

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re D.V., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

DAVID V.,

Defendant and Appellant.

D062156

(Super. Ct. No. SJ11011A)

APPEAL from an order of the Superior Court of San Diego County, Garry G. Haehnle,
Judge. Affirmed.

David V. appeals from an order terminating his parental rights. He contends the
juvenile court committed structural error by not ensuring the execution of a 2005 order for a
paternity test. We reject his assertion and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2002, the San Diego County Health and Human Services Agency
(Agency) filed dependency petitions for D.V., then aged three years, and his half-sibling, E.R.,

then aged two years (together, the children), because their mother, Tanya S., and her boyfriend used and sold methamphetamine. Tanya had two other children that lived with a great-aunt. All four children have different fathers. Tanya named David as D.V.'s father, claimed that David lived with her and D.V. for about three months after D.V.'s birth and stated that David was currently incarcerated in Boston, Massachusetts.

In May 2003, the Agency located David serving a 15-year sentence in an Arizona prison for aggravated assault and dangerous repetitive offenses. In July 2003, David indicated to a social worker that he wanted a genetic test to see if he was D.V.'s biological father and if so, he wanted his family to get involved and possibly care for D.V. At a hearing later that month, David's counsel informed the court about the requested paternity test.

In March 2005, the juvenile court granted David's request for a paternity test. The juvenile court eventually terminated Tanya's services and held a Welfare and Institutions Code section 366.26 hearing in April 2005 to determine a permanent plan for the children. The court granted David a continuance of the hearing. The following month, David's counsel informed the court that the Arizona prison would not permit the paternity testing personnel to enter the prison without an Arizona court order. The court ordered guardianship for the children, set a further hearing on the matter of paternity testing and ordered the social worker to make efforts to obtain permission to enter the prison facility so that a sample could be obtained from David for paternity testing. In November 2005, the juvenile court terminated jurisdiction. Prior to the hearing, David's counsel confirmed that he reviewed the report, submitted on the recommendations and was aware that the recommendation was to terminate jurisdiction.

About six years later, in November 2011, the Agency filed a Welfare and Institutions Code section 388 petition asking the juvenile court to modify its prior order for guardianship

and instead order adoption as the guardian wished to adopt the children. David sent the court a letter indicating he did not want the adoption to go forward, did not want to relinquish his parental rights and wanted sole custody of D.V. upon his release from prison in February 2013. At a May 2012, hearing, David's counsel indicated that David was never able to elevate his status beyond that of an alleged father based on the lack of a paternity test. David objected to the recommendation to terminate his parental rights and asked the court to continue the guardianship. The court terminated parental rights and ordered adoption for the children. David timely appealed.

DISCUSSION

David contends the juvenile court had a duty to carry out the paternity test and that its failure to fulfill its duty may have led to the denial of the right to be heard on the adoption issue. He asserts that the error is structural and that the per se reversible error standard should apply. The Agency asserts David's challenge to the failure of the court to follow up with the paternity testing order is: (1) untimely as it should have been raised when the court terminated jurisdiction in November 2005; and (2) waived because David failed to make any objection in the trial court.

As a threshold matter, we agree with David that the trial court erred when it failed to ensure that that the paternity test occurred. As we shall explain, however, the lack of a paternity test did not impact David's ability to obtain presumed father status. Because we resolve this appeal on its merits, there is no need for us to address the Agency's arguments that David's challenge was untimely or waived.

An alleged father refers to 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. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) In contrast, a biological father is one whose biological paternity has been established, but who has not achieved presumed father status as defined in Family Code section 7611. (Undesignated statutory references are to the Family Code.) (*In re Zacharia D.*, at p. 449, fn. 15.) A man is presumed to be the father of a child if he "receives the child into his home and openly holds out the child as his natural child." (§ 7611, subd. (d).) "[A] biological father's rights are limited to establishing his right to 'presumed' father status, and the court does not err by terminating a biological father's parental rights when he has had the opportunity to show presumed father status and has not done so." (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.) Thus, "[w]hether a biological is a 'presumed father' . . . is critical to his parental rights [in adoption proceedings]." (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 823.)

Here, Tanya claimed that David lived with her and D.V. for about three months after D.V.'s birth. Thus, David could have sought to obtain presumed father status per subdivision (d) of section 7611 *at any point in the proceeding* by showing that he received D.V. into his home and openly held D.V. out as his natural child. David never attempted to make this showing, nor did he ever request a finding that he was a presumed father under subdivision (d) of section 7611. (§ 7630, subd. (b).) Additionally, he never requested a judgment of parentage on the Statement Regarding Parentage, form JV-505; rather, the juvenile court noted that as of May 2012, David had not yet filed a paternity form. (Cal. Rules of Court, rule 5.635(h).) Thus, while the juvenile court erred in failing to ensure that its order for a paternity test was carried out, the error was harmless beyond a reasonable doubt and far from structural error requiring automatic reversal. (*In re James F.* (2008) 42 Cal.4th 901, 918 ["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."].)

Finally, David never had any contact with D.V., the children were attached to their caregiver and wanted to be adopted by her. Even if David had been proven to be D.V.'s biological father, he would not have been able to persuade the court that D.V. should be removed from his caregiver and placed with paternal relatives. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 933-934 [A biological father's "parental rights may be terminated based solely upon the child's best interest and without any requirement for a finding of detriment or unfitness"]].)

DISPOSITION

The order is affirmed.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.