Filed 9/17/13 In re M.E. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re M.E., a Person Coming Under the Juvenile Court Law.	B245112 (Los Angeles County Super. Ct. No. CK89040)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ROBERT E., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Terry Truong, Juvenile Court Referee. Affirmed.

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

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Kimberly A. Roura, Senior Associate County Counsel, for Plaintiff and Respondent.

Robert E. (Father) and Victoria G. (Mother) have a daughter M.E. (born July 2010).[1] Father appeals from the orders of the juvenile court granting legal guardianship of M.E. to her foster parents and denying his Welfare and Institutions Code section 388[2] petition requesting reunification services. We affirm.

FACTUAL & PROCEDURAL BACKGROUND

On June 8, 2011, Mother, Father and M.E. were living in the home of Father's ex-wife Tracey, along with Tracey's husband and children. Police raided the home based upon an allegation of gift card fraud against Father. Father and Tracey were arrested during the raid for possession of methamphetamines. Mother and M.E. were not home at the time of the raid. Father was placed in federal custody. Mother called her sister, Irma E., and asked her to pick up M.E. Mother came to visit M.E. at Irma E.'s house but did not disclose where she was living. In July 2011, M.E., then a one-year-old, was detained by the Department of Children and Family Services (Department). On July 25, 2011, the Department filed a petition pursuant to section 300, subdivisions (b) and (g), alleging that Mother and Father left M.E. and failed to make an appropriate plan for her care and supervision.

At the detention hearing on July 25th, Mother did not appear. Father was represented by counsel. Father was incarcerated and Mother's whereabouts were unknown. M.E. was placed in the custody of maternal grandparents Irene B. and Jesus B., and one of Mother's other sisters, Sally B. Mother's four other children had lived with Irene B. since they were young. Father was awarded monitored visitation.

---

1 Mother has four other children who are not the subjects of this petition.

2 All subsequent undesignated statutory references shall be to the Welfare and Institutions Code.

Mother called the social worker in July 2011 and expressed a desire that M.E. be placed with maternal aunt Irma E. and her husband, or in the alternative, maternal grandmother Irene B. Mother did not leave an address or phone number.

On August 17, 2011, Father called the social worker from prison. He said he had pled guilty and might be released in six months. He wanted to have someone bring M.E. to visit him. He denied that he and Mother abandoned M.E. He said he had talked to Mother and encouraged her to turn herself in and talk to the Department.

The August 2011 social worker's report indicated that Father had a criminal history dating back to 2004 which included several narcotics possession offenses, driving with a suspended license and a failure to appear pursuant to a domestic violence court order. The social worker also reported that while at Irene B.'s house, M.E. was sleeping and eating well and interacting well with her siblings.

At the adjudication hearing held October 28, 2011, neither parent was present. Father was found to be M.E.'s alleged father. The court sustained the allegations pursuant to section 300, subdivision (b) and dismissed the subdivision (g) allegation. It denied family reunification services for Father. The court also ordered that there be no visits for M.E. to the prison where Father was incarcerated, stating, "I am not requiring the grandmother to bring [M.E.] to the federal detention facility." The social worker said she would have Father contact the social worker once he was released.

The social worker's May 2012 report indicated that Mother was visiting M.E. weekly but had not informed the social worker of her whereabouts. M.E. was thriving in the home of Irene B., and was on track developmentally.

On May 4, 2012, the court appointed counsel for Father and set the section 366.26 hearing for August 24, 2012. Father was still incarcerated. Father's counsel indicated Father had written to the social worker several times requesting visitation and had not received a response. Father's counsel proposed that some of Father's relatives take M.E. to visit him. The court voiced concern that these relatives were strangers to M.E. It

indicated it would not allow the relatives to transport M.E. to federal prison until she had a relationship and felt comfortable with them.

On June 5, 2012, Father filed a section 388 petition requesting presumed father status and reunification services. He cited the following changed circumstances: he had "been appointed counsel and ha[d] filled out the JV-505 form which reflects his desire to be [a] presumed father [and that] his involvement in [M.E.]'s life establishes him as a presumed father." He requested to be allowed to reunify with M.E. upon his release from prison in October 2012.

Father's JV-505 form stated that he had lived with M.E. from birth until June 2011. He indicated he was a college graduate earning $100,000 prior to his incarceration. He had bathed, fed, taught, played, loved and cared for M.E. and had taken her to the park, friends' houses, Disneyland and doctor appointments.

At the July 27, 2012 hearing set for the section 388 petition, Father was still in custody, and his counsel requested a continuance. The hearing was continued until August 24th.

At the continued hearing on August 24, 2012, Father was still in custody and did not appear. His counsel represented that he had been moved to different facilities so it had been difficult contacting him. Father had continually expressed interest in reunifying with M.E. and said that he was going to be released in October. The court granted Father presumed father status. It found that there were changed circumstances but denied his request for reunification since it was not in M.E.'s best interests. It found that section 366.26 notice had been provided to Father, and proceeded to hold a section 366.26 hearing. It granted legal guardianship of M.E. to Sally B. and Irene and Jesus B., granted monthly monitored visitation to Mother and Father, and terminated jurisdiction.

Father appealed. He contends he did not have adequate notice of the section 366.26 hearing, and his due process rights were violated when the court found that proper notice had been given and proceeded to grant guardianship and terminate jurisdiction. He also contends the court erred in denying his section 388 petition because by that time he

had been found to be a presumed father and reunification services were in M.E.'s best interests.

DISCUSSION

1. Section 366.26 Notice

Father contends that he did not receive adequate notice of the section 366.26 hearing.

Section 294, subdivision (c)(1) provides that notice of a section 366.26 hearing "shall be completed at least 45 days before the hearing date. Service is deemed complete at the time the notice is personally delivered to the person named in the notice or 10 days after the notice has been placed in the mail. . . ."

At the hearing on May 4, 2012, the court set the matter for a section 366.26 hearing on August 24, 2012. At that hearing, counsel who had previously appeared on Father's behalf was formally appointed to represent Father. Father was still incarcerated.

Father filed his section 388 petition on June 5, 2012. Notice of the July 25, 2012 hearing on the petition was sent to him at the federal prison in Lompoc.

On July 2, 2012, the Department sent notice of the August 24, 2012 section 366.26 hearing by first class mail to Father in Lompoc.

On July 25, 2012, the date originally set for the hearing of Father's section 388 petition, Father's counsel requested a continuance in order to speak to the maternal grandmother. The court granted a continuance to August 24th, the same date of the section 366.26 hearing. It ordered the Department to give notice to Father of the section 366.26 hearing.

At the August 24th hearing, Father's counsel appeared, stating that it was difficult to stay in touch with Father due to his incarceration, and counsel was not able to get a declaration from Father without using someone else's email address. She requested a brief continuance in order to secure the declaration. She did not claim notice was insufficient, but the court found specifically that notice of the section 366.26 hearing had been provided.

Since the Department sent the initial notice of the section 366.26 hearing on July 2, 2012, service was deemed complete on July 12, 2012. This was 43 days before the hearing date. Counsel for the Department concedes the notice was sent two days late but argues that there was no prejudice and thus the error was harmless.

Counsel did not argue lack of notice at the hearing, nor did she argue that Father did not have time to prepare for the hearing. If Father had brought the late notice to the attention of the juvenile court, the problem could have been addressed. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) We conclude that Father forfeited the issue by failing to raise it below. (*Ibid.; In re Desiree M.* (2010) 181 Cal.App.4th 329, 334.)

In any event, even if Father had not forfeited the issue, we still conclude that any error was harmless.

In *In re Angela C.* (2002) 99 Cal.App.4th 389, a parent did not receive notice of a continued 366.26 hearing. The parent had notice of the dependency proceedings at the outset, and had received proper notice of the initial section 366.26 hearing, but did not attend. The court of appeal used a harmless error analysis, finding that the lack of notice was a "trial error" and not a "structural error." (*Id.* at p. 395.) It determined that even if the parent had appeared at the hearing, she could not establish that termination of her parental rights would be detrimental to her child's best interests, so any error in giving notice was harmless beyond a reasonable doubt. (*Id.* at p. 396.)

Like the parent in *Angela C.*, Father had notice of prior proceedings and had participated in the dependency process. (*In re Angela C., supra*, 99 Cal.App.4th at p. 395.) In addition here, unlike the parent in *Angela C.*, Father was represented by counsel. (*Id.* at p. 392.) At the section 366.26 hearing, Father's counsel was present and the court was informed of Father's position. Father's section 388 petition was also scheduled for August 24, 2012 and there was no objection to the scheduling of the hearing on that day.

Due to his incarceration, Father had not assumed a parental role during the entire dependency proceedings. But there was nothing in the record establishing that Father was presently able to resume a parental role in M.E.'s life. He was not scheduled to be

released for another two months. It was undisputed that M.E. was physically and developmentally on track and doing well in the home of her guardians, where she had spent the last year. Father would not have been able to establish that the legal guardianship would be detrimental to M.E.'s best interests. A two-day difference in the required notice period was harmless beyond a reasonable doubt. (*In re Angela C., supra,* 99 Cal.App.4th at pp. 395-396.)

2. Section 388 Petition

Pursuant to section 388, a juvenile court may modify, change, or set aside previous orders when the moving party presents new evidence or demonstrates a change of circumstances and establishes that the proposed change is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.560; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "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, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) We review the denial of a section 388 petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal. 4th 398, 415; *In re Anthony W.* (2001) 87 Cal.App. 4th 246, 250.)

Reunification services must be offered to an incarcerated parent unless the juvenile court finds services would be detrimental to the child. (§ 361.5, subd. (e)(1).) The focus is on the child. (*In re Kevin N.* (2007) 148 Cal.App.4th 1339, 1344.)

Father had been in custody since M.E. was detained. She had only spent one year of her life with Father, while she was an infant. She was doing well with her guardians and her half siblings. It was important for M.E. to form a long-lasting emotional attachment to this family. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 923-924.) Reunification services would not have helped achieve that goal. Moreover, Father did not allege changed circumstances to support the granting of the petition. He merely stated past involvement in M.E.'s life and a desire to be a presumed father. Despite a

college education and lucrative employment, Father also had a lengthy criminal history, dating back to 2004. In light of this lengthy past history, and the events which led up to M.E.'s detention, we cannot say that services to help M.E. reunify with Father would be in her best interests. As a result, the court's denial of Father's section 388 petition was not an abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

DISPOSITION

The orders of the juvenile court are affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.