Filed 10/18/18 Jesse B. v. Superior Court CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JESSE B., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Real Parties in Interest.	B291614 Los Angeles County Super. Ct. No. DK07708C

ORIGINAL PROCEEDINGS in mandate. Rashida A. Adams, Judge. Petition denied.

Frank Ahn, Lori Davis and Bernadette Reyes, under appointment by the Court of Appeal, for Petitioner.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, Brian Mahler, Deputy County Counsel, for Real Party in Interest Department of Children and Family Services.

INTRODUCTION

In this original proceeding, Jesse B. (father) challenges the juvenile court's order terminating family reunification services with his son, Marvin H., (the minor) and setting the cause for a permanency planning hearing under Welfare and Institutions Code section 366.26.[1] Father argues no substantial evidence supports the court's finding that the Department of Children and Family Services (Department) provided reasonable reunification services. We conclude the Department made substantial efforts to provide reunification services to father while he was incarcerated. Moreover, at an 18-month permanency review hearing (§ 366.22), the court had discretion to terminate reunification services and proceed with permanency planning in the absence of some exceptional circumstance showing further services would substantially and positively impact the possibility of reunification—a circumstance not present here. Father also contends the juvenile court deprived him of due process by failing to continue the 18-month review hearing and order him to be transported from prison to testify at the continued hearing. But because an incarcerated parent does not have the absolute right to be present at a review hearing under section 366.22, and

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

because father was represented by counsel at the hearing in any event, we conclude no due process violation occurred. Finding no error, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

The minor was detained at birth after mother, who is not a party to this appeal, tested positive for amphetamine and methamphetamine during the birth. Mother identified Jesse B. as the minor's father and the court later found him to be the minor's presumed father.

According to the Department, mother has a long and unresolved history of substance abuse which resulted in the removal of her two older children, the minor's half-siblings (siblings), on two prior occasions. When the minor was born in January 2017, mother was homeless and unable to provide for the siblings, who were in foster care. Mother consented to the minor's detention before leaving the hospital. The court conducted a detention hearing on January 19, 2017, and the minor was placed in a foster home with his siblings.

Like mother, father has a history of drug use, including methamphetamine, and has a significant criminal history with multiple incarcerations. At the time of the minor's birth, father was incarcerated on a felony (second-degree robbery) but he was released on January 17, 2017. When father was released from prison, he was homeless. Father indicated he was willing to participate in services and drug test but ultimately did not follow up with the Department to drug test because he was arrested again for a felony on February 5, 2017.

On March 22, 2017, the court sustained the following jurisdictional allegation under section 300, subdivisions (b)(1) and (j):

"The child, Baby Boy [H.]'s mother … has a history of illicit drug use including methamphetamine and is a current user of methamphetamine and amphetamine, which renders the mother incapable of providing regular care for the child. The mother used methamphetamine and amphetamine during the mother's pregnancy with the child. On 1/12/17 the mother had a positive toxicology screen of methamphetamine and amphetamine. The child's siblings [M.H.] and [K.H.] are current dependents of the Court due to the mother's substance abuse. The child is of such tender age that the child requires constant care and supervision. Said illicit drug use by the child's mother endangers the child's physical health and safety and places the child at risk of serious physical harm, damage and danger."

Father's case plan included a full drug and alcohol rehabilitation program with random drug testing and individual counseling. The court ordered reunification services for father and approved monitored visitation following his release from custody. The Department verified that substance abuse treatment, among other programs, was available to father at his place of incarceration.

The minor and siblings remained placed in a foster home while the Department investigated possible placement options with both mother's and father's families. Regarding relative placement, father indicated at the outset of the case that he did not have a relationship with his family and did not want the minor placed with his family. Father stated he grew up in a tumultuous environment and ended up in foster care himself as a

result. Nevertheless, the Department contacted father's extended family members to determine whether any of them would be able to take custody of the minor and his siblings. The Department also heard regularly from the maternal grandmother. Although she was homeless at the outset of the case, the maternal grandmother was looking for a stable housing situation and hoped to take custody of the minor and his siblings. The Department reported the maternal grandmother consistently visited the children twice a week during mother's slotted visitation period with no issues reported.

On November 8, 2017, at the six-month review hearing (§ 366.21, subd. (e)), the court continued jurisdiction over the minor, found the Department had offered or provided reasonable reunification services to father, and continued those services.[2] Father did not challenge that finding.

On December 1, 2017, father was transferred to a different facility. The Department attempted to contact him by mail to provide referrals, reiterate his case plan requirements, and request that father contact the Department. At that time, the minor was still residing in the home of the foster mother and the maternal grandmother continued to visit him twice a week. Also during that time, the maternal grandmother secured stable housing and indicated she hoped to become the legal guardian of the minor, if he did not reunify with father, as well as the siblings.

On January 10, 2018, father appeared at the 12-month review hearing (§ 366.21, subd. (f)). The court found the

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[2] The court terminated mother's reunification services on November 1, 2017.

Department made active efforts to provide reasonable reunification services to father and determined father's efforts to comply were partial. The court continued father's reunification services and ordered the Department to continue evaluating relatives for placement. The court specifically ordered the Department to report on the paternal great-grandmother's desire to have the minor placed with her. However, the paternal great-grandmother later withdrew her request for evaluation because other adults living in her home did not want to submit to the Department's screening requirements. In March 2018, the Department placed the minor and the siblings together, in the home of the maternal grandmother.

On July 11, 2018, the court held an 18-month permanency review hearing (§ 366.22). The Department reported the minor was adjusting well to placement with the maternal grandmother. In addition, the Department advised that father had enrolled in several groups available to him in prison. In February 2018, father enrolled in an anger management group, and in April 2018, he enrolled in groups for criminal and addictive recovery, substance abuse, Alcoholics Anonymous, and Narcotics Anonymous.

At the time of the 18-month review hearing, father expected to be released in October 2018. But the Department remained concerned about placing the minor with father upon his release, noting his history of drug use and the Department's inability to assess sobriety due to father's incarceration. Further, the Department emphasized father had been homeless prior to his incarceration and did not appear to have a good support system in place to assist him if the minor was placed with him upon his release. In light of the length of time the case had been

pending, the Department recommended terminating reunification services for father and the minor.

At the outset of the 18-month review hearing, father's counsel requested a continuance to permit father to be transported from prison to attend the hearing. Counsel represented that, if present, father would testify to his participation in the programs available to him in prison and his substantial compliance with the case plan. The court denied the request. Considering all the evidence presented, the court terminated father's reunification services and set the matter for a permanency planning hearing under section 366.26. Father then filed the instant petition challenging the court's ruling.

DISCUSSION

Father contends the court erred at the 18-month permanency review hearing by terminating his reunification services and setting the case for a hearing under section 366.26. Specifically, he argues the court's finding that the Department provided reasonable reunification services is not supported by substantial evidence. Further, he asserts the court violated his due process rights by refusing to continue the 18-month review hearing and order him to be transported from prison to the continued hearing so that he could testify in court. We address these contentions in turn.

1. The court did not err in terminating father's reunification services at the 18-month permanency review hearing.

" 'The paramount goal in the initial phase of dependency proceedings is family reunification. [Citation.]' [Citation.] 'At a disposition hearing, the court may order reunification services to

facilitate reunification between parent and child.' [Citation.] Reunification services must be 'designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300.' (§ 362, subd. (c).)" (*In re T.G.* (2010) 188 Cal.App.4th 687, 696.)

The reunification plan is ordered at the disposition hearing, and parents of children who were under three years of age on the date of initial removal from parental custody are entitled to receive six months of reunification services from that point. (§ 361.5, subd. (a)(1)(B).) Parents of such young children are generally restricted to a total of 12 months of services, calculated from "the earlier of the date of the jurisdictional hearing ... or the date that is 60 days after the date on which the child was initially removed from the physical custody of his or her parent or guardian." (*Ibid.*, § 361.49.)

At the 18-month permanency review hearing, the court must return the child to parental custody "unless [it] finds, by a preponderance of the evidence, that the return of the child to his or her parent … would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a)(1).) And in the absence of circumstances not present here, if the court does not order the child returned to a parent at the 18-month review hearing, the court must terminate reunification services and set the matter for a permanency planning hearing under section 366.26. (§ 366.22, subd. (a)(3).)

Here, father received reunification services for 18 months—longer than the typical timeframe where children are as young as the minor. The court found at the 18-month review hearing that returning the minor to father's custody would create a risk of

detriment to the minor. The court noted father was still incarcerated at the time of the 18-month review hearing. Further, although father expected to be released in October 2018 (three months after the hearing), he had been unable to make an appropriate plan for the minor's custody while the case was pending. Specifically, father initially told the Department he did not want the minor placed with his family because his own childhood home life had been difficult and he was placed in foster care for many years as a result. Notwithstanding that request, the Department contacted members of father's extended family to determine whether they might be willing to take custody of the minor. And although father's grandmother expressed the desire to take the minor into her home, she later withdrew her custody request after other residents in her home refused to submit to the background check required by the Department. Thus, at the time of the hearing, neither father nor his extended family members were willing and able to take custody of the minor.

Other factors also support the court's conclusion that returning the minor to father's custody would create a substantial risk to the minor's safety and physical well-being, particularly in light of the minor's very young age. Father has no home or support system to return to upon his release from prison. He was homeless during the few weeks he was not imprisoned during the pendency of this case and admits a history of drug abuse. These circumstances in and of themselves pose a substantial risk to a child, such as the minor, under the age of two.

We acknowledge, as the court did, that father complied with the case plan to some extent by participating in several programs available to him in prison. At the time of the hearing,

father had been participating in an anger management program for almost five months and several other programs (criminal and addictive recovery, substance abuse, Alcoholics Anonymous, Narcotics Anonymous) for three months. Although father's efforts to engage in programs available to him in prison are commendable, they are nascent and do not offset the other significant risk factors noted by the court. As our Supreme Court has recognized, "[c]hildhood does not wait for the parent to become adequate." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) This is especially true when the child is very young. In short, we find no error in the court's conclusion that returning the minor—who is not yet two years old—to father's custody would pose a substantial risk to the minor's health and safety.

Father does not challenge this critical factual finding by the juvenile court. Instead, he complains no substantial evidence supports the court's finding that the Department provided reasonable reunification services during the six months preceding the 18-month review hearing and on that basis asserts we must reverse the court's order and remand to allow the court to extend reunification services for an additional six months.

We reject father's argument for two reasons. First, although father complains the Department "essentially did nothing for [him]" while he was in prison, that is not the case. Father was transferred to his current prison facility on December 1, 2017. On December 6, 2017, the caseworker called the prison and spoke to a prison representative who advised father needed to meet with a committee before he could be approved to enroll in any of the available programs at the prison. The caseworker called a second time to speak with father's

counselor at the prison, who advised father was currently in a limited program without access to the telephone.

On December 7, 2017, the Department sent father a letter reminding him of the court's case plan, which required him to participate in a drug and alcohol rehabilitation program as well as individual counseling. The Department also provided father with a list of referrals for his use upon his release, and requested he call the Department (collect) to discuss his current situation. On the same date, the Department contacted the prison again, to advise that father had been ordered to participate in a drug and alcohol program, random drug and alcohol testing, and individual counseling. The Department also requested information about the programs available to father at the prison. On December 12, 2017, the caseworker called father's counselor and was told father was going to the committee that day. The caseworker called father's counselor again on December 14, 2017, and learned father was approved for the prison's educational programs.

On December 20, 2017, the caseworker sent a letter to the prison to determine whether father was enrolled in any available programs. Also on that day, the caseworker learned that father had not been housed at the prison long enough to be placed on the waiting list for classes, including self-help anger management and alcohol/drug recovery classes, and that it could take months for father to be placed on the waiting list. In addition, per prison rules, father was required to request to be placed on the waiting list for classes. The caseworker called the prison again on January 8, 2018. The Department subsequently verified father enrolled in the relevant and available services at the prison. In light of father's circumstances, the Department's efforts to

provide support to father during his incarceration were more than adequate.

In any event, even if the Department fell short of its obligation to provide reasonable reunification services during the early part of 2018, that fact would not necessarily preclude the court from terminating those services at the 18-month review hearing and setting the case for a hearing under section 366.26, as father apparently assumes.[3] (See, e.g., *Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1490, 1504 [order at 18-month permanency review hearing setting a hearing under section 366.26 affirmed despite agency's failure to provide any reunification services during the prior six months].) Section 366.22, subdivision (a)(3), provides that if a child is not returned to the custody of a parent at the 18-month stage, the court *must* set the matter for a hearing under section 366.26, except as provided in subdivision (b). That subdivision allows the juvenile court to extend reunification services to a period of 24 months only if "the court determines by clear and convincing evidence that the best interests of the child would be met by the provision of additional reunification services to a parent or legal guardian who is making significant and consistent progress in a court-ordered residential substance abuse treatment program, a parent who was either a minor parent or a nonminor dependent parent at the time of the initial hearing making significant and

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[3] The rule is different at the 6-month and 12-month review stages. At those hearings, if reasonable services are not provided or offered to the parent, the court is required to continue the case for the additional period of time permitted by statute. (§ 366.21, subds. (e) & (g)(1); *In re A.G.* (2017) 12 Cal.App.5th 994, 1001.) Accordingly, the cases cited by father involving those earlier proceedings are inapposite here.

consistent progress in establishing a safe home for the child's return, or a parent recently discharged from incarceration, institutionalization, or the custody of the United States Department of Homeland Security and making significant and consistent progress in establishing a safe home for the child's return … ." (§ 366.22, subd. (b); *Earl L.,* at p. 1504.) None of these circumstances is present here and father does not argue otherwise.

In sum, the court's finding that returning the minor to father would create a substantial risk of harm to the minor is both supported by the record and unchallenged by father. And as father does not qualify for an extension of reunification services under section 366.22, subdivision (b), the court had no basis to continue those services.

2. The court did not violate father's due process rights by refusing to continue the 18-month permanency review hearing.

Father contends the court erred in denying his counsel's request to continue the 18-month permanency review hearing so father could appear in person to testify regarding his compliance with the court's case plan. This argument implicates both father's right to be physically present at the 18-month review hearing and his right to testify in person regarding his compliance with the case plan.

We begin with father's right to be present at the 18-month review hearing. Section 366.22, subdivision (a)(1), provides the 18-month review hearing "shall occur within 18 months after the date the child was originally removed from the physical custody of his or her parent … ." And here, the 18-month review hearing was scheduled for July 11, 2018, exactly 18 months after the

minor's removal following his birth in January 2017. Father's counsel acknowledged father received proper notice of the hearing, but requested at the outset of the hearing that the court continue the hearing and order father to be transported to the hearing so he could testify in person.

The court properly found father did not have a statutory right to be present at the 18-month review hearing. Parents who are incarcerated in city, county, or state institutions within the State of California have certain statutory rights to be transported and be present for some dependency proceedings. (Pen. Code, § 2625.) In any action to adjudicate a child as a dependent of the juvenile court under section 300 or to terminate parental rights under section 366.26, the juvenile court must provide notice of the proceeding to the incarcerated parent. (Pen. Code, § 2625, subd. (b).) And under Penal Code section 2625, subdivision (d), if that parent wishes to be present for the hearing, the court must order the parent's temporary removal from the institution to allow the parent to appear in court. (Pen. Code, § 2625, subd. (d).) Further, no proceeding under section 300 or section 366.26 may be conducted without the incarcerated parent's presence unless the court receives a written waiver of the right to be present signed by the incarcerated parent, the warden, or the parent's representative. (*Ibid*.) But the statutory right to be present does not apply when the dependency hearing is for something other than adjudicating the child a dependent or terminating parental rights. Instead, Penal Code section 2625, subdivision (e), provides the court with the discretionary authority to order the incarcerated parent's presence for the dependency hearing. (See *In re Barry W.* (1993) 21 Cal.App.4th 358, 368–370.) Here, then,

the court had the discretion to allow father to attend the 18-month review hearing but was not required to do so.

Father asserts the court abused its discretion under Penal Code section 2625, subdivision (e), by denying his request to be in court to testify at the 18-month permanency review hearing. He cites a number of authorities, none of which stands for the proposition that an incarcerated parent has an absolute right to be physically present and testify at a permanency review hearing. For example, father cites Family Code section 217 and California Rules of Court, rule 5.113(a), both of which concern the presentation of evidence on motions presented in family law proceedings. But as these provisions do not apply in dependency proceedings—and do not, in any event, relate to an incarcerated parent's right to be physically present in court—they are of no assistance here. Father also cites section 341, which relates to the issuance of subpoenas in juvenile court proceedings—a point not at issue here. Other than citing these inapposite rules and statutes, father offers no other authority to support his assertion that an incarcerated parent has the right to testify in person at an 18-month permanency review hearing.

In addition, father contends he had a "due process right to present relevant evidence at trial, including testimony on his own behalf." We agree father had the right to present evidence at the 18-month review hearing but reject his assertion that he had the absolute right to testify in person. "Although there is no dispute that prisoners have a constitutional right of access to the courts [citation] and that 'absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard' [citation], it does not follow

that prisoners have a constitutional right to be *personally present* at every type of hearing. Due process guarantees ' "notice and opportunity for hearing *appropriate to the nature of the case*." ' [Citation.]" (*In re Jesusa V.* (2004) 32 Cal.4th 588, 601.) In the context of dependency proceedings, the California Supreme Court has held due process rights are satisfied where an incarcerated parent is represented by counsel and, through counsel, has the right to present evidence and cross-examine witnesses. (*Ibid.*) And the court has specifically noted an incarcerated parent may present his or her testimony in the form of a declaration (rather than live testimony) and such testimony satisfies due process requirements. (*Ibid.*) The record does not indicate why counsel did not present father's testimony in written form at the 18-month review hearing. But the fact that father could have done so is sufficient to support the conclusion that he received the process he was due.

DISPOSITION

The petition is denied. Our decision is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.