Filed 1/11/13 In re Alex F. CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| In re ALEX F., a Person Coming Under the Juvenile Court Law. | B239640 |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>BRIAN G.,<br><br>Defendant and Appellant. | (Los Angeles County Super. Ct. No. CK76832) |

APPEAL from orders of the Los Angeles County Superior Court. Robert Stevenson, Juvenile Court Referee. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant.

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

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Brian G. appeals dependency court orders concerning his biological son, Alex F. We affirm the dependency court's orders.

## FACTS

Laura F. is the mother of three children by three different fathers: Aaron G. born in 2002; Alex born in 2004; and A.F. born in 2005. Only Alex and his father, Brian, are involved in the current appeal.

In April 2009, Laura and her mother (the maternal grandmother) lived in a motel with Laura's children. Laura was bipolar, but had stopped taking her medication. On April 4, 2009, Laura suffered a psychotic episode which ended when she tried to drown A.F. (and possibly the other children) in the motel's Jacuzzi. The maternal grandmother stopped Laura and called 911. Officers responded to the scene and arrested Laura for attempted murder and other offenses. The Los Angeles County Department of Children and Family Services (DCFS) was contacted and dispatched a case social worker. The social worker interviewed family members and took the children into protective custody. On April 8, 2009, DCFS filed a petition pursuant to Welfare and Institutions Code section 300 on behalf of all three children, and the dependency court ordered the children detained.[1]

Laura identified Brian as Alex's father; she identified Aaron's father as Israel C.; and she identified A.F.'s father as Moises G. On April 21, 2009, Brian appeared at a hearing, and submitted a paternity declaration stating that he was Alex's biological father. The court found Brian to be Alex's alleged father. Brian agreed to take a DNA test.

On May 18, 2009, DCFS filed a first amended petition (FAP). The FAP included allegations that Brian failed to provide Alex with the necessities of life, including food, clothing, shelter and medical care. (§ 300, subd. (b).)

In May 2009, DCFS filed a jurisdiction/disposition report. The report advised the court that Brian's DNA test results indicated he was Alex's biological father. The report further indicated that Brian had requested custody, but the social worker was concerned

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

about his ability to care for Alex. In 2003, Brian had been arrested for child cruelty. It had also been several years since Brian had contact with Alex and they did not have a relationship. Brian had yet to schedule any visits with Alex and had not appeared for an interview with the social worker.

On May 18, 2009, the court found Brian to be Alex's biological father. The court amended the FAP and found the allegations in the petition to be true as to all parties. As to Brian, this included a finding that he failed to provide for Alex. The court declared the children to be dependents of the court and placed them in foster care. The court ordered family reunification services for all parties and ordered that Brian have monitored weekly visits.

In November 2009, the social worker reported that Brian had not enrolled in parenting classes or individual counseling, and had not visited Alex.[2] When the social worker asked Brian if he was going to enroll in such programs, Brian had replied with words to the effect, "[N]ot at this time."

Brian did not appear at a review hearing in November 2009. During discussions regarding A.F. and her father, Moises, the children's counsel informed the court that the social worker had spoken over the telephone to Moises in his home in Mexico. Moises's brother appeared in court and provided a letter from Moises addressed to the court. The letter asked that Moises's mother, A.F.'s paternal grandmother, be allowed to make decisions on behalf of Moises. The children's counsel said that Moises had indicated he would be interested in caring for all three children. The court appointed counsel to represent Moises.

In December 2009, DCFS received an assessment on Moises conducted in Mexico by the National System for Integral Family Development. The report was written in Spanish; DCFS filed an ex parte application seeking an order appointing a translator. The court directed DCFS to "just go ahead and make the translation."

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[2] The reports included additional information concerning Laura, the other children, and the other fathers. For purposes of the current appeal, we focus on the facts and evidence concerning Brian and Alex, except as needed for any clarification.

In an interim review report filed in December 2009, the social worker reported that she had met with Brian. Brian told the social worker he had not been in contact with DCFS or Alex's caregiver because he had been going through a "nasty" divorce. He said that he was now ready to start visits, he wanted to be in Alex's life, and he did not want Alex to grow up in foster care. He also requested to have Alex released to his care, but he was currently unemployed and living at his parents' house.

In February 2010, DCFS filed its next review report. The social worker reported on Laura's progress. As to Brian, the report indicated that he had not made any attempt to visit Alex. DCFS filed a request for modification of the court's orders regarding Laura's visits. At a hearing on February 24, 2010, the court ordered that Laura's visits were to be monitored. Brian did not appear at the February 24 hearing.

In a report filed in March 2010, the social worker again stated her concerns about Laura's progress with her reunification plan and programs. As to Brian, the social worker reported that the children's foster mother had advised that Brian had not called or visited Alex. At the children's 12-month review hearing on April 8, 2010, the court found that Laura was in compliance with her case plan requirements but the children could not be returned at that time; the court ordered services to be continued for another six months. The court ordered Laura's visitation to be unmonitored weekend and overnight visits. Brian did not appear at the hearing on April 8; his counsel indicated to the court that he had been receiving "no direction" from Brian.

On April 20, 2010, DCFS filed an ex parte application requesting the court's existing orders be modified. In an accompanying report, the social worker reported that, during an unannounced visit, she discovered that Laura had not been taking her medications as prescribed. The social worker filed a request for modification so that Laura's visits be monitored due to her noncompliance with medication. On June 7, 2010, the court ordered Laura's visitation be monitored until she could be more compliant with medications.

In July 2010, the social worker reported that Laura was pregnant and had been taken off her medications due to her pregnancy. Laura's psychiatrist reported that

although she had stopped receiving psychotropic medication, she had maintained full remission while being monitored weekly. The psychiatrist opined that Laura displayed moderate insight and no symptoms of schizoaffective disorder or paranoid thinking. The psychiatrist also said that Laura had been making excellent use of the resources available to her. The social worker remained concerned, however, as Laura's history indicated that when she stopped taking her medication, she would begin physically abusing the children. The report was silent as to Brian. On July 22, 2010, the court ordered Laura to submit to a psychiatric evaluation.

In a status review report filed in October 2010, the social worker reported that the children were doing well in their placement. The children had a good relationship with their foster family, were having their basic needs met, and appeared happy. Laura was in partial compliance with her reunification program. The foster mother reported that visits had been positive. Despite Laura's progress, the social worker continued to have concerns regarding Laura's condition and concluded that placing the children in Laura's care would put them at risk of future harm. As to Brian, the social worker reported that he had not participated in any services and had not visited Alex.

In a status review report filed in December 2010, the social worker reported that Laura's psychiatric evaluation was complete. The psychiatrist concluded that Laura had a low motivation for treatment and did not appear to be fully aware of her mental health condition. Further, that, while she appeared stable, it was unclear how she would respond to the stress of having three to four children in her care. The psychiatrist further concluded that Laura's present period of relative stability was too short to establish a prognosis for long-term stability. Laura needed to demonstrate a better comprehension and appreciation of her mental health history and of how her condition could deteriorate with the daily stressors of caring for young children. It was recommended that Laura continue receiving mental health services including therapy and consultation for psychotropic medication for a more extended period of time and cautioned that any future attempts at reunification should be very gradual and with close supervision. As to Brian,

the December 2010 report was silent except for one reference indicating that Brian still had not visited Alex.

In March 2011, A.F.'s father, Moises, filed a section 388 petition in which he requested presumed father status as to all three children, and to have them placed with him in Mexico. Moises's petition asserted that he provided support to Laura and the three children for a lengthy period of time, spending nights and days in the home with Laura and the boys before A.F. was conceived, and supporting the family through the pregnancy and then until May 2006. He provided funds, food, and clothing for all three children and had overnight weekend visits through late 2008. He stated he loved all three children and was ready, willing, and able to support them at his home in Mexico.

On April 12, 2011, the court ordered that Moises be evaluated for placement as to Aaron and Alex. (We understand that he was already under consideration for placement as to his daughter, A.F.) The court ordered that Moises was to have unmonitored visits with all three children "as frequently as possible." The court noted its tentative decision to grant Moises presumed father status, and continued the matter for a further evaluation by Mexican authorities. Brian was not present at the April 12 hearing, but, as for a number of the earlier hearings, was represented by counsel.

In June 2011, the social worker filed a report in which she indicated that she had interviewed the children in May 2011 about Moises. The children remembered Moises coming to their house when they were younger and said that he was nice. Moises said he was excited about the prospect of having the children under his care. He had been calling the Mexican government regularly in order to get an appointment to conduct a home evaluation. He represented that he lived in a five-bedroom home, earned more than enough money to meet the children's needs, and was prepared to take custody. DCFS indicated that it was in favor of placing all three children with Moises, pending receipt of a positive home evaluation.

In July 2011, DCFS filed a report in which the social worker informed the court that Laura had showed up at the children's foster home without authorization, and had tried to enter the children's school without permission. The social worker considered her

actions to demonstrate a risk that she would abscond with the children. The social worker had the children moved to a new foster home. On July 14, 2011, Mexican authorities submitted its home evaluation for Moises. The evaluation stated that Moises's home was appropriate for all three children and that Moises was able to provide for their needs. Additionally, the report stated that Mexican social workers would conduct visits to the home upon placement of the children and would provide supportive services to assist Moises in his role as a parent and caregiver to the three children.

At a hearing on August 25, 2011, the court granted Moises's section 388 petition. The court found Moises to be the presumed father of all three children, and ordered that all three children were to be placed in Moises's home. The proceedings were continued so as to get information regarding the children's legal status in Mexico. Brian did not appear for the August 25 hearing, but he was represented by his appointed counsel.

In a report filed in late December 2011, the social worker reported that she had met with Brian on December 19, 2011, at which time he stated that he opposed Alex being sent to Mexico. He said that he was concerned about the high level of crime in Mexico and that he wanted custody of Alex. He explained that he had not participated in his case plan or visited Alex because he had been busy fighting for custody of another child. He said he was ready to have custody of Alex.

At a hearing on December 29, 2011, the court expressed concern that Moises would not have any legal recognized authority in Mexico to act on behalf of Aaron and Alex, who were not his children. The record suggests there was concern that, as between any orders issued by the dependency court on the one hand, and Laura's claims on the other hand, Mexican officials would be in a quandary as to who truly had legal authority over the children. Nonetheless, the court confirmed its prior decision to grant presumed father status to Moises as to all three children and terminated further visits between Brian and Alex. At the same time, the court signed a formal written order prepared by Moises's counsel; the order directed that Aaron's birth certificate be amended to show that Moises was Aaron's father.

On February 24, 2012, Brian, in pro. per., filed a notice of appeal from the court's orders issued on December 29, 2011.

## DISCUSSION

### I. Appellate Jurisdiction

As an initial matter, we address DCFS's contention that our court does not have jurisdiction to address Brian's appeal because he filed his notice of appeal too late. We find Brian filed a timely appeal allowing him to challenge the dependency court's orders issued in *December 2011*.

California Rules of Court, rule 8.406 prescribes the time to appeal in a dependency proceeding. Rule 8.406 essentially provides that a notice of appeal must be filed within 60 days after the making of the order being appealed. To the extent Brian is appealing the dependency court's orders issued on December 29, 2011, he filed his notice of appeal on February 24, 2012, which is less than 60 days after the making of the orders being appealed. We find we have jurisdiction to address Brian's appeal.

DCFS also argues that we do not have jurisdiction to address claims of error concerning the dependency court's earlier orders issued on August 25, 2011, involving Moises's presumed father status. We agree with DCFS that those orders may not be challenged by way of Brian's notice of appeal filed in February 2012, and we will not address any such challenges. An appeal from the most recent order in a dependency proceeding does not allow for challenges to prior orders as to which the statutory time for filing an appeal has passed. (*In re Elizabeth G*. (1988) 205 Cal.App.3d 1327, 1331.) The affect that this framework will have on Brian's claims on appeal will be taken up as necessary below.

### II. Detention and Placement Error

Brian contends the dependency court erred at the time of initial detention hearing in April 2009, and at a series of ensuing hearings, by not placing Alex in Brian's custody under section 361.2. We find Brian's claim of "placement error" is time-barred for appellate review as to any decision issued prior to December 2011. We find no error in the dependency court's orders issued in December 2011.

When a child is removed from the home of a custodial parent, section 361.2 requires the dependency court to determine whether the child has a noncustodial parent who is willing to assume custody. Section 361.2 further provides that, if there is a parent willing to assume custody, the court shall place the child with that parent unless the court finds that placement would be detrimental to the child's well-being. (See generally, *In re Zacharia D.* (1993) 6 Cal.4th 435, 453.) In summary, in deciding whether to place a child with a noncustodial parent under section 361.2, the court must still consider whether the noncustodial parent is a nonoffending parent.

Under section 361.2, subdivision (b), the court has the authority to (1) grant full legal and physical custody to the noncustodial parent and terminate the court's jurisdiction over the child; or (2) grant tentative custody to the parent under the jurisdiction of the court, with a review after three months; or (3) grant provisional custody to the parent under the supervision of the court while reunification services are provided to one or both parents; or (4) deny custody pending successful reunification efforts. Although the provisions of section 361.2 suggest that the statute applies when the dependency court first takes jurisdiction over a child, its procedures favoring custody with a child's noncustodial parent may be invoked at later points during a dependency proceeding, for example, at ensuing status review hearings. (Cal. Rules of Court, rule 5.710(h); see *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1451.)

We reject Brian's claim of error for multiple reasons. First, any placement decision issued or ordered to remain in effect prior to late 2011 cannot be addressed on this appeal because, as we have noted, Brian did not file a notice of appeal challenging any order until February 2012. Again, an appeal from the most recent order in a dependency case does not allow for a challenge to prior orders as to which the statutory time for filing an appeal has passed. (*In re Elizabeth G.*, *supra*, 205 Cal.App.3d at p. 1331.) If Brian had wanted to contest Alex's initial placements in foster care, or any of the ensuing orders continuing such placement, then he should have raised the issue by appropriate request, motion, or petition.

Furthermore, at the time the court initially detained Alex and placed him in a foster home in April 2009, and at the time of the court's ensuing orders continuing placement in foster care, Brian was not in position to invoke section 361.2. He was a noncustodial *alleged* or *biological* father only, and had been found to be an offending parent. Section 361.2 favors placement with a noncustodial presumed parent who is a nonoffending parent. In short, until such time that Brian persuaded the dependency court to grant him presumed father status, and to find that he had addressed the problems which resulted in his being found an offending parent, section 361.2 was not implicated.

Turning to Brian's contention that the dependency court erred under section 361.2 in December 2011 by failing to place Alex with Brian, we see no error. On appeal, we review the record in the light most favorable to the dependency court's order; we determine whether there is substantial evidence from which the court could find by clear and convincing evidence that Alex would suffer such detriment. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1569.) The record supports a conclusion that placing Alex with Brian would have been detrimental to Alex. Brian was not part of Alex's life before the dependency proceedings commenced, and he made no effort to be a part of Alex's life afterward. Brian never attempted to visit with Alex during the time he was in foster care placement. Moreover, Alex had a sibling relationship, and the children's counsel argued against separation, but Brian only wanted custody of Alex. We are satisfied that the court weighed all relevant factors, and reasonably determined that it would be detrimental to place Alex with Brian. This was sufficient to support the court's orders. (See *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1424-1425.)

**III. Presumed Father Status Error**

At the start of the case in April 2009, Brian appeared in court, and his counsel told the court that Brian was "asking to be found [Alex's] presumed father." The court found Brian to be Alex's alleged father and ordered a DNA test. In May 2009, DNA results showed that Brian was Alex's biological father. The court changed Brian's status to biological father. Family reunification orders were issued. At the hearing in December 2011, from which Brian appeals, the court had already ordered that Moises was the

presumed father of all three children. Brian's counsel argued: "[Brian] would like to have Alex as his son and custody of his son and opposes him going to Mexico . . . . [¶] And he would just be asking that . . . he does not lose his rights to his son and that the son does not go to Mexico and that the birth certificate not be amended to show [Moises] as the presumed father." The court denied Brian's requests and affirmed its earlier decision of August 2011 naming Moises the presumed father of all three children. Brian claims the December 2011 orders are error. We disagree.

***The Governing Law***

Dependency law recognizes four types of fathers: de facto, alleged, biological, and presumed. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449, fn. 15; *In re Crystal J*. (2001) 92 Cal.App.4th 186, 190.) An alleged father is a person who has not established biological paternity or presumed father status. (*In re Zacharia D.*, *supra*, at p. 449, fn. 15.) A biological father is one whose paternity has been determined, but who has not established presumed father status. (*Ibid*.) Under Family Code section 7611, a person is presumed to be a child's father where evidence establishes that he meets one or more specified factors in the section. The evidence may show that more than one person meets certain factors under section 7611, giving rise to competing presumed father parentage status. However, the law generally contemplates that only one person will ultimately be ruled a child's presumed father, after weighing the factors in favor of and against each of the possible fathers. To this end, section 7612, subdivision (b), directs the court to evaluate the evidence and weigh the competing presumptions: "If two or more presumptions arise under [section] 7611 that conflict with each other, . . . , the presumption which on the facts is founded on the weightier considerations of policy and logic controls."

The determination of a father's status is significant in dependency proceedings because it frames his rights and the extent to which he may participate in the proceedings. (*In re Christopher M*. (2003) 113 Cal.App.4th 155, 159.) "Presumed father status ranks highest." (*In re Jerry P*. (2002) 95 Cal.App.4th 793, 801.) On appeal, a dependency court's determination of presumed father parentage status is reviewed under the

substantial evidence standard. (See *In re D.A.* (2012) 204 Cal.App.4th 811, 824 (*D.A.*), citing *In re M.C.* (2011) 195 Cal.App.4th 197, 213.)

We find that substantial evidence supports the dependency court's decision in December 2011 to decline granting presumed father status to Brian. *D.A.*, *supra*, 204 Cal.App.4th 811 guides our decision.

In *D.A.*, a dependency proceeding was filed after the six-month-old child was removed from mother. Mother had sexual relationships with two men, E.A. and C.R., during the years before the child was born. E.A. had lived with mother for a short time – a period of weeks – at the time before and after the child was born. E.A. was on the child's birth certificate. After the dependency proceedings were initiated, C.R., came forward and was determined by paternity testing to be the child's biological father. The dependency court found that E.A. was the presumed father. It found that C.R., the biological father, was not the presumed father. On C.R.'s appeal, Division One of our court reversed both findings. Division One ruled that the finding that E.A. was the presumed father was not supported by substantial evidence, and ruled that substantial evidence established that C.R. was the presumed father. Division One found the evidence showed that E.A. had done little more than be named on the child's birth certificate and live with mother when the child was born. On the other hand, C.R. had come forward at the first opportunity to assert his fatherhood rights.

The evidence in Brian's current case establishes a flip-side scenario. Brian, though the biological father, was not a significant part of Alex's life at any time. He demonstrated no commitment to Alex. Although he came forward in April 2009 and was determined by DNA testing to be a biological father, he did nothing more until December 2011, when he objected to Alex going with Moises. Despite given the opportunity, Brian did not participate in any reunification programs and did not attempt to visit Alex. To the extent that Brian wanted Alex, Brian wanted to separate Alex from his siblings.

Brian misstates the record in arguing that he requested and was denied presumed father status in December 2011. A fair reading of the reporter's transcript of the December 2011 proceedings shows Brian requested that Moises not be put on Alex's birth certificate; the more discernable aspect of Brian's position was an objection to Alex going with Moises. The court's orders naming Moises, instead of Brian, as Alex's presumed father were issued in August 2011. Brian did not contest those orders. We see no effort by Brian to assert a meaningful request for presumed father status at any time from April 2009, through December 2011. We see little, if anything, in the record to support Brian's position on appeal that he is interested in a father-child relationship with Alex.

Moises met Alex's mother in 2003, and lived with her until 2006. He provided financial support until 2008, two years after he ended his relationship with mother. He visited the children after he moved from the mother's home. Moises is employed by the federal government in Mexico, and had the ability to care for the children. He asked for presumed father status early, filed a section 388 petition for such status, and agreed to DCFS's requests and the court's orders. The evidence strongly supports a finding that Moises put in far more effort to be a father to the children than did Brian.

We reject Brian's reliance on *In re Jerry P*. (2002) 95 Cal.App.4th 793, *In re A.A.* (2003) 114 Cal.App.4th 771, and similar cases. All of the cases in this arena are largely evidence and fact-driven, as is Brian's case. For the reasons explained above, the evidence and facts in Brian's current case support the dependency court's decision to name Moises, not Brian, as Alex's presumed father.

The record does not support Brian's argument that he was involved in Alex's life. Over the years-long course of the dependency proceedings as to Alex, Brian could not even be bothered to have a meaningful visitation relationship with Alex. Brian never established himself as Alex's presumed father.

## DISPOSITION

The juvenile dependency court's orders of December 29, 2011, are affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.