Filed 12/11/12 In re J.O. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re J.O., a Person Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. E.A., Defendant and Appellant.	B241709 (Los Angeles County Super. Ct. No. CK85294)

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

Lori Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

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

E.A. appeals from orders (1) terminating his parental rights with respect to J.O., (2) denying a petition for modification, and (3) denying a request for presumed father status. He contends the order terminating parental rights must be reversed because the Department of Children and Family Services (the Department) failed to search for him with due diligence at the outset of the case. He also claims the juvenile court erroneously denied the requests for modification and presumed father status. We conclude substantial evidence supports the due diligence finding. Further, because it appears appellant was aware of the proceedings from the outset but did not wish to participate, any conceivable deficiency in the notice provided was harmless. With respect to the petition for modification, the record supports the juvenile court's finding the requested modification would not be in J.O.'s best interests. As to the request for presumed father status, we affirm the juvenile court's findings appellant failed to receive the child into his home, failed to visit or provide regularly, and failed to accept his responsibilities in a timely fashion. We therefore affirm the orders under review.

FACTS AND PROCEDURAL BACKGROUND

1. *Detention.*

On November 10, 2010, the Department received an immediate response referral indicating mother had been placed on a 14-day psychiatric hold. (Welf. & Inst. Code, § 5250.)[1] The reporting party stated mother had been diagnosed with depression and had suicidal ideas and thoughts of harming her children, four-year-old A.O. and 11-month-old J.O. Both children were placed with maternal aunt. However, maternal aunt already had custody of another child and could not provide long-term care for J.O.

On November 24, 2010, the Department filed a dependency petition. An addendum report filed the same day indicated the whereabouts of J.O.'s biological father, appellant, were unknown.

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[1] Subsequent unspecified statutory references are to the Welfare and Institutions Code.

At the detention hearing, the juvenile court questioned mother under oath. Mother stated appellant did not live with her when J.O. was conceived or born, appellant's name is not on J.O.'s birth certificate, appellant never provided financial support or lived with J.O., and mother does not know appellant's date of birth. Mother stated appellant's family lives in Highland Park. Mother indicated she did not have their telephone number but could obtain it and would provide it to the juvenile court.

After the juvenile court declared appellant J.O.'s alleged father, mother's counsel stated appellant, whom counsel referred to as Mr. A., "was present earlier today. He is no longer in the waiting area, though."

2. *Jurisdiction*.

On December 17, 2010, in an interview conducted for the jurisdiction report, mother told the social worker appellant is approximately 30 years of age, he recently got out of jail, he is homeless and has no telephone, and she does not know where appellant resides. Mother indicated appellant has acknowledged paternity of J.O. but does not want to go to children's court. Appellant visits on occasion and brings mother groceries. Mother stated she does not know where appellant's family lives and really knows nothing about appellant.

The Department filed a Declaration of Due Diligence with respect to appellant on January 3, 2011. The declaration indicated the LexisNexis Person Locator and the Sheriff's Inmate Information Center had no record of appellant, welfare records indicated appellant was not receiving services, the DMV required more specific information, records for the Air Force, Army, Coast Guard and Marines were negative, there was no one with appellant's name on probation or parole or in federal prison and neither the California Child Support Services System nor any utility companies had a record of appellant. The registrar/recorder returned more than 260 results for the name, which was reported to be very common, and indicated more information was needed to pursue a search.

On January 3, 2011, the juvenile court sustained the petition as to mother and granted her family reunification services.[2] The juvenile court held the remaining counts in abeyance pending receipt of due diligence reports as to appellant and A.O.'s father.

An interim review report filed January 18, 2011, indicated that, due to a lack of information such as appellant's date of birth, a complete search was not possible.

On January 18, 2011, the juvenile court found the due diligence search complete, sustained the petition with respect to appellant, declared J.O. a dependent child and denied appellant family reunification services.[3]

3. *Mother fails to reunify*.

A social report filed August 2, 2011, indicated J.O. had been placed in the certified foster home of Mr. and Mrs. A. They were eager to adopt but were not willing to participate in the reunification process and asked that J.O. be replaced.

A social report filed for the 12-month review hearing on January 3, 2012, indicated J.O. had been placed in the care of Mr. and Ms. D. who had expressed willingness to adopt. The report indicated mother was not in compliance with the case plan and recommended termination of mother's family reunification services and initiation of permanent placement services for J.O.

Appellant appeared at the hearing on January 3, 2012, and counsel was appointed to represent him. Appellant gave an address and a telephone number at which he could be reached. The juvenile court granted appellant monitored visitation and continued the matter, at mother's request, for a contested review hearing.

A delivered service log filed for the contested review hearing indicated that, on November 28, 2011, Ms. D. advised the social worker neither parent had visited J.O. The log further indicated the social worker made telephone contact with appellant on

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[2] The sustained petition alleged mother has mental problems, a history of heroin use and she is a current user of alcohol which renders mother unable to provide regular care and supervision.

[3] The sustained petition alleged appellant failed consistently to provide the necessities of life thereby endangering the child's physical and emotional health and safety and appellant's whereabouts are unknown.

December 27, 2011, and appellant had his first "official" visit with J.O. on December 30, 2011. The log entry indicated J.O. recognized appellant because appellant "has shown up during visits with [maternal aunt]." The child had a tantrum at the beginning of the visit but calmed down. Appellant was attentive to J.O., soothed the child, changed his diaper and played with him.

Mr. and Mrs. D.'s foster home was decertified and, on January 7, 2012, J.O. was placed with Mr. and Mrs. C.

A delivered service log entry dated January 9, 2012, indicated appellant told the social worker that members of his family wanted custody of J.O. and appellant desired family reunification services.

4. *Appellant's petition for modification.*

On February 6, 2012, appellant filed a petition for modification of the order denying him family reunification services. Appellant asserted he did not receive notice of the proceedings and the Department did not diligently search for him. Appellant requested an order vacating the jurisdictional findings and dispositional orders and an opportunity to reunify with J.O. Appellant indicated the requested modification was in J.O.'s best interests because it is always in a child's best interests for the juvenile court to have participation from all parties.

An attachment to the petition asserted the Department should have obtained results for appellant in three of the databases searched. Appellant claimed welfare records should have shown he was a prior recipient of welfare assistance, DMV records should have shown appellant possesses a California identification card issued January 6, 2009, and parole records should have shown appellant currently is on parole. Appellant declared he learned of the proceedings through maternal aunt who continued to care for J.O.'s sibling, A.O.

5. *The 12-month review hearing; permanency planning hearing set.*

At mother's contested review hearing on February 6, 2012, appellant's attorney appeared on behalf of appellant, who was not present. The juvenile court terminated mother's family reunification services and set the matter for hearing under section 366.26 on May 17, 2012.

The social report prepared for the permanency planning hearing indicated J.O. is a happy, well-adjusted child who is an integral part of his prospective adoptive family. His prospective adoptive parents, Mr. and Mrs. C., have been married for 19 years, they have a certified foster home in good standing and have an approved home study. Mr. and Mrs. C. appear to be loving and nurturing, and they promptly expressed a desire to adopt J.O. The child has flourished in their care, responds to their supervision and identifies them as his parents. Mr. and Mrs. C. were agreeable to maintaining contact with the birth family as long as it was in J.O.'s best interests.

Appellant visited J.O. on February 9 and 16, 2012. Appellant was appropriate during the visits and J.O. appeared to enjoy them. However, appellant canceled a third visit and made no further contact. The social worker suspected appellant visited during J.O.'s monthly weekend visits with maternal aunt. However, J.O. had only one weekend visit with maternal aunt after he was placed with Mr. and Mrs. C. Maternal aunt indicated mother and appellant have a two-hour visit with J.O. at her home during her monthly weekend visit.

Appellant was arrested on March 3, 2012. Appellant's criminal history and current inmate information indicate appellant's middle name is "Ray." The criminal history further indicates that, in addition to "E.A." and "E. Ray A.," appellant has used the name Ray E., Ray A. and the moniker Soto.

On the date of the permanency planning hearing, May 17, 2012, appellant appeared in custody and filed a Statement Regarding Parentage (JV-505) in which he requested a judgment of parentage and presumed father status. Appellant declared J.O. had lived with him from "conception" to "7 months into the pregnancy" and from October to November of 2010. He claimed he provided to the best of his ability during mother's pregnancy, purchasing maternity clothes and prenatal vitamins. Appellant told "family, friends, and the world at large" that J.O. was his child. He participated in caretaking activities and "made every effort to try to get him back as soon as [he] learned of the court's involvement."

At the hearing, the juvenile court questioned appellant directly. Appellant testified he lived with J.O. after he was released from custody in October of 2010 when J.O. was 10 months old. In November, appellant and mother separated and appellant thereafter had a "hard time" visiting J.O. Appellant indicated he visited J.O. "[i]n January when the [maternal aunt] -- I can't remember the date, but with the [maternal aunt] I saw [the child]." Appellant stated he provided clothes and food whenever J.O. needed them.

The juvenile court concluded living with the child for one month was not sufficient to establish presumed father status. Also, appellant testified he visited only "when the child was with the maternal aunt after the detention." Further, appellant is not named on the birth certificate and he did not sign a declaration of paternity. The juvenile court concluded appellant did not receive J.O. into his home, did not visit on a regular basis, failed to provide consistently "for the child, and he's in custody again."

In response to counsel's assertion it would be in J.O.'s best interest to reunify with appellant, the juvenile court stated appellant "did not step up when he needed to step up, and it's too late now. That's the bottom line." The juvenile court found no exception to termination of parental rights and declared J.O. free from the custody and control of his parents.

At the end of the hearing, with regard to appellant's section 388 petition, the juvenile court noted it previously had found the Department diligently had searched for appellant with the information that was available at the time and nothing in appellant's petition changed the juvenile court's view of the matter. Thus, there was no new information. The juvenile court also found "it would not be in the child's best interest for this court to revisit [the issue of] due diligence . . . ."

CONTENTIONS

Appellant contends the juvenile court erroneously proceeded without proper notice to appellant, the summary denial of appellant's petition for modification was an abuse of discretion, and the evidence does not support the juvenile court's denial of appellant's request for presumed father status.

DISCUSSION

1. *The finding the Department exercised due diligence in attempting to locate appellant is supported by the record; in any event, any error was harmless.*

The interest of a parent in the companionship, custody, and care of his or her child is a compelling one and before a parent can be deprived of this interest, the parent must be afforded notice and an opportunity to be heard. (*In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598.) Due process entitles a parent to notice that is reasonably calculated to apprise the parent of the dependency proceedings and afford an opportunity to object. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) In order to fulfill its obligation to provide notice reasonably calculated under all the circumstances to provide actual notice, the Department must undertake a " 'thorough, systematic investigation and inquiry conducted in good faith . . . .' " (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016.) We assess due diligence by what was done, not by what might have been done. (See *People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

Here, the Department conducted as thorough a search as was possible given the information at its disposal. At the detention hearing, mother testified she did not know appellant's date of birth. Although mother indicated she could obtain a telephone number for appellant's family in Highland Park, she provided no further information and, in an interview conducted for the jurisdiction hearing, indicated she really knew nothing about appellant. Thus, the Department knew only appellant's first and last name and searched welfare, parole, military, utility and DMV records with negative results.

Appellant claims a diligent search would have located him as he had a California identification card, he was on parole and he previously had received welfare assistance. He further claims the Department should have used his approximate age to narrow the scope of the databases searched and the Department should have requested information from maternal aunt because the Department knew appellant visited J.O. while the child was in maternal aunt's custody. (See *In re Arlyne A., supra,* 85 Cal.App.4th at p. 599 [the social services department failed to search the source most likely to yield an address]; *David B. v. Superior Court, supra,* 21 Cal.App.4th at p. 1016 [social services department did not contact appellant's employer].)

The Department's inability to locate appellant through the DMV and parole records may be explained by the Department's failure to include appellant's middle name and numerous variations of his name in its search. However, the Department was not aware of this information at the start of the case. Notably, appellant does not indicate how his name appears on his identification card.

Regarding the Department's failure to locate appellant through welfare records, only current recipients were included in the welfare database and appellant was not receiving welfare at the time of the search.

With respect to appellant's claim the Department should have inquired of maternal aunt, it appears the Department did not know appellant visited J.O. during maternal aunt's monthly weekend visits until appellant came forward in December of 2011, and requested visitation. Thus, unlike the cases on which appellant relies, the Department did not ignore information about appellant's whereabouts.

Finally, appellant claims the Department could have sent notices to each of the 260 E.A.'s listed in voter registration records. However, appellant does not assert he is registered to vote. Thus, it is not certain such a mailing would have reached appellant. Moreover, the juvenile court reasonably could conclude due diligence did not require the Department to notify more than 260 individuals of the proceedings.

In sum, the record supports the juvenile court's finding the Department exercised due diligence in attempting to locate appellant. Consequently, appellant's right to due process was not violated by the failure to provide him actual notice of the proceedings. (*In re Justice P., supra,* 123 Cal.App.4th at p. 191 [where reasonable efforts to notify an absent parent have been made, a dependency case properly proceeds].)

Moreover, even if the Department failed to exercise due diligence in searching for appellant and thus provided inadequate notice of J.O.'s dependency case, the record suggests appellant was aware of the dependency proceedings from the outset but chose not to appear until the Department recommended termination of mother's family reunification services.

Specifically, at the close of the detention hearing, mother's counsel noted appellant had been present in the waiting room before the case was called but was no

longer present. Appellant argues the statement of mother's counsel amounts to speculation as there is no reliable evidence indicating mother's counsel could identify him. (*In re B.T.* (2011) 193 Cal.App.4th 685.) However, counsel charged with representation of parties in dependency proceedings are officers of the juvenile court. Thus, the statement of mother's counsel regarding the presence of a party to the proceedings in the courthouse is entitled to great weight.

Moreover, other evidence indicated appellant was aware of the proceedings. Prior to the jurisdiction hearing, mother told the social worker appellant visited occasionally and bought groceries but did not want to participate in children's court, suggesting he knew of the proceedings. Also, during his testimony at the permanency planning hearing, appellant claimed he had difficulty visiting the child after he and mother separated in November of 2010, but admitted he visited J.O. when the child was in the care of maternal aunt in January of 2011.

Based on the foregoing, appellant's failure to participate in the dependency proceedings was not due to lack of notice or the Department's failure to search for him with diligence. Given these circumstances, appellant cannot complain he was not afforded adequate notice of the proceedings and any error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]. (See *In re Angela C.* (2002) 99 Cal.App.4th 389, 391.)

2. *No abuse of discretion in the summary denial of appellant's petition for modification*.

Under section 388, a party may petition the juvenile court to change, modify, or set aside a previous order on the grounds of changed circumstances or new evidence. The juvenile court may "deny a section 388 petition without an evidentiary hearing if the parent does not make a prima facie showing that the relief sought would promote a child's best interest." (*In re Justice P., supra,* 123 Cal.App.4th 181, 189.) A section 388 "petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

Appellant claims he made a prima facie showing of changed circumstances in that he demonstrated a diligent search would have identified his whereabouts. He further claims the requested change of order would have been in J.O.'s best interests. According to appellant, he appeared in the case and sought involvement in J.O.'s life as soon as he learned of the proceedings, and he told the social worker he desired family reunification services and his family members wanted custody of J.O. He claims J.O.'s best interests would have been promoted by granting appellant presumed parent status and providing him reunification services.

However, as previously noted, appellant did not come forward until the Department recommended termination of mother's family reunification services. After a long period in unsatisfactory dependency proceedings, J.O. had been placed with prospective adoptive parents who wanted to adopt him and had an approved home study. Appellant's motion effectively sought to return the dependency proceedings to square one. J.O. already had been replaced after his prior foster parents declined to wait the outcome of the reunification process. Although appellant claimed members of his family wanted custody of J.O., none came forward.

Thus, appellant failed to establish J.O.'s best interests would be served by postponing adoption by Mr. and Mrs. C. and spending additional time in the dependency system, hoping appellant or one of his relatives might eventually be in a position to care for him. "Children need stability and permanence in their lives, not protracted legal proceedings that prolong uncertainty for them." (*In re Justice P., supra*, 123 Cal.App.4th at p. 191.) Because appellant failed to demonstrate that granting the petition and delaying permanence for J.O. was in the child's best interests, the juvenile court did not abuse its discretion by summarily denying appellant's section 388 petition.

3. *The juvenile court properly denied appellant's request for presumed father status.*

Appellant contends he qualifies as a presumed father under Family Code section 7611, subdivision (d) because he received J.O. into his home from October 2010 through November of 2010, openly held the child out as his natural child, supported mother during her pregnancy, bought clothing and diapers for J.O., visited regularly and filed a

Judicial Council Form JV-505 in which he requested a judgment of paternity. Appellant claims he did not delay in asserting his interest in J.O. and concludes the juvenile court erred in failing to grant him presumed father status and an opportunity to reunify. (*In re Julia U*. (1998) 64 Cal.App.4th 532, 540-542.)

We disagree. Under Family Code section 7611, a man is presumed to be the natural father of a child if, as pertinent here, "(d) He receives the child into his home and openly holds out the child as his natural child." (Fam. Code, § 7611, subd. (d).) The party seeking to establish presumed parent status bears the burden of proof by a preponderance of evidence. (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585-586.) An appellate court reviews a juvenile court's determination of presumed father status under the substantial evidence standard. (*In re M.C.* (2011) 195 Cal.App.4th 197, 213.)

Here, appellant's claim he received the child into his home was contradicted by mother's testimony at the detention hearing that appellant did not live with her when J.O. was conceived or born, and appellant never lived with J.O. Further, even accepting appellant's declarations in support of the request for presumed father status as true, the juvenile court properly could conclude the brief amount of time appellant spent in the same residence with J.O. was insufficient to warrant granting appellant's request. (See *In re D.A.* (2012) 204 Cal.App.4th 811, 827 [denial of presumed father status upheld where biological father resided with mother for two weeks before and two weeks after delivery and there was no evidence indicating biological father had held the child out as his own].)

Finally, contrary to appellant's argument he came forward immediately upon learning of the proceedings and thus did all he could to accept parental responsibility, the record indicates appellant was aware J.O. had been detained but decided not to participate. He was in the courthouse on the day of the detention hearing but left before the case was called. Mother told the social worker appellant did not want to be involved in children's court, and appellant did not come forward until the Department recommended termination of mother's family reunification services. For all these reasons, we find no reversible error in the juvenile court's denial of appellant's request for presumed father status.

DISPOSITION

The orders under review are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.