Filed 11/17/17 In re Savanna N. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re SAVANNA N., a Person Coming Under the Juvenile Court Law.	B281890
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MELANIE N., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK08573)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa R. Jaskol, Judge. Affirmed.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Keith Davis, Assistant County Counsel, and Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Melanie N. appeals from the order of the juvenile court terminating her parental rights to six-year-old Savanna N. under Welfare and Institutions Code section 366.26.[1] She contends that the court violated due process by proceeding with the termination hearing in her absence because the Department of Children and Family Services (the Department) failed to exercise due diligence to locate her and failed to serve notice on the grandparents (§ 294, subd. (f)(7)(A)). We conclude, even assuming error, that on this record Melanie has not and cannot demonstrate prejudice beyond a reasonable doubt. Accordingly, we affirm the order terminating her parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The detention, October 2014*

In October 2014, the Department received a referral indicating that Melanie was on speed and was a " 'raging lunatic,' " who was not emotionally attached to then-three-year-old Savanna.[2] The investigating social worker arrived at the La Puente residence to see Melanie, who was under the influence,

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[1] All further statutory references are to the Welfare and Institutions Code.

[2] We do not discuss Savanna's father, as he is not a party to this appeal.

swear at the child and throw her into a filthy room. Melanie exhibited the behavior of a chronic drug user. The Department detained Savanna and filed a petition on her behalf. (§ 300, subd. (b).)

Melanie appeared at the detention hearing in December 2014 and counsel was appointed for her. She confirmed to the juvenile court that the petition identified her correct telephone number in the 626 area code and her permanent address in La Puente. The court advised Melanie that all notices and communication from the court and the Department would be sent to that La Puente address unless Melanie notified the court or the Department in writing of a new mailing address. (§ 316.1.) The court warned, and Melanie registered her understanding, that she was to notify the court or Department of any change of address.

2. *The adjudication and Melanie's case plan*

The juvenile court found Melanie had proper notice of the adjudication hearing (§ 300, subd. (b)). She did not appear. The court sustained the petition.

Melanie did not appear at the May 2015 disposition hearing. The juvenile court found notice was proper and ordered reunification services for Melanie to include counseling, parenting classes, and a full drug and alcohol program with testing. The Department received no evidence during this dependency that Melanie participated in any aspect of her case plan.

The court awarded Melanie visitation with Savanna to occur two to three times a week. Throughout the dependency, Melanie's visits with Savanna were sporadic at best.

3. *The six-month review period – May to November 2015 – Melanie did not maintain a relationship with Savanna.*

For the six-month review hearing (§ 366.21, subd. (e)), the Department reported that in an early visit, Savanna introduced her mother as "my Melanie." Melanie called Savanna "from time to time;" her last call was on September 4, 2015. The caretaker heard nothing from Melanie between then and the six-month review hearing in November 2015. The Department suspended visits in October 2015 because Melanie was not participating. She either failed to appear for scheduled visits without notice or asked for visits without confirming them.

Although Melanie appeared unannounced at the Department's offices on October 15, 2015 to resume visits, they did not restart. She gave the social worker a new telephone number in area code 626, but did not respond to the social worker's three attempts to call her.

Meanwhile, Savanna was happy, healthy, and comfortable in her placement. The child was emotionally "well-bonded" with her caretaker who met her needs.

At the six-month review hearing in November 2015, the juvenile court found that notice sent to Melanie's La Puente address was proper. She did not appear. The court continued reunification services for another six months (§ 366.21, subd. (f)).

4. *The 12-month review period – November 2015 to September 2016 – Melanie did not maintain contact with Savanna.*

Melanie had no visits with Savanna during the 12-month review period and did not express interest in seeing the child.

Although initially she telephoned the child about 3 times a month, she called once between early March 2016 and May 2016. The Department stated in its July 2016 report that Melanie made no effort to see Savanna.

Melanie called the Department in mid-May 2016 with a new telephone number in area code 626. The Department attempted to call her three times at two numbers, but the phone disconnected. In August 2016, the social worker tried unsuccessfully to call Melanie several times at a number in the 909 area code, and at the third 626 number.

In September, the social worker reached Melanie at the third 626 number, which was an internet line. Melanie confirmed that her reliable phone contact was the *first* 626 number she gave the Department. The social worker informed Melanie of the 12-month review hearing and of the Department's recommendation to terminate reunification services. Melanie scheduled a meeting at the Department's offices the following day to resume services, but neither appeared nor called. The social worker tried calling Melanie several times thereafter but could not leave a message.

Meanwhile, Savanna was still thriving in her placement. She was comfortable and emotionally bonded with her caretaker who ensured that the child's physical and emotional needs were being met.

Melanie did not appear at the 12-month review hearing (§ 366.21, subd. (f)) in September 2016. After finding notice was given as required by law, the juvenile court terminated reunification services and set a hearing in January 2017 to select and implement a permanent plan for Savanna (§ 366.26).

5. *The post-reunification period – September 2016 through March 2017 – the Department's due diligence and efforts to serve Melanie.*

Melanie did not visit Savanna or request visits in the ensuing six months. The Department noted the child's "contact with [Melanie] is almost non existen[t]." Savanna continued to thrive with her caregiver who had become her prospective adoptive mother.

The Department served notice of the section 366.26 hearing on Melanie at her La Puente address. The Postal Service left the notice with "an individual" but Melanie did not return a signed receipt. The Department filed a due-diligence declaration stating it pursued 20 sources and found only the La Puente address for Melanie.

At the scheduled hearing in January 2017, the juvenile court found that the due diligence search was "good" and that the Department had notified Melanie at her last known address. The court ordered the Department to personally serve notice of the hearing's continuance on Melanie's attorney, as authorized by the statute (§ 294, subd. (f)(7)(A)).

To locate Melanie in early February 2017, the social worker called all five numbers Melanie had used and left messages. She also called the maternal grandmother four times. The grandmother confirmed that Melanie was homeless and gave a phone number for her in the 818 area code.

After five months of silence, Melanie called the Department on February 28, 2017. She said she had been in a drug program for two weeks but left and had gone to a hospital for an aneurism. The Department's last minute information for the court stated that "on 2/28/17 [Melanie] was informed of the hearing on

3/22/17." Also in that phone call, Melanie and the social worker discussed where "the notice" could be sent. Melanie stated she was homeless and had no address for mail delivery. She was no longer living in La Puente and claimed she could not receive mail at the maternal grandmother's residence in Los Angeles. She asked the social worker to call her back to get an address. The social worker attempted to call Melanie three times but got no answer and could leave no message as the message box was full.

Melanie appeared at the Department's offices on March 2, 2017, but her social worker was in the field. She did not answer when the social worker tried calling her back. The Department mailed notice of the section 366.26 hearing to Melanie at both the La Puente address and at the maternal grandmother's Los Angeles residence.

At the section 366.26 hearing on March 22, 2017, the juvenile court found that the Department made reasonable efforts to locate Melanie and notice to her was proper. The court then found by clear and convincing evidence that Savanna was adoptable and, finding no applicable exception to adoption, terminated Melanie's parental rights. The following day, Melanie's attorney filed a notice of appeal. Melanie filed another notice of appeal that listed the maternal grandmother's Los Angeles address as her own.

DISCUSSION

Melanie contends that the juvenile court denied her due process when it found that the Department exercised due

diligence in its efforts to locate her and that statutory notice was proper.[3]

"Notice is both a constitutional and statutory imperative. In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend. [Citation.]" (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114 (*Jasmine G.*).) Section 294 governs notice for section 366.26 hearings. (§ 294, subd. (a)(1).) Thereunder, if the parent is not present when the juvenile court sets the section 366.26 hearing, notice must be given by certified mail with receipt returned, by personal service, or by substituted service at the parent's place of residence with a copy sent to that address by first class mail. (§ 294, subd. (f)(2)-(5).) If the parent's whereabouts are unknown, the Department must file a declaration describing the efforts made to locate and serve the parent. (*Id.*, subd. (f)(7).) If the court finds the Department exercised due diligence in attempting to locate and serve the parent, and adoption is recommended, it may then permit service on the parent's attorney of record and order notice be given to the grandparents by first class mail, if their identities and addresses are known. (*Ibid.*)

Melanie argues that the Department failed to exercise due diligence during its search to locate her, and violated section 294, subdivision (f)(7)(A) by failing to notify the maternal grandmother. She also argues that the Department was not

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[3] The Department initially contends that Melanie forfeited the contention because she did not object to the juvenile court's January 2017 finding that the due diligence effort was proper. We disagree that Melanie failed to raise an objection below. Also, we exercise our discretion to address her contention on appeal. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 345.)

reasonably diligent in February and March 2017 when the social worker spoke with Melanie, because the social worker never gave notice of the termination hearing. We need not determine whether notice was inadequate because any error here is reversible only upon a showing of prejudice, a showing that Melanie has not made and cannot make.

Melanie cites *Jasmine G.*, *supra*, 127 Cal.App.4th 1109 and *In re DeJohn B.* (2000) 84 Cal.App.4th 100 (*DeJohn B.*), to argue that the Department's failure to make a reasonable attempt to locate and notify her of the termination hearing was structural error triggering an automatic reversal.

Jasmine G. and *DeJohn B.* are factually inapposite because in neither case did the social service agency make any attempt to locate and to notify the parent. (*Jasmine G.*, *supra*, 127 Cal.App.4th at p. 1116; *DeJohn B.*, *supra*, 84 Cal.App.4th at pp. 107-108.) Here, by contrast, the Department did attempt to locate and to notify Melanie of the section 366.26 hearing. It searched 20 sources, telephoned the maternal grandmother, and called Melanie 13 times at the five different numbers it had for her, and sent notice to her at both her last known address and that of the maternal grandmother. The record also indicates Melanie had oral notice of the hearing.

More important, Melanie overlooks our Supreme Court's opinion in *In re James F.* (2008) 42 Cal.4th 901, 914-919 (*James F.*) clarifying application of the structural error doctrine in dependency cases. The issue in *James F.* was whether the juvenile court's procedural error in appointing a guardian ad litem for a parent of a dependent child required automatic reversal or was subject to harmless error review. (*Id.* pp. 904-905.) *James F.* reversed the appellate court's conclusion that the

error was structural (*id.* at p. 910), holding although due process was not satisfied there, that the error was amenable to the harmless error analysis. (*Id.* at pp. 905, 918-919.)

The *James F.* court explained that "[t]he rights and protections afforded parents in a dependency proceeding are not the same as those afforded to the accused in [] criminal proceeding[s]" where the structural error analysis originated. (*James F.*, *supra*, 42 Cal.4th at p. 915.) For instance, "[i]n a criminal prosecution, the contested issues normally involve *historical* facts (what precisely occurred, and where and when), whereas in a dependency proceeding the issues normally involve evaluations of the parents' present willingness and ability to provide appropriate care for the child and the existence and suitability of alternative placements. [Also], the ultimate consideration in a dependency proceeding is the welfare of the child [citations], a factor having no clear analogy in a criminal proceeding." (*Ibid.*, italics in original.) These "significant differences between criminal proceedings and dependency proceedings provide reason to question whether the structural error doctrine . . . should be imported wholesale, or unthinkingly, into the quite different context of dependency cases." (*Id.* at pp. 915-916.)

The harmless-error, rather than structural-error, analysis applied in *James F.* because the record there indicated the error caused the parent no actual harm. (*James F.*, *supra*, 42 Cal.4th at p. 916.) "[T]he United States Supreme Court has explained that most structural defects 'defy analysis by "harmless-error" standards.' [Citation.] Errors that can 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable

doubt' [citation] generally *are not structural defects*. [Citation.]" (*Id.* at p. 917, italics added, quoting from *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) The *James F.* court concluded the juvenile court's error was "amenable to harmless error analysis rather than a structural defect requiring reversal of the juvenile court's orders without regard to prejudice." (*James F.*, at p. 915.)

Following *James F.*, courts have observed that "[t]he harmless error analysis applies in juvenile dependency proceedings even where the error is of constitutional dimension." (*In re J.P.* (2017) 15 Cal.App.5th 789, 798.) The parents' interest in " 'the companionship, care, custody and management of [their] children' " is " 'ranked among the most basic of civil rights.' " (*Id.* at p. 799.) But, "[a] balancing of interests is required" in dependency cases where " '[c]hildren . . . have fundamental interests of their own that may diverge from the interests of the parent. [Citation.] [¶] Our task is to interpret the statutory scheme as a whole in a manner that balances the interest of parents and children in each other's care and companionship, with the interest of abandoned and neglected children in finding a secure and stable home.' [Citations.]" (*Ibid.*) Prejudice is not "irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child." (*James F.*, *supra*, 42 Cal.4th at p. 917.)

Accordingly, "[i]f the outcome of a proceeding has *not* been affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required. [Citation.]" (*James F.*, *supra*, 42 Cal.4th at pp. 918-919, italics added.) Following *James F.*, we review the record to determine whether error, if any, in

locating and notifying Melanie of the section 366.26 hearing caused her any actual harm, beyond a reasonable doubt.[4]

As prejudice, Melanie argues on appeal, had she received good and timely notice, that "she *might have been able to demonstrate* a change in her circumstances sufficient to *reopen* [*the*] *reunification services*." (Italics added.) The argument is unavailing. Melanie is barred from making that showing because she did not timely challenge the order terminating reunification services (§ 366.26, subd. (*l*)) or file a petition seeking modification of the order terminating those services (§ 388).

More to the point, the focus of the dependency has long since shifted from reunification to finding the appropriate placement plan for Savanna. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 305.) The central issue in the section 366.26 hearing, the one from which Melanie appeals, is whether the dependent child is likely to be adopted. The evidence supports the juvenile court's finding that Savanna was likely to be adopted, a determination Melanie does not challenge on appeal. Savanna was happy, healthy, and thriving in the care of her prospective adoptive parent, with whom she had bonded. (See *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 [adoptability is based on the child's age, physical condition, and emotional state].)

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[4] The Supreme Court declined to decide whether the appropriate standard under the harmless error analysis is harmless by clear and convincing evidence or harmless beyond a reasonable doubt. (*James F.*, *supra*, 42 Cal.4th at p. 911, fn. 1.)

The Legislature has mandated, once the juvenile court determines a child is adoptable "and there has been a previous determination that reunification services should be ended, [that] termination of parental rights at the section 366.26 hearing *is relatively automatic*. [Citation.]" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447, italics added.) Adoption is not selected as the permanent plan only when the court finds that termination would be detrimental to the child under one of the six delineated exceptions. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574.) Melanie made no argument below that any exception applied and does not do so on appeal.

Our review of the record shows the only possibly applicable exception is that under section 366.26, subdivision (c)(1)(B)(i), the so-called parental-relationship exception. Thereunder, the parent must demonstrate that she has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Ibid.*) Here, however, the record shows that Melanie had almost no contact with Savanna for the two and one-half years of this dependency. Accordingly, Melanie would be unable to demonstrate the relevant exception to adoption, even had she appeared and participated, and so she suffered no harm when the juvenile court proceeded without her. Stated otherwise, any defect in locating and serving notice on Melanie was harmless beyond a reasonable doubt as the outcome of the termination hearing would have been the same. (*James F.*, *supra*, 42 Cal.4th at pp. 918-919.)

DISPOSITION

The order terminating parental rights is affirmed.

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DHANIDINA, J.*

We concur:

EDMON, P.J.

LAVIN, 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.