Filed 1/24/13 In re Brianna B. CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| In re BRIANNA B., a Person Coming Under the Juvenile Court Law. | B239673 |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CARLOS G.,<br><br>Defendant and Appellant. | (Los Angeles County Super. Ct. No. CK47347) |

APPEAL from orders of the Superior Court of Los Angeles County, Jacqueline Lewis, Referee. Affirmed.

Joseph D. MacKenzie, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel for Plaintiff and Respondent.

Appellant Carlos G., the biological father of Brianna B., argues the juvenile court erred by denying his request to continue a hearing under Welfare and Institutions Code section 366.26[1] in order to set a contested hearing at a later date. He also contends the court erred in stating that it was only terminating the parental rights of the child's mother and presumed father, Martin R. We find no reversible error and affirm.

## FACTUAL AND PROCEDURAL SUMMARY

Brianna B. was born in August 2001, while her mother, Evelyn B., was married to Martin R. Neither Martin R. nor mother is a party to this appeal. DNA testing confirmed that appellant is Brianna's biological father. He was incarcerated when she was born, and remained in custody throughout this dependency matter. He did not qualify as a presumed father either by executing a voluntary declaration of paternity at her birth, or by taking her into his home and holding her out as his own under Family Code section 7611, subdivision (d).

In December 2001, Brianna was the subject of a prior dependency petition which alleged the child had witnessed an episode of domestic violence between mother and Martin and that mother had endangered her by driving with her in a dangerous and erratic manner while fleeing from law enforcement officers. During those proceedings, on January 9, 2002, the juvenile court found that Martin R. is Brianna's presumed father. But in the present case, Martin R. declined to care for the child.

The present petition was filed by the Department of Children and Family Services (DCFS) in March 2011, alleging that Brianna comes within the jurisdiction of the juvenile court under section 300, subdivisions (a), (b), (d), and (g). The petition alleged mother had physically abused Brianna, and that she had been sexually and physically abused when mother left her in the care of various adults while mother was incarcerated in 2008. The petition also alleged that appellant had failed to provide Brianna with the

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[1] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

necessities of life. When the petition was filed, both mother and appellant were incarcerated. Appellant filed a Statement Regarding Parentage (form JV-505) stating he was Brianna's biological father based on the earlier DNA tests. The court found him to be her alleged father. DCFS reported that no reunification services were available to appellant at the place where he was incarcerated, but recommended that they be ordered in light of the possibility that after his release, he could complete the programs before the section 366.22 review hearing.

The amended petition was sustained and Brianna was declared a dependent child. Mother and appellant were denied reunification services under section 361.5, subdivision (e) in light of their incarcerations. A permanent planning hearing was set under section 366.26. Brianna was placed with Ms. V., the sister of presumed father Martin R., with whom the child had lived for two years before coming to California. Ms. V. and her husband were willing to adopt her.

At the section 366.26 hearing on February 12, 2012, counsel for appellant informed the court that his client expected to be released from prison in June. Appellant was eager to resume contact with Brianna. Since his anticipated release was just a few months away, appellant sought a continuance of the hearing. Alternatively, he sought a contested hearing, based on his belief that he had bonded with Brianna through correspondence. Since appellant is the biological and alleged father, but not the presumed father, the court asked counsel to identify the basis for a contested hearing. Counsel did not cite authority in support of the request.

The court observed that Martin R. had been found to be the presumed father, and that he and mother were the only legal parents. It indicated some uncertainty about whether appellant had a right to request a continuance, but concluded: "[E]ven though the Court found your client [appellant] to be the biological father, he is not a legal father. And I do not believe he has a right to set this for contest because I wouldn't actually be terminating his parental rights. I'm only terminating the parental rights of the legal parents." Brianna was found adoptable by clear and convincing evidence. The court

terminated the parental rights of mother and Martin R. and "anyone else that claims to be a parent to this child . . . ." This timely appeal followed.

## DISCUSSION

"California law distinguishes '"alleged,"' '"biological,"' and '"presumed"' fathers. (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1018.) '"A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an 'alleged' father."' (*Ibid.*) '"A biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status . . . ."' (*Ibid.*) 'Presumed father status ranks highest,' (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801), and '[o]nly presumed fathers are entitled to reunification services and to possible custody of the child.' (*In re E.O.* (2010) 182 Cal.App.4th 722, 726.)"[2] (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1461.) Appellant is an alleged or biological father, but never attained presumed father status as to Brianna.

The Supreme Court has applied the definitions of "parent" found in the United Parentage Act (Family Code, § 7600 et seq.) to dependency cases. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451; *In re M.C.* (2011) 195 Cal.App.4th 197, 211.) Interpreting former Civil Code section 197, now codified in Family Code section 3010, the *Zacharia D.* court held: "only a presumed father is entitled to custody of his child; custody is the consequence of either a successful reunification plan or a placement of the child with the father under section 361.2." (6 Cal.4th at p. 451.) "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. [Citations.]" (*In re M.C.*, *supra*, 195 Cal.App.4th at

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[2] The court has discretion to order reunification services for a biological father. (*In re Raphael P.* (2002) 97 Cal.App.4th 716, 725, fn. 7.)

p. 211.) There can be only one presumed father. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 603 (*Jesusa V.*).)

The juvenile court may terminate the rights of both presumed and biological fathers in a dependency proceeding. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596.) The rights of a "mere biological father . . . may be terminated based solely upon the child's best interest and without any requirement for a finding of detriment or unfitness . . . .' [Citations.]." (*In re Jason J.* (2009) 175 Cal.App.4th 922, 933–934.)

Where a biological father has not qualified as a presumed father before the dependency case is in permanency planning, the only remedy available is to show under section 388 that it is in the child's best interest to vacate the permanent planning orders and provide the biological father with reunification services in order to allow him to qualify as a presumed father entitled to custody. (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 956.) This was the only route open to appellant here, but he has not claimed presumed father status either in the juvenile court or on appeal.

Appellant cites *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, for the proposition that the biological connection between a father and his child is entitled to constitutional protection. He contends that as a biological father, he was more than an alleged father whose rights in a dependency case are limited to the right to notice and an opportunity to establish his paternity of the child. There is no claim that mother, or anyone else, prevented appellant from achieving presumed father status. Instead, he attributes his inability to do so to his extended incarceration. Under these circumstances, appellant does not qualify as a *Kelsey S.* father.

The juvenile court stated that it was not terminating appellant's parental rights because he was only a biological father. But the court terminated the parental rights of "anyone else [who] claims to be a parent to this child," which included appellant. On this record, this was not error. "[A] biological father's rights are limited to establishing his right to presumed father status, and the court does not err by terminating a biological

father's parental rights when he has had the opportunity to show presumed father status and has not done so. [Citations.]." (*In re A.S.* (2009) 180 Cal.App.4th 351, 362.)

Under these circumstances, we conclude that appellant did not have the right to either continue the section 366.26 hearing or to set it for a contested hearing. The juvenile court did not err in denying appellant's requests.

## DISPOSITION

The orders of the juvenile court are affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.