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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JOSIAH L.,

a Person Coming Under the Juvenile Court Law.

B248838
(Los Angeles County
Super. Ct. No. CK53574)

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

JOSE L.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Jacqueline H. Lewis, Juvenile Court Referee. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant
and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County
Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Jose L. (Jose), the biological father of minor J.L., appeals from a dependency court order denying him “presumed father” status (Fam. Code, § 7611, subd. (d)), and denying him custody (Welf. & Inst. Code § 361.2, subd. (a)),¹ following a section 361.5 disposition hearing. We find no error, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 14, 2013, the Los Angeles County Sheriff’s Department raided a home rented to J.L.’s mother, T.F. (Mother),² which was known by law enforcement to be an active “drug house.” Law enforcement conducted the search when no one was home, and found a loaded revolver and 25 ecstasy pills in a black purse, a plastic bag filled with 29 plastics baggies containing marijuana, a digital scale with plastic baggies, a plastic bag with 10 vials containing phencyclidine (PCP), and a pint size bottle containing codeine syrup. On January 18, 2013, Mother was arrested, and her two-year-old son J.L. was detained.

On January 22, 2013, Jose called DCFS and asked to meet with the caseworker so that he could find out what he needed to do to gain custody of J.L. When he met with the caseworker, he reported that he was living with his girlfriend in Los Angeles, but indicated that if J.L. were released to him, he was willing to move to Lancaster and live with the paternal grandmother, who would help care for J.L. However, during the interview Jose also stated, “I can’t have him right now, I live in L.A. with my girlfriend.” Jose reported that he was on

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

² Mother is not a party to this appeal.

probation for a forgery conviction after writing a bad check. He reported that he had lost his job and was receiving general relief. He stated that he used alcohol and occasionally marijuana when he went out to parties.

The detention hearing was held on January 24, 2013. Jose completed a Statement Regarding Parentage requesting that the court enter a judgment of parentage, but also indicating that the Los Angeles Child Support Division previously had entered a judgment of parentage in 2012. He further requested that the court find that he was J.L.'s presumed father, indicating that he had told his family and friends that the child was his, had provided J.L. with clothes, gifts, and diapers, and had had day visits with J.L.

The parentage questionnaire completed by Mother indicated that Jose and Mother were never married, but were living together at the time of J.L.'s conception. Jose was not present at J.L.'s birth and was not listed as his father on the birth certificate. Although he held himself out as J.L.'s father, he had not received J.L. in his home. A paternity test had shown that J.L. was his child. The child support division had declared his paternity, but there had been no declaration of paternity in family law court. The questionnaire indicated that Mother was still married to another man, R.J., at the time of J.L.'s birth in 2010; however, R.J. was incarcerated at the time.

During the detention hearing, Referee Albert Garcia asked the parties if there was any issue as to whether Jose was the presumed father of J.L. Jose's and Mother's counsel indicated that an order establishing J.L.'s parentage had been made the year before by the Child Support Division. DCFS did not object to presumed father status for Jose, and the court found that he was the presumed father.

On February 19, 2013, DCFS contacted the paternal grandmother at her Lancaster home; she reported that Jose had not resided there for a while. On February 21, 2013, the DCFS investigator received a phone call from Jose, who provided a phone number but did not want to provide his current address. He indicated that his mailing address was his mother's address in Lancaster. Jose stated that he had not had any contact with J.L. since August 2012, because he and Mother could not agree on times for him to visit. He stated that he was in school full time, that he could not care for J.L., and that he would rather have J.L. stay with a relative who was able to care and provide for him.

As of February 28, 2013, Jose's whereabouts were unknown and he was not visiting J.L. DCFS reported that in an earlier DCFS case involving J.L. and his half-siblings, Jose had made very little effort to participate and had not responded to a letter from DCFS regarding visitation with J.L. During that 2011 proceeding Jose was not offered reunification services, and DCFS again recommended that no reunification services be offered to Jose.

On March 19, 2013, at the jurisdiction hearing, the court made a "tentative non-paternity finding" as to R.J. The court sustained two allegations under section 300, subdivision (b) alleging that (1) Mother created a detrimental and dangerous home environment for J.L. by keeping illegal drugs and a loaded handgun within his reach; and (2) Mother had a 14-year history of illicit drug use and was a current user of PCP, which rendered her unable to provide regular care and supervision for J.L., and J.L.'s oldest half-sibling had received permanent placement services due to Mother's illicit drug use. The court dismissed the allegation under section 300, subdivision (b), alleging occasional use of alcohol and marijuana by Jose rendering him periodically incapable of caring for J.L.

A last-minute information dated March 29, 2013 stated that Mother reported that Jose was never involved with J.L. and had minimal contact with him. Although Jose knew Mother was pregnant, he did not visit or see his son. Once in a while, he sent J.L. diapers through his mother.

On April 2, 2013, at the disposition hearing, a new court officer, Referee Jacqueline H. Lewis, presided. The court noted that although Referee Garcia had found Jose to be the presumed father at the detention hearing on January 24, 2013, no legal basis had been provided for the finding. The court requested further argument on the matter.

Jose argued that he had taken J.L. into his home on several occasions, and had held himself out as J.L.'s father, that there was a 2011 family law order for child support, and that he had filed a "Statement Regarding Parentage" form seeking presumed father status. He argued that Mother had prevented him from visiting and from maintaining a consistent ongoing relationship with J.L. He further argued that DCFS had not arranged any visitation for Jose, and that it was not until very recently, when J.L. was placed into the home of the maternal great-grandmother with whom Jose had a civil relationship, that Jose was able to set up visits for himself.

Referee Lewis found that Jose was J.L.'s biological father, not the presumed father, because Jose had never had an overnight visit with J.L., had not visited him in six months, and did not know what was going on with J.L. in his home. Further, Jose had never requested custody or a visitation order in family law court. The court granted reunification services for Jose so that he could attempt to build a relationship with J.L. and show that he could be a presumed father, but the court found Jose was "not there yet." Custody with Jose was denied on the ground that

such placement would be detrimental to J.L., and instead J.L. was placed with his maternal great-grandmother. Jose was ordered to complete six consecutive random drug tests. Monitored visitation was ordered, with DCFS granted discretion to liberalize visitation if and when it was deemed safe and appropriate to do so and if Jose's drug tests were negative.

Jose timely appealed from "the change in paternity finding and dispositional orders."

DISCUSSION

Jose contends that at the disposition hearing the dependency court erroneously vacated a finding by an earlier juvenile referee, made at the detention hearing, that he was the "presumed father" of J.L. He contends that vacating the previous order was procedurally improper, and he further contends that the reconsidered decision denying him presumed father status was substantively incorrect. Neither contention has merit.

Dependency law recognizes three types of fathers—presumed, alleged and biological. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15 (*Zacharia D.*); *In re P.A.* (2011) 198 Cal.App.4th 974, 979 (*P.A.*)). A presumed father meets one or more specified criteria listed in Family Code section 7611 (section 7611). (*Zacharia D.*, *supra*, 6 Cal.4th at p. 449.) Under section 7611, "a man who has neither legally married nor attempted to legally marry the child's natural mother cannot become a presumed father unless (1) he receives the child into his home and openly holds out the child as his natural child, or (2) both he and the natural mother execute a voluntary declaration of paternity." (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595.) A biological father is one who has

established biological paternity but has not achieved presumed father status. (*Zacharia D.*, *supra*, 6 Cal.4th at p. 449, fn. 15.) An alleged father is a man who may be the biological father of a child, but whose biological paternity has not been established. (*Ibid.*)

“‘A father’s status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is entitled. [Citation.] . . . Presumed father status entitles the father to appointed counsel, custody (absent a finding of detriment), and a reunification plan. [Citations.]’ [Citation.] The court *may* provide reunification services to a biological father, if it determines that the provision of services will benefit the child. (§ 361.5, subd. (a).) Due process for an alleged father requires only that he be given notice and an opportunity to appear and assert a position and attempt to change his paternity status, in accordance with procedures set out in section 316.2. [Citation.] He is not entitled to appointed counsel or to reunification services. [Citation.]” (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120 (*Kobe A.*); see *In re M.C.* (2011) 195 Cal.App.4th 197, 211 [“Under the dependency law scheme, only mothers and presumed parents have legal status as ‘parents,’ entitled to the rights afforded such persons in dependency proceedings, including standing, the appointment of counsel and reunification services.”].)

“‘Presumed fatherhood, for purposes of dependency proceedings, denotes one who “promptly comes forward and demonstrates a full commitment to his paternal responsibilities—emotional, financial, and otherwise[.]”’” (*In re Giovanni B.* (2013) 221 Cal.App.4th 1482, 1489-1490.) “A man’s status as biological father based on genetic testing does not entitle him to the rights or status of a presumed father. (*In re Joshua R.* (2002) 104 Cal.App.4th 1020, 1026–1027.) In

determining presumed father status under section 7611, “it is irrelevant that the biological father can prove his paternity or even that all parties to the proceedings may concede that [he] is the biological father.” [Citation.]” (*P.A.*, *supra*, 198 Cal.App.4th at p. 980; see *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1052 (*Michael H.*) [“the mere existence of a biological link does not merit . . . constitutional protection’ [citation]; rather, the federal Constitution protects only the parental *relationship* that the unwed father has actively developed by “com[ing] forward to participate in the rearing of his child” [citation] and ‘act[ing] as a father.’”].)

A. The Dependency Court Did Not Err in Vacating the Previous Finding that Jose was J.L.’s Presumed Father

At the disposition hearing, Referee Lewis noted that a different referee had found that Jose was the presumed father at the detention hearing, but without a proper legal basis. After hearing argument from the parties, the court vacated the earlier finding and found that Jose was the biological father, but not the presumed father, of J.L. Jose contends that it was procedurally improper for the court to vacate the earlier finding that he was the presumed father.

In their respective briefing, neither Jose nor County Counsel identifies the applicable statutory provisions governing the authority of the juvenile court to vacate an earlier order. Under section 385, “[a]ny order made by the court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article.” (§ 385; see Cal. Rules of Court, rule 5.560 [“Subject to the procedural requirements prescribed by this chapter, an order

made by the court may at any time be changed, modified, or set aside.”].) Thus, “the juvenile court has the authority pursuant to section 385 to change, modify or set aside its prior orders sua sponte,” without new evidence, where the court considered the previous order “to have been erroneously, inadvertently or improvidently granted.” (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 116.) The juvenile court’s modification or setting aside of a previously made order “will not be disturbed on appeal absent a clear abuse of discretion.” (*Id.* at pp. 118–119; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

The only procedural requirement for a dependency court’s sua sponte decision to modify or set aside a prior order is that it must provide the parties with notice and an opportunity to be heard. Section 386 provides that “[n]o order changing, modifying, or setting aside a previous order of the juvenile court shall be made either in chambers, or otherwise, unless prior notice of the application therefor has been given by the judge or the clerk of the court to the social worker and to the child’s counsel of record, or, if there is no counsel of record, to the child and his or her parent or guardian.” (§ 386; *In re Andrew A.* (2010) 183 Cal.App.4th 1518, 1527.)

Although the court allowed the parties to be heard at the disposition hearing on the issue whether Jose should be deemed the presumed father, the record does not reflect that Jose was given prior notice that the court would be reconsidering the matter. However, Jose failed to object to the lack of notice. Such failure to object to a lack of notice generally forfeits the issue for purposes of appeal. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) Thus, the issue has been forfeited.

Even if the matter were not forfeited, notice errors are subject to harmless error review (*In re J.H.* (2007) 158 Cal.App.4th 174, 183), and any error here was necessarily harmless. ““Presumed father status entitles the father to appointed counsel, custody (absent a finding of detriment), and a reunification plan. [Citations.]”” (*Kobe A., supra*, 146 Cal.App.4th at p. 1120.) Jose had appointed counsel and was offered reunification services. And, as discussed further below, while he was denied custody, that decision was not based on his lack of status as a presumed father but rather due to a finding of detriment. Accordingly, there is no ground for reversing the dependency court’s order vacating the finding that Jose was J.L.’s presumed father and finding that he was merely the biological father.

We briefly address Jose’s unsupported contention that Family Code sections 7646 and 7647 prescribe the only means by which a finding of presumed fatherhood may be overturned, and mandate that such a decision may only be made upon a noticed motion by a mother, previously established father, or child, and that the only permissible grounds for such a motion are that the previously established father is not the biological father. In fact, these provisions merely “set[] forth procedures for challenging a judgment of paternity based on the results of genetic testing” (*County of Sacramento v. Llanes* (2008) 168 Cal.App.4th 1165, 1169), which is not at issue here. Nothing in those provisions purports to limit the authority of the dependency court to reconsider sua sponte an earlier decision regarding presumed father status.

B. Substantial Evidence Supported The Decision Denying Jose Presumed Father Status

Even if the dependency court's decision to vacate the prior order was not procedurally erroneous, Jose contends that the dependency court erred in denying him presumed father status. Jose contends that he should be deemed J.L.'s presumed father under subdivision (d) of section 7611, because he "receive[d] the child into his home and openly holds out the child as his natural child." (§ 7611, subd. (d).) A man seeking status as a child's presumed father under section 7611, subdivision (d), has the burden of establishing by a preponderance of the evidence that he received the child into his home and held the child out as his own. (*In re J.O.* (2009) 178 Cal.App.4th 139, 147; *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652–1653 (*Spencer W.*).) On appeal we apply the substantial evidence test. "[W]e review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the order. [Citation.] We do not reweigh the evidence but instead examine the whole record to determine whether a reasonable trier of fact could have found for the respondent." (*Spencer W., supra*, 48 Cal.App.4th at p. 1650.)

It is undisputed that Jose held J.L. out as his child. However, the Attorney General contends, and we agree, that substantial evidence supported the dependency court's determination that Jose did *not* receive J.L. into his home.

In order to satisfy the requirement of subdivision (d) of section 7611, a father must have *physically* brought his child into his home. (*In re Cheyenne B.* (2012) 203 Cal.App.4th 1361, 1379 (*Cheyenne B.*) [man seeking presumed father status "had to prove that he had *actually* received [the child] into his home; constructive receipt of a child into his home is insufficient"]; *Michael H., supra*, 10

Cal.4th at p. 1051 [“[T]o become a presumed father, a man who has neither married nor attempted to marry his child’s biological mother must not only openly and publicly admit paternity, but must also *physically* bring the child into his home”].) Although evidence of regular visitation can satisfy the “receiving into one’s home” requirement (*Cheyenne B.*, *supra*, 203 Cal.App.4th at p. 1379; *In re A.A.* (2003) 114 Cal.App.4th 771, 784, 786), the record here does not demonstrate any such consistent visitation with J.L. As the juvenile court noted, at the time of the detention hearing Jose had not visited J.L. in six months, and previous visits had been sporadic, at best. Further, the fact that Jose never asserted his rights to visit or have partial custody support the finding that he should not be found J.L.’s presumed father. (See *Cheyenne B.*, *supra*, 203 Cal.App.4th at p. 1366 [substantial evidence supported trial court’s finding that father did not receive child into his home in part because he never asserted his paternity status in court or sought formal custody or visitation]; *In re A.A.*, *supra*, 114 Cal.App.4th at p. 787 [“[E]ven accepting as true respondent’s representation that visitation between himself and the minor stopped because Mother ended it, there is no evidence that thereafter he asserted a right to custody or visitation.”].)

We reject Jose’s argument that he received J.L. into his home by living with Mother while she was pregnant with J.L. (See *In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1228 [father who lived with mother during pregnancy, but did not physically receive child into his home after its birth, did not qualify for presumed father status under section 7611, subd. (d)].) Jose cites *In re Richard M.* (1975) 14 Cal.3d 783, for the proposition that “constructive” rather than physical reception of a child may be sufficient in certain circumstances, but, as our Supreme Court has acknowledged, the *Richard M.* decision provides no authority for this

point because it was decided in a much different statutory context, when the issue was whether a child had been “legitimated” by the father. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827-828.)

In sum, substantial evidence supported the dependency court’s determination that Jose did not receive J.L. into his home.

C. *The Court Did Not Err in Denying Jose Custody of J.L.*

Jose contends that he should have been granted custody of J.L. under section 361.2, subdivision (a). However, only a presumed father is entitled to custody under that provision (*Zacharia D., supra*, 6 Cal.4th at p. 451), which provides in part that “[w]hen a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child.” (§ 361.2, subd. (a).) Moreover, the court may place the child with that parent only if it does not find that “placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.” (§ 361.2, subd. (a).)

In this case, the dependency court did not deny Jose custody based on its determination that he was not the presumed father, but based on its finding that placing J.L. with Jose would be detrimental to his safety, protection, and physical and emotional well-being. Jose does not challenge the court’s finding of detriment. Therefore, we have no basis for reversing the court’s decision not to grant Jose custody of J.L. under section 361.2.

DISPOSITION

The jurisdictional and disposition orders, including the order denying Jose presumed father status, are affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

EDMON, J.*

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