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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re Z.B., a Person Coming
Under the Juvenile Court Law.

B286555
(Los Angeles County
Super. Ct. No. DK18671)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

C.M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Nichelle L. Blackwell, Commissioner. Reversed and remanded with directions.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

In this juvenile dependency case, defendant and appellant C.M. (appellant) challenges the juvenile court's order denying his Welfare and Institutions Code¹ section 388 petition and its order terminating his parental rights to Z.B., a minor appellant claims is his biological daughter. All parties and the juvenile court agree not only that appellant was not properly noticed of the underlying proceedings but also that the Los Angeles County Department of Children and Family Services (Department) failed to conduct a court-ordered due diligence search for appellant. Because appellant had no notice of and therefore no representation or voice in these proceedings until the permanency planning hearing when the juvenile court terminated parental rights to Z.B., we conclude a "fatal error" occurred and appellant's constitutionally protected right to due process was violated. Accordingly, we reverse and remand with directions.

BACKGROUND

1. Events Preceding Section 300 Petition

When Z.B. was born, she and her mother (mother) both tested positive for amphetamines and marijuana. The

¹ Undesignated statutory references are to the Welfare and Institutions Code.

Department was alerted and filed an expedited removal request on behalf of Z.B., which the juvenile court granted.

While at the hospital, mother stated her pregnancy was the result of being raped by appellant. When Z.B. was born, another man was at the hospital with mother, whom mother said was her fiancé. Mother's alleged fiancé explained he signed Z.B.'s birth certificate and he was "making sure that the baby's dad stays away."

A few days later, a Department social worker interviewed mother. Mother explained she did not discover her pregnancy until she was about six months pregnant, at which time she was "taken to jail." She did not specify why she was taken to jail or how long she remained there. Mother again stated appellant had raped her and was the father of Z.B. She did not have his contact information and said "he is not involved." Mother also reported she had lost custody of her older daughter who now lived with mother's aunt in Atlanta, Georgia.

2. Section 300 Petition and Detention Hearing

The Department filed a two-count section 300 petition on behalf of Z.B., alleging mother's substance abuse placed Z.B. at risk of serious physical harm. In its detention report filed with the juvenile court, the Department included a record of mother's criminal history, which included multiple arrests and convictions for prostitution. The Department also reported it was unable to locate appellant or mother's alleged fiancé because the Department did not have identifying information for either of them.

At the detention hearing, the juvenile court ordered Z.B. detained from mother. The court found appellant to be the alleged father of Z.B. and ordered the Department to make due

diligence efforts to locate him. The court also noted that, if mother's allegation of rape was true, the Department could request to "bypass" reunification services for appellant.

Shortly after the detention hearing, when Z.B. was two and a half weeks old, mother's alleged fiancé filed a statement regarding parentage, stating he was Z.B.'s father because he was present at her birth and signed her birth certificate. He also provided his mailing address, which was on Estrella Street in Los Angeles. The juvenile court ordered a paternity test, which, however, never took place.

3. Adjudication

Approximately six weeks later, on September 29, 2016, the Department filed its jurisdiction and disposition report. In its report, the Department listed appellant as an alleged father, but incorrectly listed the Estrella Street address as his address. The report did not address due diligence efforts in trying to locate appellant. Instead, the report stated a Department investigator had left voice messages with all phone numbers on file and had mailed a notice of hearing to appellant at the Estrella Street address (which was mother's alleged fiancé's address, not appellant's address).²

The jurisdiction hearing was also held on September 29. At the start of the hearing, the juvenile court addressed confusion concerning whether it was appellant or mother's alleged fiancé

² The report also indicated a Department investigator "was informed that [appellant] appeared in court and he reported he would be willing to submit to a drug test." This appears to be an error. As explained below, no one claims appellant made any appearance in these proceedings until long after the disposition hearing.

who had appeared at a previous hearing and been assigned legal counsel. Attorney Daniel Hoang indicated he represented the alleged fiancé, who had appeared at a previous hearing. Appellant was not present and no attorney appeared on his behalf. Nonetheless, the juvenile court found appellant had been properly notified of the hearing. The court proceeded to adjudicate the matter, sustaining both counts of the petition. However, because the paternity of Z.B. was unclear, the juvenile court postponed the disposition hearing and again ordered the Department to perform and report on its due diligence efforts to locate appellant.

4. Disposition

Prior to disposition, the Department filed a last minute information for the court. Although the Department indicated it had been in contact with mother's alleged fiancé, the Department made no mention of appellant or any due diligence search for him. The Department also reported that mother had told a Department social worker that she and her alleged fiancé "were no longer in a relationship and that he would no longer be involved in the case." The Department attached notices it had mailed to the parties regarding the disposition hearing date. The Department again incorrectly sent notice to appellant at the Estrella Street address.

The disposition hearing was held on October 27, 2016. Appellant was neither present for nor represented at the hearing. The juvenile court found notice to appellant was proper and, because he was an alleged father only, the court did not offer appellant family reunification services. The court removed Z.B. from mother and ordered family reunification services for mother. The court also ordered the Department to initiate and expedite

procedures for possible placement of Z.B. with her maternal great aunt in Georgia, who sought to care for Z.B. and who appeared by all reports to offer a loving and stable placement. By April 2017, Z.B. had been placed with her maternal great aunt.

5. Appellant Contacts the Department; Mother's Reunification Services Are Terminated

Five months after disposition, on March 30, 2017, appellant appeared unannounced at a Department social worker's office. He told the social worker he never lived at the Estrella Street address and, when asked for his address, he gave the social worker the address for a homeless shelter. Appellant requested a paternity test and sought visits with Z.B. The social worker advised appellant to attend an upcoming hearing in April 2017. Later, the Department sent notice of that hearing to appellant at the address he provided.

At the April 2017 hearing, the juvenile court terminated family reunification services for mother and set a permanency planning hearing. As it turned out, however, appellant had been arrested two days before the April hearing and therefore did not attend the hearing. Appellant was neither represented nor discussed at the April 2017 hearing.

6. Permanency Planning and Appellant's Section 388 Petition

In June 2017, the Department advised the juvenile court that, while incarcerated, appellant had requested appointment of counsel. The court appointed counsel and ordered appellant to appear at the scheduled permanency planning hearing. The court noted appellant was "only an alleged father. [¶] In fact, the birth certificate has a different father's name on it, [mother's alleged fiancé], who is represented by Mr. Hoang."

Prior to the permanency planning hearing, the Department submitted a report for the juvenile court. Although the report addressed mother's alleged fiancé, the report did not mention appellant.

a. First Permanency Planning Hearing

The permanency planning hearing began on August 21, 2017, at which time appellant, who was in custody, made his first appearance in these proceedings. He was represented by counsel, who made a special appearance on appellant's behalf. When questioned by the court, appellant explained he never lived at the Estrella Street address nor used that address as a mailing address. In response to a question by counsel for the Department, the juvenile court explained that, in terminating parental rights, it was not required to make a finding of detriment with respect to fathers who were alleged fathers only. The court stated it was "not going to go back and redo findings" and that both mother's alleged fiancé and appellant were "alleged, [and] they will remain alleged, unless someone files a motion to tell me they should be higher than alleged." Counsel for appellant made an unopposed request to continue the permanency planning hearing in order to review notice to appellant, which request the court granted.

b. Appellant's Section 388 Petition

Ten days later, on August 31, 2017, appellant filed a section 388 petition under *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477 (*Ansley*), challenging the juvenile court's jurisdiction for lack of proper notice. Appellant stated he never received notice of these proceedings until March 2017, at which time he contacted the Department. He further claimed that, despite court orders to do so, the Department undertook no due

diligence to locate him. He suggested the Department may have confused him with mother's alleged fiancé in that the Department sent notices to appellant at the alleged fiancé's address. Appellant believed he was Z.B.'s biological father and sought the rights, privileges, and responsibilities of being declared the father. He also explained he had completed parenting and addiction recovery classes while incarcerated.

On October 19, 2017, the juvenile court denied appellant's section 388 petition without a hearing. The court stated appellant's request did not state new evidence or a change of circumstances and did not promote the best interests of the child. The court further explained: "Although [the Department] failed to perform due diligence, this party is only an alleged father, is not on birth certificate, and at most could only be a biological parent if a DNA test proved positive for biology. In any event, there is no showing of best interests to the minor."

c. Continued Permanency Planning Hearing and Termination of Parental Rights

The continued permanency planning hearing was held on October 26, 2017. Appellant appeared in custody and was represented by counsel. At the start of the hearing, the juvenile court reiterated its ruling on appellant's section 388 petition and stated there was "no evidence to indicate he could elevate to a presumed father status."

The court then terminated mother's parental rights to Z.B. as well as any parental rights to Z.B. that appellant or mother's alleged fiancé might have had. The court ordered adoption as Z.B.'s permanent plan, with her maternal great aunt (with whom Z.B. had been living) as her prospective adoptive parent.

7. Appeal

On November 20, 2017, appellant filed his notice of appeal from the juvenile court's order denying his section 388 petition without a hearing and its order terminating his parental rights.

DISCUSSION

1. Standard of Review

We review the juvenile court's denial of a section 388 petition without a hearing for an abuse of discretion. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) However, “[c]onstitutional issues are reviewed de novo.” (*In re J.H.* (2007) 158 Cal.App.4th 174, 183.)

2. Notice in Dependency Cases

In dependency proceedings, “[n]otice of a hearing is important to an alleged father because it enables him to choose whether to appear at the hearing and assert a position on dependency matters, including establishing his paternal status.” (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 384–385.) Before depriving a parent of his parental interest, the state “must afford him adequate notice and an opportunity to be heard.” (*In re B.G.* (1974) 11 Cal.3d 679, 688–689.) “Due process guarantees ‘notice and opportunity for hearing *appropriate to the nature of the case.*’” [Citation.] As we have observed, due process entitles a biological father a meaningful opportunity to qualify as a presumed father.” (*In re Jesusa V.* (2004) 32 Cal.4th 588, 601.) Due process requires only “‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418, quoting *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314.) “There can be meaningful access to a court through

appointed counsel where the prisoner is given an opportunity to present testimony in some form and cross-examine witnesses.” (*In re Marcos G.*, at p. 386; *In re Jesusa V.*, at pp. 601–602.)

“It is settled beyond dispute that if a parent proves the absence of due process notice to him in juvenile dependency proceedings a ‘fatal defect’ exists in the jurisdiction of the juvenile court to have entered the dependency judgment.” (*Ansley, supra*, 185 Cal.App.3d at p. 483.) “When there is no attempt to serve a parent with notice the error is reversible per se; when there is error in a notice the question is whether the error is harmless beyond a reasonable doubt.” (*In re Marcos G., supra*, 182 Cal.App.4th at p. 387.) A parent may challenge the juvenile court’s jurisdiction for lack of proper notice by filing a section 388 petition. (*Ansley*, at p. 481.)

3. The Department’s failure to perform a due diligence search to locate appellant and to notify him of these proceedings constitutes reversible error.

The juvenile court found that the Department “failed to perform due diligence.” And the Department concedes, as it must, that it not only failed to perform the twice-ordered due diligence search for appellant, but also failed to notify him of these proceedings. Nonetheless, the Department argues the juvenile court’s orders and judgment should be affirmed because the Department’s notice errors were harmless beyond a reasonable doubt. We disagree.

As is clear from the facts detailed above, appellant had neither notice of nor representation in these proceedings until long after adjudication and disposition. In fact, appellant did not appear in these proceedings until the juvenile court was addressing permanency planning. Unbelievably, and

unfortunately, these circumstances existed despite the fact that, even before the petition was filed in this case, the Department knew appellant was an alleged father. While still in the hospital after giving birth to Z.B., mother stated appellant was the father, a claim she repeated many times to Department social workers. And, despite being ordered to undertake a due diligence search to locate appellant, the Department simply failed to do so.

Thus, because this case involves not only the Department's failure to notify appellant, but also the Department's failure even to attempt to locate him, we conclude appellant's constitutionally protected right to due process was violated. This is a " 'fatal defect' " that requires reversal. (*Ansley, supra*, 185 Cal.App.3d at p. 483.) "The absence of any reasonable attempt to give notice goes well beyond trial error. It is not merely a mistake that hinders a party's ability to present the case effectively, but rather a flaw in the systemic framework that denies that party the opportunity to be heard at all. It goes to the basic fairness of the structural scheme." (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116.)

Relying on our Supreme Court's opinion in *In re James F.* (2008) 42 Cal.4th 901 (*James F.*), the Department argues that, despite its failure to give notice to appellant, we must nonetheless affirm the judgment because the conceded errors were harmless. We do not agree. In *James F.*, the minor's father Marcus was properly notified of the dependency proceeding and was appointed an attorney to represent him. (*Id.* at p. 906.) The juvenile court also appointed a guardian ad litem to assist Marcus. (*Id.* at pp. 906–907.) On appeal, the parties agreed the juvenile court failed to follow proper procedures for appointment of the guardian ad litem and, as a result, Marcus's due process

rights were violated. (*Id.* at p. 911.) The issue before the Supreme Court was “whether a juvenile court’s error in the procedure used to appoint a guardian ad litem always requires reversal or instead is subject to harmless error analysis.” (*Ibid.*) The court held harmless error review applied. (*Id.* at p. 905.)

James F. does not change our conclusion here. First, the holding in *James F.* is narrowly tailored to the appointment of a guardian ad litem. A lack of notice of the entire proceedings was not at issue. Second, the reasoning there does not support application to a case such as this involving a complete lack of notice as well as no due diligence even to locate the alleged parent. “Since this was structural error, we do not consider whether it was also harmless.” (*In re Jasmine G.*, *supra*, 127 Cal.App.4th at p. 1116.)

In urging a harmless error analysis, the Department claims “there was no possibility” the juvenile court would have ordered reunification services for appellant. The Department bases its position on the fact that mother claimed appellant raped her and was not involved in her pregnancy or Z.B.’s birth. Of course, these statements not only ignore the obvious—appellant was not present to respond to any of mother’s allegations—but also glosses over the real possibility that appellant may not have known of mother’s pregnancy or Z.B.’s birth. Mother stated she did not discover her pregnancy until she was six months pregnant, at which point she was taken to jail for an undisclosed amount of time. She and her alleged fiancé also made clear they did not want appellant involved in Z.B.’s life and went to such extremes as to include the alleged fiancé’s name (admittedly, not the biological father) on Z.B.’s birth certificate. Perhaps this conduct could be rationalized by mother’s allegation against

appellant of rape. However, appellant having not been present in these proceedings until their conclusion, this remains an entirely one-sided and therefore incomplete and unfair story.

We are mindful that our conclusion prolongs Z.B.'s path to a permanent and stable home. Unfortunately, however, the circumstances presented leave us no other option than to reverse the juvenile court's order terminating parental rights so that appellant can have his day in court. In reversing, we direct only that the juvenile court allow appellant an opportunity to appear and participate, after which, consistent with the best interests of the child, the court should proceed to determine Z.B.'s permanent plan as expeditiously as possible.

DISPOSITION

The juvenile court's order denying appellant C.M.'s Welfare and Institutions Code section 388 petition and its order terminating appellant C.M.'s parental rights are reversed. The case is remanded for proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.