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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re N.J., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

B.B.,

Defendant and Appellant.

E054629

(Super.Ct.No. J229911)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill,
Judge. Affirmed.

Lund Law Firm and Andrew H. Lund for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Svetlana Kauper and Jamila Bayati, Deputy
County Counsel, for Plaintiff and Respondent.

Father B.B. (Father) appeals after the termination of his parental rights to N.J. at a Welfare and Institutions Code section 366.26 hearing.¹ He claims the juvenile court erred by failing to apply the parental benefit exception of section 366.26, subdivision (c)(1)(B)(i).

I

PROCEDURAL AND FACTUAL BACKGROUND

A. *Detention*

On November 6, 2009, four-year-old N.J., son of L.J. (Mother) and Father, was detained and placed in foster care by the San Bernardino County Children and Family Services (the Department).² According to the detention report, the Department was called to Loma Linda University Medical Center (LLUMC) on November 5, 2009, due to a report that Mother and Father had been fighting and threw bleach at each other. Father had been admitted to another hospital with chemical exposure to his corneas. Mother was admitted to the emergency room at LLUMC reporting that she was struck by Father in the back of the head three times. It was reported to the Department that N.J. was at the hospital, his eyes were extremely dilated, and he was very hyper as though he had ingested a substance. Mother refused any testing on N.J.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Mother is not a subject of the instant appeal. She died during the proceedings from a suspected seizure disorder.

Mother had recently lost her hearing. She was 95 percent deaf and did not know how to read lips or use sign language. She complained that she had been the victim of domestic violence for a long time at the hands of Father. The domestic violence got worse when she lost her hearing.

Mother was admitted into the hospital. N.J. was also admitted for observation. N.J. was extremely hyperactive and aggressive. Within 30 seconds after the social worker met N.J., he tried to punch her in the face. N.J. had punched and kicked several people at the hospital.

The Department felt that Mother was a flight risk and that the detention of N.J. was appropriate. On November 6, 2009, Mother and Father were served with warrants of detention of N.J. Father commented that he was not involved in any domestic violence and that he had been a victim of Mother's anger. She had thrown bleach on him. He complained that Mother's anger had worsened since she became deaf.

Maternal grandmother had reported that she had taken custody of N.J. in 2007 when Mother was placed on a mental health hold. N.J. had been very aggressive with her. She called Father to pick up N.J., and he told her she would never see her grandson again. She described Father as an "extremely" angry person with a terrible temper.

Mother's friend, Ron, stated that he seen "the aftermath" of Father's rage. Ron had bought a television for the family, and Father had torn it apart. N.J. had told Ron that Father was mean, was bad, and had broken his toys.

On November 6, 2009, a social worker from the Department was taking N.J. to his foster home. N.J. asked, “Is the devil going to be there?” When N.J. was told no, he responded, “Good. The devil breaks all of my toys.” N.J. later disclosed to his foster mother that the “devil” was Father. N.J. also told the foster mother that Father hit him and Mother all of the time.

There had been three prior referrals to the Department for the family alleging general neglect of N.J. and physical abuse in the family, but no case had been initiated. Father had arrests but no convictions for a drug offense in 2002 and assault with a deadly weapon in 2000.

On November 9, 2010, the Department filed section 300 petitions against Mother and Father alleging a failure to protect and provide (§ 300, subd. (b)) due to their being engaged in domestic violence in N.J.’s presence. It was further alleged under section 300, subdivision (a) that N.J. had unexplained bruises.

The detention hearing was conducted on November 12, 2009. The juvenile court found a prima facie case and ordered N.J. detained in the custody of the Department. Visitation would be one hour per week separately for the parents. Minor’s counsel noted that even though N.J. was young, he was clear about his feelings and should not be forced to go to visitation. The Department agreed that visitation would have to be closely monitored.

B. *Jurisdiction/Disposition*

In a jurisdiction/disposition report filed on December 1, 2009, the Department recommended that reunification services be granted to Mother and Father. Father had advised the Department that he was the biological father of N.J. and had always held him out as his own child. Mother confirmed that Father was the biological father of N.J.

Father was interviewed on November 12, 2009. He was not aware of any bruises on N.J.'s body or how he got them. Father denied that he was the aggressor in the altercation with Mother. He claimed that, on the day they got into a fight, she threw a chair at him. He picked up a laundry basket that contained bleach and headed to the laundry room. Mother grabbed the bleach bottle and threw it at him. Father did not plan to reunite with Mother. He was willing to take N.J., but he recognized N.J. was aggressive and needed help. Father believed that N.J. had anger toward him because he would leave when he and Mother would fight. Father admitted that he broke N.J.'s skateboard, but he did it because N.J. was hitting him with it.

Mother insisted that any bruises to N.J. were accidental. Father did not hit N.J.; he was just "emotionally abusive." The hospital staff was confused about her refusing tests for N.J.

Mother reported that Father's behavior was "unpredictable and his rages [were] unpredictable as well." She claimed that Father had thrown bleach at her and that was why she was hospitalized. She also claimed that Father bit her on the arm. N.J. witnessed the entire incident. Mother was concerned that Father was in complete denial

and blamed the incident on her. She was concerned that if N.J. was placed with Father, he would be abused. Father would tell N.J. that N.J. was making him angry and would bang his own head against the wall when he was upset with N.J.

On November 15, Mother went back to the apartment to collect some of her personal items. Father was home. He threw N.J.'s toys on the floor and tore up two of his books. Their landlord was evicting them from the apartment. A notice to quit the premises detailed three reports to the landlord in October 2009 of Father beating up Mother in the apartment and loud noises.

A social worker talked to N.J. on November 12, 2009, regarding a visit with Father. N.J. said several times to the social worker that he did not want to see Father because Father would be mad at him and was mean. N.J. called Father a devil.

At the visit, when Father entered the room, N.J. crawled under a chair and would not come out. N.J. finally crawled out but immediately started punching Father and yelling that he was mad at him. The visit was terminated early. It took the social worker an hour to calm N.J. down. N.J. continued to call Father the devil. Subsequent visits between Father and N.J. were less violent and aggressive. However, N.J. continued to show signs of anger toward Father, and some visits had to be terminated early because N.J. would not want to be with Father.

The foster mother reported that when N.J. first arrived in the home, he had nightmares and "accidents." However, as of November 30, 2009, he was no longer

having either. His tantrums were decreasing. N.J. was showing less hostility toward Father.

A contested jurisdictional/dispositional hearing was conducted on January 28, 2010. The Department dismissed the allegations in the petition under section 300, subdivision (a) and two of the section 300, subdivision (b) allegations pertaining to Mother having a mental illness that put N.J. in danger.

Father called Robert Escalera, who wrote the detention report. According to the report, no charges of domestic violence had ever been filed against Father. Escalera based his opinion that Father had engaged in domestic violence based on statements made by Mother, the hospital staff reports, N.J.'s behavior, and the history of the family. Escalera testified, "And my opinion is this is an extreme case that I have []ever seen in my entire history as an employee of the county . . . where I have seen such aggression to a parent by a child this age."

Father also testified at the jurisdiction hearing. He explained that N.J. had trouble at the visits because they were right after he got out of school, and he was tired. The visits were getting better. Father denied he had ever hit Mother or even threatened to hit her. Mother and Father had difficulty communicating after she lost her hearing. The loud noises coming from their apartment complained of by the landlord was Father trying to communicate with Mother since she lost her hearing.

Father's counsel argued that the domestic violence had not been shown and the police were not filing charges. Father was willing to participate in reunification. The

Department maintained there had been domestic violence. Mother and Father were both treated at the hospital, and N.J. showed the effects of witnessing the event. N.J. had clearly stated that Father hit Mother; Father was in denial.

The juvenile court found that there was mutual combat and domestic violence on behalf of both parties. It was having a direct impact on N.J. The juvenile court found the remaining allegations under section 300, subdivisions (b) true. Reunification services were granted to Mother and Father. Father was named the presumed father.

C. Review Reports and Section 366.21 Hearings

A six-month review report was filed on July 16, 2010. It was recommended that reunification services be continued. Father was employed and had housing.

Mother had moved into an apartment for which Father was paying. Father regularly visited Mother. On April 1, 2010, a social worker from the Department visited Mother, who was then living in a care facility. She had dark black bruising to both eyes and to her nose. She was not speaking in full sentences and had a Spanish accent. She claimed that she had had a seizure. She claimed that Father came to her apartment and stabbed an "air mattress." The police were called, and Mother was evicted.

N.J. was developing normally, although he had some speech delays. He was in kindergarten, and it was recommended that he repeat kindergarten. Father refused to hold him back, and he was promoted to first grade. N.J. would be receiving special services at school, as he was considered below grade level. He had been in counseling. He told his therapist that he had experienced violence against him by Father.

Mother had been referred to the Family Services Association of Redlands. On February 23, 2010, staff there witnessed Father try to hit Mother with his car. Mother admitted to the case manager that earlier that day Father had pulled her hair and had not wanted her to leave home. Father had taken Mother's phone from her and had broken it. She admitted that Father had tried to hit her with his car.

Father had a meeting with the Department in February 2010 regarding his case plan. He became upset and left the office. On a second occasion, he again refused to sign the case plan, got upset, and left the office. On another occasion, Father had to wait an hour at the Department for a visit with N.J., but due to miscommunication, there was no visit. Father became upset and started yelling obscenities. He almost broke the front door off its hinges. Father threw papers in the air and drove off fast. He later called and asked to make up the visit with N.J.

Father had been participating in a domestic violence program. His therapist had reported him as "very intelligent and highly manipulative." Father was visiting N.J. one time per week. In December 2009, during a visit, N.J. had become angry and threw things at Father, and he hit his aunt, who was also present, in the face with his fist. Father ended the visit early because he could not control N.J. More recent visits with Father had been better. Father brought N.J. gifts and money for ice cream.

A social worker had asked Father what he needed to overcome the circumstances that had brought him to the attention of the Department, and he had responded, "[N]othing." He still claimed he did nothing wrong. He had completed domestic

violence classes and wanted custody of N.J. It was recommended that Father complete a 52-week domestic violence course. At the hearing on July 28, 2010, reunification services were continued, and N.J. remained in foster care.

A 12-month review report was filed on January 19, 2011. It was recommended that services be terminated and that a section 366.26 hearing be set. The recommendation was adoption by the maternal aunt and uncle.

Mother was living in an apartment paid for by Father. Although they were not together, Father continued to financially support Mother. Mother continued to suffer from seizures but would not take her medication. In a progress report filed by N.J.'s counselor on October 4, 2010, he was making progress but had some reoccurring problems with violence.

The maternal uncle and his wife were being assessed for adoption. They had three young children. N.J. had visited the home for one week and bonded with the family.

Father continued to deny any violent behaviors. He threatened that he was going to sue the Department for the way that he was treated. He also stated that he no longer was going to visit with N.J. but then changed his mind. Father was fully participating in his domestic violence program and completed a parenting class. His therapist recommended further treatment. Father had "cognitive distortions" about his relationship with Mother that allowed him to blame her for the violence.

Father regularly attended weekly visitation with N.J. During one visit, a social worker had witnessed Father kick a soccer ball so hard at N.J. that it knocked N.J. over.

N.J. was not hurt, but Father showed no concern for him. In November 2010, N.J. broke Father's glasses, and Father informed the Department that he no longer wanted to visit with the child. Father did show up for the next visit. He had walked out on visitation when N.J. started to act up. Father oftentimes spoke about Mother during visitation with N.J. even though he had been told not to discuss her.

The Department recommended that N.J. not be returned to either parent as they both were in denial about their dysfunctional relationship and the effects of domestic violence on N.J. Although they had participated in 14 months of reunification services, they did not appear to have benefitted from them. It was not likely that N.J. would be returned to Father and Mother; the plan was adoption by the maternal uncle.

After the review report was filed, Mother died on February 8, 2011, apparently from a seizure. Further, Father had two unauthorized contacts with N.J. He had gone to N.J.'s school without permission. He had also gone to a church service that the foster mother and N.J. were attending. Father's counsel was unaware of the unauthorized visits. Father insisted that he did not know his actions were improper. The juvenile court felt that Father was "just trying to manipulate the situation."

At the contested hearing conducted on March 18, 2011, Father testified. He was employed and lived in Redlands. Mother had died at his apartment. Father claimed that N.J. became very upset when Mother lost her hearing because he could not communicate with her. Father still denied he ever hit Mother. He blamed N.J.'s aggressiveness on Mother losing her hearing. He wanted N.J. in his custody.

Father admitted that there had been a call regarding a domestic disturbance made from the apartment several days prior to Mother's death. Father called the police about the disturbance because Mother was throwing things and was drunk. Father claimed that N.J. called him the devil because Mother had called him that when she was under the influence of drugs. Father said he felt bad for not taking N.J. out the home away from Mother; he claimed he found out after Mother's death that she was using illegal drugs. N.J. was now living with his maternal uncle and aunt in Northern California.

The juvenile court expressed doubt regarding statements in the report that Father had tried to run over Mother, because if it were true, he would have been arrested for assault with a deadly weapon. However, the trial court believed there was some domestic violence involved in the case and that Father was not acknowledging his part in it. Based on N.J.'s behavior at the beginning of the case, it was clear to the juvenile court that something had happened.

The juvenile court did not believe that N.J. could be returned to Father within the time limits. It understood that domestic violence situations can be mutual, but Father was accepting no responsibility. Father's counsel noted that Mother was now deceased, and their relationship was no longer an issue. The juvenile court indicated that it did not think that reunification was impossible, but it would not happen during the defined time limits. It was primarily concerned with Father not taking any responsibility in the domestic violence.

The juvenile court terminated reunification services and set a section 366.26 hearing. It did state that it was not certain that termination of parental rights was in the best interest of N.J., but it had to terminate because reunification had not occurred during the time period for services. Father was notified that at the section 366.26 hearing, it would consider termination of parental rights at the hearing and N.J.'s best interests.

D. Report for Section 366.26 Hearing

On July 6, 2011, the Department filed a section 366.26 report. The Department was recommending adoption of N.J. by the maternal aunt and uncle.

N.J. continued to be very aggressive. N.J. had put a pillow over the face of the four-year-old daughter of his adoptive parents until she cried. A new therapist was being sought for N.J. N.J. also stole things from his adoptive family when he first arrived, but he was doing better. N.J. would cower as though he were going to get hit when he was being verbally disciplined. He told the adoptive mother that he hated Father. He also told the adoptive mother that Father hit and kicked Mother, and N.J. would try to stop him. Before and after visits or phone calls with Father, N.J. would be aggressive. However, N.J. was becoming increasingly more loving with the adoptive family.

N.J. had monthly visits with Father. Father refused to ride the bus to Northern California to visit N.J., so N.J. had to be transported. For the first visit, N.J. was picked up by a social worker and told he was going to visit Father. N.J. did not want to go and said he never wanted to see his father again. He was given gifts and cookies by Father.

During the visit, he was hyperactive, and Father had no control over him. After 30 minutes, N.J. said that he wanted to go back to “his family.”

For the second visit, N.J. was afraid to leave the adoptive family. When they arrived at the visit, N.J. said that he did not want to visit with Father because Father was mean to Mother. After 30 minutes, N.J. wanted to leave the visit. Father talked about Mother during the visit. After the visit, N.J. was crying and told the social worker that Father was mean to Mother and that Mother had not been happy.

Phone conversations that occurred weekly between Father and N.J. were appropriate, but N.J. only wanted to talk for a few minutes and wanted to end the conversations. He was encouraged by the adoptive father to remain talking to Father.

N.J. understood adoption and wanted to live with his aunt and uncle. He referred to his adoptive parents as “mom” and “dad” and told them he loved them. The adoptive parents had three young children. They had a large home that could accommodate the children.

The section 366.26 hearing was set as contested in order for Father to testify. At the hearing, the juvenile court terminated the parental rights of Father, and N.J. was freed for adoption. Father filed an appeal from the termination of parental rights.

II

BENEFICIAL PARENT RELATIONSHIP EXCEPTION

Father contends that the juvenile court erred because it failed to apply the beneficial parent/child exception of section 366.26, subdivision (c)(1)(B)(i), since he

maintained a substantial and close relationship with N.J. He also claims that the juvenile court did not provide a detailed analysis of the reasons it was not applying the beneficial parent/child exception and did not consider legal guardianship as an alternative.

A. *Additional Factual Background*

Father was present at the section 366.26 hearing held on August 22, 2001. The Department submitted on their reports. Father testified and claimed he had not visited with N.J. for two months. The previous month he had gone to a location where a visit was to occur, and N.J. never came to the visit. Father indicated that the last 15 to 20 visits with N.J. went well. He loved N.J. He believed that it would be in N.J.'s best interest to continue with Father as his parent.

Minor's counsel supported the adoption and stated there was no showing of a bond between Father and N.J. Father's counsel argued there was a bond and that the Department's reports were biased. Father's counsel referred the juvenile court to the prior testimony at the review hearing. The Department noted that from the outset of the case, N.J. feared Father. There could be no unsupervised visits because Father had not progressed.

The juvenile court indicated that it was looking at the way that N.J. reacted before and after the visits. The juvenile court stated, "I think as described, the caretaker's description of what was going on and how the child reacted before and after, by all appearances the caretaker has been remarkably effective in willing to do what was right by the child and by the father. [¶] But under the circumstances, everything considered, I

think the potential outcome of legal guardianship or adoption, those in theory would be the real choices, but the law under these circumstances requires that adoption proceed. That's the way I see it." After the juvenile court terminated Father's parental rights, he abruptly left the courtroom before the hearing was concluded.

B. *Analysis*

At the section 366.26 hearing, the sole issue "'is whether there is clear and convincing evidence that the child is adoptable.' [Citations.]" (*In re Josue G.* (2003) 106 Cal.App.4th 725, 733; see § 366.26, subd. (c).) "Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan, unless it finds that termination of parental rights would be detrimental to the child under one of the seven exceptions set forth in section 366.26, subdivision (c)(1)(A) and (c)(1)(B)(i) through (v). (See *In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.)

The parental benefit or "beneficial relationship" exception is set forth in section 366.26, subdivision (c)(1)(B)(i). The exception applies where "'[t]he parents . . . have maintained regular visitation and contact with the minor and the minor would benefit from continuing the relationship.'" (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) The parent has the burden of proving that the exception applies. (*Ibid.*) "The parent must do more than demonstrate 'frequent and loving contact[,] [citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the

parent must show that he or she occupies a ‘parental role’ in the child’s life.” (*Id.* at p. 827.) “In other words, for the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.)

The record does support that Father maintained consistent visitation with N.J. throughout the proceedings. However, those visits were not beneficial to N.J., and Father failed to establish that his relationship with N.J. outweighed the permanency and stability that adoption provided to N.J.

From the outset of the dependency proceeding, N.J. was aggressive and violent. He punched a social worker and kicked people at the hospital. His grandmother could not control him. It was clear N.J. had witnessed domestic violence between Father and Mother, and it had had an impact on him. N.J. continued to be aggressive in his adoptive home but was getting better with help from the parents.

Father was abusive and violent. He was described by several people as aggressive and angry. Mother called him abusive and unpredictable. N.J. called him the devil because he was mean to N.J. and hit Mother. Father continued to deny any involvement in the domestic violence with Mother despite numerous reports of violence between them. These domestic disturbances continued until Mother died.

Visitation between N.J. and Father did not establish that there was a bond between them. At the first visit, N.J. hid in the corner under a chair. At subsequent visits, N.J.

would be aggressive, and some of the visits had to be terminated early. Any time a visit did not go well, Father threatened that he would no longer attend visits. Although visits became more peaceful, there was no showing of a loving bond. Once N.J. was placed with the adoptive family, he did not want to attend visitation and wanted to end the visits early. After each visit, N.J. would act out and be aggressive.

The evidence before the juvenile court showed that N.J. feared Father and that there was little bond between them. N.J. stated that he hated Father and wished that he was not his biological father. N.J. only improved once he was in a stable environment, and he reverted back to his aggressive behavior after being with Father. Father did not occupy a parental role in N.J.'s life, and there was nothing to show that N.J. would benefit from continuing the relationship.

Father points to evidence that visits were consistent and that N.J.'s attitude improved and became more positive toward him. Further, he points to evidence that N.J.'s anger toward Father was diminishing. Father expressed his love for N.J. and wanting to continue the relationship. Father had participated in his domestic violence counseling.

None of this evidence establishes that there was any kind of bond between Father and N.J. In fact, it was reported that N.J. continued, even after being out of Father's custody for over 14 months, to be aggressive before and after his visits with Father. N.J. did not want to attend visits and expressed boredom during the visits. There simply was no parental bond.

Father also complains that the juvenile court did not appropriately consider the beneficial relationship exception and the juvenile court failed to consider guardianship. The record belies Father's claim. Father testified at two hearings, and the juvenile court carefully considered his testimony and the reports. Moreover, the juvenile court was aware that in terminating Father's parental rights, it had to take into account N.J.'s best interest. The juvenile court noted that it was making its decision to order adoption, "in the best interest of the child."

Father claims that the juvenile court failed to consider legal guardianship. However, especially in light of the fact that N.J. had moved to Northern California, guardianship was not appropriate in this case. "[G]uardianship is only the best possible permanent plan for children in circumstances where the exceptions to terminating parental rights in section 366.26, subdivision (c)(1) apply." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.) Here, as discussed, the juvenile court properly determined that the beneficial parent/child relationship exception did not apply. The adoptive family lived in Northern California, but they were the maternal uncle and aunt. Being with them provided the necessary stability and permanency that N.J. deserved. The juvenile court properly concluded that the parental/ child relationship exception did not apply in this case and properly ordered adoption of N.J.³

³ A timely request having been made at oral argument per our order of April 16, 2012, the appellant's reply brief received on April 12, 2012, has been reviewed and considered by the court.

III

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.