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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re EMILY E., a Person Coming Under the Juvenile Court Law.	B240928 (Los Angeles County Super. Ct. No. CK82245)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RYAN E., Defendant and Appellant.	

APPEAL from an order and judgment of the Superior Court of Los Angeles County. Donna Levin, Juvenile Court Referee. Affirmed.

Terrence M. Chucas, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, James M. Owens, Assistant County Counsel, Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

Appellant, Ryan E., appeals from a disposition order and the order terminating his parental rights. Appellant was incarcerated when this dependency action was initiated and remained incarcerated through the time that his parental rights were terminated. He contends that the dependency court and the Department of Children and Family Services (DCFS) committed numerous errors during the course of the proceedings, including by failing to provide proper notice of hearings. We agree with appellant that both the court and DCFS did a shoddy job of meeting their notice obligations and otherwise protecting appellant's rights. Nevertheless, since appellant is unable to show that anything more than harmless error occurred, we affirm.

FACTS

Emily E. was born in August 2007. She came to the attention of the Department of Children and Family Services (DCFS) on April 18, 2010, based on a referral that she and her half brother were victims of general neglect by Mother, Jennifer B. It was reported that Mother had a history of leaving her children with their maternal great grandmother, who had financial and physical difficulties caring for the children. The great grandmother stated that Mother would leave the children with her for periods of several weeks without making any contact. Family members stated that Mother smoked marijuana and could be using other drugs.

Mother told the DCFS social worker that she was never married to either child's father, and that she was not sure who the father of Emily was. Although Ryan E. was listed on Emily's birth certificate as the father, Mother thought that the father could have been a different individual. Mother stated that Ryan was a violent person and was currently incarcerated. He wrote letters to Emily from prison, but Mother was afraid of him and scared of what he would do once released. At the May 2010 detention hearing, the dependency court found Ryan to be an "alleged father" of Emily.

Ryan had been incarcerated in Tallahatchie County Correctional Facility in Mississippi since April 2008. He was convicted in Los Angeles County for assault with a deadly weapon. Due to overcrowding, he was transferred to the facility in Mississippi. In July 2010, Ryan reported that he was due to be released in March 2012. In a telephone

interview, he admitted to the social worker that he was unable to consistently care for Emily due to his incarceration, but stated that prior to being imprisoned he lived with Mother and Emily and "kicked in" half of the living expenses. Mother disputed this claim, stating that Ryan was never around to provide for Emily.

In conjunction with the July 2010 jurisdiction/disposition report, Ryan's Statement Regarding Parentage Judicial Council form (JV-505) was submitted to the dependency court. On the form, Ryan checked the box acknowledging that he knew he could have an attorney, but left blank the boxes stating "I want the judge to appoint an attorney for me" and "I give up my right to an attorney." He stated he believed that Emily was his child and asked that the court find him the presumed father. He also consented to taking a paternity test.

At the jurisdiction/disposition hearing, it was brought to the dependency court's attention that Ryan had submitted the JV-505 form and consented to a paternity test. In response, the court stated: "We can't go to Mississippi. He is still an alleged father. He continues to be an alleged father." The court continued the jurisdiction/disposition hearing to September 2, 2010, and ordered the parents back.

It does not appear that Ryan received notice of the continued jurisdiction/ disposition hearing. At the hearing, the dependency court found numerous counts in Emily's section 300, subdivisions (b) and (g), petition true.[1] With respect to Ryan, the court sustained two counts that Ryan had failed to provide the necessities of life to Emily. The court stated that it would not order reunification services for Ryan because he was an alleged father, had never come to court, and was currently incarcerated in Mississippi "for a very long time." A copy of the September 2, 2010, minute order was mailed to Ryan, but at the wrong address—the address used was that of the father of Emily's younger sibling. There is no indication that Ryan actually received the order.

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1 Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

In April 2011, a section 366.26 hearing was set for August 2011. Notice of the hearing was sent to Ryan by certified mail, return receipt requested. However, the notice was addressed to "Tutwiler, Missouri 38963" rather than "Tutwiler, Mississippi 38963." The receipt was not signed by Ryan, but instead by an unknown person.

At the August 2011 section 366.26 hearing, counsel for DCFS pointed out that Emily's birth certificate listed Ryan as the father. Although the birth certificate had previously been presented to the court, the court stated that it was not aware that Ryan's name was on the certificate. The court found that Ryan is the presumed father of Emily. The hearing was ordered continued to October 2011.

Notice of the continued hearing was sent to Ryan at the same "Tutwiler, Missouri 38963" address. The hearing was continued again to November 2011, but it appears that no notice was sent to Ryan.

The section 366.26 hearing was continued again to April 2012, and notice was sent to Ryan. But the notice was again mailed to the "Tutwiler, Missouri 38963" address.

At the April 2012 hearing, the court found by clear and convincing evidence that Emily was adoptable, and that no exception to adoption applied. The court then terminated Ryan's and Mother's parental rights. A copy of the minute order was mailed to Ryan at a "Tutwiler, MO 38963" address.

A few weeks after notice of the termination of parental rights was sent, Ryan wrote to the dependency court. In his letter Ryan stated that he had been incarcerated since September 2011 in Imperial, California, not Mississippi. Ryan wrote that he would be paroled in July 2012, that he wished to be at all future hearings, and that he opposed adoption. Ryan also requested legal representation.

DISCUSSION

A. Disposition hearing

Ryan first appeals from the order resulting from the September 2, 2010, disposition hearing. He contends that the time to appeal this order did not run because the matter was heard by a dependency court referee, and no copy of the order was ever served on Ryan. Respondent does not argue that the appeal was untimely.

We find that Ryan may appeal from the order because no proper service occurred. Pursuant to California Rules of Court, rule 8.406(a)(2), a referee's order must be appealed within 60 days after it becomes final. California Rules of Court, rule 5.540 (c) provides that a referee's order becomes final 10 calendar days after service of the order pursuant to California Rules of Court, rule 5.538. In turn California Rules of Court, rule 5.538 (b)(3) provides that a referee's findings and order, along with a written explanation of the right to seek review with a juvenile court judge, must be served on the parent by mail at the parent's "last known address." Because the September 2, 2010, order was not served on Ryan at his last known address (but was instead mailed to the address of an unrelated individual), we find that the appeal from the order is timely. (See *In re Miguel E.* (2004) 120 Cal.App.4th 521, 538.)

Turning to the merits, Ryan argues that the trial court wrongly found that he was an alleged father in connection with the disposition hearing, rather than a presumed father. A presumed father is entitled to appointed counsel and generally is entitled to receive reunification services, while an alleged father usually is entitled to neither. (*In re J.O.* (2009) 178 Cal.App.4th 139, 147.) Based on the fact that Ryan's name was listed on Emily's birth certificate, had the dependency court examined the birth certificate and Ryan's JV-505 form at the time of the disposition hearing, it is probable that the court would have found him to be a presumed father. (See *In re D.A.* (2012) 204 Cal.App.4th 811, 826-827.)

If Ryan was found to be the presumed father, the dependency court would have had to appoint counsel to represent him. (See § 317; Cal. Rules of Court, rule 5.534(g), (h).) The violation of a parent's statutory right to counsel in a dependency proceeding is reviewed to determine whether it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; *In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1195; *In re David H.* (2008) 165 Cal.App.4th 1626, 1634, fn. 9.) To determine whether a due process right to counsel existed we examine whether the presence of counsel would have

made a "determinative difference" in the outcome of the proceeding. (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 251; *In re Ronald R.*, at p. 1196.)

We find that reversal is not compelled by Ryan's lack of counsel at the disposition hearing. Had Ryan been found to be a presumed father and had counsel been appointed, it is not reasonably probable that Ryan would have obtained a more favorable result or that the presence of counsel would have made a determinative difference. Ryan could not have reasonably expected to receive reunification services due to the requirements of section 361.5, subdivision (e).[2] As noted by the dependency court in denying reunification services, Ryan was incarcerated in Mississippi "for a very long time." Ryan was convicted of assault with a deadly weapon and incarcerated in April 2008, when Emily was around seven months old. At the time of the disposition hearing, Ryan expected to be incarcerated until March 2012, well past the maximum 12-month services period applicable to parents of children under three years old when they enter foster care. (See § 361.5, subd. (a)(1)(B).) "The Legislature's goals are clear: 'We have long recognized that providing children expeditious resolutions is a core concern of the entire dependency scheme.' [Citation.] 'The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by

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[2] Section 361.5, subdivision (e)(1) provides: "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors. In determining the content of reasonable services, the court shall consider the particular barriers to an incarcerated or otherwise institutionalized parent's access to those court-mandated services and ability to maintain contact with his or her child, and shall document this information in the child's case plan. Reunification services are subject to the applicable time limitations imposed in subdivision (a)."

someone, at the time the child needs it, not when the parent is ready to give it.'" (*A.H. v. Superior Court* (2010) 182 Cal.App.4th 1050, 1061; see also *In re Jesusa V.* (2004) 32 Cal.4th 588, 601 [incarceration "made successful reunification all but impossible"]; *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1123 [father's incarceration for period longer than potential services period precluded any realistic possibility that the court could find by clear and convincing evidence that reunification was in the best interests of the child].)

Nor would the presence of counsel have had any effect on the court's jurisdictional findings. Ryan argues that the dependency court became involved in Emily's life not because of Ryan's actions, but because of Mother's. But, "'a jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. [Citation.] This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent. [Citation.]'" (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.) Moreover, as Ryan was incarcerated for a long period, he was unable to provide the necessities of life to Emily, and jurisdiction was properly exercised. (*Ibid.*; § 300, subds. (b), (g).) Therefore, reversal of the disposition order is not warranted.

B. <u>Permanency Planning Hearing</u>

1. Failure to transport to hearing

Penal Code section 2625, subdivision (d) provides that no proceeding may be held under section 366.26 "without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden" stating that the prisoner does not intend to appear at the hearing. Absent a waiver, Penal Code section 2625, subdivision (d) requires the presence of both the prisoner and his counsel. (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 622.) Ryan contends that his due process and statutory rights were violated because the court conducted the section 366.26 hearing without the presence of Ryan or an attorney representing him, and without receiving a signed waiver.

A harmless error test applies in the case of a Penal Code section 2625, subdivision (d) violation. The error is reversible only if it is reasonably probable the result would have been more favorable to the appellant absent the error. (*In re Jesusa V.*, *supra*, 32 Cal. 4th at p. 625.) In order to establish a reversible due process violation, the appellant must show that the error made a "determinative difference" in the outcome of the proceeding, rendering the proceeding fundamentally unfair. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 772.)

Ryan is unable to show that the lack of his presence or his lack of counsel at the section 366.26 hearing caused an unfavorable result. The issue at the hearing was whether Emily was likely to be adopted. "If the court determines, . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).) The trial court found that no exceptions to adoption applied, and Ryan does not contend otherwise on appeal. Ryan does not point to any evidence before the court that could have impacted its decision as to whether Emily was likely to be adopted. Any error was harmless. "Accordingly, one can say with confidence that '[n]o other result was possible' even if he had been present." (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 626.)

2. Faulty notice

Section 294, subdivision (a)(2) requires that notice of a section 366.26 hearing be given to fathers, presumed and alleged. Proper methods of service include personal service and certified mail, return receipt requested. (§ 294, subd. (f).) When service is by certified mail, return receipt requested, the return receipt must be signed by the father. (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 387; *In re J.H.* (2007) 158 Cal.App.4th 174, 183-184.) When there is no attempt to serve the father with notice of the hearing, the error is reversible per se; when there is error with the notice the question is whether the error is harmless beyond a reasonable doubt. (*In re Marcos G.*, at p. 387; *In re J.H.*, at p. 183.)

Here, Ryan was served with notice of the section 366.26 hearing by certified mail, return receipt requested. Ryan argues that service was not proper because the address

used stated "Tutwiler, Missouri 38963" rather than "Tutwiler, Mississippi 38963." Furthermore, the return receipt was not signed by Ryan, but instead by an unknown individual. Ryan also complains that notices of continuances were sent to the wrong address, and that one notice of continuance (for the November 2011 hearing) was not served at all.[3]

We find that any error was harmless beyond a reasonable doubt. First, there is no indication that Ryan did not receive notice of the section 366.26 hearing. Although notice of the initial section 366.26 hearing used an address that incorrectly listed the state as "Missouri," the town and zip code were correct, as was the rest of the address information.[4] It is unlikely that Ryan did not receive notice, and, at a minimum, there certainly was an attempt to give notice of the hearing. Only lack of an *attempt* at notice has been found to constitute a structural defect. (See *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116.) Furthermore, aside from the incorrect reference to "Missouri," notices of continuances that were sent complied with section 294, subdivision (d), since they were sent by first-class mail to Ryan's last known address. The only continued hearing for which notice may not have been sent was one at which the court "was not ready to go forward," and which affected Ryan in no matter whatsoever.

Moreover, Ryan does not explain how the result of the section 366.26 hearing would have changed if service of the notice had perfectly complied with section 294. As explained above, Ryan does not even attempt to argue that Emily may not have been found adoptable at the hearing, or that his parental rights may not have been terminated. As such, since any error was harmless beyond a reasonable doubt, there is no basis for reversal.

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3 A notice of continuance need not comply with the requirements of section 294, subdivision (f), but instead may be sent "by first-class mail to any last known address." (§ 294, subd. (d).)

4 Tracking shows that the notice was delivered to Tutwiler, Mississippi.

DISPOSITION

The disposition order and the judgment (order terminating parental rights) are affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.