Filed 11/13/17 In re A.J. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

In re A.J., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B281209 (Super. Ct. No. J070148) (Ventura County)
VENTURA COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. E.J., Defendant and Appellant.	

A.J. was born in 2012. Later that year his father, appellant E.J., was arrested for a violent felony.[1] In mid-2013, appellant was sentenced to 15 years in prison; he must serve 85 percent of the sentence and will be released, under present law, no sooner than 2025. (Pen. Code, § 2933.1.)

[1] Appellant committed a robbery while using a firearm.

A.J. was taken into protective custody in August 2014. One month later, appellant filed a "JV-505 Statement Regarding Parentage" provided to him by respondent Ventura County Human Services Agency (HSA). In his filing, appellant asked the juvenile court to declare him A.J.'s father and provide appointed counsel. Appellant's JV-505 was misplaced in the court file and his parentage claim was not adjudicated until 2016, when he was found to be a presumed father.

Shortly before the permanent plan hearing in 2017, appellant sought a modification to begin reunification services, asserting that he did not timely receive appointed counsel or proper notice despite his best efforts. (Welf. & Inst. Code, § 388.)[2] The court summarily denied the petition because appellant did not show changed circumstances. Appellant then asked the court to apply the "beneficial relationship" exception to the policy favoring the termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i).) The court refused to apply the exception and terminated parental rights. E.J. appeals both orders.

The record supports the rulings. Appellant has been incarcerated since A.J. was seven months old and will remain so until A.J. is 13 years old. The court bypassed services because appellant was convicted of a violent felony. (§ 361.5, subds. (b)(12), (e)(1).) There was no change in circumstances to justify a modification, and substantial evidence shows that adoption is the appropriate permanent plan. We conclude that any delay in resolving appellant's presumed father status was immaterial, as was his initial failure to receive notice: even with an earlier

[2] Unlabeled statutory references are to the Welfare and Institutions Code.

resolution, appellant would not have received services and the outcome would be the same. We affirm.

FACTS

On August 28, 2014, the juvenile court found a prima facie case for detaining two-year-old A.J. and his half-sister after their mother J.F. (Mother) was arrested for child cruelty and for being under the influence of a controlled substance.[3] HSA's petition alleged that Mother failed to protect the children and the fathers failed to support them. Appellant's whereabouts were unknown and he was deemed to be an alleged father. HSA noted that A.J. has special needs, including speech and developmental delays. Mother admitted to a 15-year methamphetamine habit and tested positive for that drug while pregnant with A.J.

In September 2014, before the jurisdiction hearing, appellant filed a JV-505 asserting that he is A.J.'s father. He attended A.J.'s birth, provided for A.J.'s food, clothing and medical needs for the first six months of the child's life, and is willing to undergo DNA testing. Though incarcerated, he did not want to lose his parental rights.

In the jurisdiction report, HSA observed that appellant is not entitled to reunification services as an *alleged* father. Should he become a *presumed* father, HSA intended to bypass services because he is incarcerated for a violent felony. He has an extensive criminal history, and in June 2013 was sentenced to 15 years in prison for armed robbery.

The court sustained HSA's petition on September 24, 2014, at an uncontested hearing. As to appellant, the order states that he failed to provide care and support or assume a parental role;

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[3] Mother is not a party to the appeal. Nor is A.J.'s sister involved in the appeal because appellant is not her father.

despite his JV-505 filing, appellant's whereabouts were said to be "unknown." He did not receive reunification services. The children were declared dependents of the court.

At the March 2015 review hearing, the HSA social worker denied receiving appellant's JV-505 form. She noted that he was not married to Mother when A.J. was born in 2012; is not listed on the birth certificate; was arrested soon after A.J.'s birth; and will not receive services as an incarcerated violent felon. A.J. was thriving, bonding to his caregiver, and stopped having tantrums. With special services, he is able to follow simple instructions and speak in sentences instead of babbling. Appellant sends A.J. cards and letters.

On May 4, 2015, the court scheduled a permanent plan hearing after Mother relapsed. Appellant was personally served with notice of the hearing. The court later reinstated Mother's services and the children began an extended visit with her.

The social worker continued to insist that appellant did not file a JV-505 form. Though appellant sent letters and drawings at least once a month, A.J. has not seen or spoken to his father since infancy and "did not seem to understand who the letters were from and did not pay much attention to them." The two have no significant relationship.

In May 2016, HSA filed a supplemental petition, alleging that Mother was arrested for being under the influence of drugs and possessing drug paraphernalia. A.J. was with Mother at the time of her arrest. She admitted using methamphetamine. The children were detained and placed in foster care.

On June 28, 2016, appellant made his first appearance in the case. The court granted his requests for paternity testing and appointed counsel. The children were thriving in a prospective adoptive home and bonding with their caregivers. Both children

stated that they "love" the home and "really like" the foster family, which is willing to maintain the children's family connections.

At the jurisdiction hearing on July 27, 2016, the court sustained the petition and found that the previous disposition was not effective to protect the children. Placing them in parental custody would pose a substantial risk of danger to their well-being. Despite 22 months of services, Mother used drugs while caring for the children. Services were terminated and the court scheduled a permanent plan hearing.

Paternity testing showed a 99.99 percent probability that appellant is A.J.'s father. HSA contacted appellant's relatives for possible placement, while observing that it would be disruptive to remove the children from a home where they have emotional stability and a sense of permanency. Appellant's relatives were not interested in taking the children.

The social worker advised the court that appellant had a parental role for the first six months of A.J.'s life, until his 2012 arrest. His conviction of a violent felony and 15-year prison sentence justify denial of services. He keeps written contact with A.J., but cannot complete services or reunify with A.J. within statutory time limits. Appellant has been in prison for 86 percent of A.J.'s life. A.J. has no memories of or attachment to appellant.

On September 21, 2016, the court found appellant to be A.J.'s presumed father. The court acknowledged that appellant filed a JV-505 and sought counsel in September 2014, but the filing was overlooked. The court said, "Quite honestly, it probably wouldn't have changed anything given his current situation which hasn't changed from when that [form] was submitted." In an unsworn statement, appellant expressed love for A.J., as well as regret and responsibility for his misdeeds. He

has been sober while incarcerated; participates in drug testing; obtained his GED and a certification in computers; is in a college sociology program; attends an anti-violence program; mentors other prisoners; is in AA, NA, and Gang Members Anonymous groups; and works in the prison ministry.

The court described appellant's accomplishments in prison as "impressive." However, it found by clear and convincing evidence that reunification services must be bypassed because appellant was convicted of a violent felony and services would be detrimental to the child.[4]

In December 2016, appellant sought a modification to begin services. The changed circumstance was HSA's ignorance for two years of his JV-505 filing, thus depriving him of appointed counsel. Appellant requested case information at least 15 times and stayed in touch with the social worker, Mother and the children. Appellant asserted that reunification services would benefit A.J. because "Father has had a relationship with [A.J.] prior to incarceration [and] it would be in the minor's best interest to continue [the] relationship." He hopes for early release from prison due to his exemplary behavior.

At a combined hearing in February 2017, HSA urged the court to deny appellant's request for services because A.J. cannot "express any memories or other information about his father. The child does not demonstrate any attachment or bond with [appellant]." The court found no changed circumstances. Only six months old when appellant was arrested, A.J. spent "a whole lifetime without Dad in his life," the court stated. Even if

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[4] Appellant appealed the bypass of services. His appeal was dismissed as abandoned under *In re Phoenix H.* (2009) 47 Cal.4th 835. (*In re A.J.* (Apr. 26, 2017, B278879) [nonpub. order].)

appellant had been appointed counsel in 2014, his lengthy incarceration means that "to offer him services now . . . would just delay, frankly, the inevitable because he'll still be in custody." A.J. would not benefit by waiting to see what will happen when appellant is released.

After denying a modification, the court selected a permanent plan. HSA proposed adoption by the foster family, where the children are thriving in a stable, loving environment. In opposition, Appellant testified that he attended A.J.'s birth and parented for nearly seven months. Appellant keeps contact with A.J. through letters, though A.J. cannot read. When he was one year old, A.J. visited appellant in prison. Appellant feels he can provide A.J. with a safe and loving home, and teach him good morals and values. He is sober and achieved his educational goals in prison. Appellant is allowed five-hour weekend visits at his prison, plus 72-hour family visits in a private apartment every 45 to 90 days.

The court found that the children are adoptable. It did not apply the "beneficial relationship" exception to the policy favoring adoption. Though appellant has bettered himself, A.J. needs a permanent, stable home, and the benefits he will realize from adoption clearly outweigh the benefit of a possible future relationship with his father. The court terminated parental rights and identified adoption as the permanent plan.

DISCUSSION

Appellant challenges appealable orders denying his petition for a modification and terminating his parental rights. (§ 395.)

1. Denial of a Modification

A petition for a modification is committed to the juvenile court's sound discretion and its decision will not be disturbed on appeal unless it is an arbitrary, capricious or patently absurd

determination that exceeds the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Here, the court did not abuse its discretion by denying a modification to begin services.

Over the course of a dependency proceeding, reunification services are "first presumed, then possible, then disfavored." (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 845.) Services are limited in duration to curtail "the length of time a child has to wait for a parent to become adequate." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.)

Section 361.5 lists numerous grounds for denying services. Once the court concludes that a parent is not entitled to services, it need not do more. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 77.) In September 2016, appellant was declared a presumed father, but services were denied owing to his conviction of a violent felony and detriment to A.J. (§ 361.5, subds. (b)(12), (e)(1); see *In re Allison J.* (2010) 190 Cal.App.4th 1106, 1112-1117 [services may be bypassed even without a nexus between a father's violent felony and his ability to parent].)

A parent may revive the reunification issue by showing changed circumstances or new evidence, such that modification will promote the child's best interests. (§ 388, subd. (a); *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 ["substantial" change required].) If a section 366.26 hearing is pending, the primary focus is on the child's need for permanency and stability; a parent's interest in reunification is not paramount. (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309-310; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent . . . might be able to reunify at some future point, does not promote stability for the

child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Appellant failed to show changed circumstances or that a modification would be in A.J.'s best interest. He has been incarcerated for a violent felony since A.J.'s infancy and was unable to take custody when Mother was arrested in 2014. Nothing has changed. There is no likelihood that appellant could take custody within the maximum statutory period because he faces years of imprisonment. (§361.5, subd. (a)(1)(B) and (a)(3)(A) [six months of services are provided for a child under age three at removal; this may be extended to one year if the permanent plan is to return the child to parental physical custody within the extended period].) Appellant cannot provide for A.J.'s safety, protection, physical and emotional well-being or special needs. Reunification services would be fruitless. (*In re Allison J.*, *supra*, 190 Cal.App.4th at p. 1112.)

The children were detained because of Mother's persistent drug abuse and parental incarceration. Years have passed. A.J. has no memories of or attachment to appellant, but developed strong bonds with caregivers who addressed his special needs and delayed development. (See *In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 224 [court considers the strength of the bonds between the child and the new caretaker, as compared to the parental bond, and whether the problems leading to dependency can be easily ameliorated].) Despite his efforts while in prison, appellant cannot take custody of A.J. now, or for many years. On the eve of the permanent placement hearing, A.J.'s "interest in [permanency and] stability was the court's foremost concern," outweighing appellant's desire to begin services. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251-252.)

Our conclusion is unaffected by any procedural lapses that occurred. In the jurisdiction report, the social worker stated that she sent appellant the petition and a JV-505 statement of parentage form by certified mail to Calipatria State Prison on September 11, 2014. (§ 290.1.) One week later, appellant filed the completed form with the court. It is true, as appellant argues, that the social worker and the trial court failed to take note of the completed form. This delayed a DNA test and a determination of appellant's parental status. In September 2016, the court acknowledged the lapse and appellant's "impressive" self-improvement, yet it still bypassed services.

Any deficiencies—whether in the service of notice, or failure to obtain a waiver from him as a prisoner, or delay in resolving appellant's status—were harmless beyond a reasonable doubt. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 623-626; *In re Marcos G.* (2010) 182 Cal.App.4th 369, 384-390.) Appellant was an offending parent because he failed to support A.J. for nearly two years before the child's detention. At the outset, HSA announced its intent to bypass services. The day that appellant was found to be a presumed father, his services were bypassed.[5]

Appellant's desire for services would not have been hastened by an earlier court appearance, or by an earlier appointment of counsel, or by an earlier acknowledgement of his presumed parent status; rather, his services would have been bypassed in 2014, instead of 2016. In sum, appellant was not prejudiced. (Cal. Const., art. VI, § 13 [no judgment shall be set

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[5] Appellant did not argue for placement with a relative at trial and cannot raise the issue for the first time on appeal. (*In re Casey D., supra,* 70 Cal.App.4th at pp. 53-54.)

aside for any procedural error unless an examination of the entire record shows a miscarriage of justice].)

2. Termination of Parental Rights

Children have a fundamental right to a placement that is stable and permanent. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) A bypass of services "ordinarily constitutes a sufficient basis for terminating parental rights." (*In re K.C.* (2011) 52 Cal.4th 231, 236-237.) At the permanent plan hearing, the court must terminate parental rights and order the child placed for adoption if it finds that the child is likely to be adopted. (§366.26, subd. (c)(1).) Adoption is the Legislature's "first choice" because it gives the child the best chance at a full emotional commitment from a responsible caretaker. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) Only "exceptional circumstances" permit a choice other than adoption. (*Ibid.*)

In this instance, appellant had to prove a significant, positive, emotional attachment such that A.J. would be "greatly harmed" by the termination of parental rights. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 50; *In re Brittany C.* (1999) 76 Cal.App.4th 847, 853; *In re Angel B.*, *supra*, 97 Cal.App.4th at pp. 466-468.) The two prongs to the showing are: (1) "regular visitation and contact" and (2) "the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

Appellant was unable to show the two prongs. It is uncontroverted that appellant has not seen A.J. since infancy. As to the second prong, the court found that A.J. would not benefit from continuing a relationship with appellant. The court's determination is supported by substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Appellant cannot establish the requisite benefit to the child because he does not occupy a parental role. (*In re Beatrice M.*

(1994) 29 Cal.App.4th 1411, 1418-1419; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109.) None of the variables that logically affect a parent/child bond favor appellant: these include the age of the child, the portion of the child's life spent in the parent's custody, the effect of interaction between parent and child, and the child's particular needs. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Appellant's bond with A.J. ended with his arrest in 2012. A.J. was half a year old when appellant left and has no memories of his father. Though appellant consistently sent letters over the years, A.J. paid little attention to them and did not seem to understand who sent them. A.J. does not look to appellant for any of his physical or emotional needs. A parent in appellant's situation cannot show that a biological relationship alone outweighs the benefit of a permanent adoptive home. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.)

Appellant does not dispute that A.J. is thriving, bonded to the foster family, and will be adopted. At the permanent plan hearing, appellant voiced his desire to have A.J. in his care. His hope for future custody is not compelling. There is no telling when, if ever, appellant will have a safe, stable home for A.J.

Appellant does not ask to separate A.J. from his half-sister or the foster family. He proposes a guardianship because eventually he might be reunited with A.J. This is not the legislative plan. "Once the court determines adoption is feasible, the less desirable and less permanent alternatives of guardianship and long-term foster care need not be pursued." (*Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 249; *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1799.) The fact remains that appellant is not his son's daily caregiver. His opposition to

adoption, on principle alone, is not sufficient to overcome the legislative preference for adoption.

Appellant did not carry his burden of showing that A.J. would be greatly harmed by the termination of his parental rights or that the benefit of continuing their relationship outweighs the benefits of a stable, permanent home. The juvenile court reasonably found that appellant's relationship is not beneficial. In a guardianship or continued foster care, A.J. would have an unstable placement. Appellant's lengthy incarceration prevents reunification and keeps him from providing a permanent home for A.J. Where, as here, a child is likely to be adopted, the court must choose "the most permanent and secure alternative that can be afforded." (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1419.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Tari L. Cody, Judge
Superior Court County of Ventura

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Leroy Smith, County Counsel, Joseph J. Randazzo, Assistant County Counsel for Plaintiff and Respondent.