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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re G.A., a Person Coming Under the Juvenile Court Law.	B234918 Consolidated with B236794
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. E.G., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK76327)

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

Janice A. Jenkins, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

E.G. appeals from two juvenile court's orders denying two petitions for modification he filed under Welfare and Institutions Code section 388,[1] seeking to be declared presumed father of three-year old G.A. We consolidated the appeals and affirm the two orders.

FACTUAL BACKGROUND

1. *Family background*

G.A. was six months old in February 2009 when the Department of Children and Family Services (the Department) detained her. Her biological mother M.M. reported to the Department that the child's biological father, D.K., died approximately eight months earlier. Mother's female companion, Lucy A. F. told the Department that she signed G.A.'s birth certificate as the "father" with the intention of becoming G.A.'s " 'legal father.' "[2]

At the detention hearing, the juvenile court inquired of M.M. and Lucy about paternity. M.M. testified that she did not believe D.K. was the biological father because his mother did a paternity test. Lucy's attorney confirmed that Lucy was requesting presumed parent status and had filed a Judicial Council form JV-505.[3] Lucy had lived with the child since birth until detention, had provided for the child financially, and had taken care of her on a daily basis. The court declared Lucy the presumed parent of G.A. The court placed the child with Lucy and ordered the two to live with the maternal great-grandmother.

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

[2] Neither M.M. nor Lucy is a party to this appeal.

[3] Judicial Council form JV-505 has check boxes next to preprinted statements with which an alleged father can indicate his position as to paternity.

The Department filed a petition alleging M.M., who has a history of mental and emotional problems, stabbed Lucy in the arm. The juvenile court sustained the petition declaring G.A. a dependent child described by section 300, subdivisions (a) [physical harm] and (b) [neglect], and ordered reunification services for M.M. and maintenance services for Lucy. On the front of the petition, the court noted that D.K. was not the biological father. Soon thereafter, the Department filed a subsequent petition (§ 342) alleging domestic violence, only this time Lucy was the aggressor. On November 16, 2009, the court sustained the subsequent petition, placed G.A. in the Department's custody, and ordered reunification services for both parents.

On July 12, 2010, the juvenile court terminated reunification services for M.M. and Lucy and set the permanent plan hearing (§ 366.26).

On March 15, 2011, the juvenile court appointed counsel to represent E.G. after he received notice of an upcoming section 366.26 hearing. To explain how he learned of the dependency, E.G. declared that in *February 2011*, when G.A.'s caretaker refused him "any further visitation" with the child, he went to the local Department offices and was first informed of the dependency and of the permanent plan hearing. The Department's report indicates that E.G. contacted the social worker on *March 11, 2011, not in February 2011*, to state that he was the father. When asked why he had not contacted the Department earlier, E.G. replied that "he thought he had to go through the caregiver." The Department gave E.G. notice of the permanent plan hearing.

E.G. filed a section 388 petition seeking custody of G.A. He alleged that the caregiver agreed to a paternity test, but then changed her mind. He asserted that M.M. denied him fatherhood by telling him and others that the father was either D.K. or the grandmother's boyfriend. He asked the court to give him custody of G.A. so he could raise her. In a five-page, single-spaced, handwritten attachment, E.G. indicated that the caregiver's boyfriend believed E.G. was the father. E.G. stated that at the time the child was born, he did not believe he was the father "based on [M.M's] relationship history . . . ." E.G. was willing to stop living a "bohemian" lifestyle to set a good

example for the child. The juvenile court summarily denied the petition because the change would not promote the best interest of the child.

2. *The first appeal* (B234918)

E.G. filed another section 388 petition for modification in April 2011. This petition requested the court (1) set aside Lucy's voluntary paternity declaration and the court's earlier parentage finding, and instead order E.G. to submit to genetic testing; and (2) to recommence the entire dependency so he could gain custody of the child. As new evidence, E.G. explained that he had uncovered information indicating the court was misled about the child's paternity. Because of the timing and nature of his relationship with M.M., she was aware at the beginning of the case of the possibility that E.G. was the father and always knew E.G.'s whereabouts and telephone number. E.G. stated he visited the child. He only recently learned of the dependency and immediately came forward and identified himself as the father. Finally, E.G. asserted that it would be in the child's best interest to know her father and have her paternal relatives in her life.

In support of the petition, E.G. declared that he had a sexual relationship with M.M. at the time of G.A.'s conception, and that M.M. occasionally resided with him during her pregnancy. E.G. acknowledged that M.M. denied he was the father and did not permit him to attend the child's birth. Nonetheless, E.G. believed he may be the father and since the birth, he has participated in visitation to the extent permitted by M.M. and the caretakers. He asserted he has provided the child with diapers, toys, clothing, food and other items. Immediately upon first learning of the dependency when he met the social worker in February 2011, he filed a JV-505 form and his section 388 petition.

The juvenile court granted E.G.'s request for a paternity test and set the section 388 petition for a hearing. The paternity test confirmed that E.G. is the biological father. Meanwhile, the court awarded E.G. monitored visits with the child a minimal of two hours per week. The child did not want to interact with E.G. during the four visits they had, despite E.G.'s efforts and affection.

In advance of the hearing on E.G.'s section 388 petition, the Department reported that E.G. provided the Department with an address, but the Department of Public Social

Services listed him as homeless, i.e., "transient." Although M.M. may have misled the court about G.A.'s paternity, she also made comments to the effect that she had multiple partners all of whom could have been the father. M.M. had sex with E.G. for money and drugs. The Department did not believe Lucy ever misled the Department or the court about paternity.

Numerous family members and friends reported that E.G. knew about the dependency from its inception but did nothing, other than to drive the caretaker to court once. He knew the family well enough to spend Christmas with the caretakers. Because he did not make himself known to the Department, he was not given notice of the proceedings. M.M. repeatedly asserted that E.G. was not the father and denied that he provided her with food, diapers or anything the child really needed. The Department expressed concern about E.G.'s motives because he maintained contact with M.M. who was incarcerated in Louisiana. Noting E.G. claimed to have had an ongoing sexual relationship with M.M. around the time G.A. was conceived, the Department observed that at that time M.M. was 16 and he was 39.

The juvenile court denied E.G.'s petition concluding there was insufficient evidence to find him a *Kelsey S.*[4] father. The court denied E.G.'s request to have the child placed with him. E.G. filed his first appeal from this order.

3. *The second appeal* (B236794)

E.G. filed a third section 388 petition requesting the court grant him status as a *Kelsey S.* father and place the child in his custody. As new circumstances, E.G. averred that he had taken advantage of all the visitation offered him and he was willing to accept the child into his home but was being prevented from doing so. The change of order would be in G.A.'s best interest, he stated, because he had established a relationship with the child through visitation and the child would benefit if the relationship were developed further. The court granted a hearing on the petition.

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[4] *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*)

In advance of this hearing, the Department reported that although the child did not appear as fearful of, or as tentative with E.G. as she had during initial visits, she continued to act out negatively by hitting E.G., throwing things, and refusing to share her activities with him.

At the hearing, E.G.'s attorney requested that the juvenile court at least grant E.G. reunification services because he had not been given an opportunity to participate in the case. After argument, the juvenile court denied E.G.'s section 388 petition. The court found that E.G. did not show that M.M. prevented him from having contact with the child under *Kelsey S.* Nor had he demonstrated that he acted quickly as possible when he learned of the dependency. The court did not find it to be in the child's best interest to grant the petition. As E.G. did not rise to the level of a presumed father, he could not compete with Lucy's status as presumed parent and was not entitled to reunification services. The court terminated the parental rights of M.M. and Lucy, and E.G. appealed. We consolidated the two appeals.

CONTENTIONS

E.G. contends (1) the juvenile court erred in failing to make the required paternity inquiry; (2) the failure to conduct a paternity inquiry is structural error; and (3) even if the error were not structural, it was not harmless.

DISCUSSION

1. *Fatherhood in dependency proceedings*

" 'Dependency law recognizes three types of fathers: presumed, alleged and biological.' [Citation.] A biological father is one whose paternity of the child has been established, but who has not established that he qualifies as the child's presumed father under Family Code section 7611. [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.' [Citation.]" (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.)

" 'A father's status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is

entitled. [Citation.] . . . Presumed father status entitles the father to appointed counsel, custody (absent a finding of detriment), and a reunification plan. [Citations.]' [Citation.] The court *may* provide reunification services to a biological father, if it determines that the provision of services will benefit the child. (§ 361.5, subd. (a).)" (*In re Kobe A.*, *supra,* 146 Cal.App.4th at p. 1120.)

"Due process for an alleged father requires only that the alleged father be given notice and 'an opportunity to appear and assert a position and attempt to change his paternity status. [Citations.]' [Citation.]" (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.) An alleged father "is not entitled to appointed counsel or to reunification services. [Citation.]" (*In re Kobe A.*, *supra,* 146 Cal.App.4th at p. 1120.)

"The statutory procedure that protects these limited due process rights is set forth in section 316.2." (*In re Paul H.*, *supra,* 111 Cal.App.4th at p. 760.) Section 316.2 requires the juvenile court at the detention hearing, or as soon thereafter as practicable, to "inquire of the mother and any other appropriate person as to the identity and address of *all presumed or alleged fathers*." (Italics added.) The statute sets out the seven minimum questions the court must ask.[5] California Rules of Court, rule 5.635 then directs, "If a person appears at a hearing in dependency matter . . . and requests a judgment of parentage on form JV-505, the court must determine: [¶] (1) Whether that person is the biological parent of the child; and [¶] (2) Whether that person is the

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[5] Section 316.2 reads in part, "The inquiry shall include at least all of the following, as the court deems appropriate: [¶] (1) Whether a judgment of paternity already exists. [¶] (2) Whether the mother was married or believed she was married at the time of conception of the child or at any time thereafter. [¶] (3) Whether the mother was cohabiting with a man at the time of conception or birth of the child. [¶] (4) Whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy. [¶] (5) Whether any man has formally or informally acknowledged or declared his possible paternity of the child, including by signing a voluntary declaration of paternity. [¶] (6) Whether paternity tests have been administered and the results, if any. [¶] (7) Whether any man otherwise qualifies as a presumed father pursuant to Section 7611, or any other provision, of the Family Code."

presumed parent of the child, if that finding is requested." (Cal. Rules of Court, rule 5.635(h)(1) & (2); see also *In re Paul H.*, *supra*, at p. 761.)

"The procedures set forth in section 316.2, subdivision (b), and [former rule 5.635] provide an alleged father with the notice to which he is entitled and the means by which to 'assert a position and attempt to change his paternity status.' [Citation.]" (*In re Paul H.*, *supra*, 111 Cal.App.4th at p. 761, quoting *In re O. S.* (2002) 102 Cal.App.4th 1402, 1408.) Although E.G. was not entitled to all of the constitutional and statutory rights of biological or presumed fathers at the first hearing, he was entitled to the opportunity to establish paternity that is afforded by these provisions. (*In re Paul H.*, at p. 761.)

Here, although the court may not have asked M.M. all of the questions listed in section 316.2 in 2009, the first time E.G. presented himself to the Department in March 2011, he received notice of the proceedings and of the next hearing. While he was an alleged father only, the juvenile court nonetheless appointed him counsel who filed a section 388 petition requesting a judgment of parentage. The court continued the permanent plan hearing (§ 366.26), set E.G.'s section 388 petition for a hearing, and ordered testing to determine whether E.G. was the biological parent. (Cal. Rules of Court, rule 5.635(h)(1) & (2); see also *In re Paul H.*, *supra*, 111 Cal.App.4th at p. 761.) Thus, E.G. received all of, if not more than, the constitutional and statutory rights granted to an alleged father.

Once he was determined to be the biological father, E.G.'s attorney filed another section 388 petition to elevate E.G.'s status to that of a presumed father. The juvenile court again postponed the section 366.26 hearing to hear E.G.'s petition. At the contested hearing on his petition, E.G. testified. The court admitted his evidence as well as that of the Department. E.G. was manifestly accorded all of the process to which he was due. That the court determined he was not a presumed father was a matter within the juvenile court's purview.

2. *Sufficient evidence supports the juvenile court's finding that E.G. was not G.A.'s presumed father*.

Three people here claim legal status as parents: M.M. as biological mother, Lucy as statutorily presumed parent (Fam. Code, § 7611, subds. (a) & (b)), and E.G. as either a statutorily presumed father (Fam. Code, § 7611) or as the constitutional equivalent, a *Kelsey S*. father. "Only two of these individuals may retain that status." (*In re M.C.* (2011) 195 Cal.App.4th 197, 222.) If no one is shown to be unfit as a presumptive parent, then the juvenile court must engage in shifting presumptions to establish which parent would retain the status. (*Id*. at pp. 222-223.) However, here, the court was not called on to weigh presumptions because E.G. never demonstrated he qualified as statutorily presumed or a *Kelsey S*. father so as to compete with Lucy's status.

Section 388 allows a parent to petition the court for a hearing to modify or set aside any previous order on the grounds of change of circumstance or new evidence, such that the proposed change would be in the child's best interest.[6] In his petition, E.G. argued he was a presumed father both under Family Code section 7611 and under *Kelsey S.* Family Code section 7611 is utilized in the dependency context as a method for determining "whether the alleged father has demonstrated a sufficient commitment to his parental responsibilities to be afforded rights *not* afforded to natural fathers -- the rights to reunification services and custody of the child." (*In re Jerry P*. (2002) 95 Cal.App.4th 793, 804.) Under subdivision (d) of section 7611 of the Family Code, the man can establish presumed fatherhood status if he "receives the child into his home and openly holds out the child as his natural child." (Fam. Code, § 7611, subd. (d).)

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[6] Section 388 provides in part: "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶] (d) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held. . . ." (§ 388, subds. (a) & (d).)

Kelsey S. will confer on an "unwed [biological] father" presumptive paternity if he "promptly comes forward and demonstrates a full commitment to his parental responsibilities -- emotional, financial, and otherwise . . . ." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) To determine whether the biological father has demonstrated such a commitment, courts must consider "[t]he father's conduct *both before and after the child's birth* . . . . Once the father knows or reasonably should know of the pregnancy, he must *promptly* attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate 'a willingness himself to assume full custody of the child -- not merely to block adoption by others.' " (*Ibid*., italics added.) "A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child." (*Ibid*., fn. omitted.)

Here, E.G.'s conduct both before and after the child's birth supports the juvenile court's conclusion that although he knew about the pregnancy, E.G. did not promptly come forward to assume his parental responsibilities -- emotional, financial, or otherwise. He never received G.A. into his home or openly held the girl out as his own, natural child. (Fam. Code, § 7611, subd. (d).) Instead, E.G. allowed Lucy to put her name on the birth certificate and parent the child. He sat back while Lucy developed a parental relationship with the child and assumed financial support. The child called Lucy, "Daddy Lucy." By contrast the child did not want to interact with E.G. during visits, and was fearful of and tentative with him. Although E.G. claimed he provided G.A. with diapers, toys, clothing, food, and other items, M.M. denied this. E.G. did not even come forward until two years after G.A. was detained and this dependency had commenced. E.G. claimed he came forward as soon as he heard about the dependency. Yet, numerous family members and friends told the social worker that E.G. knew about the dependency from its inception and did nothing until the eleventh hour except drive the caretaker to the juvenile court once. Given E.G.'s claims to have visited G.A. at the caretaker's house as often as allowed, the court could easily conclude that E.G.'s assertions of ignorance of

the dependency were simply not credible. (*In re Casey D*. (1999) 70 Cal.App.4th 38, 52.) Even were E.G.'s assertions credible, he has not demonstrated the "full commitment" envisioned by *Kelsey S*., *supra*, 1 Cal.4th at page 849.

The record also supports the juvenile court's finding E.G. did not demonstrate that M.M. prevented him from having contact with the child or that Lucy misled the court about E.G.'s paternity. (*Kelsey S., supra,* 1 Cal.4th at p. 849 [Fam. Code, § 7611 unconstitutional to extent statutes allow mother *unilaterally* to preclude her child's biological father from becoming a presumed father].) Although E.G.'s declarations allude to M.M. preventing him from attending the birth and visiting the child, he gave no indication that she prevented him from publicly holding the child out as his own; paying the hospital or doctor bills; supplying the baby with food and clothing; or attempting to take care of the child. (*Id.* at p. 849.)

Finally, E.G. did not present evidence that it would be in the child's best interest to grant him custody. (§ 388.) Apart from E.G.'s homelessness and criminal record, the evidence shows he has a limited relationship with the child and she was quite reluctant to relate to him despite visits both before and after this dependency commenced. In short, after two hearings on the question, admission of evidence and taking of testimony, E.G. did not demonstrate he qualified as a presumed father.[7]

3. *Any error was harmless*.

To bypass this inevitable result, E.G. argues that the juvenile court's error here was structural mandating automatic reversal. Pointing to the court's failure to ask M.M. to identify any alleged or presumed father other than D.K., or to conduct any further inquiry in an effort to establish paternity after determining that D.K. was not G.A.'s biological father, violated section 316.2 and was structural error. He argues repeatedly

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[7] E.G. argues "it is not clear that the juvenile court would have denied [him] reunification services or presumed father status had he received notice and appeared at the hearing on disposition." Wrong. The evidence supports the juvenile court's conclusion that E.G. was a biological father only and so he would never have been *entitled* to reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451.)

that "it is impossible to know whether [E.G.] would have been identified had the juvenile court complied with the inquiry requirement."

E.G. assumes that in responding to the juvenile court's section 316.2 questions M.M. would have divulged his name. This inference is not supported by the record where M.M. has repeatedly insisted that E.G. was not the father and otherwise admitted to having numerous sexual partners, all of whom she believed could have been G.A.'s father. Accordingly, the court's failure to comply with the statutory requirements is not structural, but trial error because it happened during the hearing. (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 557.)[8] Furthermore, the asserted error was not structural because the failure to fully inquire of M.M. did not deprive E.G. any process to which he was due.

More important, " '[w]e typically apply a harmless-error analysis when a statutory mandate is disobeyed, except in a narrow category of circumstances when we deem the error reversible per se. This practice derives from article VI, section 13 of the California Constitution, which provides: "No judgment shall be set aside, or new trial granted, in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." ' [Citation.]" (*In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1122.) *In re Kobe A.* applied the harmless-error analysis to the juvenile court's failure to provide a father with notice in accordance with

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[8] " 'Trial error' is error that occurs *during* the *presentation of the case*. [Citation.] An error that occurs during the trial process itself does not require automatic reversal because a court may quantitatively assess such error in the context of other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. [Citation.]" (*Judith P. v. Superior Court*, *supra*, 102 Cal.App.4th at p. 555.) " '[S]tructural' errors involve ' "basic protections, [without which] a criminal trial cannot reliably serve its function as a *vehicle* for determination of guilt or innocence, and no criminal punishment may be regarded as *fundamentally fair*." ' [Citation.]" (*Ibid.* & at p. 557.)

section 316.2 and California Rules of Court, former rule 5.635(h)(1) & (2). (*In re Kobe A.*, at p. 1122.)

Applying that analysis here, we conclude any error was harmless. E.G. received notice; was appointed counsel; and had three opportunities to be heard, including not one but two hearings on his section 388 petitions, for which the juvenile court postponed the permanent plan hearing (§ 366.26). E.G. was not " 'stripped of his right to participate' in the action." (Cf. *In re James F*. (2008) 42 Cal.4th 901, 917.) "If the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required. [Citation.]" (*Id.* at p. 918.) The court's failure here to inquire of M.M. any further was a form of trial error that was amenable to the harmless error analysis (*id*. at pp. 918-919; *In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1122), and was harmless.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.