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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JOSE N., a Person Coming Under the
Juvenile Court Law.

B238244

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK77184)

Plaintiff and Respondent,

v.

JORGE N.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Marilyn Mackel, Commissioner. Affirmed.

Lauren K. Johnson, 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.

Jorge N. (Father) appeals from the juvenile court's order denying his petition under Welfare and Institutions Code section 388.¹ We affirm.

BACKGROUND

On May 8, 2009, the Los Angeles Department of Children and Family Services (DCFS) filed a dependency petition under section 300, alleging mother, Gabriela R. (Mother),² physically abused her eight-year-old son Jose N., engaged in violent altercations with a male companion in Jose's presence, and failed to obtain appropriate medical care for Jose. The petition also alleged Father had failed to provide Jose with the necessities of life, including food, clothing, shelter and medical care. The petition stated Father's address was unknown.

In the detention report, DCFS stated Father's whereabouts were unknown and Jose had been living with a maternal aunt, Martha R., since early April 2009. Mother reported to DCFS that "Jose does not have any contact with his father." Mother asserted she discontinued visits between Jose and Father at some unspecified time because "Jose would act out and [F]ather would be inappropriate with Jose." When Mother and Father were still in contact, Mother learned Father had gone to New Mexico. At the time of detention, however, Mother informed DCFS she did not know Father's whereabouts because she was not in contact with him. On May 7, 2009, DCFS initiated a parent locator search for Father. DCFS did not send notice of the detention hearing to Father.

Father was not present at the detention hearing on May, 8, 2009, and the juvenile court did not appoint counsel to represent him. Mother filled out a paternity questionnaire indicating Father was Jose's father and she had last seen him in August 2007 in New Mexico. At the hearing, Mother told the juvenile court Father was "paying [child] support from New Mexico." The court found Father is Jose's presumed father. The court ordered DCFS to attempt to locate Father through the Los Angeles County

¹ Statutory references are to the Welfare and Institutions Code.

² Mother is not a party to this appeal and therefore we will not summarize here the dependency proceedings that relate only to Mother.

Child Support Division (CSD) and to present evidence of its due diligence in attempting to locate Father.

In a declaration of due diligence, prepared on or about June 11, 2009, the DCFS social worker described DCFS's efforts to locate Father using his name and birth date. Through a search with CSD, DCFS found addresses in Las Vegas, Nevada, and on Giovane Street in El Monte, California. Through a LexisNexis search, DCFS found an address in Garland, Texas. The spaces on the declaration for listing the social security number used in these searches are blank, but it is not clear whether this information was originally omitted or subsequently redacted by DCFS. Through the Department of Motor Vehicles (DMV), DCFS found another address in El Monte, California, this one on Fineview Road. Using "Directory Assistance," DCFS searched for a telephone number for Father in El Monte, California, Las Vegas, Nevada, and Garland, Texas. A DCFS dependency investigator called a telephone number DCFS found for a Jorge N. in Garland, Texas, but it was a different Jorge N., not Father. DCFS stated it could not conduct any further searches through Directory Assistance because there were "[n]o other known areas's [sic] of possible residence." DCFS also conducted searches for Father with the Welfare Case Management Information System (WCMIS), the Child Welfare Case Management System (CWS/CMS), voter registration, the military, the state prison system, the county jail system, probation/parole and the Department of Justice.

DCFS sent notice of the June 11, 2009 jurisdiction hearing by certified mail to Father at the two addresses in El Monte, California, and the addresses in Las Vegas, Nevada, and Garland, Texas. The notices sent to Giovane Street in El Monte and Las Vegas were unclaimed and returned.

In an addendum report, prepared on or about June 11, 2009 for the jurisdiction hearing, DCFS reported Jose believed Father was living in Arizona and paying child support to Mother. Jose told the social worker he obtained this information from Mother. Mother's sister, Martha R., told the social worker Father was living in New Mexico and paying child support. According to Martha, Mother called the "child support office" and

was told Father was sending support from New Mexico. Mother's sister, Maria R., also reported that Mother told her Father was living in New Mexico.

In an interim review report, prepared on or about August 3, 2009, DCFS reported Mother told the social worker: "I know that he [Father] lives in New Mexico. I don't have an address for him in New Mexico." Mother also stated Father had been paying child support since March 2009. Mother reported she "was told by friends that he [Father] moved to Nevada or Arizona in August, 2007."

On October 6, 2009, the juvenile court adjudicated the petition and removed Jose from Mother's and Father's custody. The court found notice of the proceedings had been given as required by law. Mother signed a waiver of rights form and submitted on amended language regarding her inappropriate physical discipline of Jose, and on the allegations regarding a violent altercation with a male companion in Jose's presence, and failure to obtain appropriate medical care for Jose. The court ordered reunification services for Mother. The court struck the allegation about Father's failure to provide Jose with the necessities of life, the only allegation in the petition relating to Father. The court did not order reunification services for Father, finding he was a noncustodial parent who was not seeking custody of Jose.

DCFS sent notice of the April 6, 2010, six-month review hearing to Father at the Fineview address in El Monte, California. DCFS apparently did not send notice of the October 4, 2010, 12-month review hearing to Father. At the October 4, 2010 hearing, Jose told the juvenile court he wanted his Aunt Martha to adopt him. Jose had been living with her since April 2009, and an adoption home study had been initiated.

At the November 17, 2010, 18-month review hearing, the juvenile court terminated Mother's reunification services and set the matter for a section 366.26 hearing. The court clerk mailed the minute order and advisement of rights form to Father at the Fineview address in El Monte, California.

On January 4, 2011, the adoption social worker initiated another due diligence search for Father. In the report prepared for the March 22, 2011 section 366.26 hearing, DCFS stated: "This reporter [the social worker] learned that a due diligence, which has

been reported to have been completed in November 2010, had not been initiated for [Father]. There had been only one previous search for the presumed father [i]n or about May 2009. The current case car[ry]ing worker indicated that the father's whereabouts were unknown; therefore a due diligence was initiated so that the department would then be able to request publication for [Father] at today's hearing." There is no other reference in the record about a search that was supposed to be conducted in November 2010. The record does not indicate the juvenile court ordered such a search.

DCFS prepared a declaration of due diligence in March 2011. Through a search with CSD, DCFS found an address in El Monte, California, on Elrovia Avenue. Through a LexisNexis search, DCFS found the address on Elrovia Avenue and also an address in Albuquerque, New Mexico. The United States Postal Service reported Father was not known at the Elrovia Avenue address. Through a DMV search, DCFS found an address in El Monte, California, on Continental. DCFS sent notice of the March 22, 2011 hearing to Father at these addresses.

On February 24, 2011, Father called the social worker. As reported in DCFS's section 366.26 report, Father stated he had received the notice sent to New Mexico and he wanted to know what he had to do to obtain custody of Jose. Father claimed Mother knew where he lived, but explained he "had not kept in contact with her [Mother], due to their estranged relationship." Father acknowledged he had not seen Jose in several years. He provided documentation showing he had been paying child support since October 2008.

On March 9, 2011, Father traveled from New Mexico to California. He submitted to live scan and had a visit with Jose the next day. DCFS reported: "The visit with the child was a very emotional visit. The child recognized his father and it appeared that both were very despondent about not seeing each other." DCFS was unable to schedule additional visits before Father returned home.

DCFS recommended the juvenile court continue the section 366.26 hearing to allow DCFS "additional time to assess which permanent plan is the most appropriate and to respectfully request that the court initiate a ICPC [Interstate Compact for the

Placement of Children] with the state of New Mexico in order for the department to assess the father's appropriateness." DCFS reported it had closed Martha's home study because Martha had been "evasive and non-compliant in meeting the requirements necessary to proceed with the home study." DCFS was considering whether legal guardianship with Martha would be an appropriate plan for Jose.

Father appeared for the section 366.26 hearing on March 22, 2011, and the juvenile court appointed counsel to represent him. At the hearing, DCFS's counsel informed the court that "Jose is very eager to tell the court something." Jose addressed the court and stated: "I still want my aunt to adopt me and I will never change my answer." Jose's counsel requested DCFS continue to pursue the adoption home study for Martha. The court ordered DCFS to complete the home study and initiate an ICPC with New Mexico. The court also granted DCFS discretion to liberalize Father's monitored visitation. The court set the section 366.26 hearing for a contest on July 15, 2011.

In a status review report, prepared on or about May 18, 2011, DCFS stated Jose did not want to be returned to Mother's or Father's care. He wanted Martha to adopt him. Martha told the social worker "she is committed to providing a loving and stable environment that Jose deserves." Jose stated he enjoyed his March 10, 2011 monitored visit with Father, and described it as "good." Father was calling Jose one or two times per week and they would talk for about five minutes. DCFS reported Jose "is very scared about [the] possibility [of] leaving California to live with his father in New Mexico." Jose told the social worker he did not want to have visits with Father if doing so meant "he will have to live with him in New Mexico."

In a supplemental report, prepared on or about July 11, 2011, DCFS reported New Mexico approved Jose's placement with Father. DCFS also described a telephone interview between a social worker and Father. Father stated he had lived in New Mexico for the past four years. He had been married for three years, and shared a two-bedroom home with his wife and eight-year-old stepdaughter. He was employed as a construction worker and stated he could support Jose financially. He would move to a three-bedroom home if Jose came to live with him. DCFS reported Father "loves Jose and wants the

child to live with him and his family in New Mexico.” Father did not want Martha to adopt Jose. He believed he could “provide a ‘better’ home.” The report does not elaborate on why Father believed he could provide a better home.

Regarding Father’s current contact with Jose, DCFS reported Jose would sometimes refuse to speak with Father on the telephone. In interviews with the social worker, Jose “expressed his fear of not knowing his father and leaving his maternal relatives to live with [Father] and his family.” On June 24, 2011, Jose agreed to speak with Father on the telephone with the social worker present. According to the social worker: “The child willingly talked to father and asked about the well-being of father and his step-sister. The child talked about completing the school and his summer activities. Father expressed his love and appreciation for [Jose’s] willingness to speak with him.” When the call ended, Jose told the social worker the call was ““okay.”” Jose stated he did not know if he wanted to visit Father in New Mexico.

Father appeared for a hearing on July 15, 2011. He requested the juvenile court allow him to have an unmonitored visit with Jose in New Mexico. Jose’s counsel requested the visits remain monitored and explained Jose “would like to see his father more, but prefers it be here in California in terms of location.” Jose’s counsel also explained that “Jose doesn’t enjoy phone calls as much as he enjoys visits with the father.” The court ordered visits to remain monitored and granted DCFS discretion to liberalize visitation. The court set a contested section 366.26 hearing on August 23, 2011. The court ordered DCFS to speak with Martha and Jose and submit a report about legal guardianship as a permanent plan.

On August 10, 2011, Father filed a section 388 petition, asking the juvenile court (1) to vacate all orders and findings made after the October 6, 2010 disposition hearing, (2) to order family reunification services for him, and (3) to place Jose with him in New Mexico. Father asserted he “was never legally noticed until 3/22/11.” He “challenge[d] the due diligence in that it was conducted twenty months after the detention hearing.” Father argued, “An initial due diligence conducted at such a late stage in the proceedings cannot be considered done in good faith, systematic or thorough.” Father also noted he is

a presumed, nonoffending parent. Father argued a change of order would be in Jose's best interest because, "It is always in the best interest of the minor to allow his or her parent to have full substantive and procedural due process in dependency Court cases (or any case), particularly where parental rights may be terminated. [Citation.] A judgment that is proven void due to lack of due process suffers from a fatal jurisdictional defect." The court set the matter for hearing on October 11, 2011.

In a progress report, prepared on or about August 17, 2011, DCFS reported it had been unable to speak with Martha about legal guardianship because Martha had not returned the social worker's calls. DCFS believed legal guardianship with Martha was the appropriate permanent plan for Jose. DCFS placed a hold on the adoption case so Martha could participate in "therapeutic services to address [unspecified] past issues."

At a hearing on October 11, 2011, DCFS requested additional time to respond to Father's section 388 petition. Father requested unmonitored telephone contact with Jose. Jose's counsel urged the juvenile court not to order unmonitored telephone contact until DCFS could consult with Jose's therapist. In a last minute information for the October 11 hearing, the social worker reported Jose stated "when he talks to [Father] by telephone, he gets hurt by father and does not want to talk to him for a long period of time." The court made the order requested by Jose's counsel.

In a status review report, prepared on or about November 16, 2011, DCFS reported: "Jose continues to have telephonic conversation with father twice a week for a few minutes. Jose states that he is uncomfortable talking with father." DCFS also stated "Jose continues to do well under the care of his maternal aunt" and "has a close familial bond." DCFS concluded: "Interaction with father is distasteful to Jose and any further forced interaction with father would be a disruption to Jose's life and not in his best interest at the present time."

In a last minute information for a November 16, 2011 hearing, DCFS reported: "Jose stated that he is uncomfortable with his telephone calls because father tells Jose that he comes to California and wastes his time and money. [The social worker] asked Jose if he would like to have a visit with father in New Mexico and Jose stated no. [The social

worker] asked if he would like to live with father, Jose stated no. On 10/14/11, 10/21/11 and 10/28/11, [the social worker] monitored telephone contact between Jose and father. [The social worker] observed Jose to be very uncomfortable during the telephone contact. Jose had agreed to talk with his father for 5 minutes and did not want to be on the phone a minute more. When 5 minutes elapsed, Jose informed [the social worker] that he did not want to talk anymore. . . . Jose refused to talk with father after the last visit on 11/10/11. Jose does not have any type of bond with his father and is not willing to attempt to develop one.” DCFS recommended the juvenile court deny Father’s section 388 petition and order legal guardianship as the permanent plan for Jose. The court continued the hearing on Father’s petition to December 5, 2011.

In a last minute information for the December 5, 2011 hearing, DCFS reported Jose told the social worker he wanted no further telephone contact or visitation with Father. Jose stated he wanted to be adopted by Martha and have the dependency case closed. Jose’s therapist recommended that telephone contact between Jose and Father be at Jose’s discretion “[d]ue to Jose’s consistent discomfort with having weekly phone contact with father.”

The juvenile court held a hearing on Father’s section 388 petition on December 5, 2011. Father appeared. At the outset of the hearing, Father’s counsel stated Father wanted “to testify about notice but also about history from 2007 to present, but primarily about notice.” Father’s counsel proceeded to argue that the due diligence search DCFS conducted in June 2009 was inadequate because DCFS was on notice Father was paying child support from New Mexico, but DCFS did not search for an address in New Mexico. DCFS’s counsel argued, “The issue of notice is a legal one and is not one where the father can testify to facts as to what the Department did or didn’t do.” The court stated: “I am going to hear from the father, but the court is going to ask some questions if you are not asking questions the court needs answers to. You get two questions to get to the point.” The court allowed Father to testify about the notice issue.

In response to questions from his counsel, Father testified he moved to New Mexico at the end of 2007 and found out about the dependency proceedings in 2011.

After Father's counsel asked two questions, the juvenile court began questioning Father. In response to the court's questions, Father testified he had lived in El Monte, California, on Fineview Avenue,³ but not at the other El Monte addresses listed in the June 2009 and 2011 declarations of due diligence. He also had lived in Las Vegas, Nevada, but apparently not at the address listed in the June 2009 declaration of due diligence. He had not lived in Garland, Texas, but had lived in Dallas, Texas. Father had lived at the New Mexico address listed in the March 2011 declaration of due diligence for two years. Father stated he did not have his social security card or driver's license with him, and could not provide the numbers to the court. Father did not have a California driver's license or California identification card.

Father's counsel resumed questioning Father on the notice issue. Father testified he had lived at two other places in New Mexico before moving to his current home in New Mexico.

In response to further questioning by the court, Father stated when he lived in El Monte, California, he rented a room from someone. When he lived in Las Vegas, Nevada, he lived with his son's godfather. When he lived in Texas, he lived with a group in housing provided by his employer. In response to questions by DCFS's counsel, Father stated he did not fill out a change of address card with the U.S. Postal Service with each move he made. Father testified: "I never received mail. I never had any bills or anything under my name. I never rented a house or a room where I would need to have my address and I didn't have a bank account or anything. I wasn't stable in any of those." In response to further questioning by his counsel, Father stated he filled out change of address cards when he moved from one location to another in New Mexico.

³ The reporter's transcript indicates the juvenile court asked Father if he had ever lived on "Pine View Avenue in El Monte." The court was asking Father about the addresses listed in the declaration of due diligence. There is an address on "Fineview" listed in the declaration, but not "Pine View." Thus, it appears the court asked Father if he had ever lived on Fineview, in El Monte, California, and Father responded affirmatively.

The juvenile court stated: “I will hear brief argument regarding the notice issue and then we can move on to the other part of the 388.” Father’s counsel reiterated the argument that DCFS’s June 2009 due diligence search was inadequate because DCFS was on notice Father was paying child support from New Mexico. DCFS’s counsel argued the June 2009 due diligence was proper in that DCFS conducted a search through CSD and numerous other databases, but Father’s address in New Mexico was not listed. DCFS found an address for Father on Fineview, in El Monte, California. DCFS sent Father notice of proceedings at the Fineview address and the mail was not returned. Father acknowledged he had lived at the Fineview address. Jose’s counsel joined in DCFS’s argument that notice to Father was proper.

The juvenile court found Father was not entitled to reunification services based on his argument that notice of the proceedings was improper. The court found the due diligence search for Father was proper and the finding that Father was whereabouts unknown at the disposition stage of the proceedings was proper. The court noted Jose and Father did not have the “kind and quality relationship” where the court could place Jose with Father. Jose’s counsel informed the court Jose no longer wanted to visit with Father. Father’s counsel told the court Father “would be willing to testify about the relationship that he had [with Jose], not just during this case, but . . . prior to the case coming to court.” The court declined to hear the testimony. The court denied Father’s section 388 petition, but ordered Father was entitled to monitored visitation with Jose.

Father appealed from the December 5, 2011 order denying his section 388 petition. After this matter was fully briefed on appeal, we requested minute orders from the juvenile court for proceedings occurring after December 5, 2011. On May 21, 2012, the juvenile court granted legal guardianship of Jose, and Martha signed the letters of guardianship. On the court’s own motion, we take judicial notice of the juvenile court’s May 21, 2012 minute order in this matter.

DISCUSSION

DCFS's Motion to Dismiss

In his opening appellate brief, Father challenged the orders the juvenile court made at the 18-month review hearing on November 17, 2010,⁴ arguing the orders are reviewable on appeal because he did not receive notice. At the November 17, 2010 hearing, the court terminated Mother's reunification services and set the matter for a section 366.26 hearing. Father also contended in his opening appellate brief that the court abused its discretion in limiting the hearing on Father's section 388 petition to the issue of notice.

DCFS filed a motion to dismiss, arguing Father could not challenge the orders made at the November 17, 2010 hearing on appeal because Father did not raise these issues below. Father appealed from the order denying his section 388 petition and he did not raise issues related to the November 17, 2010 hearing in that petition. In response to the motion to dismiss, Father conceded he "overstated on appeal the scope of the relief stated in the section 388 petition below." Father agreed his arguments regarding the November 17, 2010 hearing are not cognizable on appeal.

We deny DCFS's motion to dismiss. Father appealed from the order denying his section 388 petition, and we will review the order denying his section 388 petition. We will disregard Father's arguments which exceed the scope of this appeal.

Section 388 Petition

Under section 388, "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (§ 388, subd. (a).) "The parent bears the burden of showing both a change of circumstances exists and that the proposed

⁴ Father refers to the hearing on November 17, 2010 as the 12-month review hearing, but it appears from the record that it was the 18-month review hearing.

change is in the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) We will not reverse an order denying a section 388 petition unless the parent demonstrates the trial court abused its discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Father had had no contact with Mother or Jose for well over a year before these dependency proceedings commenced. At the time of the hearing on Father's section 388 petition, Jose was nearly 11 years old and had been living with Martha for two and a half years. Father had had nine months to reestablish a relationship with Jose between the time Father learned of the dependency proceedings and the juvenile court denied the section 388 petition. Jose decided he wanted no further contact with Father, and his therapist concluded such contact should be at Jose's discretion. Throughout the dependency proceedings, Jose maintained he wanted to live with Martha. Regardless of whether Father can establish DCFS should have located him sooner, he cannot establish it is in Jose's best interest to be placed with Father or to have his permanent plan delayed while Father attempts to reunify with him.

Father argues the juvenile court abused its discretion in limiting his testimony at the hearing to the issue of notice of the proceedings. Father's counsel told the court Father "would be willing to testify about the relationship that he had [with Jose], not just during this case, but . . . prior to the case coming to court." The court declined to hear the testimony. Regardless of the testimony Father could have presented about his predependency relationship with Jose, such testimony would not have established a change in the order was in Jose's best interest. At the time of the section 388 hearing, Jose did not want a relationship with Father, he wanted a permanent plan with Martha. Jose's therapist concluded forcing Jose to have contact with Father was not in Jose's best interest.

The juvenile court did not abuse its discretion in denying Father's section 388 petition and declining to place Jose with Father or order reunification services for Father. The court did not prevent Father from developing a relationship with Jose. The court ruled Father was entitled to monitored visitation with Jose. The court subsequently

selected a permanent plan for Jose—legal guardianship—which did not require termination of Father’s parental rights.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.