Filed 5/26/17 In re Precious N. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re PRECIOUS N., a Person Coming Under the Juvenile Court Law.	B277217 (Los Angeles County Super. Ct. No. CK97726)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ERIC H., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Marpet, Juvenile Court Referee. Affirmed.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Kimberly Roura, Deputy County Counsel, for Plaintiff and Respondent.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

This is the third appeal filed by Eric H. (Father) relating to Los Angeles Superior Court juvenile dependency case No. CK97726. In Father's 2015 appeal, we upheld the juvenile court's determinations of jurisdiction, removal of Precious N. (born 2001) from Father's custody and her placement with her mother, P.N. (Mother). (*In re Precious N.* (Jan. 29, 2015, B255648) [nonpub. opn.] (*Precious I*).) Thereafter, the juvenile court held additional proceedings, culminating in its orders terminating juvenile court jurisdiction, and ordering sole legal and physical custody in Mother. (April 14, 2015 Custody Order—Juvenile—Final Judgment.) These orders included an order under Welfare and Institutions Code section 362.4[1] (sometimes referred to as an "exit order") specifying Father would be allowed monitored visits with Precious, but not stating the frequency of those visits. (*In re Precious N.* (Jan. 25, 2016, B265933) [nonpub. opn.] (*Precious II*).)

In Father's 2016 appeal of the exit order, this court reversed on the ground that the juvenile court may not delegate either the right to or the frequency of visitation. (*Precious II,* citing *In re T.H.* (2010) 190 Cal.App.4th 1119, 1122-1123, among other cases.) On remand, the juvenile court entered an order specifying that Father would be allowed one visit per month of two hours' duration.[2]

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[1] All further undesignated statutory references are to the Welfare and Institution Code.

[2] No party to this appeal has included a copy of the signed order in the record on appeal, nor does the minute order for any hearing set out the full terms of the order which the court signed. We take the terms of the order from the transcript of proceedings on April 13, 2016: ". . . father's visits are as indicated in the custody order [the exit order], supervised in a therapeutic setting only, paid for by the father and that shall be done a minimum of one time per month for no more than two hours . . . ." Later at the same hearing the court clarified that there would be one 2-hour visit per month.

Father now appeals from the April 22, 2016 exit order.

BACKGROUND

1. Father's First and Second Appeals

A short statement of the procedural and factual history of this matter, derived from the record in the prior appeals, is appropriate to provide context to the issues raised on this appeal.[3]

This matter came to the attention of the Los Angeles County Department of Child and Family Services (DCFS) in February 2013, after the Los Angeles County Sheriff's Department was called to Mother's home to investigate a report of domestic violence. DCFS filed a section 300 petition on February 11, 2013, alleging that Father physically abused his daughter Precious and that Mother and Father engaged in violent conduct in the presence of the child. On February 27, 2013, the juvenile court granted a temporary restraining order protecting Mother and Precious from Father; that order was subsequently reissued numerous times.

The section 300 petition was amended in March 2013, adding allegations that Father had mental and emotional problems, and that he

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[3] We grant the unopposed request of counsel for DCFS and take judicial notice of the minute order of April 22, 2016. (Evid. Code, §§ 452, subds. (c) & (d), 453, 459, subd. (a).) Pursuant to local rule 9, we augment the record with the clerks' and reporters' transcripts in the two prior appeals. (Ct. App., Second Dist., Local Rules of Ct., rule 9.)

We take judicial notice that counsel for appellant had asked the clerk of the superior court to locate any notice of hearing for the April 12, 2016 hearing, any report submitted for the hearing that date, and of the superior court Clerk's Certificate re: Missing Documents certifying that no such documents were located in the trial court's records. (Evid. Code, §§ 452, subds. (c) & (d), 453, 459, subd. (a).)

We also take judicial notice that the remittitur in the most recent appeal in this case was issued on April 4, 2016, and of its contents. (Evid. Code, § 452, subds. (c) & (d).)

suffered from stress and depression. The jurisdictional and dispositional hearings were ultimately held on February 24 through 26, 2014. The evidence at those hearings included the following: Precious testified that in the February 2013 incident Father had tried to suffocate Mother and to throw the child down the stairs outside their apartment. Father would also throw Precious on the couch and put his hand over her mouth. She also described other physical abuse by Father, and testified she was afraid of him.

The juvenile court found jurisdiction and ordered Precious removed from Father and placed in Mother's custody, sustaining the allegations that Father had physically abused the child and caused her unreasonable pain and suffering. The court also found that Father had engaged in a violent physical altercation with Mother. On Father's appeal, we affirmed the juvenile court's jurisdictional and dispositional orders. In so doing, we stated, "The record demonstrates that Mother and Father have had a contentious relationship. Mother's willingness to allow consistent (if any) visitation is unknown. Furthermore, Precious has expressed a desire not to visit Father." (*Precious II*.)

While the first appeal was pending the dependency case proceeded. In monitored spring 2014 visits with Father, Precious wore headphones and played on a tablet computer, ignoring Father. She informed a social worker that it would be a "game changer" if her father would apologize. In August 2014, DCFS recommended the court terminate jurisdiction with an order under section 362.4 (exit order)[4] giving Mother physical custody of the child

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[4] An order made pursuant to section 362.4 is a final judgment that remains in effect after juvenile court jurisdiction is terminated and can be modified by a family law court under specified circumstances. (See § 302, subd. (d).) It also ends the risk to the noncustodial parent of the involuntary

with monitored visits for Father. Social services were continued for six months and DCFS was ordered to set up conjoint therapy sessions for Precious and Father.

A final hearing was held on April 13, 2015, in the fourth month after issuance of our opinion on the first appeal. Father's counsel advised the court that while Father had checked in at court that morning, both counsel and the bailiff were unable to locate Father thereafter. During the hearing that day, Precious's counsel stated that Father had failed to visit her for many months and said that the child did not want visits with Father. Father's counsel advised the court that she had no directions from Father. The next day, the juvenile court signed and filed the final custody order, providing for Father to have visitation with Precious in a therapeutic setting, according to a schedule to be determined by Father and Mother. On Father's timely appeal, we reversed with directions to the juvenile court to specify the frequency and duration of Father's visits in the exit order, as any delegation of the power to determine those parameters was improper. (*Precious II*.)

2. Hearings and Orders Following Father's Second Appeal

Following the April 4, 2016 remittitur of the second appeal, the juvenile court held a hearing, on April 12, 2016. Only counsel for DCFS was present. The court relieved Father's prior counsel and appointed Lonisha Thompson as his counsel.[5] The matter was trailed one day as no other party was then present. On the following day, April 13, 2016, with counsel for DCFS, Mother

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termination of parental rights. (See Cal. Juvenile Dependency Practice (Cont.Ed.Bar (2016 ed.) § 6.20, pp. 501-502.)

[5] DCFS represents that the former and new counsel for Father were employed by the same law firm. As appellant does not contest this representation, we accept it as accurate.

and Father all present (but not Mother or Father personally), the juvenile court modified its exit order to state the frequency and duration for Father's visitation with Precious. It did so without comment or objection by any counsel. The court directed counsel for Mother to prepare a proposed order specifying the new visitation rulings, and continued the matter in order to allow Mother's counsel time to do so, also stating that the order would be effective once the written order was signed. On April 22, 2016, the juvenile court entered the final exit order, signing the order that Mother's counsel had by then provided. (No reporter's transcript for this hearing is in the record on appeal.)

With regard to the April 13 and April 22, 2016 hearings, the record does not indicate any formal notice was provided to Father, nor does the record indicate Father acquired notice of either hearing by any other means. The record also does not indicate any attempts were made to contact Father, or whether he could be located during this time period.

On June 22, 2016, Father filed a Notice of Appeal, designating the order from which his appeal is taken as "Right to Rehearing—April 13, 2016" and as "Right to Rehearing—April 22, 2016." We give the Notice of Appeal a liberal construction. (Cal. Rules of Court, rule 8.405(a)(3) [notices of appeal are to be liberally construed].)

CONTENTIONS

Father contends the exit order—made on April 13 and implemented on April 22, 2016—must be reversed because Father was not personally provided proper notice. Father also contends *he* did not waive the right to object to the contents of the order on remand when *his counsel* did not state any objection at the time the order was made at the April 13, 2016 hearing, or when it was signed in conjunction with the April 22, 2016 hearing. DCFS

contends Father's appeal must be dismissed because it was untimely filed, and that Father forfeited his right on appeal to challenge any defect in notice because his counsel did not object to lack of notice at the juvenile court hearings on April 13, 2016 or April 22, 2016. The parties also dispute whether the absence of any objection to the exit order by Father's counsel was the result of ineffective assistance of counsel.

DISCUSSION

I. Father's Appeal Was Timely

DCFS contends the appeal was untimely and must be dismissed. This contention lacks merit.

DCFS correctly states the general rule with respect to appeals in dependency matters: California Rules of Court, rule 8.406(a)(1) provides that an appeal in a dependency case "must be filed within 60 days after the rendition of the judgment or the making of the order being appealed." However, that is not the end of the analysis in this case, as "[i]n matters heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 60 days after the referee's order becomes final under rule 5.540(c)." (Cal. Rules of Court, rule 8.406(a)(2).) Further, an order made by a juvenile court referee is subject to a timing delay: "An order of a referee becomes final 10 calendar days after service of a copy of the order and findings under rule 5.538, if an application for rehearing has not been made within that time or if the judge of the juvenile court has not within the 10 days ordered a rehearing on the judge's own motion under rule 5.542." (Cal. Rules of Court, rule 5.540(c).)

In this case, our inspection of the records on the three appeals establishes that the bench officer who made the orders relevant to this appeal was serving as a referee. This is determined by the fact that Father sought

reconsideration of multiple orders which the referee who presided over the relevant proceedings in this case, Commissioner Marpet, had issued. The clerk's transcript in the first appeal (*Precious I*) contains Father's request for rehearing of orders made by Commissioner Marpet on multiple dates in 2013, and on additional dates in February 2014.[6] This procedure for rehearing of orders made by referees is pursuant to section 252.[7]

DCFS errs when it bases its argument that California Rules of Court, rules 8.406(a)(1) and 5.540(c) cannot apply on the circumstance that the bench officer who made the rulings at issue, Commissioner Marpet, is in fact a Commissioner of the Los Angeles Superior Court.[8] "'The Juvenile Court Law makes no provision for the use of *commissioners* in juvenile court.' [Citation.]" (*In re Courtney H.* (1995) 38 Cal.App.4th 1221, 1226; see also § 248; *In re Angelina E.* (2015) 233 Cal.App.4th 583, 587.) Instead, pursuant to Government Code section 71622, subdivision (b), the presiding judge of the superior court appoints "subordinate judicial officers" (viz., commissioners) to

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[6] We advised counsel by letter on May 5, 2017, to tell us by May 15, 2017, if either had any objection to our taking judicial notice of the records in the prior appeals in this case. Neither counsel expressed any objection by that date. We now take judicial notice of those records pursuant to Evidence Code sections 452, subdivisions (c) and (d) and 459, subdivision (a). (See also Ct. App., Second Dist., Local Rules of Ct., rule 9.)

[7] The record also establishes that Father's request for reconsideration of those referee-made rulings was denied on March 25, 2014.

[8] DCFS does not argue, and there is nothing in the record to support, any claim that Commissioner Marpet was acting as a temporary judge in this case. We therefore do not discuss the different timing rules that could be applicable, noting only that the rehearing process is not applicable when "a referee sits as a temporary judge, [because] his or her orders become final in the same manner as orders made by a judge" under that circumstance. (§ 250; see *In re Roderick U.* (1993) 14 Cal.App.4th 1543, 1551.)

serve as referees in juvenile court. Section 248, subdivision (a) empowers each referee to "hear those cases that are assigned to him or her by the presiding judge of the juvenile court . . . ." The fact that Mr. Marpet is a Commissioner of the Los Angeles Superior Court and is sitting in the Juvenile Court is confirmation of this practice. (See *In re Angelina E.*, *supra*, 233 Cal.App.4th at p. 588 [practice of Los Angeles Superior Court, absence of any contrary evidence, and Evid. Code, § 664 presumption that an official duty was regularly performed, support the holding that a commissioner is qualified to perform the functions of a referee of the juvenile court].)

Finally, we note that in the Los Angeles Superior Court, all commissioners are cross-designated as referees, and are subject to the same rehearing procedures as referees. (Super. Ct. L.A. County, Local Rules, rule 7.15; see *In re Angelina E.*, *supra*, 233 Cal.App.4th at p. 585.) Accordingly, because the bench officer in this case was sitting as a referee, but not as a temporary judge, we look to California Rules of Court, rules 8.406(a)(1) and 5.540(c) to determine the timeliness of the appeal in this case.

The present appeal was timely filed based on these rules. Pursuant to California Rules of Court, rule 5.540(c), "[a]n order of a referee becomes final 10 calendar days after service of a copy of the order . . . if an application for rehearing has not been made within that time . . . ." No such application was made with respect to the April 2016 exit order, and no written exit order was in existence prior to April 22, 2016. It was not until this date that the juvenile court actually signed the exit order which it had directed counsel to prepare on April 13. (See *In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337 [time to appeal from a § 362.4 order runs from the time a written order is issued for the purpose of being filed in a family law action].) The 10th day following this date was May 2, 2016; pursuant to rule 5.540(c), the 60-day

period in which to file an appeal commenced to run on this date. The 60th day thereafter was July 1, 2016. Thus, this appeal, filed June 22, 2016, is timely.

II. Father's Right to Challenge the Visitation Order

In reversing the trial court's exit order on Father's 2016 appeal, we directed the juvenile court "to specify the frequency and duration of Father's visits." (*Precious II*.)

Eight days after our remittitur was issued, the juvenile court had the matter on its calendar, continuing it one day as only counsel for DCFS was then present. While there is no indication in the record of how counsel for DCFS had notice of the hearing on April 12, 2016, or how counsel for each party obtained notice of the continued hearing date, April 13, 2016, all counsel (but neither Mother nor Father) were present on the latter date. On that date, the court made the exit order, referenced *ante*, that Father was to have one 2-hour visit per month, subject to certain conditions. The court then advised counsel that the order would not be effective until a written exit order was prepared, submitted and signed. This occurred during court proceedings on April 22, 2016.

Father does not contest any term of the order made, or suggest that a different order would have been more appropriate. Instead, he contests that the order was made at all without prior notice to him *personally*, arguing that the order must be reversed because (a) at least 10 days' notice of hearing was required by section 364 and (b) in any event he "was denied procedural due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment," which error he argues cannot under any circumstance be deemed to be harmless. DCFS concedes Father had a right to be present at the hearings, but contends Father's arguments are beside the point as Father

was represented at the hearings and his counsel made no objection to the court proceeding, thus waiving any defect in notice—and that Father may not raise this issue for the first time on appeal.

In *In re Kelley L.* (1998) 64 Cal.App.4th 1279, we held that due process mandates that the parent personally receive prior notice of, and an opportunity to be heard with respect to, exit orders notwithstanding that the relevant statute, section 386[9] does not by its terms mandate notice to the party when he or she is represented by counsel. (*Id*. at p. 1285; accord, *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 111-112, fn. 16 [notice-to-parent requirement bottomed on due process principles, citing, inter alia, *Mullane v. Central Hannover Bank & Trust Co.* (1950) 339 U.S. 306, 314.)

DCFS argues that our decision in *In re Kelley L.* is distinguishable, but that argument lacks persuasive force. Thus, we proceed to address Father's contention that due process principles compel reversal.

Father argues the failure to provide him with notice is "structural error" mandating reversal. In this regard, Father errs. *In re DeJohn B.* (2000) 84 Cal.App.4th 100 and other cases cited by Father in support of his claim have been superseded by our Supreme Court's decision in *In re*

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9 Section 386 provides: "No 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."

We find Father's arguments regarding the relevance of section 364 inapposite as this case is in the juvenile court after remand following a termination of jurisdiction; statutes addressing six-month review are no longer applicable.

James F. (2008) 42 Cal.4th 901. In that case, the court held that the criminal law concept of structural error is inapposite in the context of juvenile dependency matters.[10] Instead, harmless error analysis is to be applied. (*Id.* at pp. 914-915.)

Father bears the burden in arguing why the failure to give notice to him in addition to the notice given to his lawyer resulted in prejudice to him mandating reversal. This he has not done. The only indication that he has given is that because he did not personally receive notice, he was precluded from now arguing to the juvenile court that various persons had committed perjury in connection with a prior criminal case against him, and that once the juvenile court had determined that they had done so, it would have dismissed the juvenile court petition against him. As DCFS points out, those jurisdictional findings of this juvenile court have long been final; indeed, this court affirmed the findings which Father seeks to challenge on Father's first appeal. (*Precious I.*) Accordingly, Father presents nothing from which this court can conclude there is a reasonable probability that he would prevail on

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[10] The *In re James F.* court's reasoning was described in *In re A.D.* (2011) 196 Cal.App.4th 1319 as follows: "The *James F.* court pointed out significant differences between juvenile dependency proceedings and criminal proceedings. 'In a criminal prosecution, the contested issues normally involve historical facts (what precisely occurred, and where and when), whereas in a dependency proceeding the issues normally involve evaluations of the parents' present willingness and ability to provide appropriate care for the child and the existence and suitability of alternative placements. Finally, the ultimate consideration in a dependency proceeding is the welfare of the child [citations], a factor having no clear analogy in a criminal proceeding.' (*In re James F., supra,* 42 Cal.4th at p. 915, italics omitted.)" (*In re A.D.*, *supra*, 196 Cal.App.4th at p. 1327.)

that claim—or that he would have achieved any more favorable result with respect to the visitation order most recently entered.[11]

III. Competence of Father's Counsel

Father contends the failure of his counsel to request a continuance constituted ineffective assistance so as preclude a forfeiture finding. He errs.

The burden is on Father to establish that his counsel's performance was defective. (*People v. Pope* (1979) 23 Cal.3d 412, 424.) Father must also establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense or claim. (*Id*. at p. 425.) For example, to establish that the failure to file a section 388 petition (for revision to a previously entered order) falls below an objective standard of reasonableness and resulted in prejudice, the client must establish that had a petition to modify an order (§ 388) been filed, it is reasonably probable that it would have been granted. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.)

In this case, there is no support for either finding. Father makes an unsupported claim that counsel was not authorized to represent him and that Father did not consent to the representation. These are claims outside of the present record, particularly so given the circumstances of Father's prior representation in this matter by other counsel from the same law firm and the court's appointment of different counsel from that firm to represent Father in April 2016. Because Father's claims are not established on this record, the direct challenge which he makes lacks merit. (Cf. *People v. Pope*, *supra*, 23 Cal.3d 412, 416, overruled on another ground in *People v. Berryman* (6 Cal.4th 1348, 1081, fn. 10.) Indeed, reviewing courts will

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[11] By this ruling we do not foreclose Father from applying for a modification of the visitation order on a proper application. This is specifically permitted by section 362.4.

overturn rulings on the grounds of ineffective assistance of counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his or her act or omission. (*People v. Fossleman* (1983) 33 Cal.3d 572, 581.)

In this case, it is quite plausible that Father's counsel viewed the option of later seeking to revise the terms of the order as expressly permitted by section 362.4 to be the strategically preferable course. We need not speculate; Father has presented no argument that tends to support his generalized claim that it is reasonably probable he would have achieved a different result had he had prior personal notice of the April 2016 proceedings—particularly so as the only claim he asserts relates to the prior criminal proceeding which formed the basis for the juvenile court's prior determination adverse to him which we previously upheld.

DISPOSITION

The April 22, 2016 exit order establishing rules for visitation is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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