Filed 11/19/12 In re J.M. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

In re J.M., a Person Coming Under the Juvenile Court Law.	B238423 (Los Angeles County Super. Ct. No. CK 53280)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. N.M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Valerie Lynn Skeba, Juvenile Court Referee. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

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N.M. appeals from the disposition order of the juvenile court (Ref. Valerie Lynn Skeba). He contends the court failed to give him notice of the adjudication proceeding. He further contends the court committed reversible error by failing to ensure he was provided notice and an opportunity to appear and assert his presumed father claim. He also contends the court erred in refusing to order a paternity test and determine whether he is J.M.'s biological father.[1] We affirm the order.

The court stated on the record that it had a signed waiver of N.M.'s right to be present at the adjudication hearing. The failure to provide N.M. with the requisite Judicial Counsel form JV-505 advising him, among other things, to fill out the form to invoke his right to trial on the parentage issue is harmless. Also harmless is the juvenile court's omission to order a paternity test and make a determination whether N.M. is or is not the biological father of J.M.

BACKGROUND

On June 20, 2011, the Los Angeles County Department of Children and Family Services (DCFS) detained J.M., age nine months, from J.H., her mother (Mother). Mother identified N.M. as J.M.'s biological father and stated he was incarcerated in state prison.

On June 23, 2011, a petition under Welfare and Institutions Code section 300[2] (petition) was filed alleging, among other things, the failure of Mother and N.M. to protect J.M., namely, they failed to provide J.M. with the necessities of life (§ 300, subd. (b)) and they left J.M. without any provision for care or support (§ 300, subd. (g)).

In a "Parentage Questionnaire" for the detention hearing, Mother identified N.M. as J.M.'s father and indicated he was not present at her birth and did not sign either the

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1 In his notice of appeal, N.M. challenged the juvenile court's order on November 16, 2011, finding him to be an alleged father and denying him reunification services and his "JCPC request." In his briefing, he does not address his "JCPC request" claim, which we deem abandoned, and raises for the first time his claim of no notice of the November 16, 2011 adjudication hearing at which he was not present.

2 All further section references are to the Welfare and Institutions Code unless otherwise indicated.

birth certificate or any paperwork naming him as J.M.'s father. She indicated N.M. had held himself out openly as J.M.'s parent but he had not received J.M. in his home and that he was in prison.

At the June 23, 2011 detention hearing, Mother indicated N.M. was arrested when she was five months pregnant with J.M. Although he had held himself out as J.M.'s father, he had not provided for J.M. financially nor openly accepted her into his home. Mother stated J.M. received assistance only in the form of "a little Christmas thing" from the paternal grandmother and paternal aunt.

The juvenile court appointed counsel to represent N.M. who was not present. The court ordered J.M. detained and DCFS to prepare a statewide jail removal order for N.M. from prison for an August 3, 2011 hearing.

On July 20, 2011, during a DCFS telephone prison interview, N.M. stated he had lived off and on with Mother in a two-year relationship during which J.M. was conceived. He was not present at J.M.'s birth, because he was incarcerated. Also, he had no relationship with J.M., because he never met her. He did maintain contact with J.M., however, through letters to parental relatives asking about her. Also, he sent money earned during his incarceration to Maggie B., J.M.'s paternal grandmother, for J.M.'s needs. The last time was about December 2010 in the amount of about $100 for J.M.'s Christmas gifts. He further stated he was serving a two-year sentence with a tentative release date of September 29, 2012.

In the August 3, 2011 hearing report, DCFS recommended that no reunification services be provided N.M. for these reasons: He "remains incarcerated at California Correctional Center State Prison. He has 13 months left to serve his sentence which pursuant to [section] 361.5[, subdivision] (a)(2) will exceed the six months of reunification for a child under the age of 3. He has been in prison since prior to the child's birth and has not established a relationship with the child."

The record contains a copy of the notice of the August 3, 2011 jurisdictional and disposition hearing and a copy of the certified mail receipt dated July 27, 2011, for N.M. from the United States Postal Service.

At the August 3, 2011 hearing, the juvenile court ordered the matter set on September 8, 2011, for an adjudication hearing and DCFS to complete a statewide release for N.M.

On September 8, 2011, the juvenile court continued the adjudication hearing to October 12, 2011, for N.M. to be transported to court.

On October 12, 2011, the juvenile court noted the court was unable to proceed in the absence of the missing court file and because N.M. had not been transported to court. The adjudication hearing was continued to November 16, 2011.

On October 18, 2011, the juvenile court signed an order directing the release of N.M. from prison to the custody of the Los Angeles County Sheriff's Department for the purpose of the November 16, 2011 court hearing.

On November 4, 2011, this order was returned to the juvenile court for rescheduling of the court hearing and resubmission of a new order, because it would take four weeks to release N.M. from prison.

At the November 16, 2011 hearing, N.M., who was not present, was represented by his appointed counsel. The juvenile court found true the petition allegations under "b1" and "b2" and declared J.M. a dependent of the court.[3] The court found N.M. to be an alleged father of J.M. and, as such, ordered that no reunification services be provided to him. (§ 361.5, subd. (e).)

DISCUSSION

1. Right to Appear at Adjudication Hearing Expressly Waived

N.M. contends his right to due process of law was violated, because he was not provided notice and opportunity to appear at the adjudication hearing as mandated pursuant to section 291, subdivisions (a)(2), (c)(1), (d)(1)-(5), (6)(A)-(C), (7), (e)(1), (f), and Penal Code section 2625, subdivisions (b)-(d). The record refutes this contention. N.M. executed a formal waiver of the right to appear at this hearing.

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[3] The court dismissed the allegations under counts "b3," "b4," "b5," and "g2."

At the November 16, 2011 hearing, N.M. was represented by appointed counsel Rachelle Mehrinfar. The juvenile court noted N.M. had waived his right to be present at the adjudication hearing and that the court had "a waiver signed by [him]."

N.M. points out no waiver signed by him of his right of physical presence at the adjudication hearing is in the record on appeal. This deficiency, however, is of no moment.[4] From a silent record, we may presume the juvenile court performed its official duty and ensured N.M. actually waived his right to be present physically. (See, e.g., *People v. Sparks* (1968) 262 Cal.App.2d 597, 600-601.) Here, the record affirmatively reflects the court in fact fulfilled its duty in this regard. That the juvenile court had the physical waiver signed by N.M. in hand is implicit in the court's oral statement on the record that the court had "a waiver signed by [him]." Ms. Mehrinfar did not disagree with or otherwise dispute the court's implied finding that N.M. signed a waiver of his right to be present at the adjudication hearing, and N.M. does not challenge this finding on appeal.[5]

2. Failure to Provide JV-505 Form Nonprejudicial

N.M. contends his right to due process of law was abridged, because he was not provided with the required JV-505 form. We agree that he should have been provided the form. However, he was not prejudiced by this omission. (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 382-383.)

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4 Pursuant to the request of counsel for DCFS, the clerk's transcript has been augmented with a copy of the JV-150 form in which N.M. agreed to the "WAIVER OF RIGHT TO BE PRESENT AT HEARING AFFECTING PRISONER'S PARENTAL RIGHTS," which was executed on May 10, 2012, with regard to a May 16, 2012 hearing. This form is irrelevant to this appeal, because it pertains to a different hearing and was executed almost six months after the subject hearing. Clearly, it is not the waiver before the juvenile court at this hearing.

5 N.M.'s counsel argued that it was her "understanding" that N.M. wanted to appear but feared for his safety "in men's central jail considering the recent occurrences that are going on with the 3000 boys, which is a gang violence that is going on with the sheriffs." The juvenile court pointed out that N.M. did not write a letter or otherwise communicate such fear to the court.

"[S]ection 316.2, subdivision (b) and California Rules of Court, rule 5.635 provide an alleged father with the notice and procedural means to attempt to change his paternity status. [Citation.]"[6] (*In re Marcos G., supra*, 182 Cal.App.4th at p. 384.) This statutory provision "states that when a man is identified as an alleged father he is to be provided, at his usual place of abode by certified mail, return receipt requested, with a notice that alleges that he is or could be the father of the minor child, and that states the child is the subject of proceedings under section 300 and such proceedings could result in the termination of parental rights and adoption of the child. Additionally, the notice shall include . . . form JV-505[, which, among other matters, advises the alleged father] that he can have a trial on the issue of parentage and an attorney may be afforded him if he cannot afford one for himself, and if he wants the court to decide if he is the minor's parent he should fill out form JV-505." (*Id.* at pp. 383-384.)

Rule 5.635 "[s]ubdivision (g) . . . provides that when an alleged parent is identified, the clerk must provide such person, at their last known address by certified mail, return receipt requested, with a copy of the petition, notice of the next scheduled hearing, and form JV-505 unless certain matters (which are not relevant in the instant case) have occurred. Subdivision (h) of the rule states that when a person appears at a dependency hearing and requests a judgment of parentage on form JV-505, the court must determine if that person is the minor's biological parent, and if requested to do so, determine if he is the child's presumed parent." (*In re Marcos G., supra*, 182 Cal.App.4th at p. 384.)

The record reflects that even if N.M. had been provided the JV-505 form, a result more favorable to him would not have ensued. N.M. does not contend that he would have presented anything new or different than that of his appointed counsel, who appeared before the juvenile court on his behalf. He also could not have shown that he qualified as a presumed father who would be entitled to reunification services.

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6 All further references to rules are to those of the California Rules of Court.

"'Due process for an alleged father requires only . . . notice and an opportunity to appear and assert a position and attempt to change his paternity status, in accordance with procedures set out in section 316.2. [Citation.] He is not entitled to appointed counsel or to reunification services.' [Citation.]" (*In re J.H.* (2011) 198 Cal.App.4th 635, 644.)

"'Presumed fathers are vested with greater parental rights than alleged or biological fathers. [Citation.] "[O]nly a presumed . . . father is a 'parent' entitled to receive reunification services under . . . section 361.5," and custody of the child under . . . section 361.2.' [Citation.]" (*In re J.H., supra,* 198 Cal.App.4th at p. 644.) "To be a presumed father, a man must fall within one of the categories set forth in Family Code section 7611. Several of the categories relate to the man's status as the mother's husband, or his attempts to marry the mother. However, under section 7611, subdivision (d), a man may also be deemed a child's presumed father if he 'receives the child into his home and openly holds out the child as his natural child.' [Citation.]" (*Ibid.*)

Substantial evidence supports the juvenile court's conclusion that "under any permutation of the Family Code, [N.M.] would [not] qualify as a presumed father." He was not married to J.M.'s mother, nor was he living with the mother at the time J.M. was born. Rather, he was incarcerated at the time of birth. He never met J.M., received her in his home, and had no relationship with her. His sole communication with J.M. was through letters asking about her to paternal relatives sent from prison.

Additionally, the record reflects in all probability, the length of his incarceration would have foreclosed any reunification between him and J.M. When the section 300 petition was filed, J.M. was approximately nine months old. As of July 6, 2011, N.M. was incarcerated at the California Correctional Center and was serving a two-year sentence. His tentative release date was September 29, 2012. This incarceration period would exceed the six months for reunification with J.M, a child under age three, which time would expire in May 2012.[7]

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[7] The juvenile court stated the court would not offer N.M. reunification services even if he were a presumed father given the length of reunification time would be limited

Under these circumstances, N.M. could not have qualified as a presumed father even if a trial were held pursuant to form JV-505. Accordingly, N.M. cannot demonstrate that he was entitled to reunification services as a presumed father.

3. Failure to Make Biological Father Finding Harmless

N.M. contends the trial court erred in failing to order a paternity test and determine whether he is or is not J.M.'s biological father. These omissions are harmless.

At the November 16, 2011 hearing, counsel for N.M. requested that, if the juvenile court were not inclined to grant N.M. presumed father status, the court find him to be J.M.'s biological father within the meaning of *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 and order a DNA test that same day. She argued N.M. was prevented from receiving J.M., into his home due to his incarceration but he was eager to care for her following his release and that he had "promptly come forward and demonstrated full commitment to his parental responsibilities."

The court disagreed that N.M. promptly came forward or he was committed to caring for J.M., pointing out he waited until the petition was filed to get involved and did not take advantage of any of the ways available to communicate with the court, such as court appearances or providing a declaration under penalty of perjury.

"'A biological father is one whose paternity is established, but who does not qualify as a presumed father.' [Citation.] 'A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an "alleged" father.'" (*In re J.H.*, *supra*, 198 Cal.App.4th 635, 644.) "'Due process for an alleged father requires only . . . notice and an opportunity to appear and assert a position and attempt to change his paternity status, in accordance with procedures set out in section 316.2. [Citation.]'" (*Ibid*.) "[A] biological father who is not also a presumed father has very limited rights. He is not entitled to custody of the child. [Citations.] Nor may he receive reunification services

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in that the "length of incarceration would likely exceed the period of time that he would have to reunify."

unless the court determines such services will benefit the child. [Citations.]" (*Ibid*., italics added.)

We note that in *In re J.H.* this court concluded "[r]ule 5.635(h) required that the juvenile court determine if Tyrone M. was J.H.'s biological father as part of the parentage determination, whether by ordering genetic tests or deciding based on the other evidence presented at the parentage hearing. The juvenile court's parentage finding as to Tyrone M. was incomplete, and as such, must be reversed. We therefore remand this matter to the juvenile court to determine whether Tyrone M. is J.H.'s biological father. [Citation.]" (*In re J.H.*, *supra*, 198 Cal.App.4th at p. 650.)

In re J.H., however, is factually distinguishable. In that case, George J., the presumed father, was in prison and did not expect to be released before the end of any possible reunification period. This court concluded that under these circumstances, the probability of a successful reunification between George J. and J.H. was dubious. A determination whether Tyrone M., the alleged father, was J.H.'s biological father was therefore warranted, as he already had developed some connection to J.H., and it was not ruled out that he might still qualify as a presumed father or obtain reunification services. (*In re J.H.*, *supra*, 198 Cal.App.4th at pp. 649-650.)

These are not our facts. Rather, the facts here are substantially similar to those in *In re Joshua R.* (2002) 104 Cal.App.4th 1020, which this court in *In re J.H.*, *supra*, 198 Cal.App.4th at page 648, acknowledged was authority for a juvenile court to refuse to order a paternity test when the results would be irrelevant, because the man would not qualify as a presumed father even if he established his biological paternity. The alleged father in *In re Joshua R.*, as N.M. here, had no relationship with the child. In denying the paternity test, the *In re Joshua R.* court and the court here impliedly found the child would not benefit from reunification services to the alleged father, even if he were the biological father. (*In re Joshua R.*, *supra*, at pp. 1025-1026, 1028.)

A hearing to determine whether N.M. is J.M.'s biological father could not have resulted in a determination that reunification services would have been in the best interests of J.M. It was highly improbable that reunification with J.M. would have

transpired in view of the fact N.M.'s incarceration was expected to extend beyond the reunification period.[8] A determination that N.M. was J.M.'s biological father who might be entitled to reunification services if found by the juvenile court to be in the best interests of J.M is of no moment.

DISPOSITION

The disposition order is affirmed.

FLIER, Acting P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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[8] The juvenile court, however, left open the possibility that if after his release, N.M. began visitation with J.M., the court would consider his request for reunification services but there was no legal basis presently for such services.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.