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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

D.B.,

Petitioner,

v.

THE SUPERIOR COURT OF  
HUMBOLDT COUNTY,

Respondent;

HUMBOLDT COUNTY DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

Real Party in Interest.

A134135

(Humboldt County  
Super. Ct. No. JV050138)

**I.**

**INTRODUCTION**

Petitioner D.B., the presumed father of the eight-year-old minor, T.B., seeks extraordinary writ review pursuant to California Rules of Court, rule 8.452, to vacate the order of respondent juvenile court setting a hearing to terminate his parental rights in accordance with Welfare and Institutions Code section 366.26.<sup>1</sup> When the court set the

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code. The issues in this petition relate solely to the minor’s father. Therefore, we have focused our discussion on facts and issues pertaining to his parental rights and have omitted many aspects of this case that are relevant to the minor’s mother. We note that the minor’s mother has filed a separate writ petition challenging the court’s decision to terminate reunification services and set a hearing to terminate her parental rights. (*D.W. v. Humboldt County Superior Court* (A134134).)

termination hearing, it also denied petitioner's section 388 petition requesting reunification services. Instead, the juvenile court entered an order bypassing reunification services based on a finding that the minor had been found to fall within section 300, subdivision (g) (no provision for support), and that petitioner had "willfully abandoned" him, placing him in "serious danger" (§ 361.5, subd. (b)(9)).

In seeking extraordinary writ review, petitioner makes two arguments: (1) he was denied his due process right to be heard at the jurisdictional/dispositional hearings because the Humboldt County Department of Health and Human Services (the Department) "sent all notices to the wrong address from the detention hearing onward"; and (2) the evidence does not support the bypass of reunification services under section 361.5, subdivision (b)(9). We find these contentions to be without merit, and deny the petition.

## **II.**

### **FACTS AND PROCEDURAL HISTORY**

The minor was born in 2003. Both of his parents have extensive histories of drug abuse, including methamphetamine and/or heroin use. On June 30, 2005, the minor's mother left the two-year-old minor at her sister's home. The minor arrived at his aunt's home with a black eye, a bruise above his eyebrow, and a severe diaper rash that extended up his back. The minor was so covered with head lice that they crawled onto his aunt when she was bathing the boy. The minor was detained.

When the case was investigated, petitioner was living out of the area in Crescent City, California. On July 14, 2005, petitioner was present in court. However, he was in custody. The court appointed counsel for petitioner and elevated him to presumed parent status. Upon his release from custody, petitioner left the area, and his whereabouts became unknown. When the jurisdictional hearing went forward in October 2005, the court did not sustain the petition and the minor was returned to his mother's care.

On November 12, 2006, mother telephoned her sister asking for help. She said that she had hit the two and one-half-year-old minor in the face because he would not leave her alone. The sister contacted the Department. The mother said that she used as

much heroin as she could on a daily basis. The mother told authorities that petitioner was in custody facing assault charges.

The Department detained the minor on November 12, 2006. On November 14, 2006, a petition was filed containing allegations pursuant to section 300, subdivisions (b) and (g). Petitioner was once again listed as the presumed father. On December 12, 2006, the court took jurisdiction over the minor. The minor was placed with foster parents. On March 13, 2007, at the disposition hearing, petitioner was ordered to participate in a substance abuse evaluation, and to follow all treatment recommendations.

Between January and December 2007, petitioner visited the minor erratically. He failed to show up for visits, and when he did attend, he was argumentative with the staff supervising visits. Petitioner completed a parenting class, but he failed to complete any other aspect of his case plan. The social worker wrote several letters to petitioner in an effort to encourage him to engage in services.

On March 14, 2008, petitioner contacted a social worker to discuss visitation with the minor. At this point in time, petitioner had not had contact with the minor for four months. He said there was no way for social workers to contact him, and told them that he would visit the social worker in person on March 15, 2008. As of September 2008, the department had not heard from petitioner, and petitioner had no contact with the minor.

On October 1, 2008, the court terminated the dependency and granted sole physical custody of the minor to mother.

The minor's half-sister was born in 2009. Mother's new relationship with the baby's father was troubled. The minor reported that when his parents fought, "daddy hits mommy and mommy cried." In August 2010, mother was living in a camp trailer outside her sister's home. Her sister believed the mother continued to use drugs.

On September 28, 2010, the Department filed petitions containing allegations pursuant to section 300, subdivisions (b), (g), and (j) as to both the minor and his half-sister. The petition pertaining to the minor alleged petitioner's whereabouts were unknown. The children were placed together in a foster home. When this case was

investigated, the Department mistakenly informed the court that petitioner was an “alleged” father when, in fact, he had been designated a “presumed” father in the minor’s prior dependency. Because petitioner’s whereabouts were unknown, an absent parent search for petitioner was initiated. Court documents were sent to petitioner at a general delivery address in Eureka, California, but were returned unclaimed. Social worker Nathan Ask attempted to contact petitioner through his father, the minor’s paternal grandfather, who “hung up” on the call.

On October 20, 2010, the court sustained the allegations in the petition pertaining to the minor. A disposition hearing was scheduled for November 2, 2010. Social workers again attempted to contact petitioner in advance of the disposition hearing by making telephone calls to petitioner’s father. Those calls were “terminated with . . . no response.” The Department mistakenly continued to characterize petitioner as an alleged father. The social worker initiated a new absent parent search.

After several continuances, the dispositional hearing was held on January 10, 2011. The court ordered reunification services for mother but did not order services for petitioner, whose whereabouts were still unknown.

In a report prepared for the six-month review hearing, social worker Tara Riddle reported that petitioner had contacted the Department shortly after the dispositional hearing in late February 2011 expressing interest in visiting the minor, but she had not been able to reach him at the contact number he provided. She left a message with her name and number and asked petitioner to call her back, but petitioner did not return her call. The social worker again mistakenly reported that petitioner was an “alleged father” as opposed to a “presumed father.”

On June 1, 2011, petitioner entered a guilty plea to a violation of Health and Safety Code section 11377, subdivision (a), charged as a misdemeanor. He was sentenced to serve 180 days in custody, suspended to provide for his entry into a treatment program. On August 22, 2011, mother submitted to a drug test as required by the terms of her probation. The test result was positive for opiates, and mother was arrested and jailed on August 29, 2011. In a report submitted to the court for the 12-

month permanency planning hearing, the social worker recommended that the court terminate the mother's services.

Petitioner visited the social worker at her office on September 13, 2011. During that meeting, petitioner said that he was about to graduate from a drug treatment program, and was interested in reunifying with his son. The social worker explained that the minor was "in a slightly fragile emotional state" and that it would be inappropriate to start up visits when the minor had not had any contact with petitioner for many years. The social worker gave petitioner the next court date. Petitioner provided the social worker with a number where he could be reached.

Petitioner was present when the case was called on October 6, 2011, for the 12-month review hearing. Counsel was appointed to represent petitioner and the review hearing was continued. At this point, petitioner was working as a residential assistant at the drug treatment program, and had recently started working at a fast food restaurant in Eureka. He indicated he would be renting a room in the drug treatment program until he could find his own home. On October 20, 2011, the court elevated petitioner's status to presumed father and counsel was appointed to represent his interests. The contested 12-month review was continued.

Petitioner filed a section 388 petition on November 14, 2011, requesting that the court order the Department to provide him with reunification services. The Department filed a response to petitioner's section 388 petition on November 23, 2011, requesting that the court deny the petition. In its response, the Department stated, "It is clear that this child's best interest would not be served by extending services to an absent father and would only postpone the child's chance for stability and continuity that he has found . . . in his current foster home."

On November 14, 2011, the social worker attempted to contact petitioner at the number he had provided. She did not speak with him in person, but left a message requesting that he contact her. Petitioner's probation officer spoke to the social worker on November 15, 2011, and informed her that petitioner had been arrested and jailed on November 14, 2011, after he tested positive for methamphetamine and alcohol use. The

probation officer said he intended to recommend that petitioner be released from custody that day. On November 17, 2011, petitioner called the social worker and left a message requesting that she call him back at a new number. The social worker called that number on November 17, 2011, but did not hear back from petitioner.

The social worker submitted a first addendum to a report prepared for the 12-month permanency review hearing on November 29, 2011. It was reported that the minor, who was placed in the same home as his half-sibling, wished to be adopted by his current caregivers. With regard to petitioner, she wrote he “clearly suffers from severe chemical dependency . . . .” She recommended that petitioner be denied reunification services.

The 12-month permanency planning hearing took place on December 1, 2011. Testimony was taken over the course of five days. After hearing lengthy argument by the parties, the court denied petitioner’s section 388 petition, finding that it was not in the minor’s best interests to offer reunification services to petitioner, who was “essentially an unknown person” to the minor. The court also found that “there is not a substantial probability that [the minor] would be returned to his father within even an extended period of time.” In its ruling, the court concluded that the bypass provisions of section 361.5, subdivision (b)(9), the parent willfully abandoned the child, applied to petitioner. The court also set a permanency planning hearing pursuant to section 366.26 for April 2, 2012.

### **III. DISCUSSION**

#### **A. Notice Issues**

Petitioner contends his statutory and due process rights were violated because he was not given adequate notice of the jurisdictional and dispositional hearings.

“Notice is both a constitutional and statutory imperative. In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend. [Citation.]” (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114 (*Jasmine G.*)) “The child welfare

agency must act with diligence to locate a missing parent. [Citation.] Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. [Citation.] [¶] However, there is no due process violation when there has been a good faith attempt to provide notice to a parent who is transient and whose whereabouts are unknown for the majority of the proceedings. [Citations.]” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188 (*Justice P.*)) Thus, where a parent cannot be located notwithstanding a reasonable search effort, the failure to give actual notice will not render the proceedings invalid. (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 247 (*Claudia S.*))

In setting out the Department’s efforts to notify petitioner of the most recent dependency case involving the minor, the social worker testified at the 12-month permanency planning hearing that documents were sent to petitioner at the “only address that was available for him” in the computer system—a general delivery address in Eureka, California. However, the mail was returned unclaimed. The Department followed up on its effort to locate petitioner by attempting to contact petitioner by telephoning his father, but petitioner’s father abruptly terminated the call. We believe these search efforts “were reasonably calculated under the circumstances to apprise [petitioner] of the proceedings” thus, “substantial evidence supports the trial court’s findings concerning proper notice by mail . . . .” (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1354; *Claudia S.*, *supra*, 131 Cal.App.4th at p. 247.)

In arguing for a contrary finding, petitioner claims the Department failed to exercise due diligence in attempting to notify him of the initiation of new dependency proceedings regarding the minor because the Department “had many chances to ask petitioner’s criminal attorney, probation officers, relatives, the jail, the family support office, and others where to find petitioner, and failed to do so.” Although it is clear petitioner had no stable address during the period in question, he claims that the Department ignored an address on Third Street in Eureka, California where “he received mail from the Department . . . during the first phase of the case, 2005-2008.” When petitioner testified at the 12-month permanency planning hearing, he indicated that his

mother, who was recently deceased, resided at the Third Street address. He claims “that he had a system for receiving mail at Third Street during the period in question,” but that the Department erroneously sent notice to General Delivery, which came back “unclaimed.”

The Department argues that any defect in the notice was harmless because, even if petitioner had received actual notice of the jurisdictional and dispositional hearing, there would have been no different result. The court in *In re J.H.* (2007) 158 Cal.App.4th 174, found any error in serving notice to be harmless beyond a reasonable doubt, differentiating errors in attempting to serve notice from a complete failure to make any attempt to locate an absent parent. (*Id.* at pp. 183-184.) “Unless there is no attempt to serve notice on a parent, in which case the error has been held to be reversible per se [citations], errors in notice do not automatically require reversal but are subject to the harmless beyond a reasonable doubt standard of prejudice. [Citations.]” (*Id.* at p. 183.)

We conclude that even if the Department did not act with the requisite due diligence in attempting to locate and notify petitioner of the dependency proceeding involving the minor, any error was harmless beyond a reasonable doubt. (*In re J.H.*, *supra*, 158 Cal.App.4th at p. 183.) On appeal, petitioner does not even attempt to argue that there was any possibility the court would have granted him physical custody of the minor had he received adequate notice and appeared at the jurisdictional or dispositional hearings. Nor does he contend he would have put forth an alternative caregiver, or that the court would have done anything other than take jurisdiction over the minor and place him in foster care.

Additionally, the record before us supports an inference that petitioner knew of the dependency proceedings at an early stage and simply chose not to participate. Petitioner, on his own, made contact with the Department late in February 2011, shortly after the dispositional hearing and well before the six-month review hearing, which was held on July 11, 2011. When the social worker attempted to call him at the number he provided, she left her name and number. Petitioner never returned the social worker’s call. While petitioner suggests that once he came forward, the Department should have done more to

engage him in the reunification process, he cites no legal authority to support this argument. This is because the law is to the contrary. “The Department has a duty initially to make a good faith attempt to locate the parents of a dependent child.” However, “[o]nce a parent has been located, *it becomes the obligation of the parent to communicate with the Department and participate in the reunification process.*” (*In re Raymond R.* (1994) 26 Cal.App.4th 436, 441, italics added.)

Petitioner resurfaced on September 13, 2011, approximately seven months after his initial contact with the Department, when he personally visited with the social worker. During that meeting, petitioner said that he was about to graduate from a drug treatment program, and was interested in reunifying with the minor. In this regard, it is disingenuous for petitioner to now complain of lack of notice, when after speaking directly with a social worker early on in the dependency proceeding, petitioner then voluntarily chose to absent himself from any further contact with the Department for a lengthy period of time during which he could have been working toward reunifying with the minor.

Given petitioner’s lack of any relationship with the minor, his ongoing substance abuse issues, as well as his voluntary and unexplained absence for approximately seven months after he became aware of these proceedings, “we can quantitatively assess the [alleged notice] error in the context of other evidence presented in order to determine” that any conceivable error in providing petitioner with inadequate notice “was harmless beyond a reasonable doubt. [Citation.]” (*In re Angela C.* (2002) 99 Cal.App.4th 389, 395.)

Therefore, we conclude beyond a reasonable doubt that even if petitioner had received actual notice of the proceedings before the date of his initial contact with the Department, he would not have obtained different or more favorable rulings from the juvenile court. Petitioner has been aware of these dependency proceedings since shortly after the dispositional hearing, giving him a window of opportunity to work toward establishing a parental role in the minor’s life. Instead, he once again dropped out of sight and failed to keep the Department apprised of his whereabouts. By the time of the

12-month hearing, which petitioner attended and had counsel to represent his interests, petitioner had recently been arrested and jailed because he tested positive for methamphetamine and alcohol usage.

### **B. Denial of Section 388 Petition for Reunification Services**

Petitioner asserts that the court erred when it failed to provide him with reunification services as requested in his section 388 petition.<sup>2</sup> He contends that insufficient evidence supports the court's bypass of reunification services under section 361.5, subdivision (b)(9). That provision authorizes a bypass upon three findings: (1) a child has been found to fall within section 300, subdivision (g); (2) the parent "willfully abandoned" the child; and (3) that abandonment constituted a "serious danger," meaning that without intervention by others, the child would have sustained severe or permanent disability, injury, illness or death. The statute contains no positive definition of "willful abandonment" but does state one exception, " 'willful abandonment' shall not be construed as actions taken in good faith by the parent without the intent of placing the child in serious danger." We review an order denying reunification services under section 361.5, subdivision (b), for substantial evidence. (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.)

Viewing the evidence in a manner most favorably to the order, substantial evidence supports finding the court's finding that petitioner "willfully abandoned" the minor, placing him in "serious danger." (§ 361.5, subd. (b)(9).) The evidence shows that petitioner left the minor in the care of the minor's mother in 2005 when he knew that she was struggling with a serious drug addiction, and she had severely neglected the minor in the past. However, during the years where his whereabouts were unknown, there is nothing to indicate petitioner made any effort to contact the minor, or to ascertain if he

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<sup>2</sup> Section 388 allows the juvenile court to modify an order if a parent establishes, by a preponderance of the evidence, that there are changed circumstances or new evidence that would support the proposed change. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) It is well settled that the parent must show that the modification or setting aside of the prior order would be in the best interest of the minor at the time the request is made. (§ 388, subd. (c); *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

was safe and being properly cared for. In fact, there is no evidence that petitioner took any interest in the minor's well being until after these dependency proceedings were commenced in 2010. As the trial court pointed out, petitioner is "essentially an unknown person" to the minor. Substantial evidence supports the court's finding that petitioner willfully abandoned the minor within the meaning of section 361.5, subdivision (b)(9).

Furthermore, given this record, we find the juvenile court could reasonably conclude that it was not in the minor's best interests to delay permanency in order to grant petitioner reunification services. Petitioner has a lengthy substance abuse and criminal history punctuated by token attempts to regain some stability in his life, and to remain drug free. Given petitioner's past history, and the evidence of very recent drug usage, it is extremely unlikely petitioner would be able to complete a case plan within six months. (§ 361.5, subd. (a).)

In the meantime, the minor has a compelling interest in remaining in a permanent placement with his prospective adoptive parents, to whom he is very bonded. "If a missing parent later surfaces, it does not automatically follow that the best interests of the child will be promoted by going back to square one and relitigating the case. Children need stability and permanence in their lives, not protracted legal proceedings that prolong uncertainty for them. Further, the very nature of determining a child's best interests calls for a case-by-case analysis, not a mechanical rule." (*Justice P.*, *supra*, 123 Cal.App.4th at p. 191.) Consequently, petitioner has not demonstrated that the court abused its

discretion by denying his modification petition under section 388 on the basis of the minor's best interests.<sup>3</sup>

**IV.**  
**DISPOSITION**

The petition for extraordinary writ is denied on the merits. (§ 366.26, subd. (l)(1)(C); Cal. Rules of Court, rule 8.452(h).) Our decision is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(3).) The request for a stay of the section 366.26 hearing scheduled for April 2, 2012 is denied.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.\*

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<sup>3</sup> Because petitioner seems to claims it is relevant to both the notice issue and the argument concerning reunification services, we take this opportunity to comment on petitioner's status in this proceeding. Petitioner claims the "Department erroneously and unreasonably assumed that petitioner was a mere alleged father" when actually he "was a presumed father from 2007 onward." We conclude that the Department's error in reporting petitioner's proper status was necessarily harmless error. Petitioner's status as a presumed father, as opposed to an alleged father, had absolutely no bearing on the court's analysis or decisions, which have been affirmed in this opinion. We also point out that the Department's error was corrected and petitioner was, in fact, considered a presumed father prior to the 12-month permanency planning hearing.

\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A134135, *D.B. v. Superior Court*