

The present situation is not comparable. Appellant lived with E. the first two years of her life, and thereafter provided occasional support payments, clothing and school supplies. He appeared at DCFS offices for an interview within weeks of her detention. He attended nearly every court hearing. He acquired two apparently suitable places to live and repeatedly sought custody. Although not completely analogous, his situation has some parallels to that of *In re Z.K.*, *supra,* 201 Cal.App.4th 51, where the court found a violation of due process and reversed an order terminating parental rights. The minor there had been kidnapped as an infant by his father, and his mother had no knowledge of his whereabouts until the section 366.26 hearing was set, five years after the child's disappearance. The department opposed return to the mother due to concerns about the adequacy of her income and housing. It placed the burden on her to establish her fitness by participating in a psychological study and an ICPC (Interstate Compact on the Placement of Children) home study conducted by officials in her state of residence, which included background checks of the people with whom she resided. The Court of Appeal rejected the contention that the mother's lack of cooperation with its multiple procedural requirements justified the juvenile court's termination order. The court specifically found that "neither the [psychological] study nor the [ICPC] evaluation could lawfully be required as a precondition to placing the minor with mother and avoiding the termination of mother's parental rights." (201 Cal.App.4th at p. 64.) To the extent the refusal to transfer custody was based on

the failure to receive background information on persons living with the mother, "the department fail[ed] to explain why it was *mother's* responsibility to provide such a background check in the first place. '[I]t is the party opposing placement who has the burden to show by clear and convincing evidence that the child will be harmed if the noncustodial parent is given custody.' [Citation.] Upon learning that [a third party] was living with mother, it was *the department's* responsibility to provide evidence that the situation would be detrimental to [the minor] if the minor were placed in mother's custody; it was not mother's responsibility to prove the contrary." (*Id.* at p. 69.)

Here, DCFS similarly offered no support for appellant's attempts, as a nonoffending parent, to obtain custody of his child, but instead put multiple barriers in his path over which he had no control. It insisted that appellant's first Nevada apartment be cleared by CPS, which did not occur until June 2010. After appellant moved, DCFS demanded another clearance, although it had been informed that CPS would not undertake another home visit. When appellant suggested his mother's house as an alternative for overnight and weekend visitation, DCFS insisted that every person be fingerprinted although there is no requirement that individuals to whom a non-offending parent exposes a child during unmonitored visitation be subject to fingerprinting or background checks. At no point did the court step in to impose or enforce a specific visitation order.

In short, the court's findings that termination of appellant's parental rights could be justified by his lack of a relationship with the child cannot be sustained because visitation was out of appellant's hands. The order terminating parental rights must be reversed as contrary to appellant's due process rights. Appellant does not appear to be seeking an immediate order transferring custody and it would be inadvisable for this court to issue such an order, as we have no knowledge of how circumstances may have changed while the appeal was pending. (See *In re*

G.S.R., *supra*, 159 Cal.App.4th at pp. 1215-1216 [after reversal of order terminating nonoffending father's parental rights, court remanded to allow juvenile court to revisit whether current facts and circumstances indicated legally sufficient ground for finding of detriment, with the understanding that the basis on which juvenile court made its original finding -- father's poverty and lack of suitable housing -- was not such ground].) However, appellant is entitled to reinstatement of his parental rights, regular visitation supported by any necessary court orders, and an opportunity to seek custody of E. in due course. In resolving any future custody issues, the court may consider whether appellant and E. continue to lack a parent-child relationship and whether transfer of custody to appellant will cause emotional harm to E. However, any such finding must be supported by clear and convincing evidence of a serious risk of emotional harm.

DISPOSITION

The order terminating appellant's parental rights is reversed. The matter is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.