Filed 3/21/18 In re Z.W. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

In re Z.W., a Person Coming Under the Juvenile Court Law.	B283905 (Los Angeles County Super. Ct. No. DK00106)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.W., Defendant and Appellant.	

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

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

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Travis W. (father) is the biological father of Z.W., born in December 2009. Z.W. lived with his mother (mother) in Los Angeles County, and father lived in Arizona. Z.W. and his half-brother, J.D., were detained by the Los Angeles County Department of Children and Family Services (DCFS) after a violent altercation involving mother and J.D.'s father. As part of the case plan, the juvenile court ordered father to complete drug tests, parenting classes, and individual counseling.

Father asserts that the court lacked authority to order him to complete services because he was a non-offending parent. We agree with father that the court's order with respect to drug testing was an abuse of the court's discretion, and therefore reverse that portion of the order. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because only the background relating to father is relevant for purposes of this appeal, we focus primarily on facts in the record relating to father.

On March 14, 2016, DCFS was alerted to an unsafe situation involving six-year-old Z.W. and one-year-old J.D. The caller reported that J.D. had been walking outside without any adult supervision and had wandered into the street. The caller also said there was heavy drug use in the home, drugs present and accessible to the children, and multiple people entering and leaving the home. Two days later, a caller reported that mother

was "very violent" and had hit J.D.'s father in the head with a brick.

The detention report stated that in multiple visits from social workers, the children appeared fed and cared for and did not show any indication of physical or sexual abuse. Mother denied drug use and denied any violent altercations. Mother took a drug test that was positive for methamphetamines. During one visit, a sheriff's deputy, who had been passing by the home while the social worker was there, also interviewed mother and opined that she was under the influence of drugs. The deputy also said that the home was a known drug house. The children were detained due to mother's positive drug test and the deputy's statements.

Mother reported that father was Z.W.'s father. Z.W. said he does not have contact with father. The social worker attempted to contact father, but was unsuccessful.

The detention report noted that there had been a prior juvenile dependency proceeding involving Z.W., initiated in July 2013. In a domestic violence incident, mother caused injury to her partner's head, and Z.W. was taken into custody while mother was incarcerated. In October 2014, the court ordered Z.W. to be returned to mother's care. Another allegation in 2010 involving domestic violence between mother and a partner also had been substantiated.

On March 23, 2016, DCFS filed a juvenile dependency petition under Welfare and Institutions Code, section 300.[1] The petition alleged that mother and J.D.'s father had a history of violent physical altercations, Z.W. had been previously detained

---

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

due to domestic violence between mother and J.D.'s father, and Z.W. and J.D. were at risk of serious physical harm as a result (counts a-1 and b-3). The petition further alleged that mother had an "extensive substance abuse history" and was a current amphetamine user, and her drug use placed the children at risk of serious physical harm (count b-1). The petition also alleged that J.D.'s father had "an extensive illicit drug history" and had convictions for possession of drug paraphernalia, which rendered him unable to care for the children and placed the children at risk of serious physical harm (count b-2).

At the detention hearing on March 23, 2016, the court stated that father "was previously found to be the biological and alleged father to" Z.W. The court ordered the children detained in shelter care. The court ordered father to have monitored visits upon contacting DCFS.

On May 20, 2016, DCFS filed an amended petition that added an allegation against father. It stated that father "has an unresolved substance abuse history" that rendered him incapable of providing care to Z.W., including a conviction for possession of marijuana while driving, and three convictions for driving under the influence (DUI) (count b-4).

A jurisdiction/disposition report dated May 19, 2016 stated that father lives and works in Arizona. When father spoke with the social worker, he said he had been trying to find mother and Z.W. Father said that when Z.W. was three weeks old, mother dropped him off with father for a weekend visit; there were no problems during the visit. The following weekend, father's mother (paternal grandmother) picked Z.W. up for a visit, and although mother had allowed Z.W. to go, she later called the sheriff's office and accused paternal grandmother of kidnapping

Z.W. Several weeks later, mother asked father when he was going to visit Z.W. again.

Father said that when Z.W. was in foster care previously, father visited him every week. Father's job relocated and father moved to Arizona, and he lost contact with mother. The jurisdiction/disposition report stated that father was previously found to be the biological and alleged father of Z.W. When the social worker asked why father had not gotten custody of Z.W. during the last detention, father said, "When he was removed, they told me they weren't going to give him to me and that I don't need to come (to Court). They said they were going to reunify him with his mother. I told them that I wanted him all along. I never said I didn't want him."

A California Law Enforcement Telecommunication System (CLETS) report showed that father had the following misdemeanor convictions: DUI and driving with a suspended license in 2014; DUI, possession of 1 ounce or less of marijuana, and driving with a suspended license in 2009; DUI in 2007; reckless driving and cruelty to a child in 2002. In addition, father had one felony conviction for "accessory" in 1997, which father said was "accessory to possession." Father admitted his conviction history and said that he had "completed a program" following his prior convictions, and he had provided that information to the court. Father denied drug use.

The jurisdiction/disposition report stated that Z.W. would not be safe in father's home because father "has not addressed the concerns that brought his family to the attention of the Department or the Court. The father resides in Arizona and has limited contact with the child. Further, the father's Reunification Services were previously terminated." Father had not yet had

any visits with Z.W. DCFS recommended that father be provided reunification services, and that father be ordered to participate in parenting classes, counseling, and substance abuse treatment.

Father filed a "statement regarding parentage" requesting that the court enter a judgment of parentage. He stated that a DNA test confirmed his parentage in 2013. Father also stated that he visited Z.W. during the last dependency case. At the hearing on May 27, 2016, father's counsel asked that father be deemed the presumed father of Z.W. The court noted that father had never accepted Z.W. into his home, and father's counsel explained that was only because father lived in Arizona and had lost contact with mother. The court ruled that father was the biological father of Z.W. Father asked for custody of Z.W., and the court denied the request because as a biological father, father was not entitled to custody. The court ordered DCFS to work out a visitation schedule so that father and Z.W. could visit by phone or video calls.

An interim review report dated August 25, 2016 stated that father had not maintained contact with DCFS, and attempts to contact him were unsuccessful. Paternal grandmother said she did not have updated information for father. DCFS had obtained police reports regarding father, which included descriptions of an altercation between father and mother in 2009, when mother was two months pregnant with Z.W. The report said that a witness saw father and mother inside a car; father hit mother approximately four times in the head and chest. Father told police that he and mother had argued while he was driving, and mother bit his cheek; a bite mark was visible on his cheek. Father said he also bit mother; she had a bite mark on her chest. The incident report states that the officer was "unable to

determine a dominant aggressor due to the mutually involved nature of [mother's] and [father's] actions towards each other." Police noticed that father smelled of alcohol and showed signs of intoxication; he was arrested for DUI. Father had 0.8 grams of marijuana with him when he was arrested.

The interim review report also included facts and a police report from an incident in 2006 in which father allegedly broke a car windshield. The police report stated that father approached the victim's vehicle with a metal bar and smashed the front windshield. Father later called the victim and threatened that her daughter's car "is next." The report continued, "Vict[im] stated that susp[ect] was upset with her daughter's best friend . . . whom he had battered earlier in the evening." The report also noted that father was an active gang member.

In the interim review report, DCFS recommended that father be provided reunification services and ordered to participate in substance abuse counseling, parenting education, and individual counseling. A supplemental report dated December 29, 2016 contains no updated information about father.

On December 29, 2016, mother pled no contest to the allegations in the petition pertaining to her in counts a-1, b-1, and b-3. Counsel for DCFS asserted that count b-4 pertaining to father should also be sustained, arguing that father has "an extensive history of substance abuse" with the most recent DUI in 2014. DCFS also said that "although it is not alleged in the petition," father's actions in the 2009 altercation with mother were concerning. Counsel for the children asked that the petition be sustained on all counts, and noted that father's three DUIs suggested an unresolved substance abuse history.

Father asked that count b-4 be dismissed because DCFS failed to demonstrate a risk of harm to Z.W. Father's counsel said that past conduct alone could not demonstrate future risk, and it was purely speculative to say that past DUIs, without any additional evidence, presented a risk of harm in the future. The court dismissed count b-4 pertaining to father. The court found that the children were persons described by section 300 based on mother's no contest plea and a sustained count against J.D.'s father. The court set a date for a contested disposition.

Last-minute informations filed January 31 and April 6, 2017 do not include additional information about father. At the contested disposition hearing on April 6, 2017, the court noted that DCFS recommended that father participate in a full drug and alcohol program, submit to random drug testing, participate in parenting classes and individual counseling, and have monitored visits. Father was not present at the hearing, but his counsel objected to the plan, stating that the allegations against father in the petition had been dismissed. Father's counsel noted that father previously requested a home-of-parent order, but because counsel had not been in touch with father recently, he did not know whether that was father's current preference. Counsel therefore requested unmonitored visits.

DCFS argued that father had not provided any proof that he addressed any substance abuse issues. It also said that the altercation between mother and father in 2009 warranted an order for individual counseling, because although it was "somewhat remote in time, it does not appear it has been addressed." DCFS also stated that father "hasn't had much contact with the child," and "hasn't demonstrated that he . . .

doesn't pose a risk to the child based on this history." Counsel for the minors agreed with DCFS's suggested case plan.

The court denied the request for a full drug and alcohol program, but ordered father to submit to random or on-demand drug testing. The court said, "[T]he case plan for [father] is random or on-demand drug testing every other week, and if any test is missed or is dirty, then a full drug rehabilitation program with random testing."[2] The court ordered DCFS to contact an agency in Arizona, near father's residence, to facilitate testing. The court also ordered that visits between father and Z.W. be monitored, and required that father participate in parenting classes and "individual counseling to address case issues."

Father timely appealed the court's order.

DISCUSSION

Father contends that because he is a nonoffending parent and his actions did not lead to the detention of Z.W., the court erred by ordering him to participate in drug testing, parenting classes, and individual counseling. Father also asserts that because the court's orders were based on information that was not alleged in the petition, his due process right to adequate

---

[2] At the hearing, the court did not discuss alcohol testing or rehabilitation. However, the minute order from the hearing states, "Random and on demand drug/alcohol testing every other week; if any test is missed or dirty, then full drug rehab program with random testing." "Conflicts between the reporter's and clerk's transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter's transcript unless the particular circumstances dictate otherwise." (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.) Because the court did not order alcohol testing or rehabilitation at the hearing, we assume the court did not intend to include that in its order.

notice was violated. DCFS asserts that because father was deemed to be a biological father rather than a presumed father, he does not have standing to appeal. We address the threshold issue of standing issue first.

A. Standing

DCFS asserts that because father was not deemed Z.W.'s presumed father, he has no standing to appeal and therefore the appeal should be dismissed. We reject this assertion.

"There are three types of fathers in juvenile dependency law: presumed, biological, and alleged. [Citation.] A presumed father is a man who meets one or more specified criteria in [Family Code] section 7611.[3] A biological father is a man whose paternity has been established, but who has not shown he is the child's presumed father. An alleged father . . . is a man who has not established biological paternity or presumed father status. [Citation.] These categories are meant 'to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.'" (*In re P.A.* (2011) 198 Cal.App.4th 974, 979-980.)

The juvenile court found that father was Z.W.'s biological father, and father has not challenged this finding on appeal. DCFS asserts that because father is not a presumed parent, he was not a party to the proceedings below and therefore does not have standing to appeal. DCFS cites Code of Civil Procedure section 902, which states that only a "party aggrieved" may

---

[3] Family Code section 7611 includes a list of factors that allow a person to be deemed a presumed parent, including if the presumed parent is married to the child's mother at the time of birth (subd. (a)), or if the "presumed parent receives the child into his or her home and openly holds out the child as his or her natural child" (subd. (d)).

appeal. Generally, "only parties of record may appeal. [Citation.] A party of record is a person named as a party to the proceedings or one who takes appropriate steps to become a party of record in the proceedings." (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.)

Here, father was named as a party to the proceedings by DFCS, when it included count b-4 against father in the amended section 300 petition. Moreover, father took steps to become a party of record by attending one hearing personally, and appearing through counsel at additional hearings. Father specifically requested that the court rule on whether he was a presumed parent, and told DCFS that he was interested in gaining custody of Z.W.

This is not a case like *In re Joseph G., supra*, where the biological father received notice but did not appear at any hearings before appealing the termination of parental rights. (See *In re Joseph G.*, *supra*, 83 Cal.App.4th at pp. 715-716.) Instead, the case is more like *In re Paul H.* (2003) 111 Cal.App.4th 753, 759, where the father "took immediate steps to become a party once he was notified of the dependency proceedings. He contacted the social worker, appeared at the next court hearing, communicated to the court that he might be the minor's father and attempted to complete paternity testing." The court found that the father in *In re Paul H.* had "standing on appeal to raise issues concerning his parental interest in the minor." (*Ibid.*)

The same is true here. Father appeared at the hearings, requested a court order to find him to be a presumed parent, sought to establish visitation, and was subject to the court's

orders for services. Father therefore has standing to appeal issues relating to his parental interests with respect to Z.W.

B. Court's orders

Father asserts that the court lacked discretion to order him to participate in parenting classes, individual counseling, or drug testing, because he was a nonoffending parent. At a disposition hearing, a "juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child." (Welf. & Inst. Code, § 361.5, subd. (a).) "The court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accord with this discretion. [Citations.]. We cannot reverse the court's determination in this regard absent a clear abuse of discretion." (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006 (*Christopher H.*).)

Father asserts that the court's order was inappropriate because pursuant to section 362, subdivision (d), "The program in which a parent or guardian is required to participate shall be designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300." Father asserts that the conditions that led to Z.W. coming to the attention of the court involved mother, not father, so the court's order was inappropriate.

Father cites *In re Jasmin C.* (2003) 106 Cal.App.4th 177, in which the father of several children lost his temper and hit one adult child and minor Jasmin. The mother of the children intervened, restrained the father, and directed that police be called. The children were detained and placed in mother's care. (*Jasmin C., supra*, 106 Cal.App.4th at pp. 179-180.) The court found jurisdiction under section 300, and ordered family

reunification services; "[a]s to mother, even though she was described in the petition and minute order as 'non-offending,' she was ordered to attend parenting education." (*Id*. at p. 180.) Mother challenged the order on appeal, and the Court of Appeal held that evidence did not support the court's order. "The trial court imposed the parenting class condition on mother without making any findings or giving any explanation. Even more troubling, nothing in the record supported the order, which apparently was based on a rote assumption that mother could not be an effective single parent without parenting classes, something belied by common sense and experience in 21st century America." (*Id*. at pp. 181-182.) The court therefore reversed the order requiring mother to attend parenting classes.

Generally, "a dispositional order may reach both parents, including a nonoffending parent." (*In re D.M.* (2015) 242 Cal.App.4th 634, 639.) The Court of Appeal in *Jasmin C.* did not hold that the juvenile court lacked the authority to order the mother to participate in services. Rather, the court found that the circumstances of the case did not support the order.

Here, by contrast, the evidence before the court supported the orders requiring father to attend parenting classes and individual counseling. Aside from one or two weekends when Z.W. was three weeks old, it appears that father has never cared for Z.W. on a regular basis. Father also had very little contact with Z.W. while he was in mother's care. Although the court ordered father to have phone or video visits with Z.W., the record does not indicate that any such visits ever took place. When father was first contacted, he was living with paternal grandmother; later when DCFS tried to reach him, paternal grandmother reported that she had not spoken to father, so it

was unclear whether he was still living there. Thus the record indicated that father might not be aware of some of the most basic requirements of parenting, such as creating and maintaining an ongoing relationship with the child, the need to keep a stable home for the child, and the importance of maintaining ongoing communication with the child's caregivers. The court's determination that father and Z.W. might benefit from parenting classes was therefore supported by the evidence in the record. (See § 361.5, subd. (a) [a "juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child."].)

Similarly, the court's order for individual counseling was warranted based on the evidence. The record contains two police reports of father engaging in violent behavior toward people close to him when he lost his temper. In the 2009 incident father bit mother and witnesses saw father hitting her multiple times. In the 2006 incident, father broke a woman's windshield with a metal bar because he was angry at her daughter's friend, and he also threatened to break her daughter's windshield. Although the incidents are somewhat remote in time, the record contains little else about father, his life, or his mental health. Father did not maintain contact with DCFS, make efforts to visit Z.W. by phone or video call, or otherwise provide information to show that he is sufficiently mentally stable to maintain regular visitation Z.W.

Father argues that DCFS and the court improperly placed the burden on him to show that he was *not* a danger to Z.W. (See, e.g., *In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1214- 1215 ["It is not up to [father] to prove he is a fit parent. Rather, it is up to DCFS to satisfy its constitutional burden to establish, by clear

and convincing evidence, that he is not."].) However, it does not appear that the court made any presumptions about father's dangerousness that father was required to rebut. Instead, the evidence before the court showed that father had a history of engaging in violence toward people close to him. The court was entitled to rely on that evidence,[4] and it did not improperly shift the burden to father by doing so. The court therefore did not abuse its discretion by ordering father to participate in individual counseling.

On the other hand, the evidence before the court did not support the order requiring father to submit to drug testing. Father denied that he used drugs. He admitted that he had three misdemeanor DUIs; the record shows that each DUI was related to alcohol use. Although father was also convicted of possessing less than one ounce of marijuana in 2009, the record does not indicate that father was a drug abuser or that drug use interfered with father's ability to appropriately parent Z.W. DCFS argues that father should have to "prove his sobriety," but sobriety is not a requirement for establishing visitation with a child. (See, e.g., *In re Drake M.* (2012) 211 Cal.App.4th 754, 768; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003.)

DCFS argues that this case is similar to *Christopher H., supra,* 50 Cal.App.4th 1001, in which the child, Christopher, was born two months premature in March 1995, and due to serious medical issues, remained in the hospital for several months.

---

[4] A social study prepared by the petitioning agency and social worker is admissible evidence and appropriately considered in a jurisdictional and dispositional hearing. (§§ 355, subd. (b); 358, subd. (b)(1).) Father does not assert that the evidence was inadmissible.

DCFS alleged that the father "failed to visit the child, to cooperate with medical staff, to obtain the training necessary to care for Christopher, and to prepare his home for the child's basic needs." (*Id.* at p. 1005.) In addition, the father was arrested for DUI in July 1995. The trial court did not sustain the allegation involving drug use, but nonetheless ordered father to undergo a substance abuse evaluation and submit to random drug and alcohol testing, because the court found that father had a "substance abuse issue." (*Ibid.*) The father appealed. The Court of Appeal held that the order was supported by the evidence, because the father "was arrested for driving under the influence after he was involved in an automobile accident which injured the adult passenger in his car," and blood testing was positive for alcohol above the legal limit and methamphetamine. In addition, this was the father's third arrest for driving under the influence of alcohol in fairly rapid succession. (*Id.* at p. 1007.) The court also noted that Christopher was a high-risk infant requiring specialized care. (*Ibid.*) Given these facts, the juvenile court "reasonably concluded [the father's] substance abuse was an obstacle to reunification that had to be addressed in the reunification plan." (*Id.* at p. 1008.)

This case is not similar to *Christopher H.*, in that the record does not contain evidence indicating that father had ongoing drug use issues that could impair his ability to establish a parenting relationship with Z.W. Father denied drug use, unlike the father in *Christopher H.*, who tested positive for alcohol and methamphetamine following a car accident. In addition, the father in *Christopher H.* had multiple DUIs in quick succession shortly before the juvenile court case, and here father's convictions were more remote. Moreover, the *Christopher H.*

father demonstrated in other ways that he was not prepared to parent a special-needs infant, whereas the record here is silent on father's current ability to bring Z.W. into his home. The reasoning of *Christopher H.* therefore does not support the court's order.

Although a juvenile court has broad discretion to require parents to engage in services as part of a case plan, that discretion is not without limits. Such requirements must be supported by evidence in the record indicating that they will serve the goal of benefitting the child. Here, there was evidence that parenting classes and individual counseling would benefit Z.W., but the evidence did not support drug testing for father.

C. Due process

Father also argues that his due process rights were violated because he is a nonoffending parent and the court based its order in part on the unpled 2009 altercation between mother and father. Father said he demonstrated that DCFS had not met its burden with respect to count b-4 in the petition, and therefore he had no notice or incentive to present any evidence to rebut the 2009 incident. DCFS asserts that as a biological father, father did not have any due process rights other than a right to notice of the hearing, which father received.

The cases father cites do not support his argument that he was entitled to notice of the particular facts upon which the court might base a case plan. Father relies on *In re Neal D.* (1972) 23 Cal.App.3d 1045,[5] in which the petition alleged that "the parent was not providing a suitable place of abode for the two minors in that the place of residence was a condemned dwelling." (*Id.* at p.

---

[5] *In re Neal D.* was disapproved of on other grounds by *In re B.G.* (1974) 11 Cal.3d 679.

1047.) The mother later filed a petition to terminate proceedings, asserting that she had obtained a suitable home. (*Ibid*.) A social worker's report received by the court "dealt with completely new circumstances," including "[p]hysical, mental, emotional and social problems, none of which were considered in the original hearing." (*Id*. at p. 1048.) The court denied the mother's petition, and the mother appealed. The Court of Appeal noted that under due process principles, "a parent is entitled to be apprised of the charges he must meet in order to prepare his case, and he must be given an opportunity to be heard and to cross-examine his accusers." (*Ibid*.) The court continued, "[T]he proceeding denied appellant-parent due process of law. A social study is not a substitute for nor commensurate with a petition alleging jurisdictional facts. It cannot serve in lieu of a petition in an original proceeding." (*Id*. at p. 1049.) The court concluded, "We hold that where a minor, who has been adjudicated a ward of the juvenile court . . . is readjudicated a ward for new and different reasons from those litigated in the original proceeding, a supplemental petition must be filed alleging the grounds upon which the readjudication is to be predicated and notice of the hearing thereon must be given . . . ." (*Id*. at p. 1050.)

Neal D. is not analogous. Here, the court did not change the basis upon which Z.W. was found to be subject to the jurisdiction of the court. Instead, the court appropriately made orders based on the information available to it at the time. "[W]hen the court is aware of [unpled] deficiencies that impede the parent's ability to reunify with his child, the court may address them in the reunification plan." (*Christopher H., supra*, 50 Cal.App.4th at p. 1008.) That is what the court did here. Father has not demonstrated that he was entitled to notice that

court orders might address case issues included in the DCFS reports that were not alleged in the petition itself.

DISPOSITION

The juvenile court's order requiring father to complete random or on-demand drug tests, and to complete a full drug rehabilitation program if any drug test is missed or positive, is reversed without prejudice to any future such order that may be warranted based on admissible evidence before the court. The court's order is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.