Filed 7/25/17 Adoption of I.P. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ADOPTION of I.P., a Minor.	2d Juv. No. B279761 (Super. Ct. No. A017504) (Ventura County)
T.D. Plaintiff and Respondent, v. O.E., Objector and Appellant.	

O.E. (Father) appeals a judgment terminating his parental rights to I.P., a minor child, in a stepparent adoption proceeding. (Fam. Code, § 7822, subds. (a)(3) & (b).)[1] We conclude, among other things, that the juvenile court erred by proceeding to trial without Father and not complying with Penal Code section 2625,

[1] All statutory references are to the Family Code unless otherwise stated.

which protects an incarcerated parent's right to participate in the proceedings. We reverse and remand.

FACTS

Father and J.P. (Mother) are the parents of I.P., a minor child. Father and Mother had lived together but were never married. In 2014, Mother married T.D.

T.D. filed a petition to terminate Father's parental rights to I.P. and to adopt that child. (§§ 7822, 8604.) Mother consented to this stepparent adoption. T.D. alleged termination of parental rights on the grounds of abandonment, claiming: 1) Father had not supported the child, and 2) Father had not contacted I.P. for a "period of time in excess of one . . . year." (§§ 7822, subd. (a)(3), 8604.)

On April 15, 2016, Father appeared in court and requested appointed counsel. The court granted that request.

On April 18, 2016, Father provided information to a social worker for the Ventura County Human Services Agency (HSA). He said that he wanted "visitation" with his child. He provided facts to show that he had not abandoned I.P.

On June 17, 2016, Father appeared with his counsel at a pretrial hearing.

At a July 28th hearing, Father's counsel told the court, "[I]f we do a trial, I only have one witness, which would be [Father]."

On October 21, 2016, Father's counsel appeared at a pretrial hearing. She told the court that Father was in custody. She said that "he's not in local custody." She requested the juvenile court issue an order that he be transported to trial. The court said, "[I]f the father . . . *is in local custody*, I'll order he be transported." (Italics added.) The court ordered the sheriff "to transport father *if he is in local custody*." (Italics added.)

At the November 4th trial, Father was not present because of his incarceration in the Los Angeles County jail. His counsel told the court that the Los Angeles County jail officials would not transport Father to court in Ventura. She said, "*In light of the fact that Los Angeles County will not transport*, I believe that we are prepared to proceed today." (Italics added.)

At trial Mother and T.D. testified. Father's counsel called no witnesses.

The juvenile court granted the petition to terminate Father's parental rights. It found T.D. had not shown that Father failed to support the child. But it also found Father had not communicated with the child for "a period in excess of one year," which constituted "prima facie evidence of his intent to abandon the minor child."

DISCUSSION

Father contends the judgment must be vacated. He claims the juvenile court proceeded to trial without his presence and did not comply with his rights as an incarcerated parent under Penal Code section 2625. We agree.

Parents who are in custody are entitled to notice of proceedings to terminate their custody and control of their children. (Pen. Code, § 2625, subd. (b); § 7800 et seq.)

Incarcerated parents also are entitled to be present in court to protect their parental rights. Penal Code section 2625, subdivision (d) provides, in relevant part, "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*." (Italics added.)

The statute also provides, "*No proceeding may be held* under Part 4 (commencing with Section 7800) . . . 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), italics added.)

At the November 4th trial, Father's counsel told the juvenile court that Father was in the Los Angeles County jail. She said, "Los Angeles County will not transport individuals that are incarcerated in that county to Ventura County . . . ." The court asked, "[H]ow do you wish to proceed?" It had previously ruled it would not issue an out-of-county transportation order. Counsel replied, "*In light of the fact that Los Angeles County will not transport*, I believe that we are prepared to proceed today." (Italics added.) Father's counsel had previously told the court, "[I]f we do a trial, I only have one witness, which would be [Father]."

Father contends the juvenile court erred by proceeding to trial without his presence because: 1) he did not waive his right to be present, and 2) the court did not have the required waiver or affidavit from the jail superintendent. We agree.

The statute provides that "[n]o proceeding may be held" without compliance with these waiver requirements. (Pen. Code, § 2625, subd. (d).) The court must have the incarcerated parent's "presence or his waiver of that right." (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624.) T.D. notes that Father had appointed counsel.

But the presence of Father's counsel at the hearing did not satisfy the statutory requirements. (*Id*. at pp. 622-624; *In re M.M.* (2015) 236 Cal.App.4th 955, 962-963.) Because the juvenile court knew Los Angeles County jail officials would not voluntarily transport Father to the Ventura court, it should have ordered them to do so. (Pen. Code, § 2625.) The court concluded it could not make such an order.

But the statute provided the juvenile court with that authority. (Pen. Code, § 2625, subds. (d) & (e) ["duty . . . to bring the prisoner before the proper court"]; *In re M.M.*, *supra*, 236 Cal.App.4th at p. 963 [failure to issue the order because another county will not transport parent violates "section 2625's clear mandate"]; *In re Iris R.* (2005) 131 Cal.App.4th 337, 343 [jail authorities from another county are required to obey a section 2625 order]; *In re Maria S.* (1997) 60 Cal.App.4th 1309, 1313 ["[jail] custodian is subject to the mandate of section 2625 and the jurisdiction of the requesting court"].) "'[T]he relationship between parent and child is so basic to the human equation as to be considered a fundamental right, and that relationship should be recognized and protected by all of society, no less jailers.'" (*Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 641.)

T.D. notes Father's counsel decided to proceed to trial. He contends this should be presumed to be Father's waiver of appearance. We disagree.

Father's counsel did not claim Father had waived his right to appear. She had requested a transportation order so he could appear. There are no waivers in the record or findings that Father made a waiver. The HSA reports show Father opposed the termination of his parental rights. We may not presume a waiver. "'[C]ourts indulge every reasonable presumption against

waiver' of fundamental constitutional rights and . . . we '*do not presume acquiescence in the loss of fundamental rights*.'" (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464, fn. omitted, italics added; see also *Brookhart v. Janis* (1966) 384 U.S. 1, 4 [presumption against waiver of rights]; *In re Laura H.* (1992) 8 Cal.App.4th 1689, 1695; see also *People v. Tran* (2015) 61 Cal.4th 1160, 1169 [no presumption defendant waived a jury trial because he is represented by counsel]; *People v. Blackburn* (2015) 61 Cal.4th 1113, 1130 [counsel's waiver insufficient without defendant's express waiver].)

Here Father's counsel simply indicated that she proceeded to trial without Father because the Los Angeles County jail would not transport Father to court. The trial court had previously ruled that it would not issue a transportation order if Father was in custody out of county. Given that ruling, counsel's options were limited. This is the result section 2625 was intended to prevent. Father's right to be present (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 624) may not be sacrificed because of another county's jail transportation policy. (Pen. Code, § 2625, subds. (d) & (e); *In re M.M.*, *supra*, 236 Cal.App.4th at pp. 962-963; *In re Iris R.*, *supra*, 131 Cal.App.4th at p. 343.)

Moreover, the juvenile court did not consider any of the available procedures to bring Father from jail to court or to otherwise obtain his testimony. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 924-925.) Even apart from section 2625, appellate courts have long held that trial courts must consider a variety of options to guarantee that an incarcerated parent's testimony is considered. (*Hoversten v. Superior Court*, *supra*, 74 Cal.App.4th 636, 643.) In cases not involving a result as severe as termination of parental rights, courts have ruled these options

may include transportation, using "closed circuit television," "modern electronic media," or "other innovative" procedures. (*Ibid.*) Here the complete disregard for any court access rights for Father may not be condoned.

Given the facts of this case, the error is prejudicial. (*Hoversten v. Superior Court*, *supra*, 74 Cal.App.4th at p. 640.) Father had no opportunity to testify to protect his parental rights. His counsel said he was the sole witness. Without him, there was no defense case. There was no valid justification to prevent him from testifying and no consideration of reasonable alternatives. The court misunderstood the scope of section 2625. It incorrectly assumed another county's jail transportation policy overrides a parent's right of access to the courts. This result contravenes fundamental elements of due process. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753 ["'state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause'"]; *Armstrong v. Manzo* (1965) 380 U.S. 545, 552 ["A fundamental requirement of due process is 'the opportunity to be heard'"]; *Payne v. Superior Court*, *supra*, 17 Cal.3d at pp. 914-915 [due process includes the right of access to the courts]; *In re M.M.*, *supra*, 236 Cal.App.4th at p. 964 [preventing incarcerated parent to appear and testify to challenge allegations of the petition was prejudicial error].)

A major part of T.D.'s case was the claim that Father failed to support his child. But the trial court found the evidence did not support that claim. It granted the petition finding that "[F]ather did not communicate with the minor child for a period in excess of one year." It relied on Mother's testimony that in the one-year period starting in January 2015, when Father was

incarcerated, Father did not attempt to phone the child. The court said, "Father has not provided a lawful excuse for such failure."

But Father was prevented from testifying, and the record reflects Father had evidence to contest Mother's testimony. (*In re M.M.*, *supra*, 236 Cal.App.4th at p. 964.) A June 2016 HSA report indicates Father claimed he had attempted to call his child from jail in 2015, but on each occasion when he called collect, the "call was not accepted." He sent a birthday card to the child. He told the social worker that in December 2014 he spoke to his child. He had visited her in 2014. He sent her a Christmas card. He also sent her "some presents." Father said he had "no court ordered visitation," but "plans to seek visitation soon." He said he had paid money for the child's support. He would not consent to an adoption. Father appeared, obtained appointed counsel, attended court hearings and cooperated with the HSA.

Moreover, Mother testified that Father contacted her regarding visitation in 2013 and that he had contacted her *six times* in 2014 about visitation. Father visited the child twice in 2014. Father's counsel said there was disagreement about the places and times for further visitations. Mother said, "I was working with him to talk about locations and dates." She testified Father had contacted the child "[o]ver the past 10 years" with phone calls and "in-person visits." Prior to 2014 there were periods where Father visited the child "[o]nce a month." Before finding abandonment, the juvenile court noted Father was incarcerated in 2015. It said, "[B]eing incarcerated . . . may have made it more difficult for him to be able to communicate with his child, although it certainly didn't make it impossible."

But the court must consider "all the facts and circumstances of the case" before finding an abandonment. (*In re Brittany H.* (1988) 198 Cal.App.3d 533, 550.) It could not do this when only one side presents evidence. (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 753; *Armstrong v. Manzo*, *supra*, 380 U.S. at p. 552; *In re M.M.*, *supra*, 236 Cal.App.4th at p. 964.) "The Court places decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'" (*M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 105.)

The juvenile court relied on the presumption that not contacting the child for the one-year statutory period is sufficient to find an abandonment. But that presumption may be overcome by a parent's testimony. (*In re Rose G.* (1976) 57 Cal.App.3d 406, 423-424; *In re Ayers* (1953) 116 Cal.App.2d 55, 58; *In re Cattalini* (1946) 72 Cal.App.2d 662, 667.) Such testimony plays a "vital role" in "a court's assessment of credibility and its evaluation of conflicting evidence." (*In re M.M.*, *supra*, 236 Cal.App.4th at p. 964.)

Mother testified that she obtained sole custody of the child in 2013 *pursuant to a court order* and that Father's visitation was at her "discretion." One court has held a finding that a parent did not contact the child for the statutory period may not be sufficient, by itself, to support an abandonment in certain cases where the other parent or guardian has obtained an exclusive custody order. (*In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 756; but see *In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491, 504, and *In re Jack H.* (1980) 106 Cal.App.3d 257, 264, reaching different results.) "The controlling issue for a finding of abandonment is the subjective intention of the parent." (*In re Christina P.* (1985) 175 Cal.App.3d 115, 131.) Father had a right

to testify on that issue, to show his attempts to communicate, and any factors that impeded his ability to contact his child. (*Ibid.*; see also *Santosky v. Kramer*, *supra*, 455 U.S. at pp. 753-754; *Armstrong v. Manzo*, *supra*, 380 U.S. at p. 552; *In re M.M.*, *supra*, 236 Cal.App.4th at p. 964.)

Because reversal is required, we do not address Father's remaining contentions.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Tari L. Cody, Judge

Superior Court County of Ventura

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

Marsha K. Niedens for Plaintiff and Respondent.