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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

K.B.,

Defendant and Appellant.

G050095

(Super. Ct. No. DP023056)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Linda B. Puertas, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, Karen L. Christensen County Counsel, and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

* * *

Minor N.A. was declared a dependent child and removed from mother's custody due to her inability to provide for him. After 12 months of reunification services, mother had done little to improve her circumstances, and reunification services were terminated. The court held a contested hearing pursuant to Welfare and Institutions Code section 366.26¹ (.26 hearing) at which it terminated mother's parental rights and began the process of minor's adoption by his foster parents. Mother appealed and raises three issues.

First she contends minor, who is over 12 years old, objected to termination of her parental rights under section 366.26, subdivision (c)(1)(B)(ii). On the stand, minor was generally in favor of adoption, but equivocated somewhat when confronted with the possibility that his foster parents could prevent him from seeing his mother. He testified, however, that his foster parents assured him he could continue to see his mother. A reasonable interpretation of his testimony is that he consented to adoption based on those assurances. Accordingly, the court's finding that he did not object is supported by substantial evidence.

Second, mother contends the court erred by failing to find that she had maintained regular contact and visitation with minor and that maintaining her parental rights would benefit him under section 366.26, subdivision (c)(1)(B)(i). The record is clear, however, that under mother's supervision, minor languished and struggled, whereas under his foster parents' care, he thrived. It was equally obvious that mother's legal

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

status as a parent was conferring no benefit to minor whatsoever during the reunification period. Accordingly, it was in minor's benefit to terminate mother's parental rights and proceed with the adoption.

Finally, mother contends the court erred by permitting minor's foster parent to testify concerning his assurances that he would permit minor to continue visiting his mother after the proposed adoption. The court admitted the testimony for the limited purpose of interpreting minor's testimony regarding those assurances. We agree that the testimony was irrelevant, but it was harmless. Accordingly, we affirm.

FACTS

In September 2012, mother contacted Orange County Social Services (SSA) requesting temporary placement for minor, who was 12 years old. Mother explained that she and minor had been living on the streets or in motels since July 2012. Prior to becoming homeless in July, she and minor had been living in a motel for two and one-half years. They were evicted, however, because minor had been running wild in the complex, breaking windows. Minor had been diagnosed with autism and Pervasive Developmental Disorder-Not Otherwise Specified (PDD NOS), and had exhibited physical and verbal aggression towards peers and adults. Mother tried to find other help for minor, but he was not cooperative, so she called SSA because she "felt she had no other option"

A few days later, SSA filed a section 300 jurisdictional petition. Minor was placed at Orangewood Children and Family Center (Orangewood). Minor's mother regularly visited him at Orangewood, and the visits were reportedly enjoyable for both. Minor was comfortable and active at Orangewood, though he showed impulsive tendencies, had threatened his peers, and had a hard time with boundaries. Given these

concerns, SSA sought a more appropriate placement in October 2012, as he was deemed inappropriate for a mainstream group or foster home given his special needs.

In November 2012, mother submitted on the jurisdictional petition and the court sustained it. In February 2013, minor was declared a dependent child and was removed from mother's custody. Mother was granted reunification services with supervised visits three times per week.

In March 2013, minor was placed with nonrelated extended family members D. and L., with whom minor was eager to be placed. L. was a psychologist working at minor's school.

The court held a six-month review hearing in August 2013. SSA's report noted that mother's visits with minor, though acceptable, were sporadic, with her utilizing only 40 percent of her allowed visitation time. Additionally, the report noted mother's "minimal level of participation" in services, as mother had twice been terminated from counseling services for nonattendance, did not increase her visits with minor despite the child's wishes, was making no effort to document job search efforts, was making no effort to obtain stable housing, and refused to provide the address of where she was living with a male friend. SSA concluded in its report, "Unfortunately, although it is apparent that the mother cares about her son, [she] has not demonstrated behaviors that would indicate her ability to protect the child from risk or harm if returned to her care. Specifically, [she] has not demonstrated the ability to meet the child's needs for supervision, food, clothing or medical care. The mother lacks an adequate social support system, is isolated, and appears reluctant to seek additional support. The mother displays coping skills that include low self-esteem and apathy. Lastly, the mother lacks resources, or severely mismanages available resources, which results in unmet basic care needs related to health and safety."

Minor, by contrast, was beginning to show improvement, with his foster parents noting that his behavior at home and school had improved, and that their use of a

point system to track his behavior and dole out privileges accordingly had been an effective device. Minor had not had any episodes of violent or destructive behavior since living with his foster parents. A social worker observed minor was happy and very comfortable in his placement, appropriately bonded with his caregivers, and expressed a desire to continue living with them if needed. He did, however, express excitement about the possibility of living with his mother again.

At the six-month review hearing, the court extended mother's reunification services.

In November 2013 the court held a 12-month review hearing. SSA's report noted that minor was continuing to thrive at school and at home. His foster parents had no behavioral concerns and noted that minor's behavior was continuing to improve while in their care. The report observed that caregiver L.'s "expertise as a school psychologist continues to be a great benefit to the child." Minor's therapist reported that he was doing "really well." Minor stated to his therapist that he used to be afraid when he and his mother were homeless, but that he is no longer afraid. Minor's therapist asked him if it would be ok if he were to stay with his foster parents permanently, and he stated "he would [be] completely fine with that." The therapist was unsure, however, how much minor understood that concept.

By contrast, the report noted that while mother was entitled to visitation and daily phone calls, "she is choosing [to] not play an active role in [minor's] life." Mother had made zero progress towards alleviating the problems giving rise to the court's involvement, had been nonresponsive to the social worker, and had not participated in any counseling or education classes. In August 2013, mother explained that she had been visiting more sporadically because she could not afford the bus fare. In response, a social worker provided her with a bus pass. As of the time of the report in November, however, mother had not increased her visitation and was using only 25 percent of her allotted time. Mother subsequently recognized "there is no significant

barrier preventing her from increasing her visits with [minor].” Although mother called daily, the calls typically lasted no longer than two minutes, and in one case was only 19 seconds.

The report further noted that minor’s foster parents had expressed a desire to adopt minor. “Given this information, the mother’s lack of suitable [housing] and a stable income, the maternal grandmother’s homelessness, the concerns regarding the grandmother’s mental health, and no relatives available for placement, the current placement is both appropriate and in the best interest of the child at this time.”

At the 12-month review hearing, the court terminated mother’s reunification services and scheduled a contested .26 hearing to decide whether to terminate mother’s parental rights.

Prior to the .26 hearing, SSA submitted an additional report noting minor’s exceptional progress — so much so that his therapist suggested “it may be difficult to justify continuing his services.” She was “amazed at how well [minor] is able to generalize his treatment into other settings.” The report noted that “[a]ll reports indicate that [minor] has made great progress during his treatments and much of the credit for his significant improvement is being given to his current caregivers and the stable environment that they are providing.” With respect to minor’s willingness to be adopted, he stated he was “a seven out of ten informing this Social Worker that he is happy about being adopted but ‘just need[ed] some time to get used to it.’” The report further noted that “[t]he caregivers have expressed a fervent desire to adopt the child and are supportive of [minor] continuing to have regular contact with his mother and maternal grandmother.” By contrast, mother’s visits had dwindled to twice per month, despite now having a bus pass.

At the .26 hearing, minor was called to testify. We quote at some length from this testimony since the primary issue on appeal is whether this testimony constituted an objection to terminating mother’s parental rights.

On questioning from mother's counsel, minor testified:

Q. "And I understand that on a scale of one to 10, is it true that you told [your social worker] you're a seven out of 10?

"A. A six.

"Q. A six out of 10 and that's a six in favor of being adopted by [your foster parents]?

A. Yeah. I'll get used to it."

Later minor testified:

Q. "So, do you understand that you have the right to say, hey, I do not want to be adopted?

"A. Yes.

"Q. Okay.

"A. It's fine, in October, so I get adopted."

Later minor testified:

Q. "So, if you're adopted by [your foster parents] do you understand there's a possibility where you may never see your mother again?

"A. Yeah, yeah. But I would still see her when I get adopted, right? I'll still see her still.

"Q. Okay. Who told you that?

"A. My social worker says I can still see my mom when I get adopted.

"Q. Are you aware there's no guarantee you'll still see your mom when you're adopted?

"A. Yes.

"Q. Okay. [¶] So, you understand its possible where if [your foster parents] adopt you you may never see your mother again?

"A. Yes.

"Q. Okay. [¶] You enjoy your visits [with] your mother, is that right?

“A. Yeah. I’m still going to get visits when I get adopted though. Once in a while.

“Q. I — I don’t think anyone can promise you that you will still get visits if you’re adopted, okay. [¶] So, if someone has promised you that it’s incorrect. No one can make a promise that you’ll continue to see your mom if you’re adopted?

“A. Uh-huh.

“Q. Okay. [¶] Do you understand that?

“A. Yeah.

“Q. Is that ‘yes’?

“A. Yes.

“Q. Okay. [¶] And you testified you just said that you enjoy the visits with your mom?

“A. Yeah.

“Q. You would like to continue to see your mother?

“A. Yes.

“Q. You would like — and why do you enjoy the visits with your mother?

“A. I just enjoy them. I just, like, enjoy them.

“Q. Okay. [¶] Do you miss your mother since you’ve been with [your foster parents]?

“A. Uh-huh.

“Q. Is that ‘yes’?

“A. Yes.

“Q. So, knowing that there is no guarantee — there’s no promise that you’ll [be] able to see your mom if you’re adopted, is it still your desire to be adopted? Or would you rather not be adopted?

“A. Am I still going to be at [my foster parents’] house when I don’t get adopted?

“Q. That is something I don’t know the answer for.

“A. I don’t know the answer.”

“Q. You would like to continue to at least live with [your foster parents]?

“A. Yeah. And also get adopted also. I really want to get adopted but I would still like to stay with them.

“Q. You say that one more time, I’m having difficulty hearing.

“A. I don’t think I would like to get adopted but I’d still like to stay at their house.”

Minor’s counsel then questioned minor as follows:

Q. “[Y]ou lived with [your foster parents] for almost a year now, right?

“A. Uh-huh.

“Q. Is that, yes? . . .

“A. Yes.

“Q. Okay. [¶] And do you trust them?

“A. Yeah.

“Q. Okay. [¶] Have they ever lied to you about anything?

“A. Huh-uh.

“Q. Is that no?

“A. No.

“Q. Okay. [¶] And have you ever talked to them about whether you’d see your mom if –

“A. Yeah.

“Q. You were adopted?

“A. I would still see my mom if I got adopted.

“Q. Is that what they told you?

“A. Yeah — mean, yes.”

Later he testified:

“Q. And have you talked to [your foster parents] about seeing your grandmother if you’re adopted?

“A. Yeah.

“Q. What did they tell you?

“A. Every other week.

“Q. Okay. [¶] And is that okay with you, seeing her every other week?

“A. Yeah. And my mom, too, every other week.

“Q. Okay. That is what they told you’d [be] able to see your mom? Every other week?

“A. No. They tell me that if she’s available I still get to see her.

“Q. Okay. So, whatever she’s available?

“A. I — I’m confused about — I’m confused about [mother’s counsel] and a little confused I’m not going [to be] able to see my mom again. Is that a possibility or is it my choice to see her — not see her?

“Q. Well, if you were adopted it would be [your foster parents’] choice because they would be the ones —

“A. Oh, I get — no, got it.

“Q. They would make decisions for you just like parents.

“A. Yeah. They said, yes.

“Q. Okay.

“A. I see.

“Q. And if you were adopted they would become your parents, right?

“A. Right.

“Q. Okay. [¶] And is that something you want, for them to become your parents?

“A. Yes. As long as I see my mom. That’s all.”

After minor's testimony, minor's counsel sought to call one of the foster parents to testify concerning his assurances to the minor that he would continue to see his mother after the adoption. Mother's counsel objected. The court invited briefing on the issue and continued the hearing a week. At the subsequent hearing, the court ruled the foster parent could testify but only for the limited purpose of clarifying whether minor objected to terminating mother's parental rights, not whether postadoption visitation would render adoption more beneficial than maintaining mother's parental rights for purposes of the parental-bond exception.

One of the foster parents then took the stand and testified that he and his partner are "100% committed to [minor's] continued contact with his mom," "[t]he only restriction being is if his mother's behavior were to be harmful to him." As to that restriction, he offered the hypothetical example of her "hook[ing] up with someone that I would feel might be hurtful to [minor]. Someone abusive emotionally, mentally, verbally, physically."

At the close of testimony the court adopted SSA's recommendation and terminated mother's parental rights and ordered a permanent plan of adoption. In particular, the court found that any hesitation on minor's behalf to be adopted was not an objection but just a statement of internal conflict and a preference to both live with his foster parents and continue to see his mother. The court also rejected application of the parental-bond exception to terminating mother's parental rights, stating, "Analysis and weighing in all the factors including age of [the] child, the portion of the child's life spent with the parents, the positive and negative effect of the interaction between the parent and the child and the child's needs. Ultimately, mom does not even get to the first prong, maintaining regular visitation and contact." Mother timely appealed.

DISCUSSION

Upon the termination of reunification services, the statutorily preferred consequence is that the court will terminate parental rights and order adoption, unless one of several exceptions applies. (§ 366.26, subd. (b)(1), (c)(1)) The two exceptions relevant here are the child-objection exception (§ 366.26, subd. (c)(1)(B)(ii)), and the parental-bond exception (§ 366.26, subd. (c)(1)(B)(i)).

The child-objection exception applies if “[t]he court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] . . . [¶] (ii) A child 12 years of age or older objects to termination of parental rights.” (§ 366.26, subd. (c)(1)(B)(ii).) “Before terminating parental rights, the juvenile court must consider the child’s wishes, to the extent that they are ascertainable. [Citations.] The juvenile court should explore a child’s feelings toward his or her parents, foster parents, and prospective adoptive family. [Citations.] Evidence of a child’s wishes may, but need not, be in the form of direct testimony at the parental rights termination hearing; such evidence may also appear in the Agency’s reports.” (*In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1334.) The burden is on the party asserting the exception to prove an objection. (See *id.* at p. 1335; *In re C.B.* (2010) 190 Cal.App.4th 102, 122.) We review the court’s finding concerning whether minor objected for substantial evidence. (*In re Christopher L.*, at pp. 1333-1334.)

Mother argues that this exception applies, despite the ambiguous nature of minor’s testimony. It would be unrealistic, she argues, to require a minor to clearly articulate an objection. “This is too high of a standard to set on a 13-year-old trying to piece together a fractured life,” she argues.

We disagree. The end goal of the proceeding is to select a plan in the best interests of the minor. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1165.) At this

stage, the parent's reunification services have already been terminated and thus it has been determined that the child cannot be safely returned to the parent. Where that child is likely to be adopted, there is usually little to be gained, and potentially much to be lost, from maintaining the parent's legal rights. (See *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256 ["In light of the earlier judicial determinations that reunification cannot be effectuated, it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home"].) Accordingly, for the child-objection exception to apply, the objection must be clear enough to indicate that adoption is not going to be a good fit for that particular child due to his or her strong preference against it.

In re Christopher L, supra, 143 Cal.App.4th 1326 is on all fours. There, the child was removed from mother's custody when he was 14 years old, at which time he was depressed and suicidal. (*Id.* at p. 1329.) The child was placed with his paternal aunt and uncle, where he thrived. (*Id.* at p. 1330.) During that time, the child expressed a strong preference to continue living with his aunt and uncle permanently, but he also wanted to continue visiting his mother. (*Ibid.*) Mother visited sporadically and ultimately her reunification services were terminated. (*Id.* at p. 1331.) At a contested .26 hearing, the child testified he wanted to be adopted (*ibid.*), but when asked, "Would you want to be adopted if it meant that — if there was a chance you couldn't ever see your mom again?" He replied, "No, because I would like to see my mom again." (*Id.* at p. 1332.) The court terminated mother's parental rights and she appealed based on the child-objection exception. (*Id.* at pp. 1332-1333.) The court affirmed, finding the record showed the child "did not *unequivocally* object to the termination of parental rights. . . . Rather, the statements appear to reveal an internal conflict between his hope to be adopted and live in a stable and loving environment, and his hope to see [his mother] again." (*Id.* at pp. 1334-1335, italics added.)

Essentially the same thing happened here. As we interpret minor's testimony, giving due deference to the trial court, he was willing to be adopted provided his foster parents assured him he could continue visiting his mother, which they did. Mother's counsel's questioning confused minor — and we can understand why. Mother's counsel's assertion that no one could promise that minor would continue seeing his mother was simply wrong — his foster parents could and did make that promise. And while that promise may not be legally enforceable, which was mother's counsel's point, minor was free to make his decision trusting that his foster parents would not lie to him. Ultimately, based on that assurance, minor assented to adoption. Accordingly, the child-objection exception did not apply.

Next mother contends the court erred by failing to apply the parental-bond exception. The parental-bond exception applies where “[t]he court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) “The exception . . . must be considered in view of the legislative preference for adoption when reunification efforts have failed. [Citation.] So viewed, the exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Instead, to invoke this exception the parent must show that “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging that a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional

attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Mother contends that minor's 12 years with her before the dependency proceedings and regular contact they had during those proceedings, coupled with minor's consistently expressed desire to visit her, is evidence of a sufficient benefit to invoke the parental-bond exception. We question whether the record in this case could ever support the parental-bond exception, but given that our review is deferential, we easily affirm.² Although we recognize that minor and mother cared for one another, there was nothing in the record to suggest that their relationship promoted minor's well-being. She was unwilling to make any lifestyle changes to provide a supportive environment for him, and her visits were half-hearted and sporadic. Nor was there evidence that his bond with her was so tight that severing it would create more hardship than the stability of his adoptive home would offset in benefits.

Mother attempts to analogize the present case to *In re Scott B.* (2010) 188 Cal.App.4th 452 (*Scott B.*), where the court reversed an adoption order, but we find that case distinguishable. There are some facial similarities with this case: in both cases the minor was made a dependent at a later age, having been raised by his mother up to the point of being detained. Both cases involve autistic children with behavior problems. In both cases, the foster parent effected significant improvements in the child's life. But the

² We note there is a split of authority regarding whether we review the court's ruling for substantial evidence or abuse of discretion or some combination of both. (Compare *In re Clifton B.* (2000) 81 Cal.App.4th 415, 424–425 [substantial evidence standard]; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576 [substantial evidence standard.] with *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 [abuse of discretion standard]; see *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 [incorporating both standards].) We need not resolve the issue because under either standard we would affirm.

child's bond with his mother was more prominent in *Scott B.*, and the detriment to terminating that relationship was more obvious.

For example, in *Scott B.*, *supra*, 188 Cal.App.4th 452, the mother “had done the things required of her (parenting classes, counseling, etc.)” (*id.* at p. 463), was no longer living with the individuals who had created a threat to the child (*id.* at pp. 461, 466), almost never missed any visitations (*id.* at p. 467), and during the visitations she acted as a parent towards him, rewarding him for good behavior and reprimanding him for bad (*id.* at pp. 463-464). At one point, the mother got sick and this triggered such a strong emotional response in the child that he not only adamantly opposed adoption but also threatened to run away if adopted. (*Id.* at p. 463.) Indeed, at one point the child attempted to run away. At the same time the child's behavior regressed to growling and biting. Due to his worry about his mother, he was not able to sleep. (*Id.* at p. 462.) Even after the mother recovered and the child's behavior improved, his court appointed special advocate “opined that it is imperative that when [the child] is adopted he maintain contact with Mother as it is clear that Mother and [the child] are extremely close and it would be detrimental for their relationship to be disrupted.” (*Id.* at p. 465.) Further, the child continued to oppose adoption and threatened to run away. (*Id.* at p. 466.) The social worker's report noted that the child's life had stabilized due, in part, to the support of the mother. (*Id.* at p. 472.) The *Scott B.* court concluded that legal guardianship was the only way to ensure the child maintained his vital relationship with his mother. (*Ibid.*)

None of those factors are present here. Although the record reveals that minor and mother enjoy their visits together, and they care for one another, mother does not play a parental role, and minor is not so unstable that severing mother's parental rights will significantly harm him. Mother has showed only a half-hearted interest in minor, making almost no attempt to alter her circumstances or take advantage of services, and only utilizing approximately 25 percent of her visitation time. In this case, the

stability of an adoptive family far outweighs any benefit of maintaining mother's parental rights.

Mother's final argument is that the court erred by admitting into evidence the foster parent's testimony that he would continue to permit minor to visit his mother after the adoption. Indeed, in considering whether the parental-bond exception applies, it is improper to consider the prospective adoptive parents' willingness to permit continued visitation. (*In re C.B.* (2010) 190 Cal.App.4th 102, 128; *In re S.B.* (2008)164 Cal.App.4th 289, 300.) The trial court recognized this principle and admitted the testimony for the limited purpose of clarifying whether minor's testimony amounted to an objection, specifically noting that it was not considering the testimony in connection with the parental-bond exception.

Mother argues the testimony "was irrelevant to the court's determination of whether [minor] objected to terminating his mother's parental rights." We agree. The court apparently sought clarification regarding what assurances the foster parent had made, but what was relevant was minor's understanding of those assurances, which he had already testified to. At best, the foster parent's testimony was cumulative.

Nonetheless, we find the error was harmless. Since the testimony was cumulative, it did not add any facts that were not already before the court. And nothing in the record suggests the court placed any undue reliance on the foster parent's testimony. To the contrary, the court admitted it for a narrow purpose. Mother suggests this testimony creates the danger of being a "comfort [to] the judge in making the difficult decision to terminate parental rights" We agree that this danger exists in general, and thus the testimony is inadmissible, but there is nothing in this record to suggest that played any role here. Rather, as we explained above, the evidence in the record strongly supports the court's ruling, and we are confident the court would have reached the same result without the foster parent's testimony.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.