Filed 7/11/17 In re L.B. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re L.B., et al., Persons Coming Under the Juvenile Court Law.	B278704
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARCUS B., Defendant and Appellant.	Los Angeles County Super. Ct. No. CK51222

APPEAL from an order of the Superior Court of Los Angeles County, Kristen Byrdsong, Juvenile Court Referee. Appeal dismissed.

Jaime A. Moran, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Appellant Marcus B. (father) challenges the juvenile court's order removing his daughter, L.B. (the minor), from his custody. Father's sole contention is that the court erred by ordering the minor's removal under Welfare & Institutions Code section 361, subdivision (c),[1] because she did not reside with father (who was then incarcerated) at the time the Department of Children and Family Services (department) filed its petition. (See *In re Dakota J.* (2015) 242 Cal.App.4th 619, 629-630 (*Dakota J.*) [removal order reversed where child did not reside with parent for five years prior to department's involvement].) The department contends the appeal should be dismissed because father's notice of appeal is defective and, in any event, father forfeited the right to challenge the removal order by failing to object to the removal order or otherwise contest the disposition below. We agree with the department on both points and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Father and N.P. (mother) are unmarried and have three minor children: the minor (15), Marcus (13), and M.B. (11). The family came to the attention of the department on February 29, 2016, after it was reported that the minor appeared at school with bruises over much of her body and a stab wound on her ankle. The minor disclosed that mother attacked her the previous night by punching her with a closed fist, striking her with a spiked belt, and stabbing her with a pair of scissors. The

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[1] Further undesignated section references are to the Welfare & Institutions Code.

minor stated mother frequently used corporal punishment on her as well as her two younger siblings. At the time, the minor and her brothers had been living with mother and mother's boyfriend, Dennis P., in his home for approximately four years. Father was incarcerated.

Pursuant to a court order, the department detained all three children and placed them temporarily in the home of their paternal aunt. On March 10, 2016, the department filed a petition regarding all three children under section 300, subdivisions (a), (b) and (j), alleging mother physically abused the children repeatedly during the preceding seven years. Subsequently, father was convicted of making a criminal threat with intent to terrorize, a felony (Pen. Code, § 422, subd. (a)), and sentenced to eight years in state prison. The department amended the petition on June 9, 2016, adding an allegation under section 300, subdivision (b), relating to father's criminal threats conviction and prior criminal history including driving under the influence of alcohol. Meanwhile, the department placed the boys together in a foster home and placed the minor in a group home.

The court held the jurisdictional hearing on August 29, 2016. Mother appeared at the hearing, signed a waiver of rights, and pled no contest. Father appeared in custody and the matter was adjudicated as to him. The court found all three children were dependents of the court after sustaining the following allegations:

- Under section 300, subdivision (a): "Since 2009, the [children's] mother, [N.P.], inappropriately physically disciplined [the minor]. On 02/28/2016, the mother repeatedly struck the child's body with a belt. The mother

attempted to cut the child's hair with a pair of scissors. On prior occasions, the mother struck the child with a belt and the mother's fists and hands, inflicting marks and bruises on the child's body. Such inappropriate physical discipline was excessive and caused the child unreasonable pain and suffering. The physical abuse of the child by the mother endangers the child's physical health and safety and places the child and the child's siblings . . . at risk of serious physical harm, damage and physical abuse."

- Under section 300, subdivision (b): "The [children's] father, Marcus [B.], has a criminal history including DUI Alcohol 0.08 percent. On 4/5/2016, the father was convicted of Threaten Crime with Intent to Terrorize and was sentenced to eight years in prison. Said criminal history of the father endangers the children's physical health and safety and places the children at risk of serious physical harm, damage and danger."

- Under section 300, subdivision (j): repeats the sustained allegations of the count under section 300, subdivision (a), and concludes: "The physical abuse of [the minor] endangers the child's physical health and safety and places the child and the child's siblings . . ., at risk of serious physical harm, damage and physical abuse."

The court set the matter for a contested disposition hearing on October 3, 2016, which was later continued to October 12, 2016, so the minor could be present. Although father's appearance at the disposition hearing was waived, he appeared in custody at the hearing on October 3, 2016. On that date, father's attorney represented to the court that father did not wish

to appear at the continued hearing. Specifically, counsel stated "I'll waive his appearance. I know his position regarding disposition."

The department recommended that the children be placed in out-of-home care and, as to father, recommended that he not receive family reunification services under section 361.5, subdivision (e), due to his eight-year prison sentence. At the dispositional hearing on October 12, 2016, father's counsel did not object to the department's recommendations or the court's disposition. Instead, father's counsel simply requested reunification services: "It's my understanding that the department is recommending no [family reunification] (F.R.) for the father, and my client is asking that the court provide him with F.R. today. [¶] Based on the last minute dated 10-3-16, he's been in contact with the social worker. He's completed several classes. [¶] Based on the progress, the significant progress that my client is making, he is asking that the court grant him F.R. today. It would be in the best interest of the child, and it would not be detrimental for this father to have a chance to attempt to reunify." Father's counsel made no other statements during the hearing.

The court found, with respect to M.B. and Marcus, that remaining in mother's home would not pose a substantial danger to the children and released the boys to mother's home. As to the minor, the court found by clear and convincing evidence that "remaining in the home of parents would pose substantial danger to her physical health, safety, and protection." The court ordered that suitable placement continue for the minor along with unmonitored visitation in a public place with mother. As to father, the court ordered that he receive enhancement services.

The court's minute order of October 12, 2016, reflects the court's rulings at the dispositional hearing. Father filed a timely notice of appeal on October 17, 2016.

DISCUSSION

After father filed his opening brief, the department moved to dismiss father's appeal. As the department asserts, father's notice of appeal states he is appealing from the "[a]djudication finding on 8/29/2016," but the substantive issue he raises on appeal relates to the court's dispositional order, which was not entered until October 12, 2016.

"Because the right to appeal is strictly statutory, a judgment or order is not appealable unless a statute expressly makes it appealable." (*In re Michael H.* (2014) 229 Cal.App.4th 1366, 1373.) Section 395, subdivision (a)(1), provides, "A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment." Further, "[t]he dispositional order is the 'judgment' referred to in section 395, and all subsequent orders are appealable." (*In re S.B.* (2009) 46 Cal.4th 529, 532.) An order made prior to the dispositional hearing is not an appealable order. (*In re T.W.* (2011) 197 Cal.App.4th 723, 729 ["[t]he first appealable order in a dependency case is the dispositional order"]; see also *In re Athena P.* (2002) 103 Cal.App.4th 617, 624.) Thus, a jurisdictional order is not appealable; a challenge to the court's jurisdictional findings must be raised in an appeal from the dispositional order. (*In re T.W., supra*, 197 Cal.App.4th at p. 729; *In re Athena P.* (2002) 103 Cal.App.4th at p. 624.)

The essential problem in this case is that father's notice of appeal specifically identifies the "[a]djudication finding on

8/29/2016" as the subject of the appeal. Because that order is not appealable, father's notice of appeal is defective. Certainly, we are bound to construe father's notice of appeal broadly, in favor of its sufficiency. (See Cal. Rules of Court, rule 8.100(a)(2); see *Knodel v. Knodel* (1975) 14 Cal.3d 752, 762 ["We adhere to the rule that doubtful cases should be resolved in favor of the right to appeal where a substantial interest is affected"].) But in light of the fact that father's notice of appeal is specifically limited to the adjudication order and identifies the date of August 29, 2016, we cannot reasonably construe it to include a challenge to the court's dispositional order entered on October 12, 2016.

In any event, even if we were to construe the notice of appeal liberally enough to encompass a challenge to the court's removal order, we would hold father forfeited his right to challenge that order. As noted, *ante*, father's counsel did not make any argument or objection concerning the department's proposal to remove the children. Father's counsel did not object when the court indicated it would issue a removal order. Instead, his counsel requested that the court order reunification services for father, despite the fact that the length of his current prison sentence (eight years) plainly exceeded the statutory time period for reunification services. (§ 361.5, subd. (a)(1) & (3)(A) [providing "court-ordered [reunification] services may be extended up to a maximum time period not to exceed 18 months after the date the child was originally removed from physical custody of his or her parent or guardian"].) Given that family reunification services are only provided after a child has been removed, see section 361.5, subdivision (a), we construe father's request for reunification services, together with his failure to object to removal, as a forfeiture of the right to challenge the

court's removal order on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 & fn. 2, superseded by statute on other grounds as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962 ["[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court"]; *In re T.G.* (2015) 242 Cal.App.4th 976, 984; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 502; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339.) Although an appellate court has the discretion to excuse such forfeiture, it should do so "rarely and only in cases presenting an important legal issue." (*In re S.B., supra,* 32 Cal.4th at p. 1293.) We see no reason to excuse father's forfeiture in the present case.

DISPOSITION

The appeal is dismissed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

JOHNSON (MICHAEL), 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.