Filed 6/27/19 In re H.B. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re H.B., a Person Coming Under the Juvenile Court Law.	B292626 (Los Angeles County Super. Ct. No. DK20821)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Y.B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Rashida A. Adams, Judge. Appeal dismissed.

Serobian Law, Liana Serobian under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, Veronica Randazzo, Deputy County Counsel, for Plaintiff and Respondent.

In these dependency proceedings Y.B. (father) appeals from a juvenile court order terminating his parental rights over his infant daughter, contending the court erred when six months before the termination order it found that the Department of Children and Family Services (DCFS or the department) had provided him reasonable reunification services. Because father failed to challenge the findings when they were made, we have no jurisdiction to hear his appeal from the termination order. We therefore dismiss the appeal.

BACKGROUND

a. Initial Dependency Proceedings

The family in this case consists of father, his girlfriend (mother), and the infant H.B. Earlier this year we examined an order terminating mother's parental rights in a case where H.B.'s half sibling reported that father physically abused mother. We ultimately affirmed the order. (*In re M.G.* (Feb. 27, 2019, B292062) [nonpub. opn.].) As with the other appeal, mother is not a party here.

In light of those open dependency proceedings, DCFS was notified when H.B. was born, and on January 26, 2017, filed a Welfare and Institutions Code section 300 petition alleging H.B. was a child described by subdivisions (a), (b)(1), and (j) due to domestic violence between mother and father.[1] The juvenile

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[1] All undesignated statutory references will be to the Welfare and Institutions Code.

court detained H.B. from mother and ordered DCFS to submit a prisoner removal order so that father, who was incarcerated, could attend the next hearing. Father appeared at the next hearing in custody.

After the hearing father filed a Notification of Mailing Address (Form JV-140) reporting a residence on *55th Street*, Los Angeles as his permanent mailing address, and the juvenile court admonished him to notify his attorney and DCFS if he changed his address.

The court found H.B. was described by section 300, subdivisions (a), (b)(1), and (j), due to domestic violence and physical abuse, and sustained the petition. At the disposition hearing the court removed H.B. from the custody of her parents and ordered family reunification services and monitored visitation. The court ordered father to participate in a parent education course and a 52-week domestic violence program.

By the November 13, 2017 six-month review hearing, father had been released from custody, but his whereabouts were unknown. A DCFS social worker reported that father had made no effort to contact her, would not return her telephone calls, and had not visited H.B. The social worker had been reassured by father's family members that he would contact her but he never did. Notices sent to 55th Street, his address of record, went unanswered and an inquiry to the Postmaster showed father was not known at that address. At the hearing, father's counsel reported that father had supplied no instructions.

The juvenile court found that DCFS had provided father reasonable reunification services but H.B. could not be safely returned to her parents. The court terminated services and set

the matter for a selection and implementation hearing pursuant to section 366.26.

b. Notice of the November 13, 2017 Ruling

The next day, November 14, 2017, the court clerk executed a certificate of mailing indicating the juvenile court had served (1) notice of entry of the court's November 13 minute order and (2) "Appeal Rights form(s)" on father at his address of record "by placing the document for collection and mailing so as to cause it to be deposited in the United States Mail at the courthouse." The outgoing mail was postmarked one day later, on November 15, 2017.

On November 21, 2017, the clerk filed the returned, undeliverable mail. The returned mail included the November 13 minute order, an advisement of rights made pursuant to section 366.26, a Notice of Intent to File Writ Petition form, and a Petition for Extraordinary Writ form.

c. Section 366.26 Hearing

The department's search for father unearthed an address on *53rd Street* in Los Angeles, and during an unannounced visit a DCFS social worker encountered a relative who stated father lived at the address but was at work. The social worker left notice of the upcoming selection and implementation hearing, and later that day father called DCFS and reported he had not enrolled in any court ordered programs because he could not afford them.

Nearly a year after the November 13, 2017 hearing, on September 10, 2018, the juvenile court found at the section 366.26 hearing that father had failed to maintain regular visitation with H.B., who was adoptable. The court terminated mother and father's parental rights.

Father filed a notice of appeal on September 13, 2018.

DISCUSSION

Father contends the juvenile court erred when it found on November 13, 2017, that he had been provided reasonable family reunification services, even though he actually received no services. He implicitly concedes this issue would be barred by his failure to seek writ review of the finding but asserts he may raise the issue because the court failed properly to notify him of his right to seek an extraordinary writ. We disagree.

Referral orders must be challenged by writ before a section 366.26 hearing. (§ 366.26, subd. (l).) A referral order not so challenged is not cognizable on appeal from other orders made at the 366.26 hearing. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 448.) However, noncompliance with the writ requirement may be excused when notice of the referral order was defective. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 720.)

In his opening brief father contended the court's notice of entry of the November 13, 2017 minute order was defective because it could not be ascertained from the clerk's proof of service whether all required documents had been included in the service. Father observed that on November 14, 2017, the clerk certified only that unspecified "Appeal Rights form(s)" had been mailed, and it was not clear that a required advisement of writ petition rights was included.

After father filed his opening brief DCFS sought and obtained augmentation of the clerk's transcript showing that all required documents were served.

In his reply brief father abandoned his argument concerning inadequate advisement and raised two new arguments: (1) The notice contained an unconstitutional waiver

of notice; and (2) the notice was untimely. Neither contention has merit.

a. No Waiver of Notice Occurred

A footnote to the court clerk's certificate of mailing states the following notice of waiver: "**Please Note: Pursuant to the 'Waiver of Statutory Notice Pursuant to Welfare and Institutions Code Section 248 and 248.5' filed in the County of Los Angeles – Office of the County Counsel, the Los Angeles Dependency Lawyers, Inc., and the Children's Law Center of Los Angeles agree that notice requirements pursuant to any and all applicable law shall be deemed served when the Deputy Clerk completes the above mentioned minute order and this Certificate of Mailing. (A copy of said Waiver of Statutory Notice may be found within the court file and the original located within the Clerk's Office, Edmund D. Edelman Children's Court, Monterey Park, California.)"

Father contends that court acceptance of a waiver of statutorily mandated notice contravenes the Legislature's authority to prescribe notice and thus violates the Separation of Powers doctrine. He is incorrect. (Civ. Code, § 3513 ["Any one may waive the advantage of a law intended solely for his benefit"].)

DCFS responds that the notice of waiver is irrelevant because it applies by its own terms (those referencing sections 248 and 248.5, pertaining to matters heard by referees) only when a dependency ruling is made by a referee, whereas here the ruling complained of was made by a judge.

Perhaps so, but the easier answer is that the notice of waiver is irrelevant because father received proper notice.

b. Notice was Timely

Father argues notice of the November 13, 2017 order, which must be provided within 24 hours, was untimely because it was postmarked two days later, on November 15. The argument is without merit.

Section 366.26 directs notice of dependency orders to the parents as follows: "A trial court, after issuance of an order directing a hearing pursuant to this section be held, shall advise all parties of the requirement of filing a petition for extraordinary writ review as set forth in this subdivision in order to preserve any right to appeal in these issues." (§ 366.26, subd. (l)(3)(A).)

California Rules of Court, rule 5.590 (Rule 5.590) implements the requirement by mandating that when a court orders a section 366.26 hearing it must advise nonattending parents that if they wish to preserve any appellate right to review the order they must seek an extraordinary writ. The advisement must be sent by first class mail to the parents last known address within 24 hours of the hearing.

If the juvenile court fails to give a party notice of the availability and necessity of writ review, the party's claims on appeal are not limited by the provisions of section 366.26, subdivision (l)(1) and (l)(2). (See *In re Cathina W.*, *supra*, 68 Cal.App.4th at p. 722.)

Here, the court clerk certified on November 14, 2017 that notice of the rulings made on November 13 was served on father by first class mail at his last known address. This notice complied with Rule 5.590. That the mailing bore a postmark one day later is irrelevant. When a postmark is dated no more than one day after service, the service is presumed to have been effected on the certified date. (Cf. Code Civ. Proc., § 1013a(3)

[service "shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit"].)

DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LEIS, J.*

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