Filed 8/14/17 In re S.J. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re S. J., a Person Coming Under the Juvenile Court Law.	B277525 (Los Angeles County Super. Ct. No. CK86980)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DWIGHT B., Defendant and Appellant.	

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

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 Julia Roberson, Deputy County Counsel for Defendant and Respondent.

Dwight B. appeals from the jurisdiction finding and disposition order declaring his daughter, eight-year-old S.J., a dependent child of the juvenile court and removing her from the custody of her mother, her sole custodial parent at the time dependency proceedings were initiated. Acknowledging the propriety of dependency jurisdiction based on the court's findings relating to S.J.'s mother, Dwight challenges the court's jurisdiction finding as to him and insists that issue is justiciable because it prevented him from obtaining preferential custody consideration as a noncustodial parent. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Petition, First Amended Petition and Emergency Application for Removal*

On January 7, 2016 the Los Angeles County Department of Children and Family Services (Department) filed a petition pursuant to Welfare and Institutions Code section 300[1] alleging S.J.'s mother, Tamara J., had engaged in a violent altercation with her live-in boyfriend, Ray H., in S.J.'s presence (§ 300, subds. (a), (b)), had failed to take her prescribed medication for her diagnosed bipolar disorder (§ 300, subd. (b)) and had permitted Ray to use marijuana in S.J.'s presence (§ 300, subd. (b)). The court detained S.J. and released her to Tamara's custody after being informed Ray H. was no longer living with Tamara.

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[1] Statutory references are to this code.

On February 22, 2016 the Department filed a first amended petition adding the allegation that Dwight had an extensive criminal history, including convictions for possession of a firearm by a felon and assault with a deadly weapon, that placed S.J. at risk of physical and emotional harm. At the time the petition and first amended petition were filed, Dwight was in prison. He had only seen S.J. once since she was born and had not been involved in her life.

Also on February 22, 2016 the Department filed an ex parte application pursuant to section 385 to remove S.J. from Tamara's custody after Tamara had threatened to harm herself and asked the Department to pick up S.J. for S.J.'s own safety. The court detained S.J. from Tamara and placed her in shelter care under the supervision of the Department pending the jurisdiction hearing.

2. *The Jurisdiction Hearings*

On March 8, 2016 the court conducted a jurisdiction hearing relating only to Tamara because the results of the paternity test Dwight had requested had not been received. The court sustained the petition in part, finding Tamara's conduct and history of domestic violence posed a substantial risk of harm to S.J. and Tamara's recent progress to address these problems, including her participation in psychiatric treatment, while certainly a positive development, was too recent to eliminate that risk. The court dismissed the section 300, subdivision (a), count and the marijuana-related allegation and set a separate jurisdiction hearing for Dwight and a disposition hearing for April 20, 2016. This jurisdiction/disposition hearing was ultimately continued to June 6, 2016.

Dwight appeared by telephone at the June 6, 2016 hearing and, through an offer of proof by his counsel, informed the court his criminal behavior was "behind him." He had completed several classes and counseling sessions while in prison and believed he had rehabilitated himself. Although he left Tamara when she was eight months pregnant with S.J. and had only seen S.J. once in her life, he wanted to get to know his daughter.[2] He hoped upon his release from prison in October or November 2016 to enter a sober living facility and to "work out a plan" for S.J. to be cared for by his relatives.

The court sustained an amended allegation that Dwight's criminal lifestyle placed the child at risk of harm. The court emphasized Dwight's extensive criminal history—he had been convicted of multiple criminal offenses, included violent crimes, in a 15-year period from 1998 through 2013—and concluded "the only reason why he hasn't committed any other crime is because he's in state prison. I really do believe that his past history of criminal conduct places this child, who he really does not have a relationship with, at risk of harm." The court continued the disposition hearing at Tamara's request to July 28, 2016 to permit Tamara's therapist to testify.

3. *The Disposition Hearing*

In a last minute report submitted for the July 28, 2016 disposition hearing, the Department stated that Shirley A., the mother of Dwight's current wife and custodial caregiver for his other minor children (none of them Tamara's), had contacted the Department asking that S.J. be placed with her in Kansas where

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[2] The DNA test established Dwight was S.J.'s genetic father, and the court found he was S.J.'s presumed father.

she and S.J.'s half-siblings resided. The Department informed Shirley that placement of S.J. with her in Kansas would not be possible because it would impede Tamara's efforts at reunification. Dwight did not challenge that conclusion at the disposition hearing or request custody of S.J.

The court declared S.J. a dependent child of the court and found no reasonable means to protect her other than to remove her from Tamara's custody. After observing that Dwight had not requested custody, the court nonetheless went on to find that placement with Dwight "would be detrimental to [S.J.]'s safety, protection, or physical or emotional well being." The court granted both parents reunification services.

DISCUSSION

1. *Dependency Jurisdiction Was Proper Based on Findings Relating to Tamara*

Dwight challenges the jurisdiction findings pertaining to him. He contends the court's finding his criminal history posed a risk of harm did not meet the jurisdictional threshold under section 300, subdivision (b), which requires a finding his conduct posed a "substantial risk" the child would suffer "serious physical harm or illness." Although not mentioned by Dwight or the Department in their appellate briefs, Dwight's status as a noncustodial parent and his incarceration at the time the dependency proceedings were initiated also call into question the court's finding.

Nonetheless, we do not consider whether jurisdiction was proper based on Dwight's past conduct because the findings regarding Tamara alone were sufficient to assert dependency jurisdiction. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [jurisdiction finding involving one parent is good against both;

"""the minor is a dependent if the actions of either parent bring [him or her] within one of the statutory definitions of a dependent"""]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [same].) Accordingly, Dwight's challenge to dependency jurisdiction based on findings relating to his conduct does not raise a justiciable controversy for our consideration. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 310-311; *In re I.A.,* at p. 1492.)[3]

2. *Dwight Has Forfeited His Challenge to the Court's Disposition Finding*

Upon removing a dependent child from a custodial parent, the juvenile court must place the child with a noncustodial parent who requests custody unless it finds such placement would be detrimental to the child. (§ 361.2, subd. (a); see *In re Noe F.* (2013) 213 Cal.App.4th 358, 368 [incarcerated

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[3] In limited circumstances courts have exercised their discretion to consider a parent's challenge to dependency jurisdiction notwithstanding the propriety of jurisdiction based on other grounds. (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 [review of challenged finding appropriate when it could be prejudicial to the parent in the current or future dependency proceedings]; *In re I.A., supra,* 201 Cal.App.4th at p. 1494.) Here, however, in light of the undisputed evidence of Dwight's criminal history, the court's finding is unlikely to prejudice him in this or future proceedings. (See *In re Briana V.*, *supra*, 236 Cal.App.4th at pp. 310-311 ["father has failed to show that this case fits in to the narrow exception created by *Drake M.*" in which courts have addressed a jurisdiction finding even when the finding does not affect the child's status as a dependent].) We address in the following section Dwight's argument that the jurisdiction finding prejudiced his efforts to obtain custody at disposition.

noncustodial parent may obtain custody under section 361.2 if that parent requests custody, makes arrangements for the child's care during the parent's incarceration and the court finds that placement with that parent is not otherwise detrimental to child]; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 700 [same].)

Dwight contends the court's allegedly erroneous jurisdiction finding disqualified him from preferential custody consideration afforded to noncustodial parents under section 361.2.[4] At the threshold, Dwight did not request custody at the disposition hearing. (See *In re A.A.* (2012) 203 Cal.App.4th 597, 604 [noncustodial mother's failure to request custody under section 361.2 at disposition hearing results in forfeiture of that argument on appeal]; *In re Terry H.* (1994) 27 Cal.App.4th 1847, 1854 [same].) Moreover, contrary to Dwight's contention, the court directly considered Dwight's status as a noncustodial parent in accordance with section 361.2 and found that placing S.J. with him would be detrimental to S.J.'s well-being. Dwight does not challenge that finding and thus has forfeited any argument relating to its sufficiency. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [forfeiture doctrine applicable in

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[4] There is some disagreement whether a noncustodial parent must also be nonoffending to obtain preferential custody consideration under section 361.2. (Compare *In re John M.* (2013) 217 Cal.App.4th 410, 424 [reading into section 361.2 an implicit requirement that noncustodial parent must also be nonoffending] with *In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 302 [section 361.2 does not contain a requirement that a noncustodial parent be nonoffending] and *In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1505 [same].) It is not necessary to resolve that question here because, as we discuss, the court did consider Dwight as a custodial alternative under section 361.2.

dependency proceedings]; *In re Daniel M.* (2003) 110 Cal.App.4th 703, 707, fn. 4. [failure to raise issue in appellate brief results in forfeiture of issue on appeal].)

DISPOSITION

The court's jurisdiction findings and disposition order are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.