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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re K.R., a Person Coming Under  
the Juvenile Court Law.

B278608

(Los Angeles County  
Super. Ct. No. CK98549)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.C.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Natalie Stone, Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

Mother A.R. (Mother) and father L.C. (Father) are the parents of a daughter K.R. She was the subject of juvenile court dependency proceedings, which ultimately progressed to a contested hearing to terminate the parental rights of Father, who was then incarcerated in Tennessee, and Mother. Father's attorney asked to call then-12-year-old K.R. as a witness to question her about whether she understood the consequences of adoption and whether she continued to adhere to her previously reported wish to be adopted by her maternal grandfather. K.R.'s attorney objected to calling his client to testify and represented K.R. was "in total agreement with adoption today." The juvenile court did not require K.R. to testify, terminated Father's rights (and Mother's), and ordered K.R. placed for adoption. We are asked to decide whether the court prejudicially erred in denying Father's request to call K.R. as a witness.

## I. BACKGROUND

### A. *Initial Proceedings*

In March 2013, Mother was using methamphetamine and she had a psychotic episode while taking care of K.R. at a park. K.R. (nine years old at the time) called the police, and officers took Mother to the hospital where she was held for psychiatric treatment. The incident was reported to the Los Angeles County Department of Children and Family Services (DCFS).

A DCFS social worker began investigating K.R.'s welfare the next day. K.R. had been living with Mother and her maternal grandfather (Grandfather) for many years. K.R. told the social worker that Grandfather took good care of her but he was often out of town on business. When he was out of town, Mother used

drugs in front of K.R. and brought other drug users into the house. K.R. reported Father was residing in Tennessee.

DCFS filed a petition alleging K.R. was a child described by Welfare and Institutions Code section 300, subdivision (b)<sup>1</sup> because of Mother's substance abuse and emotional problems, which rendered her incapable of providing regular care for K.R. At an initial hearing on the petition, the court found DCFS had made a prima facie case for detaining K.R. She was placed in foster care.

DCFS subsequently learned Father was in custody for manufacturing a narcotic, which, according to K.R., he had done in "mama's basement." Father's prison sentence was set to end in 2024, but he was eligible to be released on parole much earlier.

In advance of the jurisdiction hearing on the petition, DCFS conducted a multidisciplinary assessment of K.R. The assessment determined K.R. was able "to articulate her thoughts and feelings about being in foster care as well as what her home life was like prior to being removed." K.R. told DCFS she wanted to go back to live with Grandfather in Los Angeles. According to the assessment report, K.R. would "cry every night [in foster care] because she misses [Grandfather] even though she has remained in consistent contact with him via telephone."

At the adjudication hearing on the petition, held only as to Mother because Father had not yet been appointed counsel, the court sustained the allegations in the petition (with certain amendments). The court ordered K.R. removed from Mother's

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<sup>1</sup> Undesignated statutory references that follow are to the Welfare and Institutions Code.

custody but refrained from making a disposition order as to Father pending a hearing that would take place later.

*B. Subsequent Proceedings Concerning Placement and Adoption*

DCFS prepared various reports and the juvenile court held multiple review hearings over the ensuing three years. We summarize the events pertinent to the issue Father raises on appeal, focusing on instances in which K.R. expressed views about whom she wanted to live with and whether she wanted Grandfather to adopt her.

By the time of the six-month review hearing for Mother (which also served as the disposition hearing as to Father), DCFS reported K.R. was not adjusting well to foster care. She told a social worker that she did not feel comfortable and was not getting along with other foster children. In addition, she was not performing well in school. K.R. advised DCFS she wanted to be moved from foster care to a relative's home. Grandfather had been visiting K.R. weekly and K.R. had enjoyed the visits.<sup>2</sup> Mother stated she wanted K.R. placed with Grandfather, and Grandfather repeatedly expressed interest in having K.R. placed with him. At the time, however, DCFS was opposed to such a placement because the agency doubted Grandfather could keep K.R. safe.

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<sup>2</sup> Initially, Grandfather and Mother visited K.R. together. However, after an incident during a visit when the police were called because Mother became physically and verbally aggressive, Mother stopped visiting K.R. and Grandfather visited the child by himself.

The juvenile court ordered K.R. would remain a dependent child. The court also ordered DCFS to make best efforts to facilitate a team meeting to discuss possible placement of K.R. with Grandfather.

DCFS thereafter submitted a report indicating it had held a team meeting with K.R., Grandfather, and K.R.'s aunt and uncle. The meeting resulted in a determination that it was in K.R.'s best interest to live with Grandfather, and DCFS advised the court it had placed K.R. accordingly. The DCFS report also included a brief evaluation of the prospect of adoption if reunification efforts were to fail. In that event, DCFS reported Grandfather wanted to adopt K.R. and, when asked, K.R. similarly stated "I want my grandfather to adopt me."

DCFS later submitted another status review report in preparation for the next review hearing (the 12-month review as to Mother and the 6-month review as to Father). The report noted K.R. was happy in Grandfather's home, "respectful in and out of the home," and seemed to be doing well in her new school. DCFS elaborated that Grandfather could be "firm with his structure" but he and K.R. were adjusting. The report additionally noted a social worker had asked K.R. about her "placement and her future." K.R. told the social worker she had considered whether to live with her aunt but she had decided to remain with Grandfather and be adopted by him.<sup>3</sup> K.R. added she was "adjusting again to his home [and] we will make it work."

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<sup>3</sup> Mother told DCFS she no longer lived with Grandfather and would not interfere if he got custody of K.R. Mother said Grandfather raised her and provided for her very well, and she wanted K.R. to be raised by Grandfather too.

At the review hearing, the juvenile court found continued jurisdiction over K.R. was necessary. The court terminated reunification services for Mother and set a 12-month permanency hearing as to Father only. The court ordered DCFS to prepare another status review report in advance of that hearing.

In its next status review report, submitted in March 2015, DCFS reported it had again spoken with K.R. about her placement and her future. K.R. told a social worker it remained her intent to have Grandfather adopt her and care for her needs. The DCFS report also indicated Father remained incarcerated. According to the report, Father had a possible parole release date in June 2016, but if he were not paroled at that time he would not be released until November 2024. The report attached a letter from Father's prison counselor who stated Father had been attending counseling, was working on his GED, and wanted to be "very involved" with decisions affecting K.R.'s future.

At the 12-month permanency hearing, and without opposition from Father, the court terminated Father's family reunification services and found there was no substantial probability K.R. would be returned to the custody of her parents. The court accordingly set the matter for a section 366.26 hearing at which it would consider terminating Mother and Father's parental rights.

In August 2015, DCFS prepared a report to address the section 366.26 issues the juvenile court would consider. DCFS recommended the juvenile court designate adoption by Grandfather as K.R.'s permanent plan. DCFS justified its proposed adoption plan by emphasizing Grandfather had an approved adoption homestudy, Grandfather had been involved in K.R.'s life since she was born, K.R. had been placed with him

since April 2014, she was “overall doing well” in that placement, and K.R. had expressed her desire to be adopted. According to the report, Grandfather had expressed every intention of adopting K.R. if parental rights were terminated.

For various reasons, the section 366.26 hearing was continued several times over the next 12 months, which resulted in DCFS’s submission of several additional status reports over that period of time. Many of these reports, including reports in October 2015, December 2015, and April 2016, recounted K.R.’s expressed wish to be adopted by Grandfather and his intention to adopt her. The reports noted K.R. was thriving in Grandfather’s care (albeit still with some trouble in school), and DCFS continued to recommend the juvenile court terminate Mother and Father’s parental rights and order K.R. placed for adoption with Grandfather.

*C. The Court Proceedings That Led to Termination of Father’s Parental Rights*

At an April 2016 court appearance that resulted in one of the aforementioned continuances of the section 366.26 hearing, counsel for Father informed the court she planned to contest termination of his parental rights and would like to have K.R. present for the hearing. The juvenile court asked Father’s attorney what statutory exception to termination of parental rights she planned to explore and expressed its hope that cross-examination of K.R. would not be necessary. Father’s attorney answered that K.R. had reached the age of 12 and counsel wanted “to have her here to cross-examine her if she really wants the adoption,” explaining that in past cases counsel had encountered children who say they want to be adopted but



express a different view “once you do put them on the stand[ and] you actually explain to them exactly what it means.” Father’s attorney said she believed K.R. might oppose termination of Father’s parental rights based on certain letters K.R. had sent to Father while he was in prison.

Father’s attorney submitted these letters as proposed exhibits for the contested hearing. In one of the handwritten (and undated) letters, K.R. told Father she really missed him and thought about him all the time. In another, she stated: “I miss you a lot. I wish I was with you well in this letter [sic] I am going to send you pic[tures] so just saying I love ya and I miss you. Well I will always love you ok gotta go! love ya[ ] bye.” Other letters from K.R that Father’s attorney submitted included wishes for a Merry Christmas, wishes for a Happy Easter, birthday wishes, and expressions of love.

Counsel for K.R. offered “to talk to [K.R.] regarding adoption so that, hopefully, she won’t have to testify.” The juvenile court accepted the offer and ordered K.R.’s attorney to counsel the child on what it means to be adopted.

At the next court appearance (with K.R. present), the juvenile court continued the section 366.26 hearing to allow DCFS to provide proper notice of the hearing to Mother. Father’s attorney reiterated she believed she had a right “to put [K.R.] on the stand” when the parties came back to court. The court invited Father’s attorney to submit a written brief explaining the legal basis on which she would contest adoption and why she believed she was entitled to examine K.R.

Father thereafter filed a brief arguing he had a due process right to question K.R. Father noted he would seek to contest the termination of his parental rights partly on the basis of section

366.26, subdivision (c)(1)(B)(ii), which authorizes a juvenile court to refrain from terminating a parent's rights if the child is over 12 years old and objects to the termination.<sup>4</sup> Father argued that "[t]he attorney for minor relating or the social worker relating the minor's desires is not the same as a child of this age being able to explain her understanding of adoption and if she truly has been told the legal as [well] as emotional consequences for her if [Father's] parental rights are terminated."

Counsel for K.R. filed a brief opposing Father's request to call K.R. to testify. The brief argued there was no basis to call K.R. as a witness because there was no evidence K.R. disagreed with the adoption plan. Counsel for K.R. agreed K.R. would like to see Father again—as the letters written to him in prison would indicate—but counsel argued that was insufficient to establish K.R. was opposed to adoption. To the contrary, counsel for K.R. explained his client had repeatedly expressed her desire to be adopted by Grandfather, as indicated in the DCFS reports.

Shortly after the filing of the written submissions by Father and K.R., the parties appeared in court for the section 366.26 hearing. Father was represented by counsel and listened in on the hearing via CourtCall. K.R. was present in court, sitting in the back of the courtroom with Grandfather.

Father's attorney renewed her request to call K.R. as a witness. The juvenile court invited counsel for K.R. to respond in open court, noting it had received the briefs submitted on the

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<sup>4</sup> Father additionally argued the parent-child relationship exception to termination of parental rights was applicable. (§ 366.26, subd. (c)(1)(B)(i).) He does not continue to press that argument on appeal.

issue. K.R.'s attorney stated: "[I] think my client makes clear—and I spoke to her today as well—she is fine with adoption. She understands that her grandfather will, essentially, be legally her parent, and he will dictate whether she has communication with her father or not. So she has no—she is not in disagreement. She is in total agreement with adoption today."

The juvenile court declined to permit Father to call K.R. as a witness. Quoting *In re Amanda D.* (1997) 55 Cal.App.4th 813 (*Amanda D.*), the juvenile court reasoned that "[e]vidence of the child's wishes must be ascertained prior to terminating parental rights, but it need not be in the form of direct testimony. It can be found in court reports prepared for the hearing." The juvenile court concluded K.R.'s wishes were clear on the record before it, without any need for testimony. The court explained there was "one court report after another demonstrating [K.R.'s] consistent statement that she wanted to be adopted." In addition, the court emphasized K.R.'s attorney had inquired as to her wishes and was told K.R. wanted to be adopted by Grandfather. The court acknowledged K.R. had sent letters to Father in prison, but the court concluded "the fact that the child has expressed her love for him in some letters and stated that she misses him does not diminish the force of her repeated statements that she wants to be adopted by . . . her prospective adoptive parent, who is her grandfather."

Finding no proper legal basis to refrain from terminating Father's parental rights or Mother's parental rights, the court ordered the rights terminated. Grandfather was designated the prospective adoptive parent and DCFS was ordered to facilitate adoptive planning and placement.

## II. DISCUSSION

The only contention Father presents in seeking reversal is the claim that the juvenile court violated his constitutional due process rights when it declined to permit him to call K.R. as a witness. DCFS defends the juvenile court's ruling solely on the ground that any error was not prejudicial.

DCFS's prejudice argument is not without force, but we believe the issue is better analyzed as whether there was error in the first place. We hold there was not. Father had no constitutional right to call K.R. to testify under the circumstances here, i.e., where DCFS reports repeatedly recounted K.R. had no objection to adoption (indeed, she unequivocally desired it), K.R. was present in the court for the section 366.26 hearing, and K.R.'s attorney represented in open court he had consulted with K.R. and she had no objection to adoption.

### A. *The Parental Rights Termination Exception at Issue*

"Section 366.26 establishes a detailed procedure for terminating parental rights. Subdivision (c)(1) states that a prior order under section 361.5 terminating reunification services 'shall constitute a sufficient basis for termination of parental rights.' If the court determines under a 'clear and convincing standard' that it is 'likely the child will be adopted,' the court 'shall terminate parental rights and order the child placed for adoption.' (§ 366.26, subd. (c)(1).) The goal is to provide 'stable, permanent homes' for children who are dependents of the juvenile court, and the first choice to achieve that goal is adoption. (§ 366.26, subd. (b); *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 [ ] (*Jasmine D.*).)

“This procedure recognizes that ‘[b]y the time of a section 366.26 hearing, the parent’s interest in reunification is no longer an issue and the child’s interest in a stable and permanent placement is paramount.’ (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348 [ ].) Thus, to terminate parental rights under section 366.26, the court ‘need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated.’ (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250 [ ].) Under these circumstances, ‘the court shall terminate parental rights’ unless certain exceptions apply. (§ 366.26, subd. (c)(1).)” (*In re Logan B.* (2016) 3 Cal.App.5th 1000, 1009-1010.)

One of the exceptions to termination of parental rights is found at subdivision (c)(1)(B)(ii) of section 366.26. That provision states a court should conclude a compelling reason exists for declining to terminate parental rights where “[a] child 12 years of age or older objects to termination of parental rights.” (§ 366.26, subd. (c)(1)(B)(ii).) As Father has framed the issues on appeal, the sole reason he sought to examine K.R. was to establish the applicability of this exception.

*B. Father Had No Due Process Right to Examine K.R.  
Under the Circumstances*

A parent has a right to due process in dependency proceedings, including the right to confront and cross-examine witnesses in many circumstances. (*In re Ingrid E.* (1999) 75 Cal.App.4th 751, 756-757 [right to confront and cross-examine witnesses, “at least at the jurisdictional phase”]; *In re Amy M.* (1991) 232 Cal.App.3d 849, 864.) Due process “is a flexible

concept which depends upon the circumstances and a balancing of various factors.” (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816-817, citing *In re Sade C.* (1996) 13 Cal.4th 952, 992.)

In contrast to other parental rights termination exceptions, and indeed, a variety of other factual determinations juvenile courts are routinely required to make, the presence or absence of an objection is not a point that ordinarily requires development by cross-examination of a represented party; an objection is either made or it is not. Here, counsel for K.R. interposed no objection to termination of Father’s parental rights at the section 366.26 hearing, instead advising the court (in K.R.’s presence) that he consulted with his client and she was “fine” with adoption (which she understood meant that Grandfather would be her legal parent and would dictate whether she had communication with Father).<sup>5</sup> That, in our view, is the end of the matter in light of the specific exception to termination that Father urges as a basis for reversal.<sup>6</sup> (See *In re Jesse B.* (1992) 8 Cal.App.4th 845,

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<sup>5</sup> There was also no evidence that K.R. at any earlier time objected to the termination of Father’s parental rights. Rather, all the DCFS reports indicated K.R. consistently expressed her desire to be adopted.

<sup>6</sup> We therefore find it unnecessary to rely on the dicta in *Amanda D.* that would apply more generally where *any* exception to termination of parental rights is at issue. (*In re Amanda D.*, *supra*, 55 Cal.App.4th at p. 820 [“Section 366.26, subdivision (h) provides the court must “consider the child’s wishes to the extent ascertainable” prior to terminating parental rights. [Citation.] But the evidence need not be in the form of direct testimony in court or chambers; it can be found in court reports prepared for the hearing”].) Had this case involved only DCFS reports purporting to recount K.R.’s wishes, rather than her own

852-853 [argument made by counsel representing child at hearing satisfied the statutory requirement that the court ascertain the child’s wishes before terminating parental rights]; see also § 317, subd. (e) [describing duties of minors’ counsel in dependency proceedings, including the obligation of counsel to “interview the child . . . and . . . advise the court of the child’s wishes” if the child is four years of age or older].)

Father’s argument to the contrary comes down to the assertion that neither the juvenile court nor we should take K.R.’s attorney’s word for it. He argues “minor’s counsel is not the minor herself, and [Father] was not unreasonable in seeking to remove any external filter from [K.R.]’s report of her preference.” At least when the presence or absence of an objection is all that is at issue (as opposed to other factual representations like whether a child has a strong bond with a parent), the argument is antithetical to the manner in which courts routinely operate: Courts generally do not insist on looking behind an attorney’s representation of his or her client’s position to probe whether the client personally agrees. Thus, absent some credible basis to believe K.R.’s attorney had misadvised his client or misrepresented her wishes (and we see none), Father was no more entitled to cross-examine K.R. on whether she actually declined to object to termination of parental rights than K.R. was entitled to cross-examine Father on whether he actually subscribed to the objections his attorney made on his behalf at

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attorney’s representation after consulting with her on the day of the hearing, we believe the due process calculus might be different.

the hearing.<sup>7</sup> Indeed, with K.R.’s attorney having already represented in open court that his client was in total agreement with adoption, it appears Father was intent on calling K.R. to testify solely for a purpose prior cases have disapproved. (See, e.g., *In re Leo M.* (1993) 19 Cal.App.4th 1583, 1593 [“[I]n honoring [children’s] human dignity . . . we should not carelessly impose upon them decisions which are heavy burdens even for those given the ultimate responsibility to decide. To ask children with whom they prefer to live or to ascertain what they wish through other evidence is one thing. To ask those children to choose whether they ever see their natural parent again or to give voice to approving that termination is a significantly different prospect”].)

Father counters that the letters K.R. wrote to Father in prison were sufficient reason to disregard the representations made by K.R.’s attorney and to instead require testimony from K.R. herself. We disagree for the same reason the juvenile court disagreed: a child’s expression of love for a parent and a desire to continue to see the parent is not inconsistent with an expressed desire to be adopted nor does it demonstrate the child objects to termination of parental rights. (*In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1335 [“We therefore do not construe Christopher’s wish to continue to see [his mother] as undermining or being contrary to his wish to be adopted by his

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<sup>7</sup> We believe a contrary holding would run the risk of unjustifiably intruding on the attorney-client relationship between K.R. and her lawyer—especially in light of the fact K.R. was present in court and heard the representations her lawyer made.



aunt and uncle”].) Father’s reliance on *In re Laura H.* (1992) 8 Cal.App.4th 1689 is also unavailing for similar reasons. In that case the court found there was “a distinct chance” the child might have indicated a preference for a plan other than adoption by her aunt and uncle because the “record [was] replete with examples of minor’s equivocation and the dilemma she faced in choosing between” them and her mother. (*Id.* at p. 1697) There is no similar record here, where K.R. consistently expressed her preference to be adopted by Grandfather throughout the dependency proceedings that lasted over three years.

In sum, the juvenile court did not err in denying Father’s request to call K.R. to testify at the parental rights termination hearing. It is therefore unnecessary for us to consider whether any error was prejudicial.

DISPOSITION

The juvenile court's order is affirmed.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KUMAR, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.