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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

In re S.D., a Person Coming Under
the Juvenile Court Law.

B276600

(Los Angeles County
Super. Ct. No. CK94099)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.D.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Joshua D. Wayser, Judge. Affirmed in part, dismissed in part, and remanded with directions.

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

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

J.D. (Father) appeals from the dependency court's jurisdiction and disposition orders under Welfare and Institution Code¹ section 300 concerning his daughter S.D. (born in 2011). Father, the non-offending, non-custodial parent, was incarcerated throughout the proceedings. He complains the court violated his right to due process when it failed to ensure that he received proper notice of the adjudication proceedings, and failed to have him brought to court to attend the hearing or appoint him counsel. He also argues that the court misapplied section 361.2. First, with respect to the jurisdiction order, the claimed errors are harmless because the court did not make jurisdictional findings with respect to Father's conduct and the jurisdictional findings concerning S.D.'s mother have not been challenged on appeal. Second, Father's complaints concerning the application of section 361.2 have been rendered moot by subsequent court orders returning S.D. to her mother, granting Father family maintenance services, and appointing Father legal counsel. Nonetheless, because the record contains an ambiguity as to Father's status as either an "alleged" or "presumed" father and is silent on the issue of visitation, this matter is remanded for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On February 4, 2016, the Department of Children and Family Services (DCFS) received a referral that S.D.'s five-month-old sibling, T.T., had been hospitalized for failure to thrive. According to the reporting party, T.T.'s parents² had not been feeding the baby. DCFS removed both children from parental custody and filed

¹ Statutory references are to the Welfare and Institution Code unless otherwise indicated.

² T.T. and S.D. have the same mother but different fathers. The children's mother, T.T., and T.T.'s father are not parties to this appeal.

a dependency petition pursuant to section 300, subdivisions (a), (b) and (j), alleging that the children's mother physically abused S.D., and that mother and T.T.'s father had a history of drug abuse and of engaging in violent altercations in the presence of the children. The petition further alleged that the parents neglected T.T. by failing to get him necessary medical care and feed him. The petition also alleged that Father had a history of substance abuse which rendered him incapable of providing regular care for S.D.

DCFS sent a written notice of the detention hearing by first class mail to Father at his last known address. At the detention hearing on February 16, 2016, S.D.'s mother filed a parentage questionnaire that identified Father as S.D.'s biological father and based upon that questionnaire, the court found Father was S.D.'s "presumed" father. Father did not attend the detention hearing.

The Jurisdiction/Disposition Report revealed that DCFS had learned from Father's mother that Father was incarcerated. S.D.'s paternal grandmother expressed an interest in having S.D. placed with her. She did not, however, make herself available for a criminal background check, and stated she was unable to begin the assessment process. DCFS mailed notice of the jurisdiction hearing to Father at his place of incarceration, by first class mail.

Father was not present for the April 28, 2016, jurisdiction and disposition hearing. The children's mother and T.T.'s father pled no contest to the petition. The court sustained certain allegations under section 300, subdivision (b) and dismissed others, including all of the allegations concerning Father. The court declared the children dependents. The court then proceeded to the disposition; it ordered S.D. removed from mother's custody, and found that placement with Father was not appropriate under section 361.2 because Father was incarcerated and did not have an appropriate plan for the child's care during his incarceration.

During the disposition hearing, the court conducted an off-the-record discussion regarding Father's status as a parent. On the record, the court noted that in a prior dependency case, Father had been found to be an "alleged" father of S.D.³ The court stated, "I'm making no paternity finding, other than that in this case, it shall remain that he is the alleged father. And I'm not going to disturb that at the moment." The court ordered reunification services for mother and T.T's father and did not make orders regarding reunification services to Father. The court scheduled a six-month review hearing for October 2016.

On May 19, 2016, Father filed a letter with the dependency court titled "Notice of Appeal." Father acknowledged that he did not attend the prior hearing but had asked his mother to appear on his behalf⁴ to explain the circumstances of his incarceration and to obtain an order so that he could appear in the proceedings. He further indicated that he had attempted to contact the social worker but was unable to make a telephone call during her business hours. The letter also stated Father's plan to have S.D. placed with his mother while he was incarcerated.

On October 27, 2016, during this appeal, the dependency court conducted a section 366.21, subdivision (e) review hearing. The court continued its jurisdiction over the children and entered an order returning them to the custody of their mother. The court ordered DCFS to provide all parents with family maintenance

³ In 2012, the court sustained a section 300 petition, alleging that S.D.'s mother and Father abused methamphetamine which put S.D. at risk of harm. According to DCFS, the court ordered no reunification services for Father because he was an "alleged" father of S.D. In June 2014, the court terminated jurisdiction and returned S.D. to her mother's custody.

⁴ There is no indication in the record that Father's mother appeared at the jurisdiction/disposition hearing.

services, and visitation for T.T.'s father; the order is silent as to visitation for Father. The court subsequently appointed counsel for Father.

DISCUSSION

Father contends the dependency court: (1) violated his due process rights when it failed to ensure that he was given proper notice of the jurisdiction/disposition proceedings and that he was present or appointed counsel for the proceedings; and (2) failed to comply with section 361.2. DCFS implicitly concedes the errors but argues that they are harmless as to the jurisdiction order. DCFS also contends that in light of the subsequent orders returning S.D. to her mother, providing family maintenance services and appointing Father legal counsel, any error with respect to the disposition is moot. DCFS acknowledges, however, that the matter must be remanded to the dependency court to consider whether Father should have visitation with S.D. As we shall explain, we agree with DCFS.

Because Father was not present at the detention hearing, section 291 required DCFS to provide notice to Father of the jurisdiction/disposition proceeding by certified mail—which DCFS admittedly failed to do. Father also did not have the opportunity to seek the appointment of counsel to appear at the proceedings on his behalf. Moreover, absent Father's waiver of his right to be present, the court was required to issue an order for his temporary removal from custody and transportation to court for the adjudication proceedings. (See *In re Marcos G.* (2010) 182 Cal.App.4th 369, 385; Pen. Code, § 2625, subds. (b) & (d) [juvenile court cannot adjudicate without the physical presence of the prisoner or his attorney unless the court has a knowing waiver of his presence from the prisoner].)

These errors, however, with respect to the jurisdiction order are harmless. The court exercised dependency jurisdiction over

S.D. based on her mother’s conduct—the court dismissed all the allegations relating to Father. A jurisdictional finding involving one parent is “ ‘good against both. More accurately, the minor is a dependent if the actions of either parent bring [him] within one of the statutory definitions of a dependent.’ ” (*In re X.S.* (2010) 190 Cal.App.4th 1154, 1161.) For this reason, had Father been properly served, appeared at the jurisdiction hearing and been represented by counsel, the outcome would have been the same on the jurisdiction order.

On the disposition orders, Father’s due process complaints and his argument regarding section 361.2 have been rendered moot by subsequent orders. On October 26, 2016, the court returned S.D. to her mother’s custody, and therefore, a prerequisite to an order under section 361.2 is missing: There no longer is an order removing the child from her custodial parent under section 361. Thus the existence of Father as a noncustodial parent and his desire to assume custody of S.D. no longer entitles him to custody (or to make a plan for her care and placement while he is incarcerated) under section 361.2, subdivision (a). Therefore, it is impossible for us to grant Father any effective relief for errors with respect to section 361.2. Similarly, we can provide no remedy for the failure to appoint Father legal counsel for the disposition because Father was subsequently appointed a lawyer in the proceedings. “ ‘[W]e cannot simply unwind a juvenile case and presume that circumstances cannot have changed in the interim. They always do.’ [Citation.]” (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 701; see *In re E.T.* (2013) 217 Cal.App.4th 426, 436 “[a]n appeal may become moot where subsequent . . . orders by the juvenile court[] render it impossible for the reviewing court to grant effective relief”). The court’s April 28, 2016, disposition orders have been superseded by subsequent orders, and thus Father’s appeal concerning section 361.2 and his complaint

about the lack of notice and appointment of counsel with respect to the disposition are moot.

Notwithstanding this conclusion, the court must address unresolved issues on remand. First, an ambiguity exists in the record as to Father's status as a parent. On February 16, 2016, the court found, by checking a box on the Mother's parentage questionnaire, that Father was the "presumed" father of S.D. Thereafter, however, at the adjudication, the court was persuaded that Father was only the "alleged" father of S.D. On remand, the court is directed to resolve this ambiguity in Father's status as either an alleged or presumed father, and second, if Father is determined to be the presumed father of S.D., then the court is directed to consider whether he should receive visitation with S.D. (See *In re Zacharia D.* (1993) 6 Cal.4th 435, 448-451 [alleged fathers have fewer rights in dependency proceedings than presumed fathers; an alleged father is not entitled to custody, services, or visitation]; see also *In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.)

DISPOSITION

The jurisdiction order is affirmed, and the appeal from the dispositional orders is dismissed. The matter is remanded to the court for further proceedings as directed herein.

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ROTHSCHILD, P. J.

We concur.

CHANEY, J.

LUI, J.