Filed 11/2/18 In re John O. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JOHN O., a Person Coming Under the Juvenile Court Law.	B290207 (Los Angeles County Super. Ct. No. CK89924)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GRANT O., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Steven E. Ipson, Juvenile Court Referee. Affirmed.

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

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, and David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

Grant O. (Father) appeals from an order terminating his parental rights as the presumed father of John O. at a hearing pursuant to Welfare and Institutions Code section 366.26.[1] At that hearing, the court explicitly found by clear and convincing evidence that placing John in Father's custody would be detrimental to John. Father contends that, because the court made its detriment finding at the hearing terminating parental rights, rather than earlier, the proceedings below did not comply with due process.[2] Although Father forfeited this argument by failing to raise any due process issues below, we exercise our discretion to address it.

We conclude that the juvenile court proceedings satisfied due process because (1) the detriment finding at the section 366.26 hearing was made by the requisite standard of clear and convincing evidence, and (2) earlier proceedings afforded Father sufficient notice that his parental rights were in jeopardy. We therefore affirm.

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

[2] Father's briefs are unclear as to what issues he is raising. At oral argument, however, Father's counsel confirmed that Father's only contention on appeal is the due process issue identified above.

FACTUAL AND PROCEDURAL SUMMARY

A. *Father's Involvement in John's Life*

Father is the presumed father of nine-year-old John O. When John was nine months old, his mother, Elizabeth J. (Mother), obtained a domestic violence restraining order against Father covering the period from April 22, 2010 to April 23, 2013. The restraining order granted Mother sole legal and physical custody of John, and afforded Father no visitation rights, except "at [Mother's] discretion."

After Mother obtained the restraining order, Father moved to Utah because he "had to get away." On one occasion, Father declined Mother's request that Father care for John for a week, due to the distance Father would need to travel. Father last saw John in approximately May 2010, 18 months before DCFS filed the initial section 300 petition in the underlying dependency proceedings.

B. *Father's Criminal History Predating Dependency Proceedings Regarding John*

Father has a criminal record involving domestic violence and sexual offenses against minors that predates the dependency proceedings. Specifically, a month before Mother obtained the April 2010 restraining order against Father, he was charged with violating Penal Code section 273.5, subdivision (a) (infliction of corporal injury on a spouse or cohabitee). On October 27, 2011, Father was arrested for domestic violence with his new girlfriend, resulting in misdemeanor charges. The record reflects that Father was arrested in 2003 for committing lewd and lascivious acts with a child under 14 years old, and in 2011, for oral copulation with a person under 18 years old.

Father's criminal history contains additional child molestation charges and convictions that postdate the start of the

dependency proceedings. These are discussed below in the context of those proceedings.

C. *Overview of Father's Role in Dependency Proceedings Regarding John*

On November 11, 2011, the Department of Children and Family Services (DCFS) filed a section 300 petition on John's behalf alleging that Mother's substance abuse and mental health issues posed a danger to John, then two years old, and his older half-sister, Hailey C. This commenced dependency proceedings that continued for over six and one-half years, until the court terminated Father and Mother's parental rights in the order from which Father now appeals. The proceedings involved four petitions,[3] none of which alleged conduct by Father. Instead, Mother, John's sole custodial parent, was the focus of the petitions and the proceedings. Nevertheless, as we discuss in more detail below, during the course of the proceedings, the court asked DCFS to investigate Father, made several findings regarding Father, and issued several orders affecting Father. (See Factual Procedural Summary parts C.2, C.3,

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[3] The court sustained the original section 300 petition in January 2012. On May 22, 2012, DCFS filed a section 360, subdivision (c) petition that included allegations that John had witnessed domestic violence between Mother and her boyfriend, and that Mother failed to adequately supervise John by allowing him to wander public streets unattended. On June 22, 2012, DCFS filed an amended section 360, subdivision (c) petition, adding that Mother had failed to participate in court-ordered substance abuse programs. The court sustained this amended petition on August 1, 2012 as to all but the domestic violence count. DCFS filed a section 387 petition on May 6, 2015, alleging that services ordered for Mother had proven ineffective in addressing the issues of substance abuse underlying the original petition. The court sustained that petition on June 1, 2015.

C.5 & C.7, *post*.) DCFS investigated Father and updated the court on Father's whereabouts and criminal activities.

Father received proper notice of all petitions. He does not contest the court's findings that he also received the level of notice required by law regarding hearings in these proceedings. Although Father never personally appeared at any hearing, his appointed counsel was present at all hearings from November 2011 through February 2015, as well as from August 2017 through the section 366.26 hearing in April 2018.[4] Father does not suggest that such appointed counsel appearing on his behalf did not receive copies of the DCFS reports filed with and considered by the court in connection with each hearing. These reports focused on Mother, but also discussed Father, his domestic violence issues, and his criminal history.

Throughout the course of the proceedings, the court at times released John to his Mother, at times placed him in foster care, and at times placed him with maternal relatives. The court never ordered John be placed in Father's custody, but ordered visitation rights for Father on more than one occasion. Nothing in the record suggests that at any point after 2010 Father had or attempted to have any contact with John.

Dependency proceedings regarding John culminated in a section 366.26 hearing on April 9, 2018, at which the court terminated both Mother's and Father's parental rights over John.

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[4] All but five of the minute orders from these dependency hearings indicate that appointed counsel appeared on Father's behalf without reservation. Five orders from hearings in 2017-2018 indicate that appointed counsel "specially appear[ed]" for Father or that counsel appeared "as a friend of the Court for [Father]." These limited appearances seem to concern the difficulties appointed counsel encountered meeting with Father after he was transferred from state prison to San Bernardino County jail.

Mother and Father each filed a notice of appeal. We dismiss Mother's appeal in a concurrently-filed order, having received a no-merit brief from Mother's counsel pursuant to *In re Phoenix H.* (2009) 47 Cal.4th 835. Father is thus the sole appellant. The majority of the lengthy procedural history in this matter, however, pertains solely to Mother. We therefore do not present a full procedural history, but rather summarize below the aspects of the proceedings and DCFS's investigation that most directly involve Father.

1. *Initial DCFS contact with Father*

A DCFS social worker spoke with Father by telephone on November 8, 2011, and informed him of the section 300 petition regarding John and the upcoming hearing. Father expressed interest in the proceedings, indicated he would like to have custody of John, and expressed concern for the well-being of his son.

2. *Findings regarding Father at initial detention hearing*

Father did not participate in the November 14, 2011 detention hearing, though appointed counsel appeared on his behalf. The court found that Father was John's presumed father. The court considered a DCFS detention report containing details about Father's history of domestic violence. Based on this information, the court found that "[s]ubstantial danger exist[ed] to the physical or emotional health of [John]" if released to Father. The court ordered family maintenance services for Father, including referrals to domestic violence and parenting education, and permitted Father visits with John. The court ordered DCFS to interview Father "regarding the criminal allegations [of domestic violence] made by Mother." (Capitalization omitted.)

3. *Jurisdictional hearing in 2012 and related DCFS contact with Father*

Father's next contact with DCFS occurred on January 9, 2012, when Father called DCFS after receiving notice of the jurisdictional hearing. Father provided updated details about the October 2011 misdemeanor domestic violence charges against him in Utah involving his current girlfriend. He further reported on his efforts to enroll in a domestic violence program, although he could not remember the name of the program. He expressed a desire to have John stay with him in Utah, and noted his sister also lived in Utah and was "good with kids." He stated he would not be able to attend the hearing due to distance, but would like legal representation.

Consistent with this, Father did not attend the jurisdictional hearing on January 11, 2012, but appointed counsel representing him appeared on his behalf. At the hearing, the court admitted into evidence various documents containing additional information about Father, including a copy of Mother's April 2010 restraining order against Father and a report summarizing statements by Mother regarding Father. Mother stated that, during her time with Father, he drank liquor excessively, choked her, punched holes in the walls, and slashed her tires. She further expressed concerns "about incest and sex offenses involving [Father] and his family members." The court ordered family maintenance services for both parents, and DCFS executed a case plan for Father that included participation in a domestic violence program "as ordered by [the] criminal court in Utah" and "compliance [with the] restraining order." (Capitalization omitted.)

A DCFS case worker next contacted Father via telephone on or about February 7, 2012. Father confirmed he was in a domestic violence program but could not provide any additional details or corroborating paperwork. In a last minute information form filed

the next day, DCFS informed the court about this conversation and noted an intention to file an amended petition including allegations against Father, based on a "pattern of violence [by Father] that is concerning." DCFS never filed this amended petition.

4. *Father is charged with child molestation and incarcerated*

On October 25, 2013, police arrested Father in California on charges of oral copulation with a person under 18 years of age (Pen. Code, § 288). Father pleaded guilty to other charges, resulting in the Penal Code section 288 charges being dismissed, and a seven-year sentence in state prison. According to a criminal history transcript[5] for Father contained in the record, these other charges were "att[empt] to commit crime [Penal Code section] 288.7[, subd. (a)]—sodomy victim under 10[years]." (Capitalization omitted.) The record suggests Father has been incarcerated or in jail without interruption since this October 2013 arrest.

5. *December 1, 2016 finding regarding Father*

In a December 1, 2016 order terminating Mother's reunification services, the court found that "[r]eturn of [John] to either of the parents . . . would likely result in either severe emotional or severe physical harm." This is the first detriment finding expressly referencing Father since the court's November 11, 2011 detention finding.

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[5] This information is according to the California Department of Justice Bureau of Criminal Information's criminal history transcript (capitalization omitted) which was attached to DCFS's social worker M.W.'s affidavit supporting DCFS's application for removal. Father cites this document in his opening brief in connection with the dismissed 2013 oral copulation charge. However, neither party raises the specific nature of the offense to which Father pleaded in 2013.

6. *Father's efforts to attend the section 366.26 hearing*

After terminating reunification services and setting a section 366.26 hearing, the court encountered complications properly noticing Father, and continued the hearing several times as a result. Once Father received such notice, he indicated he wanted to be present for the hearing. The hearing was then continued several more times as the court worked with prison and jail officials to effectuate Father's transport to juvenile court. Father had been transferred from state prison to San Bernardino County jail in connection with charges that he again had violated Penal Code section 288, subdivision (a) (lewd and lascivious conduct with a child under the age of 14 years). Jail officials refused to transport Father to the hearing while he awaited criminal trial on these charges.

In the midst of these efforts, in December 2017, Father wrote to DCFS requesting a DNA test to confirm paternity over John and reiterating his desire to be present for the section 366.26 hearing.

The court and DCFS's efforts to secure Father's presence at the hearing, which spanned over five months, were ultimately unsuccessful.

7. *The section 366.26 hearing and termination of Father's parental rights*

The section 366.26 hearing took place on April 9, 2018. Although Father was not present, appointed counsel appeared on his behalf. The court assured Father had the opportunity to confer with his counsel prior to the hearing.

At the hearing, DCFS recommended the court terminate Mother's and Father's parental rights over John to facilitate adoption with his current caregiver. John had been living in Arizona with his maternal aunt and half-sister Hailey since

January 2017 and was "thriving." The aunt was committed to adopting both Hailey[6] and John.

Father's counsel requested a continuance based on Father not being present. Counsel could not provide an offer of proof as to what Father's testimony would be, were he to personally appear, however, and further noted that he had no "basis to state [Father] could meet any of the exceptions to adoption" under section 366.26. The court denied the continuance.

The court heard argument from all parties, and Father's counsel objected to the termination of Father's parental rights on the bases that: (1) The adoption home study was not complete; (2) Father was not present; and (3) DCFS had not assessed John's paternal aunt for placement. The court rejected Father's arguments and found that no exception to adoption existed. It further found by clear and convincing evidence that John was adoptable and that it "would be detrimental for the minor to [be] returned to the parents." Father's counsel did not object to or otherwise contest the finding of detriment, nor did his counsel request a hearing on the issue. The court ordered Father's and Mother's parental rights terminated.

On May 6, 2108, Father filed a notice of appeal.

DISCUSSION

A. *Forfeiture, Waiver, and the Completeness of the Record on Appeal*

DCFS argues that we need not consider Father's arguments because: (1) Father did not supply transcripts for all hearings and, thus, failed to create an adequate record on appeal; (2) Father's counsel's statements at the section 366.26 hearing waived any

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[6] The court had previously terminated Mother's parental rights over Hailey.

arguments challenging the termination of Father's parental rights; and (3) Father forfeited his due process arguments by failing to raise them below.

We agree that it is an appellant's responsibility to provide a record that is adequate for review of its claims, and that a failure to do so allows this court to presume the missing portion of the record supports a contested finding. (*In re L. B.* (2003) 110 Cal.App.4th 1420, 1424; see *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 ["Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant]."].) But this does not warrant summary dismissal of Father's claims. As discussed below, the court's detriment finding at the section 366.26 hearing—a transcript of which is included in the record before us—is sufficient to satisfy due process. Thus, the record before us is sufficient to "assess [the claimed] error." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296.)

To support its waiver argument, DCFS notes that Father's counsel stated at the section 366.26 hearing that he did not see "a basis to state [Father] could meet any of the exceptions to adoption." But the due process violation of which Father now complains is not an exception to adoption under section 366.26. Thus, Father's counsel's statements, standing alone, did not relinquish Father's right to raise such complaints.

With respect to forfeiture, we agree with DCFS that the due process nature of these arguments, standing alone, does not prevent forfeiture. Where a litigant failed to raise a procedural argument when he had the opportunity, he generally forfeits that argument (*In re S.B.* (2004) 32 Cal.4th 1287, 1293), even if such forfeiture affects important or constitutional rights. (See *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151.) The cases Father cites are not to the contrary. (See *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 993 [appellant did not forfeit ICWA argument by failing to

raise below, as he had no opportunity to do so, and instead raised at earliest possible time].)

In any case, for the reasons discussed below, Father's due process claims fail. (See *In re P.A.* (2007) 155 Cal.App.4th 1197, 1210 ["an appellate court *may* review an error despite a party's failure to raise it below if due process rights are involved"].)

B. *The Proceedings Below Satisfied Due Process*

Father's due process arguments present purely legal issues regarding the scope of due process rights in the context of California dependency proceedings. Accordingly, we review these arguments de novo. (See *In re J.H.* (2007) 158 Cal.App.4th 174, 183 [constitutional questions reviewed de novo]; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 ["To adopt a reading of decisional law . . . entails the resolution of a pure question of law" and is scrutinized de novo.].)

1. *The court's detriment finding at the section 366.26 hearing satisfies the due process requirements in Santosky*

The United States Supreme Court has held that, in dependency proceedings seeking to sever parental ties, due process requires the state establish "parental unfitness" by at least "clear and convincing evidence." (*Santosky v. Kramer* (1982) 455 U.S. 745, 747-748, 760 (*Santosky*).) Although California law does not require a court to make a finding of parental unfitness during the section 366.26 hearing at which the court severs parental ties, (see § 366.26), in order to even reach that stage, a court must have made one or more such findings of parental unfitness by clear and convincing evidence earlier in the proceedings. On this basis, the California Supreme Court concluded that California dependency law complies with *Santosky*. (See *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250, 253 (*Cynthia D.*).)

Father suggests that the court's detriment finding against him does not comply with *Santosky* and *Cynthia D.* because the court made it at—rather than before—the section 366.26 hearing. But neither case requires that a finding of detriment be made at any particular point prior to the termination of parental rights—just that it be made before termination and by clear and convincing evidence. (See *In re D.H.* (2017) 14 Cal.App.5th 719, 730-731 ["[A] juvenile court must make a detriment finding against a presumed father before terminating his rights. The finding may be made at the dispositional stage or during a subsequent review period, but it must occur prior to termination."].)

Nor does Father's argument that a court may not make the requisite detriment finding at the section 366.26 hearing make sense in the context of the due process concerns animating *Santosky*. The New York law the Supreme Court reviewed in that case allowed the state to sever parental ties where the "fair preponderance" of the evidence supported parental unfitness. (*Santosky*, *supra*, 455 U.S. at p. 761.) The Supreme Court rejected this level of proof as insufficiently certain to justify termination of parental rights, given the balance of interests at stake, as well as "the risk of erroneous deprivation of private interests" under the current standard and "the likelihood that a higher evidentiary standard would reduce that risk." (*Id.* at pp. 764-766.) The goal of this analysis was identifying the appropriate standard of proof for a parental unfitness finding—not deciding *when* that finding should be made. (*Ibid.*; see *Cynthia D.*, *supra*, 5 Cal.4th at pp. 251-253 [describing *Santosky* analysis as requiring an "elevated standard of proof"].) The balance of rights and risk of erroneous outcomes animating *Santosky* does not change depending on whether a court applies the standard 10 minutes before the termination of parental rights or some months before. Either way, if the court makes its

finding before termination and with the requisite level of certainty, the finding addresses the Supreme Court's due process concerns.

Such is the case here. Specifically, at the section 366.26 hearing, the court expressly found by clear and convincing evidence that placing John in Father's custody would be detrimental to the child. This is exactly what *Santosky* requires to satisfy due process.[7]

The cases Father cites to suggest otherwise all involve proceedings in which the court never made *any* finding of parental unfitness, and are thus distinguishable. (See *In re Gladys L.* (2006) 141 Cal.App.4th 845, 848 (*Gladys L.*) ["DCFS never alleged that [the father] was unfit and the trial court never made that finding"]; *In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1211-1212 [no judicial finding of parental unfitness made against the father, and "[t]he record strongly suggest[ed that] the *only* reason [the father] did not obtain custody . . . was his inability to obtain suitable housing for financial reasons"]; *In re Frank R.* (2011) 192 Cal.App.4th 532, 538 (*Frank R.*) ["the juvenile court failed to meet the *Santosky* requirements . . . because the court never made a finding the father was unfit"]; see also *In re T.G.* (2013) 215 Cal.App.4th 1, 20 ["*Gladys L.*, *Frank R.*, and[*In re*] *Z.K.* [(2011) 201 Cal.App.4th 51] teach that a court may not terminate a nonoffending, noncustodial mother's or presumed father's parental rights without finding, by clear and convincing evidence, that awarding custody to the parent would be detrimental."].)

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[7] Given that the court's express detriment finding regarding Father, we need not reach DCFS's arguments that the court's orders reflect implied detriment findings, and that Father forfeited his ability to challenge any such findings by failing to raise them at or before the April 2018 hearing.

2. *The proceedings below afforded Father sufficient notice that his parental rights could be terminated*

Father further suggests that the manner in which the court made its detriment finding denied him sufficient notice of the allegations underlying the detriment finding. We disagree. While it would have been better practice for DCFS to more directly and formally identify its concerns regarding Father before reaching the section 366.26 hearing phase, we conclude the proceedings afforded Father adequate "notice of specific charges and an opportunity to respond" to them in a meaningful manner. (See *Gladys L.*, *supra*, 141 Cal.App.4th at p. 848.)

Father was not in the dark about the dependency proceedings or their potential to affect his rights. Through his contact with DCFS, he was aware of DCFS's concerns about his domestic violence and criminal background. Father does not contest that his appointed counsel received copies of the DCFS reports filed with the court, which also describe DCFS's concerns. The court found legally sufficient the notice Father received regarding the section 300 petition and all associated proceedings. Father does not challenge those facts, nor do we see a basis for him to do so. Each of the petitions contained a warning addressed "to parent" that "[y]our parental rights may be permanently terminated." (Capitalization omitted.) At the outset of the proceedings, Father was appointed legal counsel, which in itself put him on notice that those proceedings held the potential to affect his rights. Father was consistently represented by counsel. At various hearings, the court asked DCFS to investigate Father, issued several orders affecting Father, and made several findings regarding Father. Father had counsel available to assist him in understanding the significance of these findings. Father does not suggest counsel failed to do so. On these facts, Father had notice of and a meaningful opportunity to be

heard in response to the allegations underlying the court's detriment finding.

Finally, Father does not argue on appeal that the outcome of the proceedings would be different were we to grant the relief he seeks. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 625 [goal of resolving dependency actions expeditiously would be thwarted if proceeding had to be redone without a showing the new proceeding would have a different outcome].) Father's counsel did not object to or contest the court's detriment finding at the 366.26 hearing, nor did counsel request a hearing or further opportunity to be heard on the issue. On appeal, Father likewise does not challenge the sufficiency of the evidence to support the detriment finding. Nor does the record reflect Father contesting the earlier detriment findings. The record also demonstrates that remand would not result in a different outcome: Father never made any effort to participate in any way in the proceedings for many years, has never requested custody of John, and has made no efforts to arrange visitation with John by telephone or in person. This consistent failure to seek any involvement in John's life or the dependency proceedings "must be seen as a concession by [Father] that any of the claims he might have asserted would have failed." (See *In re P.A.*, *supra,* 155 Cal.App.4th at p. 1209.)

DISPOSITION

For the reasons discussed above, the court's order terminating Father's parental rights complied with due process. Accordingly, we affirm.

NOT FOR PUBLICATION.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.