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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re T.R., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

T.B.,

Defendant and Appellant.

E054925

(Super.Ct.No. J236864)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A.
Buchholz, Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and
Appellant.

Jean-Rene Basle, County Counsel, and Adam E. Ebright, Deputy County Counsel,
for Plaintiff and Respondent.

T.R. was detained shortly after birth because both of his parents had mental illnesses and criminal histories. The parents had met while committed to Patton State Hospital (Patton) where the minor was conceived. Subsequently, father was incarcerated in state prison, and mother remained at Patton as a Mentally Disordered Offender (MDO).¹ No reunification services were ordered for either parent due to their criminal histories involving violent felonies and their respective mental illnesses. Additionally, because father was an alleged father, he was not entitled to services. Although paternity testing had been ordered early on, father was not provided with the results showing he was T.R.'s biological father until the date of the hearing at which father's parental rights were terminated. (Welf. & Inst. Code, § 366.26.²) Father appealed.³

On appeal, father contends that (1) the delay in obtaining and providing paternity test results deprived him of material evidence and compels reversal; (2) his rights to equal protection under the law were violated where mother was offered the opportunity for relative placement but he was not, due to his status. We affirm.

¹ Mother is not a party to this appeal. For that reason, she will be mentioned only where necessary to a clear understanding of the proceedings.

² All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

³ Father also filed a petition for writ of habeas corpus, which is considered separately.

BACKGROUND

T.R. was born in January 2011, to mother, who was a patient at Patton as a MDO, following a prison term. The San Bernardino County Children and Family Services (CFS) were contacted because the medical facility where mother gave birth reported mother had not visited the child and was not “appropriate.” Patton wrote to CFS before the minor was born to recommend that mother not be permitted to hold her baby after delivery due to her current and past history of aggressive and assaultive behavior, as well as her mood instability.

When the initial social worker met with mother shortly after T.R.’s birth, mother was agitated and unwilling to engage for longer than five minutes. She informed the social worker that she had no relatives to care for the baby and she did not know the identity of the father. Mother was diagnosed with schizoaffective disorder, bipolar type, polysubstance abuse, and antisocial personality disorder.

On January 10, 2011, CFS filed a dependency petition alleging failure to provide the child with adequate food or shelter (§ 300, subd. (b)), no provision for support (§ 300, subd. (g)), and abuse of siblings. (§ 300, subd. (j).) The section 300, subdivision (b) allegation was grounded on mother’s mental illness and her history of substance abuse. The section 300, subdivision (g) allegation was based on the fact mother was confined in Patton under an MDO commitment and the fact father’s identity and whereabouts were unknown. The sibling abuse allegation was based on the fact that two older half-siblings had been removed in 2000 and 2005 respectively due to similar allegations. The minor

was ordered detained at a detention hearing on January 11, 2011. On January 14, 2011, the court conducted further proceedings as to detention. At that hearing, mother provided the court with the name of father and informed the court that they met at Patton.

On January 23, 2011, mother again informed the court, by way of correspondence, that the father was known to her as T.B., giving father's correct surname. In the jurisdictional report submitted on February 2, 2011, the social worker recommended true findings on the petition and removal of the child from both parents, although the social worker used the wrong surname for father. CFS was unable to locate the father using the wrong name, and submitted an absent parent search under that incorrect name. However, at some point prior to the submission of the report, the social worker indicated the mother had identified the father and included his true surname. The report set out mother's extensive criminal history, her history of psychiatric hospitalizations which commenced when she was 12 years old, and her prior dependency history relating to the two older children, who had been freed for adoption by their respective caretakers in separate proceedings.

On February 3, 2011, an amended dependency petition was filed which included allegations against father, who was named incorrectly in the petition. The allegations against father related to his unknown ability to parent, as well as his unknown criminal and mental health history (§ 300, subd. (b)), and his inability to provide for the minor due to his incarceration. (§ 300, subd. (g).) On February 16, 2011, CFS made a motion to

have an attorney appointed for the father and to have paternity tests done. The court granted the motion, authorizing paternity testing to be commenced as soon as possible.

In an addendum report submitted on March 18, 2011, the social worker informed the court that father had been located and interviewed after he was located at Twin Towers Correctional Facility in Los Angeles, in the psychiatric ward. The report revealed father had been diagnosed as paranoid schizophrenic, had a lengthy criminal history which included violent felonies and dated back to 1980, and was serving a sentence of 30 years to life. Father indicated he met mother while they were both at Patton. He was informed that paternity testing had been arranged for March 23, 2011, at Twin Towers. Father also stated he had family members who could care for the minor, but was unable to provide the names or addresses of any relatives.

On March 22, 2011, at a pretrial conference, father's counsel asked the court to vacate the trial date because father requested a paternity test, which would take approximately 30 days. County counsel indicated that a request had been submitted, although paternity results would not affect the recommendation for no services. Father's counsel informed the court the paternity results were relevant because he might have relatives interested in being assessed for placement of the child. The court indicated that if father did turn out to be the father, it would reserve the issue of placement to be determined at a later date. However, the testing did not take place as scheduled because had been transferred to North Kern State Prison.

The jurisdictional hearing was set for April 4, 2011, at which time the court accepted the social worker's reports. The matter was continued due to evidentiary objections to records attached to the social worker's report. On May 24, 2011, the court resumed the jurisdictional hearing. The court found allegations b-1 through b-3, g-5 through g-7, and j-8 through j-9 to be true. The court declared the child to be a dependent, finding that T.R. came within section 300, subdivisions (b), (g), and (j). Prior to ruling on disposition, father's counsel voiced concern that he had not received information about the paternity testing that was to have been conducted. Father's counsel objected to the recommendation of no services, noting that father had previously requested to be considered a presumed father.

Counsel went on to indicate that if father were not the biological father, a packet with that information should be submitted so counsel could determine if father would like to be made a nonparty. Counsel later added that if father is the biological father, he would like a relative to be considered for placement. The court authorized the social worker to notify father of the results of paternity testing as well as to make inquiry about any relatives to be assessed for possible placement.

Thereafter, the court removed the minor from the custody of both parents and ordered no reunification services for father because he was an alleged father who is not entitled to services. The court also found that the reunification services would be detrimental to the minor because the parents were incarcerated and institutionalized. Further, the court found father had been convicted of a violent felony, bringing him under

section 361.5, subdivision (b)(12). The court placed the minor in the custody of CFS. The court directed CFS to notify father of any paternity test results and scheduled a hearing to select and implement a permanent plan for the child. (§ 366.26.)

On July 8, 2011, the matter came before the court for a notice review hearing. At that hearing, father's counsel advised the court that paternity testing had not taken place. Counsel requested that the court urge CFS to make arrangements for the testing to "get that ball rolling. Because if he's not the father, we may be seeking to make him a non-party." The court acknowledged that father was to be notified of the results and informed father that "we will look into that."

On August 16, 2011, the court granted the minor's caretakers de facto parent status over the objection of the parents. At the end of the hearing, the court inquired about the status of the paternity testing for father. County counsel responded that the results were not available yet. Upon further questioning by the court, county counsel could not say if the testing had actually taken place yet.

Prior to the section 366.26 hearing, the social worker submitted its report. A section of the report addressed the paternity issue, explaining that the originally scheduled test did not take place because father was transferred from Twin Towers to North Kern State Prison, so testing had been rescheduled. Although the child had been tested, there was no indication father had been tested as of the date of the report. Genetic testing of father apparently took place on September 15, 2011, and a report was issued on September 29, 2011, indicating that father was the biological father of T.R.

On October 31, 2011, the section 366.26 hearing took place. Father did not present any evidence at the hearing, but objected to the termination of his parental rights because he did not have an opportunity to establish the relationship that he would have liked to with the child, and asserted he held the child out as his own.⁴ Father requested that the court establish a “lesser permanent plan” so he could have an opportunity to have a relationship with his child upon his release, and requested that the child be placed with a relative, specifically a paternal aunt, whom he did not name. After hearing the arguments of counsel, the court terminated parental rights. On October 31, 2011, father appealed.

DISCUSSION

On appeal, father argues that (1) the delay in obtaining and providing paternity test results deprived him material evidence and compels reversal; (2) his rights to equal protection under the law were violated where mother was offered the opportunity for relative placement but he was not, due to his status. While the delay was inexcusable, it does not require reversal.

1. Delay Did Not Deprive Father of Material Evidence or Violate His Rights.

Father’s argument centers on the assertion that he was entitled to seek relative placement. However, he also argues that he was the biological father who did all that he

⁴ Father did not make any formal attempt to change his status from alleged father to presumed father or challenge the juvenile court’s earlier finding that he was an alleged father.

could reasonably do under the circumstances to act as one, citing *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 850, and asserts that father's desire to qualify as T.R.'s legal father was thwarted by CFS's delay in obtaining the paternity test results. He further argues that by failing to promptly comply with the order for testing, he was deprived of an opportunity to place T.R. with a relative. Although we disapprove of the delay, father never satisfied the criteria to become a *Kelsey S.* father, and, even if he had, his paternal status would not have conferred a "right" to have his child placed with a relative.

Because time is of the essence, CFS has a duty to act with due diligence to locate an alleged father. (*In re O. S.* (2002) 102 Cal.App.4th 1402, 1409.) The dependency court has a duty to determine the parentage of a child when a man appears at a hearing requesting a paternity finding. (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 959.) Once a father's biological paternity has been established, CFS may consider his relatives as possible placements for the minor. (*In re J.H.* (2011) 198 Cal.App.4th 635, 650.)

As a prisoner, father's whereabouts were ascertainable by CFS with the exercise of reasonable diligence, and paternity testing could have been completed before the jurisdictional hearing, or at some reasonable time during the five months between the dispositional hearing (May 24, 2011) and the section 366.26 hearing (Oct. 31, 2011). CFS had two months to locate father between the dates of the originally scheduled paternity test of father and the date of the dispositional hearing, in order to reschedule. CFS did not properly discharge its duty to arrange for testing and provide results of that testing in a prompt manner.

However, that does not end our enquiry. Father did not argue in the trial court that he was deprived of an opportunity to establish his paternity status by virtue of the late paternity test results.⁵ Father's main contention is that he was deprived of the right to have his relatives considered for placement by virtue of the delay in establishing his status as a biological father.

Section 361.3, subdivision (a) provides in relevant part that in any case in which a child is removed from the physical custody of his or her parents, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative. The preference applies at the time of the child's initial removal from the parents' custody at the dispositional hearing. (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 854.) Once a child is placed in the home of a nonrelative at the dispositional hearing, the relative placement preference does not arise again until a new placement of the child must be made. (§ 361.3, subd. (d); *In re N.V.* (2010) 189 Cal.App.4th 25, 31.)

Father argues he was entitled to relative placement, but does not provide any authority for this proposition of law. In fact, there is no "right" to relative placement.

⁵ The petition for writ of habeas corpus (E055592), includes a declaration by father's trial counsel attesting to the fact that the paternity results were provided to him on October 31, 2011, the date of the hearing pursuant to section 366.26. Trial counsel indicates that the results were discussed during the hearing, but the reporter's transcript contains no mention of the paternity test results. Because the results were available on the date of the hearing, the fact father did not object or seek leave to file a section 388 petition based on the new evidence gives rise to a forfeiture of the issue.

There is only a duty of the juvenile court to give preferential consideration to placement with a relative where a relative requests placement. (§ 361.3, subd. (a).) The statute expressly provides that the inquiry into relatives for possible placement is not to be construed to guarantee that the child will be placed with any person identified as a relative. (§ 361.3, subd. (a)(8); see also *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863 [preferential consideration does not create an evidentiary presumption in favor of a relative].) Instead, in all cases, the placement of a child is governed by the juvenile court's fundamental duty to assure the best interest of the child. (*Alicia B.*, *supra*, at p. 864.) Father had no "right" to consideration of a relative's home for placement, so there can be no violation of that right.

At the time T.R. was removed from his parents' custody, father did not provide the names or addresses of relatives to be assessed or evaluated by CFS. No relatives sought placement preference at the dispositional hearing, and there was no need for a new placement at which a relative preference was required to be considered. Father did not challenge the original placement of T.R. in a nonrelative home following the disposition hearing, so no error can be assigned to the placement of T.R. in foster care at that time. Because no new placement of T.R. was necessary, there was no new opportunity to consider relatives for placement. (§ 361.3, subd. (d).)

The child was properly placed in foster care at the original disposition hearing, absent any timely challenge to the disposition orders. Although CFS erred in failing to

act diligently in obtaining results of the court ordered paternity testing, that delay did not preclude consideration of relative placement absent a need for a new placement.

2. No Equal Protection Violation Has Been Established.

Father argues that mother had the opportunity to name relatives for placement consideration, but he did not have a similar opportunity despite the fact both mother and father were biologically related to the minor. This circumstance, he asserts, violated his right to equal protection under the law. We disagree.

The guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution compel recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. (*Elysium Inst. v. County of L.A.* (1991) 232 Cal.App.3d 408, 426-427.) The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*In re Eric J.* (1979) 25 Cal.3d 522, 530; *In re Mary G.* (2007) 151 Cal.App.4th 184, 198.)

Father's equal protection challenge was not raised in the trial court, which presents a forfeiture problem. (*Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 254.) However, we may address his claim as a pure question of law. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1266-1267, citing *In re S.B.* (2004) 32 Cal.4th 1287, 1293.) Father relies on cases which stand for the proposition that "distinctions granting unequal parental rights to fathers and mothers may not be constitutionally applied where the

parents are similarly situated with regard to their relationship to the child,” to show his “right” to relative placement was violated. But relative placement preference is not a right, so those cases are inapposite.

In any event, many cases have upheld the distinctions between alleged fathers, biological fathers, and presumed fathers, as rational classifications. (See *Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 239-240.) There is an obvious distinction between a man who has undertaken the obligations of marriage and family and a man whose only connection with the child is biological; the state has a legitimate interest in preferring the former over the latter. (*Id.* at p. 239, citing *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, 363.)

Some cases involve competing claims of paternity, which hold the potential for confusing the issue of which alleged father is entitled to custody, or what relatives are entitled to preferential consideration for placement when the child is removed from the parents’ custody. Thus, it is rational to require a father to establish his biological relationship to a child before his relatives can seek preferential consideration for placement. Once a father has established his biological relationship, he has the same opportunity to seek placement of the child with relatives as does the mother, because section 361.3 does not refer to either mothers or fathers. There is no facial violation of equal protection principles in the language of the statute.

More significantly, by its own terms, there is no guarantee of a relative placement under section 361.3 to either a mother or a father, irrespective of father’s status in the

action. Section 361.3 only requires a court to give preferential consideration to relatives who request placement when the child is initially removed from the parents' custody at the disposition hearing, or when a new placement is necessary, and does not guarantee placement. (§ 361.3, subds. (a), (d).) There was no equal protection violation.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

RICHLI
J.

KING
J.