Filed 8/27/18 Adoption of G.E. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Adoption of G.E., a minor.	B286624 (Los Angeles County Super. Ct. No. BN006216)
ADAM T., Plaintiff and Respondent, v. MARTIN T., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret Henry, Judge. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Andre F. F. Toscano, under appointment by the Court of Appeal, for Plaintiff and Respondent.

The trial court terminated Martin T.'s parental rights over his biological daughter G.E. because he voluntarily abandoned her. Martin, who was incarcerated at the time of the hearing concerning his parental rights, refused to (1) attend the hearing, (2) speak to his counsel in advance of the hearing, or (3) participate in a court-ordered evaluation. On appeal, Martin's sole contention is that the trial court erred in holding the hearing without ensuring his presence. Martin relies on Penal Code section 2625, which he cites for the first time on appeal. Martin's argument is forfeited, and even on the merits, he demonstrates no error and no prejudice. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Martin's Background and Relationship to G.E.

Martin is G.E.'s biological father. G.E. was born in 2007 when Martin was 19 years old. Martin was incarcerated when G.E. was born and has had no contact with her since 2008.

Martin has a long criminal history. In 2007, he was convicted of possession for sale of a controlled substance. In 2009, he was convicted of inflicting corporal injury on a spouse. In 2015, Martin was convicted of possession for sale of a controlled substance. In 2016, he was convicted of a firearm offense. Also in 2016, he was charged with murder and shooting at an inhabited dwelling. Our record does not reveal if that case resulted in a conviction.

It is undisputed that Martin never supported G.E. G.E.'s mother N.E. obtained a restraining order after Martin punched N.E. in the face and "knocked [her] out." According to N.E., the restraining order did not apply to G.E.; Martin still did not contact or visit G.E.

2. Adam T.'s Background And Petition To Adopt G.E.

It is undisputed that G.E. knows Adam as her only father, refers to him as "dad," and has a loving relationship with Adam. G.E. lived with Adam, N.E., and G.E.'s half-sister. G.E. wanted Adam to adopt her.[1]

In August 2016, Adam filed a petition under Family Code section 7820[2] to release G.E. from Martin's parental custody and control. Section 7820 permits a child to be declared free of the custody and control of a parent. (§ 7820.)[3] The purpose of such a declaration "is to serve the welfare and best interest of a child by providing the stability and security of an adoptive home." (§ 7800.) A child may be found abandoned if "[o]ne parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child." (§ 7822, subd. (a)(3).)

Section 8604 was another basis for the petition. "Section 8604, subdivision (b) . . . permits an adoption to proceed with the consent of the parent who has sole custody, and without the consent of the noncustodial parent, if the noncustodial parent

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[1] The trial court was required to consider G.E.'s desire to be adopted. (Fam. Code, § 7890.)

[2] Undesignated statutory references are to the Family Code.

[3] Section 7820 provides: "A proceeding may be brought under this part for the purpose of having a child under the age of 18 years declared free from the custody and control of either or both parents if the child comes within any of the descriptions set out in this chapter."

has willfully failed to communicate with and support the child for over one year." (*Adoption of I.M.* (2014) 232 Cal.App.4th 40, 46.)

It was alleged that Martin left G.E. in the custody of N.E. for a one-year period without any provision for support or communication and with the intent to abandon G.E. (§ 7822, subd. (a)(3).)

The court-appointed psychologist recommended that Adam be permitted to adopt G.E.[4] The psychologist concluded that the proposed adoption was in G.E.'s best interest because Adam and G.E. had a close relationship and because Adam had parented G.E. since 2010. The psychologist further noted that Adam provided a stable home for G.E., and the adoption would "protect" G.E. if anything happened to N.E.

3. Martin Did Not Appear Or Oppose Adam's Petition

Martin was served with notice to appear on October 31, 2016. Martin did not appear on October 31, 2016. Counsel was appointed to represent him. When Martin moved, he did not inform his counsel of his new contact information. Martin's counsel located Martin, but Martin refused to speak to

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[4] The expert was appointed pursuant to Evidence Code section 730. That statute provides in pertinent part: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

counsel before the hearing. The court-appointed psychologist reported that Martin refused to be evaluated. Martin provided no opposition to Adam's petition and filed no witness list or exhibit list.

A hearing was scheduled for October 11, 2017. Martin did not appear at that hearing either. The hearing was continued to October 18, 2017. The trial court ordered Martin transported from jail to the October 18, 2017 hearing.

When Martin failed to appear notwithstanding the trial court's order, the trial court's bailiff called Men's Central Jail and was told Martin "refused to come to court." Martin's counsel requested a continuance to determine "exactly the reason why Mr. T[.] is not present." Counsel did not mention Penal Code section 2625. Counsel provided no legal basis to continue the hearing. The trial court denied the request for a continuance. Later in the hearing, Martin's counsel indicated that Martin's absence from the hearing "appears to be voluntary."

4. The Trial Court Granted Adam's Petition

After the hearing, the trial court concluded that Martin had abandoned G.E. and that his parental rights should be terminated. The court indicated that notice was proper and that Martin had failed to communicate with or support G.E without any lawful excuse. The trial court found that it was in G.E.'s best interest to be free of Martin's parental control.

DISCUSSION

On appeal, it is undisputed that Martin received notice of the petition. Martin does not challenge the conclusion that it was in G.E.'s best interest to be free of his parental control. The sole issue he raises is whether Penal Code section 2625,

subdivision (d) precluded the trial court from holding a hearing on Adam's petition without Martin's presence at the hearing. Penal Code section 2625 applies to proceedings to terminate parental rights under Family Code section 7822, one of the statutes upon which Adam based his petition. (Pen. Code, § 2625, subd. (b).)

Penal Code section 2625, subdivision (d) provides: "Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. No proceeding may be held under Part 4 (commencing with Section 7800) of Division 12 of the Family Code . . . without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden, superintendent, or other person in charge of the institution, or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding." (Pen. Code, § 2625, subd. (d).)

A. Martin Forfeited His Argument By Failing To Raise It In The Trial Court

Martin's argument that Penal Code section 2625 precluded the trial court from proceeding in his absence is forfeited because it was not raised in the trial court. " ' " '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court.

Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]' " ' " (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) The purpose of the rule of forfeiture is to afford a trial court an opportunity to correct an error. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on anther ground as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962.) By failing to raise the issue in the trial court, Martin offered the trial court no opportunity to correct the alleged error.

The forfeiture rule applies with particular force to this case, which was required to proceed "on an expedited basis." (*In re E.M.* (2014) 228 Cal.App.4th 828, 839.) Section 7870, subdivision (a) provides: "It is the public policy of this state that judicial proceedings to declare a child free from parental custody and control shall be fully determined as expeditiously as possible." Section 7871 sets forth limited grounds for a continuance and requires a showing of good cause. Although the court has discretion to hear an oral motion, a written motion must be filed in advance of the hearing "together with affidavits or declarations detailing specific facts showing that a continuance is necessary." (§ 7871, subd. (b).) Martin did not identify any good cause or any legal basis to continue the case, which the trial court had previously continued.

Additionally, as in juvenile dependency cases, the best interest of a child was at stake, which curtails this court's discretion to excuse a forfeiture. (See *In re S.B.*, *supra*, 32 Cal.4th at p. 1293; see also *In re T.G.* (2015) 242 Cal.App.4th 976, 984.) In the context of dependency proceedings, our high court explained that "the appellate court's discretion to excuse

forfeiture should be exercised rarely and only in cases presenting an important legal issue." (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) No such important legal issue is presented here; accordingly, we conclude that Martin forfeited his appellate argument.

B. Martin Demonstrates No Error And No Prejudice

Even had Martin not forfeited his only argument on appeal, that argument would fail on its merits. Martin has failed to demonstrate any error in proceeding with the hearing in his absence. Penal Code section 2625 is triggered by the "receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings." (Pen. Code, § 2625, subd. (d).) The record contains no statement by Martin or his counsel indicating that he desired to be present during the court's proceedings. Although Martin's counsel stated at the hearing that Martin was a "miss-out," counsel did not state that Martin wanted to be present and did not even refer to Penal Code section 2625. Later on during the hearing, Martin's counsel indicated that Martin had voluntarily absented himself from the proceedings, undermining any potential claim that Martin desired to be present.

Finally, Martin identifies no prejudice resulting from his absence at the hearing. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 624-625 [error under section 2625 reversible only if prejudicial].) Reversal is not required unless it is reasonably probable that a result more favorable to Martin would have been reached in the absence of the error. (*In re M.M.* (2015) 236 Cal.App.4th 955, 963.) The purpose of section 7822 is to protect the child and to permit the child to be adopted into a

stable home. (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 162.) The evidence uniformly supported the conclusion that it was in G.E.'s best interest to be adopted by Adam, the only father she has known and with whom she has had a consistently loving relationship. Martin did not communicate or provide support for G.E. for more than eight years, much longer than the statutorily required one-year period necessary to find abandonment.

Martin identifies no evidence or argument that he would have provided had he been present at the hearing. Martin submitted no trial brief or declaration in the trial court. The record does not suggest Martin could have presented a colorable claim that he did not abandon G.E. Because Martin has not demonstrated that his presence at the hearing would have changed the outcome, any error under Penal Code section 2625 was harmless. (*In re J.I.* (2003) 108 Cal.App.4th 903, 913.)

DISPOSITION

The judgment terminating Martin's parental rights over G.E. is affirmed.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

CURREY, 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.