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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re Terrance T., a Person Coming Under
the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

RENEE A.,

Defendant and Appellant.

A135339

(Alameda County
Super. Ct. No. OJ1014686)

Mother Renee A. appeals from the juvenile court's order terminating her parental rights to her son Terrance T. She contends that because of the strong bond she and Terrance shared, termination was improper. She submits that the court should have instead ordered a legal guardianship, which would have preserved her right to maintain contact with Terrance. But, significantly, although Renee initially contested the recommendation by the Alameda County Social Services Agency (Agency) that her parental rights be terminated, she subsequently withdrew her contest and submitted on the Agency's recommendation. In doing so, she waived her right to challenge the juvenile court's order. We thus affirm.

BACKGROUND

Detention

On April 14, 2010, Renee was living in a shelter with then three-year-old Terrance. Around 4:00 a.m. that morning, she left the shelter in search of cocaine and alcohol, locking Terrance alone in the room they shared. Terrance was discovered hours later when someone heard him crying. He was taken into protective custody and, shortly thereafter, placed in the adoptive home of his half-brother, Shawn.

The following day, Renee contacted the Agency and spoke with a child welfare worker about Terrance, admitting that she had left him alone in their room at the shelter when she went to look for drugs. She returned two hours later, but the night guard did not recognize her and refused her entry. When she again attempted to return, Oakland Police and Child Protective Services were there, so she fled.

On April 16, the Agency filed a petition pursuant to Welfare and Institutions Code section 300,¹ alleging that Terrance came within the juvenile court's jurisdiction because Renee failed to protect him within the meaning of subdivision (b). According to the petition, Renee had a serious and chronic substance abuse problem that impaired her ability to adequately care for and support Terrance. She also suffered from mental health issues, having previously been diagnosed with posttraumatic stress disorder (PTSD), major depression, and anxiety. She was taking psychotropic medications, but she was not otherwise receiving treatment for her mental health issues.

As to Terrance's father, the petition alleged that his whereabouts were unknown and that he had left Terrance without any provision for support. (§ 300, subd. (g).)

Lastly, the petition alleged abuse or neglect of a sibling (§ 300, subd. (j)) because Renee had previously lost her parental rights to two of her children, one born positive for cocaine, the other diagnosed with fetal alcohol syndrome.

On April 19, the juvenile court ordered Terrance detained.

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

Jurisdiction Report

The Agency's May 4 jurisdiction/disposition report recommended that reunification services be bypassed. Renee was working toward entering a dual diagnosis residential treatment program and was initially very focused on getting herself into a program. Her efforts derailed, however, when she became ill with what she claimed was irritable bowel syndrome, and she delayed entering a treatment program. She finally began an outpatient program on May 3, nearly three weeks after Terrance's removal from her care.

The Agency informed the court that Renee had previously received more than 18 months of family reunification services for her three older children. She lost her parental rights to two of them in 2006, and both children were adopted. She stopped receiving services for her oldest child when the child became a section 602 ward of the court.

In terms of "assessment/evaluation," the Agency summarized:

"[Renee] has a very long history of serious and pervasive drug and alcohol abuse. She has been in treatment many times before as she was ordered to do so through a previous Family Reunification plan with San Mateo County and through criminal court, also in San Mateo County. Despite the amount of treatment [Renee] has had, she continues to relapse. Additionally, while she has been consistent with her psychotropic medication for her mental health issues, she has not been consistent with her mental health treatment. [Renee] cannot afford to seek weekly therapy, very possibly for the rest of her life. She has sustained a lot of trauma in her life, continues to relapse with drugs and alcohol and appears to have a very hard time managing her life. She has been unable to maintain permanent housing and is constantly moving.

"She has a history of allowing very abusive and dangerous individuals into her life, and she is easily overwhelmed if she has too many tasks to undertake in one day. This is extremely concerning, of course, because frequently parents of small children have multiple tasks to attend to in one day. Additionally, [Renee] claims to have a condition known as IBS, irritable bowel syndrome. The undersigned has urged [Renee]

to receive proper medical treatment for this condition and to try to obtain a referral for a specialist, as [Renee] has claimed to be quite sick with this condition. So far, it has prevented her from entering the out-patient program earlier than she could have, and has caused her to postpone other appointments, such as the intake for the residential treatment facility. The undersigned has concerns that [Renee] is using this condition as an excuse, rather than seeking treatment to help her combat the issue.

“[Renee] does show a pattern, whereby she engages immediately, jumps into the tasks at hand and says all the right things about wanting to reunify and do what it takes to get her child back. Then things begin to get in the way and excuses are made as to why tasks cannot be completed or things have to be rescheduled. While [Renee] has been cooperative and forthcoming, and has engaged to an extent right away, she has begun to use her health condition as a crutch and has begun to make excuses. The Agency is very concerned that [Renee] has fallen back into bad habits and will not be able to sustain what is required of her, which are long-term sobriety and a healthy lifestyle for herself and her very young son. Therefore, the Agency respectfully recommends that no services be offered to [Renee] on behalf of Terrance T.”

At the May 6 jurisdiction/disposition hearing, Renee contested the Agency’s recommendation, and the court continued the matter to May 26 for a contested hearing.

The contested hearing proceeded on May 26, and at the conclusion of it, the court found the allegations in the petition to be true. The court further found by clear and convincing evidence that reunification services should be denied. It thus adopted the Agency’s recommendation and continued the matter for a due diligence hearing on July 6 and a permanency hearing on September 28.² The court also ordered the Agency to

² The due diligence hearing was subsequently continued to afford the Agency additional time to complete its search for Terrance’s father, with the court ultimately finding that the Agency exercised due diligence. This appeal is brought only on behalf of Renee. Because Terrance’s father is irrelevant to the issues before us, further details regarding him are omitted from our opinion except where pertinent to the issues raised by Renee.

arrange for visitation between Renee and Terrance “as frequently as possible consistent with the child’s well being.”

September 13, 2010 Section 366.26 Report

In a September 13 section 366.26 report, the Agency advised the court that it expected Renee to file a section 388 petition requesting family reunification services, and it recommended that the court grant the petition. The Agency changed its position on reunification services because Renee had been enrolled in the Chrysalis Substance Abuse Treatment Program (Chrysalis) since May 17 and was participating in all aspects of the program, including individual counseling and drug testing, which had consistently been negative for illegal substances. She was visiting with Terrance on a weekly basis, and they shared a parent-child relationship. The Agency was of the opinion that due to the nature of their relationship, terminating Renee’s parental rights would be detrimental to Terrance, and any permanent plan other than reunification would need to be one that maintained contact between Renee and Terrance.

Providing more details regarding visitation, the Agency described how Renee had visited Terrance “faithfully” for the preceding four months, not missing a visit during that time period. During the visits, she was “very loving and appropriate with Terrance, and he often responds with focused, age-appropriate play. He is able to slow down, sit in his mother’s lap, and be read to for 10-15 minutes at a time.” It also noted that the foster parents facilitated extra weekend visits one to two times a month for four to six hours each visit. Additionally, Renee telephoned Terrance two to three times per week.

At the same time, Terrance was slowly adjusting to his placement. The foster parents had implemented a consistent nighttime routine that was helping Terrance and his half-brother sleep better, which had positively impacted their morning routines and school schedules. Additionally, sexualized behaviors that Terrance had been exhibiting were abating; the boys were playing together much better; Terrance’s biting and hitting had diminished; and his nightmares and need to eat quickly and voraciously had lessened.

Renee's Section 388 Request to Change Court Order

As anticipated, on September 23, Renee filed a section 388 request to change court order, seeking six months of reunification services because she was participating in a substance abuse treatment program and regularly visiting with Terrance. Five days later, the court granted the petition and ordered the Agency to provide family reunification services.

Six-Month Status Review

In an October 19 status report, the Agency recommended that reunification services continue. Renee remained in her treatment program at Chrysalis, with an anticipated graduation date of November 11. She had already made arrangements to transition to a one-year outpatient program upon her graduation. During her time at Chrysalis, Renee had adhered to her visitation schedule with Terrance, with visits having increased from one hour to two hours in early October.

The Agency reported that Renee had a long history of domestic violence and that she had agreed to participate in a domestic violence program. She continued to see a therapist for semi-weekly individual therapy sessions. She had also completed a Positive Parenting course and was working hard with staff from the Center for Independent Living to obtain housing for postgraduation from Chrysalis.

According to the Agency, Terrance was generally doing well in his placement. He was developmentally on target in most ways. He was attending preschool and, despite a difficult beginning, his behavior had greatly improved. The Agency noted, however, that since reunification services began, Terrance's behavior both at home and preschool had regressed. The foster parents speculated that the behavioral changes were linked to the increase in visits with Renee, while the child welfare worker believed that the change was linked to the changed emotional outlook of Renee and the foster parents as a result of the order for reunification services.

At the six-month review hearing, the court continued reunification services for six months, setting a 12-month review hearing for April 21, 2011.

De Facto Parent Request

On March 25, 2011, the foster parents filed a request to be declared Terrance's de facto parents.

12-Month Status Review

On April 6, the Agency filed a 12-month status review report, this time recommending that reunification services be terminated and a section 366.26 hearing set. As detailed in the report, Renee had graduated from the Chrysalis program on November 11, 2010 as anticipated. The following day, she transitioned to a one-year outpatient substance abuse program at Options Recovery Services (Options). That program consisted of half-day afternoon classes five days a week, regular drug testing, and two morning acupuncture sessions per week during the intake phase of the program. Renee did not schedule any acupuncture appointments during her first three weeks at Options, and she missed one to two afternoon classes per week, including a three-day absence at the beginning of December.

Due to her numerous absences during the first weeks of the program, Options required her to sign an attendance contract that provided for termination from the program with one more absence. She missed a class just days after signing the contract (purportedly due to "extreme diarrhea and stomach flu"), resulting in her termination.

The child welfare worker spoke to Renee's case manager at Options, who advised that despite the attendance contract, termination from the Options program was not automatic. Renee, however, had not been in contact with Options staff about her continued participation.

Renee told the child welfare worker that the requirements of the Options program were excessive, forcing her to reduce her therapy regimen to one appointment per week and leaving her unable to devote sufficient time to her housing search. She requested that she be able to switch to an outpatient program that was less rigorous and would allow her additional time to devote to her other case plan activities.

Renee subsequently enrolled in East Oakland Recovery Center (EORC), another outpatient program. She felt that she would be more able to focus on her case plan

activities if she attended classes at EORC three days a week. Because the Agency's referral to EORC did not specify that she was to attend three classes a week, however, the program only enrolled Renee in one class per week, an oversight she did not correct. The child welfare worker learned of the discrepancy on January 18, 2011—a full month into the program—and directed Renee to immediately increase her schedule to three classes per week, which did not occur until February 8.

Further, Renee had not maintained her sobriety since her graduation from Chrysalis. On March 2, she was late to class at EORC and had difficulty staying awake. A staff member asked to speak to her in her office, where the smell of alcohol became apparent. Renee initially denied drinking, only admitting after a breathalyzer test that she had “three glasses of wine”—a seeming minimization given her behavior—that morning. According to Renee, it was her first relapse since May 2010. A March 23 drug test was positive for low levels of cocaine, however, suggesting recreational use within the past 90 days. Renee denied any recent drug use, stating she had not used cocaine since May 2010.

Renee was also involved in an abusive relationship. One incident prompted her to call a domestic violence hotline. After receiving treatment for a contusion and a chest abrasion, she entered a domestic violence shelter, where she began participating in a domestic violence support group and individual counseling. Renee advised the child welfare worker that she had been in a relationship for the past three to four months with a man who was extremely jealous and had grown violent. She claimed to have made extensive efforts to file a police report and was working on filing for a restraining order, but neither had happened.

Addressing her case plan, the Agency advised the court that Renee was not in compliance with the requirements that she stay free from alcohol and illegal drugs, demonstrate her ability to live free from drug and alcohol dependency, and obtain and maintain a stable and suitable residence for herself and Terrance. She was in partial compliance with the requirement she attend and demonstrate progress in a certified domestic violence prevention program. She was in compliance with the requirements

that she attend individual therapy, adhere to a psychotropic medication regimen, and demonstrate her willingness to have custody of Terrance.

Concerning visitation, Renee had maintained regular contact with Terrance, missing only two visits between October 2010 and March 2011. Since her relapse and involvement in an abusive relationship, however, visits were being held in a visiting room at the Agency, and the extra weekend visits facilitated by the foster parents had been suspended.

As to Terrance's well-being, the Agency described him as "obviously traumatized" by being removed from his mother's care, describing the transition to his foster home as "difficult." His emotional state was improving, however, and life in the foster home was stabilizing. Terrance had developed a close and loving relationship with his older half-brother, although the relationship was often fraught with conflict. He sought comfort and affection from his foster parents, but he still maintained a strong connection to his mother, adhering to the belief that he would be returning to her care.

The Agency advised that the foster parents would like to adopt Terrance should Renee fail at her reunification efforts, but that in the absence of adoption, they were willing to become Terrance's legal guardians. The Agency recommended a permanent plan of adoption "while acknowledging that this is a very difficult case in which to determine the best permanency option. Terrance is craving the long term stability that an adoption would provide, but he also appears to enjoy safe and stable visits with his mother." It suggested that it would obtain a bonding study prior to the section 366.26 hearing "to help provide some clarity around these issues"

A status review hearing was held on April 21, at which the court continued the matter to May 11 for a contested review hearing.

Contested Review Hearing

On May 11, the juvenile court held a contested hearing. Although Renee had been ordered to appear, she appeared only by counsel. At the conclusion of the hearing, the court found that the Agency had provided reasonable reunification services to Renee and had made reasonable efforts to return Terrance to her care. Renee, on the other hand, had

made only partial progress toward alleviating the concerns that prompted Terrance's removal. The court therefore terminated reunification services and set the matter for a section 366.26 hearing on August 30, which was subsequently continued to allow for the completion of a bonding study.

The court also granted the foster parent's de facto parent request, and ordered the Agency to arrange for visitation between Terrance and his mother as frequently as possible consistent with Terrance's well being.

Bonding Study

Anne Brodzinsky, Ph.D., of Family Mental Health Consultants conducted a bonding study for the Agency. It was based on eight hours of observations and interviews, including two visits between Terrance and Renee, two visits to Terrance and his foster parents, interviews with both Renee and the foster parents, and a consultation with Terrance's psychotherapist.

Based on her evaluation, Dr. Brodzinsky made the following observations and recommendations:

"Terrance has an attachment to his birth mother and wants to continue seeing her. However, his attachment is quite insecure, and he is confused and ambivalent about his relationship and contact with her. Although having a difficult time in transitioning to the R.'s home, there is ample evidence that Terrance has made remarkable progress in this family. His disruptive behavior has reduced and he has become well integrated into the family. He has a strong attachment to the foster parents, with evidence of growing security and feelings of safety. Nevertheless, mild insecurity is seen in his relationship to them, which is understandable and attributable to the impact of previous trauma and disruptive life experiences prior to placement. Given the high level of parental competence and sensitivity on the part of Mr. and Mrs. R.; [*sic*] it is anticipated that Terrance's security will grow stronger over time.

"Guardianship, with court ordered visitation, allows [Renee] and Terrance the ability to maintain a relationship with one another. Such contact could be very important for Terrance in his developing years. But it also could be extremely disruptive and

detrimental to him. If [Renee] relapses again, becomes emotionally destabilized, or attempts to undermine her son's relationship with the R. family, it could re-traumatize this young boy, creating irreparable harm. Furthermore, if at some point in the future [Renee] believes her circumstances have changed, it might lead her to petition the court for Terrance's return. Getting caught in another court action, especially when he is older and can more fully understand what is going on, would be devastating for Terrance. Finally, guardianship does not provide the type of lifelong commitment on the part of parenting figures that Terrance needs. Terrance's recovery from trauma is still in progress and it will take time for him to heal. Without the legal authority to protect their son from difficulties in the ongoing relationship with his birth mother, they would feel disempowered, which could undermine their confidence and effectiveness as parents—and more importantly; undermine Terrance's ability to become an emotionally healthy and stable young man.

“Adoption offers the greatest degree of residential and psychological permanence for Terrance, even though it entails the termination of [Renee's] parental rights and no guarantee of ongoing contact between the birth mother and her son. There is good evidence, however, that Mr. and Mrs. R. understand the importance of maintaining this relationship and they have supported contact up to this point, even providing more weekend time between [Renee] and Terrance in the past than the county required. Furthermore, their goal is to continue the relationship following adoption, but they also believe they must have the ability to protect Terrance in case [Renee] relapses again, or becomes inappropriate in her behavior. In my view, they must have this type of authority; adoption provides it for them.

“In summary, it is my professional opinion that Terrance should be adopted by [Mr. and Mrs. R.]. It is also my opinion that Terrance's relationship with his mother be supported by the R. family through reasonable contact, both directly (visitation) and indirectly (telephone). The R. family and [Renee] should be referred for counseling services to facilitate a more trusting and cooperative relationship and to set boundaries and parameters on the contact with Terrance. [Renee] should be provided referrals and

support services to help her maintain her sobriety, improve her psychological state, stabilize her life, improve her parenting behavior, and help her understand Terrance's needs.”

December 2, 2011 Section 366.26 Report

On December 2, the Agency filed a section 366.26 report. It supported a plan of adoption provided it was accompanied by a postadoption contact agreement because Terrance would be negatively affected if his relationship with his mother was terminated. It advised the court that a mediation had been scheduled to discuss postadoption visitation, but the foster parents cancelled. It thus recommended that the court order mediation between the foster parents and Renee to agree on a plan for visitation following adoption. Renee did not support the Agency's adoption recommendation, preferring instead a legal guardianship because she was concerned about the possibility of losing contact with Terrance.

On December 19, the matter came on for a section 366.26 hearing. Per the Agency's recommendation, the court referred the parties to mediation, setting a further section 366.26 hearing for January 30, 2012.

January 19, 2012 Addendum Report

In an addendum report, the Agency advised the court that a mediation was held on January 12 to discuss postadoption contact. Renee did not appear, later telling the child welfare worker that she knew about the mediation but forgot the date because she was overwhelmed by stress and depression. A second session was scheduled for January 26.

January 26, 2012 Second Addendum Report

In a second addendum dated January 26, the Agency advised the court that that morning Terrance's foster mother had called to cancel the second mediation session scheduled for that afternoon purportedly because the foster father and Terrance were ill. She would not reschedule, however, because she felt they had met their mediation obligation by attending the first session and their position on visitation was clear. The Agency explained to the court: “While the proposed adoptive parents initially expressed support for a post-adopt parent-child contact, their position seems to have changed. This

puts the Agency in a difficult position in regards to the permanent plan which is compounded by statements made by the proposed adoptive mother to [the child welfare worker] that the caregivers would remove Terrence [*sic*] from their home if they were not able to adopt him. [¶] It was the hope of the [child welfare workers] that mediation could lead to some assurance that Terrance would not lose contact with his mother under a plan of adoption. As a 5.5 year old child, such loss would be profound particularly since Terrance was almost four years old when he was removed from his mother and has visited with her regularly for the last eighteen months. While adoption is the most permanent plan, the sense of permanency could be undermined for Terrance if it means losing his birth mom. However, if the proposed adoptive parents are not willing to keep Terrance under any plan other than adoption, the Agency will need to be mindful of the possibility of disrupting this placement in its efforts to maintain the parent-child relationship.”

On January 30, the matter came on for a continued section 366.26 hearing, and was further continued to February 15 to give the parties time to review the bonding study.

February 15, 2012 Addendum Report

In a third and final addendum filed on February 15, the Agency recommended that the court terminate Renee’s parental rights to free Terrance for adoption by his foster parents. While the foster parents had stated their intention to maintain contact between Terrance and Renee, there was no real understanding of their plans for postadoption contact as they were not interested in entering into a mediated agreement nor had they provided to the child welfare workers specific information about the frequency of contact. The Agency was disappointed by this, but acknowledged that “Terrance’s need for permanency should not be prolonged. The plan of adoption allows Terrance an opportunity to fully integrate himself into the proposed adoptive family and for the family to claim him as their child. It is the hope of the [child welfare workers] that the caregivers can move forward in the adoption process while understanding the significance of Terrance’s relationship with his mother and that they can find a way to honor this relationship.”

The Agency represented that Renee “would like to support the plan of adoption, as she understands Terrance’s need for permanence. However, she fears she will lose contact with Terrance if the caregivers adopt him.”

Section 366.26 Contested Hearing

The contested section 366.26 hearing finally proceeded on February 15, 2012. The Agency requested that the reports of December 19, 2011, January 19 and 26, 2012, and February 15, 2012 be admitted into evidence. It then rested regarding the permanency issues.

Renee began her case by calling child welfare worker Michael Furness to testify. As pertinent here, counsel for Renee began to question whether Furness had any concerns as to whether the foster parents would allow continued visitation between Terrance and Renee on a regular basis if her parental rights were terminated. Terrance’s counsel’s objected that the line of questioning was irrelevant to the issue of the parent/child bond, an objection the court sustained. The Agency took the position that the evidence was relevant but that Furness, who was not the current child welfare worker, was not a proper witness to testify on the subject. The court requested briefing on the issue and continued the hearing.

Briefing on the Admissibility of Evidence Regarding the Likelihood of Postadoption Contact

On February 27, Renee filed a memorandum of points and authorities arguing that evidence of the likelihood of postadoption visitation was relevant to the court’s determination of detriment. As she explained it, in order to establish the applicability of the beneficial relationship exception to termination, she had to demonstrate that she had maintained regular visitation and that Terrance would benefit from continuing the relationship, such that termination of her parental rights would be detrimental to Terrance. (See § 366.26, subd. (c)(1)(B)(i).) Whether or not Terrance would be able to see Renee postadoption, she argued, was a variable that was relevant to the possible detrimental effect of termination.

The foster parents and Terrance filed separate oppositions, both seeking to exclude evidence relating to future contact between Renee and Terrance. They argued that evidence of postadoption contact was irrelevant to the court's determination of whether the beneficial relationship exception to termination applied in this case. That determination was to be based on a number of factors which affect the parent/child bond, they argued, but postadoption contact was not one of them.

The Agency filed no briefing on the issue.

Further Contested Section 366.26 Hearing

The matter came on again on March 2, 2012. The court advised that it had received and considered the briefs, and concluded that evidence concerning postadoption contact was irrelevant to the decision on termination of parental rights. The taking of evidence then continued, with Renee presenting testimony from child welfare workers Furness and Kenya Aissa. During Aissa's testimony, the court noted for the record that Renee had been nodding off for the past 15 minutes. Renee responded that she had insomnia and did not sleep well. The hearing was then continued to March 12.

Postadoption Contact Agreement and Termination of Parental Rights

Prior to the March 12 hearing, the parties resumed discussion of a postadoption visitation agreement. At the hearing, counsel for the Agency informed the court that they had reached an agreement, submitting a signed copy of the written contract for its review. The agreement provided that visitation would occur twice monthly through the end of July 2012 and monthly from August 2012 through December 2012. Telephone calls through December 2012 would occur no more than twice monthly at the request of either Terrance or Renee, provided she requested a call in advance. After 2012, all visits and telephone calls would occur based on Terrance's mental health as determined by his therapist. The parties agreed in "good faith" that the adoption would be an "open" one with ongoing contact between Terrance and Renee as dictated by Terrance's best interest.

After reviewing the contract, the court noted that it had some questions, the first concerning the clause identifying the adoption as an "open" one and seeking clarification from the parties. Counsel for Renee explained that it meant Terrance would know the

identity of his biological mother and there would be no attempt to prohibit contact between Terrance and Renee. Counsel for the Agency expressed her agreement with the term. The following colloquy then ensued:

“THE COURT: So this is the agreement that you all have signed?

“MR. BAKER [COUNSEL FOR TERRANCE]: Yes, your Honor.

“MS. SHAWLER [COUNSEL FOR THE AGENCY]: Yes.

“MS. COOK [COUNSEL FOR RENEE]: Yes, your Honor.

“MS. RAAP [COUNSEL FOR THE FOSTER PARENTS]: Yes.

“MS. SHAWLER: Your Honor, with that then is Ms. Cook withdrawing her contest?

“MS. COOK: I am withdrawing my contest. I would request copies of the agreement today so that my client can take one with her.

“THE COURT: No problem.

“MS. COOK: Thank you.

“THE COURT: All right. So Ms. Shawler.

“MS. SHAWLER: Yes, your Honor. In light of that, the Agency would ask the Court to adopt the recommendations of the February 15, 2012 Addendum Report.

[¶] . . . [¶]

“THE COURT: Mr. Baker, submitted?

“MR. BAKER: Submitted, your Honor.

“THE COURT: Ms. Cook, submitted?

“MS. COOK: Submitted, your Honor, just with a couple of comments.

“THE COURT: Of course.

“MS. COOK: I just wanted to note for the record that this was very difficult for my client. This is, as we all know, not a case that was clear-cut, at least in my opinion. The mother loves her child very, very much and is trying to do the right thing for him. She recognizes that he is in a very good home now, that he is with his brother and there are many advantages growing up with the de facto parents as his parents. But she has been very, very concerned about the possibility of not having visitation with him and,

therefore, we did proceed with this contest, especially in light of the fact that there was testimony by the social worker . . . who perhaps knows Terrance best . . . that it would be detrimental to him to terminate the relationship. This was a very hard decision for her, having heard that testimony.

“She also wants the Court to know, because it did not come out in the testimony at the last hearing, that she does have insomnia. It is a medical condition. She’s on disability for it. She falls asleep and she has never been to a visit where she’s been under the influence, but she falls asleep due to her medical and psychological condition which causes insomnia. We just wanted to make that clear.

“[Renee] will be making her best efforts to establish to continue have [*sic*] a very good relationship with the foster parents. She thinks that they can do that and will work with them to continue to be in contact with Terrance in a way that is in his best interest. She cares very much about him. With that, submitted.”

This timely appeal followed.

RENEE WAIVED HER RIGHT TO CHALLENGE THE ORDER TERMINATING HER PARENTAL RIGHTS

Renee’s primary argument on appeal is that the court erred in terminating her parental rights to Terrance because she and Terrance were deeply bonded such that the beneficial relationship exception to termination applied. As a secondary matter, she contends the juvenile court erred when it determined that evidence of postadoption visitation was irrelevant to the question of whether terminating her parental rights would be detrimental to Terrance. These issues are not properly before us, however, because Renee waived her right to appeal from the court’s order.

As detailed above, at the March 12, 2012 further contested hearing, the parties submitted to the court a written, signed agreement concerning postadoption visitation. After the court clarified what the parties meant by an “open adoption,” all parties confirmed that they were in agreement with the contract. Counsel for the Agency then inquired, “Your Honor, with that then is Ms. Cook [counsel for Renee] withdrawing her contest?” Ms. Cook unequivocally responded, “I am withdrawing my contest.” The

court then adopted the Agency's recommendations and terminated Renee's parental rights. As the Agency correctly argues in its respondent's brief, by withdrawing her contest and submitting on the Agency's recommendations, Renee waived her right to challenge the court's order terminating her parental rights.

Renee's rebuttal to this argument in her reply brief consists, in its entirety, of the following: "The agency argues, incorrectly that mother waived all of her arguments presented in this appeal when she allegedly submitted the matter to the juvenile court based upon the recommendations contained in the agency's report. [Citation.] What the record shows is that the agency's own counsel asked the juvenile court to adopt the recommendations contained in the report. [Citation.] Mother's counsel simply submitted the matter, based upon the information available to the juvenile court at that time. [Citation.] Submission based upon the evidence in the record is different from submitting the matter based on the social worker's recommendations. (*See In re Richard K.* (1994) 25 Cal.App.4th 580, 588-589.)" Neither *In re Richard K.* nor the record supports Renee's claims.

In *In re Richard K.*, *supra*, 25 Cal.App.4th at pp. 584-585, the mother and her two children had a lengthy history with the department of public social services. The department detained the children after receiving a referral alleging that there had been a violent incident at home and that when the police arrived to investigate, the mother met them at the front door with a gun in her hand. A drug test of the mother came back positive for cocaine and amphetamines. (*Id.* at p. 585.) The juvenile court subsequently sustained allegations in a section 300 petition that the mother abused alcohol and suffered from emotional problems that put the children at risk of harm. (*Id.* at p. 583.)

Prior to the disposition hearing, the department filed a report recommending out-of-home placement for the children and reunification services for the mother. (*In re Richard K.*, *supra*, 25 Cal.App.4th at p. 583.) At the hearing, the parties submitted the matter on the department's recommendation. (*Ibid.*) Specifically, counsel for the mother advised the court that "I think we'll submit it." The court clarified, "Are you submitting on the recommendation?" Mother's counsel responded, "Yes. Yes, we are." (*Id.* at

p. 588.) The court then adjudged the children dependents, placed them in the department's custody, and ordered the services recommended by the department. (*Id.* at p. 583.)

Mother appealed, arguing, as pertinent here, that there was insufficient evidence to support the dispositional order. (*In re Richard K., supra*, 25 Cal.App.4th at p. 587.) The court concluded, however, that she waived any objection to the order and could not assert an insufficient evidence argument. (*Ibid.*) It explained that in dependency proceedings, it was not uncommon for a parent to submit on a social services report, meaning that the parent was agreeing to the court's consideration of such information as the only evidence in the matter. Under such circumstances, the court must still "weigh evidence, make appropriate evidentiary findings and apply relevant law to determine whether the case has been proved. [Citation.] In other words, the parent acquiesces as to the state of the evidence yet preserves the right to challenge it as insufficient to support a particular legal conclusion. [Citation.] Thus, the parent does not waive for appellate purposes his or her right to challenge the propriety of the court's order." (*Id.* at p. 589.)

The court contrasted that with the mother's situation, where she had submitted on the Department's *recommendation*, not on the *report*, which evidenced her acquiescence in the recommendation. This "dispel[ed] any challenge to and, in essence, endorse[d] the court's issuance of the recommended findings and orders." (*In re Richard K., supra*, at p. 589; see also *In re N.S.* (2002) 97 Cal.App.4th 167, 170 [" "[A] parent who submits on a recommendation waives his or her right to contest the juvenile court's decision if it coincides with the social worker's recommendation," " while "a parent who submits on a particular report or record acquiesces to the evidence, [but] preserves the right to challenge the sufficiency of the evidence to support a particular legal conclusion."].)

Here, Renee claims her counsel "simply submitted the matter, based upon the information available to the juvenile court at that time." By this, she apparently intends to suggest that her counsel was submitting on the Agency's section 366.26 reports, in which case, according to *In re Richard K., supra*, 25 Cal.App.4th 580, there would be no

waiver. But the record clearly demonstrates that the submission was in fact to the Agency's recommendation of termination.

First, the exchange at the section 366.26 hearing, and in particular the statements of Renee's counsel, can only be read as a submission to the Agency's recommendation. After discussing the terms of the postadoption contact agreement, the court inquired of all counsel if that was the agreement they had signed. Everyone responded affirmatively. Renee's counsel then stated that she was withdrawing her contest. Counsel for the Agency asked the court, in light of Renee withdrawing her contest, to adopt the Agency's recommendations. All counsel, including Renee's, then submitted. That counsel was submitting on the Agency's section 366.26 report, which was not the subject of the discussion, is an unreasonable construction of this exchange.

Our conclusion is also supported by the context in which the submission arose. In the months leading up to the contested section 366.26 hearing, Renee made it known that she agreed Terrance's long-term placement with his foster family was in his best interest. She was concerned, however, that if he was placed with them through adoption, she would have no legal rights to see him postadoption. The court had therefore referred the parties to mediation to see if they could come up with a contractual agreement for postadoption contact. When those efforts failed, Renee's focus changed to a legal guardianship, which would have allowed her ongoing visitation with Terrance. On March 12, however, the parties finally signed a postadoption visitation contract. With that contract in place, and Renee guaranteed contact after adoption, she withdrew her contest to the Agency's adoption recommendation. In other words, she was no longer challenging the Agency's recommendation that her parental rights be terminated and that Terrance be freed for adoption by his foster parents.

Comments Renee's counsel made after the matter was submitted provide further support. She stated: "I just wanted to note for the record that this was very difficult for my client. This is, as we all know, not a case that was clear-cut, at least in my opinion. The mother loves her child very, very much and is trying to do the right thing for him. She recognizes that he is in a very good home now, that he is with his brother and there

are many advantages growing up with the de facto parents as his parents. But she has been very, very concerned about the possibility of not having visitation with him and, therefore, we did proceed with this contest, especially in light of the fact that there was testimony by the social worker . . . who perhaps knows Terrance best . . . that it would be detrimental to him to terminate the relationship. This was a very hard decision for her, having heard that testimony.” The decision to which Renee’s counsel was referring was her decision to acquiesce in the adoption.

But perhaps the most compelling evidence of Renee’s waiver is her own brief. Before the Agency raised the issue of waiver in its respondent’s brief, Renee had already conceded in her opening brief, “When the juvenile court refused to consider [evidence of postadoption visitation], mother withdrew her request to contest the agency’s recommendation for adoption.” While the record does not support Renee’s claimed reason for withdrawing her contest,³ she herself admits that she withdrew her contest to the Agency’s recommendation that the court terminate her parental rights. It logically follows that the ensuing submission was to that same recommendation.

The record is clear. After Renee entered into the postadoption contact agreement with Terrance’s foster parents, she no longer objected to adoption as the permanent plan for Terrance. She thus withdrew her contest and submitted on the Agency’s recommendation that her parental rights be terminated. With that acquiescence, she waived her right to challenge the court’s termination order on appeal.

DISPOSITION

The order terminating Renee’s parental rights to Terrance is affirmed.

³ Renee claims that when the court ruled that evidence of postadoption contact was irrelevant to the issue of parent/child bond and thus inadmissible, “the dynamic of the hearing changed,” prompting her to withdraw her contest and submit the matter to the decision of the court. The record belies this claim. At the March 2, 2012 hearing, after the court’s evidentiary ruling, Renee proceeded with the presentation of her case, resuming her direct examination of child welfare worker Furness. Her withdrawal of the contest did not occur until 10 days later, after the parties had signed an agreement regarding postadoption visitation.

Richman, J.

We concur:

Haerle, Acting P.J.

Lambden, J.