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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re MYLES P., a Person Coming Under the Juvenile Court Law.	B283153 (Los Angeles County Super. Ct. No. CK49698)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DOMINIC B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Emma Castro, Juvenile Court Referee. Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

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

At a selection and implementation hearing for Myles P., Myles's alleged father Dominic B. requested a DNA paternity test. The juvenile court ordered the test and continued the hearing pending the results. The court told Dominic, if the test results showed he was Myles's genetic father, it would appoint counsel for him at the next hearing; if the paternity test was negative and he did not wish to participate in the dependency proceedings, he need not appear at the next hearing. The court advised Dominic the DNA results would be mailed to him and to the court and advised him of the date of the next hearing. The DNA test results confirmed Dominic's paternity, but Dominic did not appear at the scheduled hearing. After finding notice of the hearing and the paternity test results had been properly given, the court terminated Dominic's parental rights. On appeal Dominic contends he had a constitutional right to counsel at the selection and implementation hearing as soon as he requested a paternity test and the court erred in failing to appoint counsel for him. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Juvenile Dependency Petition*

After Myles was born with a positive toxicology screen for cocaine, the Los Angeles County Department of Children and Family Services (Department) filed a Welfare and Institutions

Code section 300[1] petition alleging, among other things, Myles's mother, Ja'Net P., had a long history of substance abuse that had led to the permanent removal of Myles's five older siblings from her custody and had placed Myles at substantial risk of serious physical harm. At the time of Myles's detention, Ja'Net identified Garnel C. as Myles's genetic father. The court found Garnel to be an alleged father and ordered the Department to conduct due diligence efforts to locate him. Following a hearing, Myles was detained in foster care under the temporary care and custody of the Department.

2. *Ja'Net's Identification of Dominic as an Alleged Father*

On April 4, 2016, in advance of the April 18, 2016 jurisdiction hearing, Ja'Net identified Dominic as another possible genetic father of Myles. (Dominic's name was not on Myles's birth certificate, and he and Ja'Net had never married.) Ja'Net did not know Dominic's address but knew he once lived in Los Angeles near La Cienega Boulevard and Clemson Street and was a war veteran who had regularly sought treatment at the local Veterans Administration Hospital. The court continued the April 18, 2016 jurisdiction hearing to June 13, 2016.

In the meantime, the Department filed its declaration of due diligence. As to Dominic, it had found two possible addresses, one on Jasmine Avenue and the other on Clemson Street. The Department reported it had mailed certified notices to Dominic at both the Jasmine Avenue and Clemson Street addresses; the postmaster had referred the Department to the Jasmine street address; and the postmaster confirmed "mail is

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[1] Statutory references are to this code unless otherwise stated.

delivered" to the Jasmine Avenue address. The Department's declaration was signed on April 13, 2016 under penalty of perjury by dependency investigator Shaquenta Mack, and due diligence searches were attested to by caseworker TyTanisha Rice. The Department reported it would inform the court of responses to its due diligence efforts as soon as possible.

3. *The Combined Jurisdiction and Disposition Hearing*

On June 13, 2016 at the combined jurisdiction and disposition hearing, the court sustained allegations pursuant to section 300, subdivision (b), based on Ja'Net's substance abuse, declared Myles a dependent child of the court, removed him from Ja'Net's custody, denied Ja'Net reunification services based on her failure to correct the problems that had caused her to lose custody of her older children and set the matter for a section 366.26 selection and implementation hearing on October 7, 2016. The court ordered the Department to prepare an assessment plan, initiate an adoptive home study of Myles's prospective adoptive parents (who had also adopted one of Myles's older siblings) and supply the court with evidence of its due diligence in attempting to locate both alleged fathers.

4. *The Due Diligence Evidence*

On July 25, 2016, in a last-minute information for the court, the Department reiterated its statements that it had sent by certified mail in April 2016 notices of the dependency proceedings to Dominic at both the Jasmine Avenue and the Clemson Street addresses; the postmaster had referred mail addressed to the Clemson address to the Jasmine address and confirmed to the Department that mail was being delivered to the Jasmine address. The Department also reported Garnel's

whereabouts "remain unknown." The court found due diligence completed on Dominic and Garnel "as required by law."

5. *The Selection and Implementation Hearing*

At the October 7, 2016 selection and implementation hearing the court terminated Ja'Net's parental rights. Neither of Myles's alleged fathers appeared at the hearing. The court inquired as to the propriety of service on both Dominic and Garnel. As to Dominic, the court reprimanded the Department for failing to provide proofs of service to support the social workers' sworn statements that notice had been sent to Dominic by certified mail. The Department responded that a finding that notice had been given as required by law had been made by a different bench officer in July 2016. Finding the Department's answer unsatisfactory and concerned about whether notice had been proper, the court vacated any earlier finding as to notice, continued the selection and implementation hearing as to Dominic and Garnel to January 6, 2017, ordered the Department to provide personal service to Dominic at the Jasmine address and directed the Department to be prepared to show cause at the next hearing why it should not be sanctioned for its failure to fulfill its due diligence and service obligations.

On December 12, 2016 the Department provided evidence it had personally served Dominic on November 16, 2016 with notice of the January 6, 2017 hearing. The January 6, 2017 hearing was again continued to April 5, 2017 to permit proper publication service on Garnel, whose whereabouts remained unknown.

Dominic made his first appearance in the proceedings at the continued selection and implementation hearing on April 5, 2017 and confirmed he had received "notice to appear in the mail" at his Jasmine Avenue address. Dominic immediately requested

a paternity test. He explained he and Ja'Net had had a year-long romantic relationship. Ja'Net had told him she was pregnant with his child when he last saw her sometime in 2015, but he did not believe her and had not had any contact with her since that time. In response to the court's inquiry, Dominic stated, if he was found to be Myles's father, he would "probably" request that "I be allowed to care for the child." On the other hand, if the DNA results showed he was not Myles's father, he did not want to participate in the proceedings. The court responded, "All right. So, sir, I'm not going to appoint an attorney for you today. I am going to order DNA testing. It is in the building . . . . Today's hearing—it was a hearing to terminate parental rights for [Myles] to be placed for adoptive placement in the home of the child's current caretakers . . . . We won't be able to proceed to do that until we get the DNA test results. And even if you are found to be the father, I'm making no promises of whether the child will be returned to you. But at that point, I will likely appoint an attorney to represent you." The court advised Dominic that the results would be mailed to him in advance of the next hearing, which the court informed him would occur on May 17, 2017, and told him he need not appear "if you're not found to be the father, and you'll know that when you get the report from the DNA program." In response to the court's inquiry, Dominic assured the court he understood.

The DNA test results confirmed Dominic's paternity, but Dominic did not appear at the May 17, 2017 hearing. Addressing Dominic's absence, the court stated, "Mr. [B.] was ordered to return on today's date for a 366.26 hearing. The court did advise him that if he received a letter from the DNA test lab that he was not the biological father, he did not need to appear. The court

notes that the DNA documents that have been submitted to the court clearly show the full address of Mr. [B], and the Labcorp's protocol is to send letters to each parent with copies of the DNA test results, whether it's a positive test for biology—or paternity better said—or a negative for paternity. The court has no reasons to believe that Mr. [B.] did not receive the document. Mr. [B.] received notice of this court hearing as he was present. And the Department reports today that he has not been in contact with the Department since the last court hearing of April 5, 2017. A contact letter was sent to him, and he has not responded. The court intends to go forward on this .26 hearing today." The court terminated Dominic's parental rights, freeing Myles for adoption.

DISCUSSION

1. *Governing Law and Standard of Review*

The Uniform Parentage Act (UPA) (Fam. Code, § 7600 et seq.), which governs parentage determinations (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 116), identifies "the parent and child relationship" as "the legal relationship existing between a child and the child's natural or adoptive parents . . . ." (Fam. Code, § 7601, subd. (b); *Elisa B.,* at p. 116.) In determining who qualifies as a natural parent, the dependency courts recognize and differentiate among three categories of parents: an alleged parent, a genetic parent (referred to in the governing statutes as the "biological" parent) (see, e.g., § 361.5) and a presumed parent. (*In re H.R.* (2016) 245 Cal.App.4th 1277, 1283; accord, *In re D.P.* (2015) 240 Cal.App.4th 689, 695.)

A presumed parent "ranks highest" of all three categories and enjoys a full panoply of rights attendant to parenthood,

including entitlement to appointed counsel (§ 317, subd. (a)),[2] custody (assuming the court has not made a detriment finding) and reunification services. (*In re H.R., supra,* 245 Cal.App.4th at p. 1283; *In re D.P., supra,* 240 Cal.App.4th at p. 695; see generally *In re Nicholas H.* (2002) 28 Cal.4th 56, 65 [presumed parent status is intended to preserve the important relationship created between parent and child when the alleged parent has treated that child as a son or daughter].)

A genetic parent is one whose maternity or paternity has been established, but who has not achieved presumed parent status pursuant to Family Code section 7611. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15; *In re H.R., supra*, 245 Cal.App.4th at p. 1283; see *In re P.A.* (2011) 198 Cal.App.4th 974, 980 ["[a] man's status as biological father based on genetic testing does not entitle him to the rights or status of a presumed father"].) A genetic parent may have an opportunity for reunification services only if the court determines such services will benefit the child. (§ 361.5, subd. (a).)

An alleged parent, one whose maternity or paternity has not yet been established, or who has not achieved presumed parent status (*In re Zacharia D., supra,* 6 Cal.4th at p. 451; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596), has a narrow range of rights in dependency proceedings, generally limited under the due process clause to notice of the proceedings so that he or she may appear and have the

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[2] Section 317, subdivision (a)(1), provides, "When it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section."

opportunity to challenge his parentage status. (*In re D.P., supra,* 240 Cal.App.4th at p. 695; *In re J.H.* (2011) 198 Cal.App.4th 635, 644; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1408.)

Generally speaking, alleged parents are not entitled to the appointment of counsel under either section 317 or the due process clause. (*In re H.R., supra,* 245 Cal.App.4th at p. 1283; *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) However, courts have found an alleged parent's due process right to notice and the opportunity to appear to challenge parentage may, in an appropriate circumstance, also include the right to appointed counsel when the consequence is the difference between being an alleged or presumed parent. (See *In re J.O.* (2009) 178 Cal.App.4th 139, 147 ["[a]n alleged father is not entitled even to appointed counsel, except for the purpose of establishing presumed fatherhood"]; *In re O.S., supra*, 102 Cal.App.4th at p. 1407 [alleged father seeking to obtain presumed or biological status may in limited circumstances have a due process right to appointed counsel].)

The question whether "a parent" has a constitutional due process right to counsel at dependency proceedings is a fact-dependent determination that requires balancing of the private interests at stake, the government's interest and the risk that the procedures used will lead to an erroneous decision. (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 31-34 [101 S.Ct. 2153, 2161-2163, 68 L.Ed.2d 640]; *In re O.S., supra,* 102 Cal.App.4th at p. 1407.) Of course, in conducting that analysis, the court must factor in that the private interest at stake for alleged parents, including purely genetic parents, is substantially less than that of a presumed parent. (*In re Zacharia D., supra,* 6 Cal.4th at pp. 448-449; see *In re A.S.* (2009)

180 Cal.App.4th 351, 359 [a genetic parent's desire to establish a personal relationship with his or her child, without more, is not a fundamental liberty interest protected by the due process clause].)

The question whether Dominic enjoyed a statutory or due process right to counsel is a legal one subject to de novo review. (See *C.M. v. M.C.* (2017) 7 Cal.App.5th 1188, 1198 [statutory interpretation]; *In re A.B.* (2014) 230 Cal.App.4th 1420, 1434 [due process].)

2. *Dominic Had No Right to the Appointment of Counsel at the May 2017 Selection and Implementation Hearing*

Emphasizing his statement at the April 5, 2017 hearing that he would "probably" seek custody if found to be Myles's genetic father, Dominic contends he enjoyed a due process right to the appointment of counsel at that hearing to assist him in elevating his status from alleged father to presumed father. However, Dominic did not seek to change his status to presumed father at the April 5, 2017 hearing. To the contrary, he told the court his desire to participate in the dependency proceedings was contingent on the results of the DNA test. The court properly ordered the DNA test (§ 316.2, subd. (d); Cal. Rules of Court, rule 5.635(e)(2)), continued the hearing and informed Dominic that it would appoint counsel for him at the next hearing if he was found to be Myles's genetic father and wished to participate in the dependency proceedings. Nothing more at that point was requested or required. (See *In re Kobe A., supra,* 146 Cal.App.4th at p. 1120 [alleged father has limited rights and is not entitled to appointment of counsel under section 317 or due process clause].)

3. *Dominic Forfeited and/or Waived Any Right to Counsel He May Have Possessed by Failing To Appear at the Continued Selection and Implementation Hearing*

Dominic argues at the very least the court erred in failing to appoint counsel for him at the continued hearing on May 17, 2016 after he was determined to be Myles's genetic father. Because Dominic told the court he would like to pursue his parental rights if the paternity tests showed him to be Myles's father, he asserts it was improper for the court to infer from his nonappearance that he had abandoned his desire to participate in proceedings affecting his parental rights. (Cf. *Katheryn S. v. Superior Court* (2000) 82 Cal.App.4th 958, 970-971 [parent's failure to appear at hearing and unknown whereabouts were not, without more, sufficient grounds to relieve appointed counsel "for cause" under section 317, subdivision (d)]; *Janet O. v. Superior Court* (1996) 42 Cal.App.4th 1058, 1065 [parent's repeated absences from dependency proceedings reflected abandonment of child and lack of interest in proceedings; this was sufficient for-cause grounds to relieve counsel after notice to parent].)

At the threshold, Dominic's communicated desire to participate in the dependency proceedings was not as unequivocal as he suggests. Dominic stated he "probably" would elect to participate in the proceedings if DNA testing proved him to be Myles's father, but he was by no means certain. Recognizing Dominic's ambivalence, the court advised him he need not return for the continued hearing if he did not desire to participate; and, if he did desire to participate, it would appoint counsel for him at that time. Dominic failed to appear at the hearing and does not contest the court's finding he had notice of the hearing and the DNA results. Whether viewed as a forfeiture of his right to object to the termination of his parental rights on

appeal (see *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [dependency cases are not exempt from forfeiture doctrine; purpose of forfeiture rule is to encourage parties to bring errors to the attention of the juvenile court so that they may be corrected]; *In re Wilford J.* (2005) 131 Cal.App.4th 742, 754 [parent forfeited challenge to notice by failing to object when he appeared in the juvenile court]) or an informed and knowing waiver of any right to counsel he may have otherwise possessed (see *In re Jamie R.* (2001) 90 Cal.App.4th 766, 771 [where parent stipulated to the court being allowed to interview the child alone in chambers and did not then assert a right to have her counsel present, parent made a knowing and intelligent waiver of right to counsel she would have otherwise had]), the result is the same: Dominic has lost his right on appeal to object to the court's termination of his parental rights.

4. *Dominic's Argument Also Fails on Its Merits*

Citing *In re O.S., supra,* 102 Cal.App.4th 1402, Dominic contends he had a procedural due process right to counsel to assist him in attempting to alter his status from alleged to presumed father and the absence of counsel was prejudicial. Had counsel been appointed, Dominic argues, he or she would have filed a section 388 motion to vacate the prior disposition order for inadequate notice to Dominic (see *In re Marcos G.* (2010) 182 Cal.App.4th 369, 380, fn. 8 ["a challenge to a dependency judgment on lack of due process/notice grounds is properly made by means of a section 388 petition"]; *In re Justice P.* (2004) 123 Cal.App.4th 181, 189 [same]) and obtained for Dominic presumed parent status or, at the very least, reunification services as a genetic father under section 361, subdivision (a).

Dominic's reliance on *In re O.S., supra,* 102 Cal.App.4th 1402 is misplaced. In that factually inapposite case, an alleged father incarcerated for a probation violation lacked notice of the dependency proceedings until a few weeks prior to the selection and implementation hearing. When he learned of the proceedings, he requested, and was granted, appointed counsel. The father called his counsel several times prior to the selection and implementation hearing to discuss his relationship with his child and his desire for custody and/or services, but she never returned his calls. His counsel did not appear at the hearing; another attorney appeared in his counsel's stead and asked the court to continue the hearing and order paternity testing. The court denied those requests and terminated the father's parental rights. (*Id.* at pp. 1405-1406.)

The *O.S.* father filed an appeal and a petition for habeas corpus, arguing he had received ineffective assistance of counsel at the selection and implementation hearing because his counsel never bothered to learn of his desires for custody and/or services and never attempted to alter his parentage status. In response, the Department argued the father's counsel's actions and omissions, even if constitutionally deficient, were not prejudicial because the father would never have been declared a presumed parent. The *O.S.* court rejected that position, observing that the father had visited the mother daily before she disappeared six months into her pregnancy and prevented him from finding her; thus the father had a substantial likelihood of changing his status from alleged to presumed father under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849 (an unwed biological father who comes forward at first opportunity to assert his paternal rights after learning of his child's existence, but has been

prevented from becoming a statutorily presumed father under Family Code section 7611 by the unilateral conduct of the child's mother or a third party's interference may have a constitutional right to status as a presumed father). (*In re O.S., supra*, 102 Cal.App.4th at pp. 1411-1412.) The court also observed the father may have obtained reunification services if genetic testing confirmed his paternity and he showed reunification was in his child's best interests. (*Id.* at p. 1410.) Thus, the court held, the father's counsel's deficient behavior was prejudicial. (*Ibid.* ["[h]ad counsel acted competently, there is a reasonable probability that the outcome would have been different"].)

Assuming *In re O.S.*'s holding concerning the effectiveness of appointed counsel is properly interpreted to imply a due process right to the appointment of counsel under the circumstances presented in that case (see generally *In re Darlice C.* (2003) 105 Cal.App.4th 459, 462-463 ["'[a] parent who has established a due process right to appointed counsel is entitled to effective assistance of counsel'"]; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1659 [same]), the facts in the instant matter are very different. By his own admission, Dominic had been in a romantic relationship with Ja'Net and was told by Ja'Net that he was the father of her then-unborn baby. Yet he made no effort to assist Ja'Net with the pregnancy or to contact Ja'Net after Myles's birth, let alone to receive Myles into his home and hold himself out as Myles's father. He also failed to contact the Department or the court after learning he was Myles's genetic father and failed to appear at the hearing addressing the termination of his parental rights. Under those circumstances, we have little difficulty finding the appointment of counsel would not have altered Dominic's status from an

alleged to presumed father under *Kelsey S.,* much less allowed him to obtain reunification services with a child he denied fathering, had never met and for whom he failed to appear at a hearing despite an unchallenged finding of notice of the hearing and his paternity. Accordingly, no due process violation occurred. (See *In re Kobe A., supra,* 146 Cal.App.4th at p. 1124 [no due process violation for inadequate notice and failure to appoint counsel when circumstance showed alleged father could not under any circumstances have obtained presumed parent status]; *In re Claudia S.* (2005) 131 Cal.App.4th 236, 251 [to determine whether failure to appoint counsel in dependency proceeding violated due process, reviewing court looks to whether counsel could have made a "determinative difference" and whether the absence of counsel rendered the proceedings fundamentally unfair], citing *Lassiter v. Department of Social Services, supra,* 452 U.S. at p. 33; see generally *In re Jesusa V.* (2004) 32 Cal.4th 588, 626 [there can be no due process violation when reviewing court can "say with confidence that '[n]o other result was possible'"].)[3]

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[3] As discussed in the governing law portion of the opinion, alleged fathers do not have a statutory right to counsel under section 317. In any event, even if there were such a right, it is not reasonably probable under the facts in this case that Dominic would have obtained a more favorable result had counsel been appointed at any stage of the selection and implementation hearing. (See *In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1195 [violation of statutory right to counsel in dependency proceedings is reviewed under standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

DISPOSITION

The order terminating parental rights is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.