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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re L.A., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.A., et al.,

Defendants and Appellants.

E062703

(Super.Ct.No. J252356)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lynn Poncin,
Judge. Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and
Appellant, A.A.

Grace Clark, under appointment by the Court of Appeal, for Defendant and
Appellant, D.Z.

Jean-Rene Basle, County Counsel, Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

Appellant A.A. (father) appeals from a juvenile court's order terminating parental rights to his son, L.A. (the child). Father was incarcerated at the time of the disposition hearing. Although he was represented by counsel at that hearing, he now claims the juvenile court violated Penal Code section 2625 and due process by proceeding in his absence. Appellant D.Z. (mother) filed a separate brief, joining in father's arguments and contending that if the order terminating father's parental rights is reversed, the order terminating her parental rights must also be reversed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 9, 2013, the San Bernardino County Department of Children and Family Services (CFS) filed a Welfare and Institutions Code¹ section 300 petition on behalf of the child, who was almost one month old at the time. The petition alleged that he came within section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). The petition included the allegations that father and mother (the parents) engaged in domestic violence, and that the parents may suffer from substance abuse issues. The petition also alleged that father's whereabouts were unknown.

The social worker filed a detention report and stated that it received a referral from the Community Hospital of San Bernardino (the hospital) that there was a physical altercation between the parents in a hospital sleep room. Father came running out of the

¹ All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

room with the child, a newborn, in his arms. Mother claimed that father kicked her in the stomach and grabbed her neck. Father claimed that mother slapped him in the face. He also reported that mother had slapped him multiple times when she was pregnant.

The social worker called the hospital social worker, who reported that mother had just left the hospital to go to the welfare office. Mother was living with father, but her plan was for her and the child to go and live with her aunt in Victorville. The social worker went to the welfare office and interviewed mother while she was waiting for the police to come and assist her in getting her belongings from father's home. Mother said that, at the hospital, father called her "stupid" and a "bad mom," so she hit him in the forehead. Father then ripped her necklace off and kicked her in the stomach and vaginal area. The social worker went with her and the police to get her belongings from father's home. The social worker then dropped mother off at the home of her uncle, who had agreed to let her stay with him for the night. Mother said she would return to the hospital to stay with the child until he was discharged. However, the social worker subsequently received a phone call from the hospital social worker stating that mother had not been to the hospital in four days. The child was continuing to vomit when being fed, so he was still in the hospital. The social worker attempted to reach both mother and father, but could not. She then obtained a detention warrant for the child.

A detention hearing was held on December 10, 2013. Mother was present, but father was not. Mother confirmed that father was the child's biological father, and that he was on the child's birth certificate, but she was not married to him. The court detained the child in CFS's care.

Jurisdiction/Disposition

The social worker filed a jurisdiction/disposition report dated December 31, 2013, and recommended that the court sustain the petition, declare the child a dependent of the court, and offer reunification services to both parents.

A jurisdiction/disposition hearing was held on December 31, 2013. Father was present and represented by counsel. Mother's counsel was present, but mother was not. Mother's counsel requested the court to set a short cause contested trial. The court agreed and set a hearing for January 22, 2014. The court instructed father to be in court at 8:00 a.m. on that day.

The court held a contested jurisdiction/disposition hearing on January 22, 2014. Father was not present, but was represented by counsel. Mother was present, also represented by counsel. Father's counsel informed the court that he had a waiver of rights form that he and father had previously completed together. However, since father was not present, he could not submit it to the court. The court noted that father was present at the previous hearing and that he was ordered to appear at the instant hearing. Thus, the court stated that it was "inclined to proceed." The court went on to review mother's waiver form with her. The court found that mother's waiver was voluntary, knowing, and intelligent. Father's counsel then informed the court that the allegation that father's whereabouts were unknown was to be dismissed and that father was not contesting the remaining allegations. Father's counsel submitted "by way of report on those allegations on behalf of [his] client." The court dismissed the allegation regarding father's whereabouts pursuant to the county counsel's motion, found the other allegations

true, and found that the child came within the provisions of section 300, subdivision (b). Father's counsel then submitted on the report and asked for further authority to liberalize visitation to unsupervised overnights. The court referred to the jurisdiction/disposition report and adopted certain findings, including that reunification services would not exceed six months, and that failure to visit or contact the child may result in termination of services at the six-month status review hearing and the ordering of adoption or guardianship as a permanent plan. The court declared the child a dependent, removed him from the parents' custody, placed him in foster care, and ordered mother and father to participate in reunification services. The court set a six-month review hearing for July 22, 2014.

Six-month Status Review

The social worker filed a six-month status review report, dated July 22, 2014, and recommended that reunification services be terminated and a section 366.26 hearing be set. The social worker reported that father and mother were both young and immature, that they had ongoing, serious domestic violence incidents, that they failed to take responsibility for their own actions and blamed each other, and that they had been unable to show that they could put their own needs aside for the child. The social worker reported that father was arrested on January 14, 2014, and was not released from custody until March 25, 2014. On June 16, 2014, father was arrested and incarcerated again, after he repeatedly assaulted mother and then began assaulting his brother, who called the police.

The court held a six-month review hearing on July 22, 2014. Neither parent appeared, but both were represented by counsel. Father's counsel informed the court that father was in custody. Father's counsel set the matter contested and requested that father be transported for the next hearing. The court ordered the matter continued to August 5, 2014.

On August 5, 2014, father appeared in court, in custody. County counsel asked the court to accept the status review report dated July 22, 2014, into evidence. None of the parties objected. Father's counsel presented no affirmative evidence, but objected to the termination of father's reunification services and to the setting of a section 366.26 hearing. The court proceeded to terminate reunification services and set a section 366.26 hearing for December 3, 2014.

Section 366.26

The social worker filed a section 366.26 report recommending that parental rights be terminated and the permanent plan of adoption be implemented. The parents had failed to complete a reunification plan. The social worker reported that the child had been in the home of his current caretakers since birth, and they wanted to adopt him.

The court held a section 366.26 hearing on December 3, 2014. Father did not appear, but was represented by counsel. Father was still in custody. His counsel asked the court to continue the matter and have father transported for the next hearing. The court set the matter for January 13, 2015, to allow him to submit a transportation order.

At the contested hearing on January 13, 2015, father appeared in court, in custody. He testified on his own behalf and said he did not agree with the recommendation to

terminate his parental rights. He testified that the last time he had contact with the child was in June 2014. He said he was having visits, but he stopped because he was incarcerated. He also confirmed that he was incarcerated in January 2014 and released on March 25, 2014. The court found that the child was adoptable and that it was likely he would be adopted. The court then terminated parental rights and ordered adoption as the permanent plan.

ANALYSIS

The Court Properly Proceeded With the Disposition Hearing

Father challenges the court's disposition order, contending that the court acted in excess of its jurisdiction when it declared the child a dependent of the court and removed him from his custody, in his absence. Father claims that the court violated its statutory duty to have him transported to the hearing, pursuant to Penal Code section 2625, subdivision (b), since he was incarcerated. He also claims the court violated due process by proceeding in his absence. He thus requests this court to reverse the order terminating his parental rights and remand the matter for a new disposition hearing. Father's claims have no merit.

A. Father Failed to Appeal From the Disposition Order

At the outset, we note respondent's argument that father forfeited his argument on appeal by failing to appeal the disposition order earlier. "Dependency appeals are governed by section 395, which provides in relevant part: 'A judgment in a proceeding under Section 300 may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment.'" (*In re*

Meranda P. (1997) 56 Cal.App.4th 1143, 1149.) Section 395 “makes the dispositional order in a dependency proceeding the appealable ‘judgment.’ . . . A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.” (*In re Meranda P.*, at p. 1150.) Here, father failed to appeal from the disposition order, which is final and binding. (*Ibid.*) He claims he was not provided with notice of his right to appeal. Assuming *arguendo* he was not given notice, we will address the merits of his claims.

B. Father Has Not Demonstrated That the Court Erred

Father claims that the court has a statutory duty, under Penal Code section 2625, subdivision (b), to order an incarcerated parent to be brought to a hearing where it seeks to remove a child from his parent’s custody. Penal Code section 2625, subdivision (b), requires a court to order a prisoner-parent’s temporary removal and production before the court “where the proceeding seeks to terminate the parental rights of any prisoner, or any proceeding brought under Section 300 of the Welfare and Institutions Code, where the proceeding seeks to adjudicate the child of a prisoner a dependent child of the court” Subdivision (d) of Penal Code section 2625 provides: “Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner’s desire to be present during the court’s proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner’s production before the court.” The statute’s meaning is clear. Under Penal Code section 2625, a prisoner-parent has a statutory right to be present at certain hearings. (*In re Axsana S.* (2000) 78 Cal.App.4th 262, 269 (*Axsana S.*), overruled on other grounds by *In re Jesusa V.* (2004)

32 Cal.4th 588, 624, fn. 12 (*Jesusa V.*.) However, a court is only required to order a prisoner-parent's temporary removal and production before the court when the prisoner requests it. (*Adoption of I.M.* (2014) 232 Cal.App.4th 40, 46; see Pen. Code, § 2625, subd. (d) ["Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings".].)

Here, the record does not reflect that father requested to be present at the disposition hearing, and father does not assert on appeal that he ever made such request below. Moreover, he was represented by court-appointed counsel at the disposition hearing on January 22, 2014. At the outset of that hearing, the court noted that father was present at the previous hearing on December 31, 2013, and that the court ordered him to appear. Indeed, the record shows that the court instructed father to be in court at 8:00 a.m. on January 22, 2014. Thus, father had notice of the January 22, 2014 disposition hearing. If he wanted to be transported to the hearing, he was required to inform the court of such desire. (Pen. Code, § 2625, subd. (d).) It appears that he failed to do so. Since the court was not in receipt of the required statement indicating father's desire to be present, the court had no duty to order him to be transported to court. (*Ibid.*; *Adoption of I.M., supra*, 232 Cal.App.4th at p. 46.)

Furthermore, father has not shown a due process violation. As noted, although he was not present at the January 22, 2014 disposition hearing, he was represented by counsel. He received meaningful access to the courts through his appointed counsel. (*Axsana S., supra*, 78 Cal.App.4th at p. 269.) "In dependency cases, as in other civil cases, personal appearance by a party is not essential; appearance by an attorney is

sufficient and equally effective.” (*Ibid.*) Moreover, father has not directed this court to any authority that recognizes a due process right to personally attend the section 300 hearings. (See *Id.* at p. 271.) In his reply brief, he claims that the recently published case of *In re M.M.* (2015) 236 Cal.App.4th 955 (*M.M.*), recognized a parent’s due process right to be present at the disposition of a case. However, the court in that case found that the juvenile court violated the mother’s *statutory right* to be present, under Penal Code section 2625, subdivision (d). (*Id.* at pp. 10-11.) Furthermore, that case is factually distinguishable. In *M.M.*, the mother’s counsel invoked the mother’s right under Penal Code section 2625, subdivision (d), to be present at the contested jurisdiction/disposition hearing at the outset of the proceedings. (*Id.* at p. 12.) “Yet the juvenile court elected to conduct the hearing in [the mother’s] absence over her counsel’s objection.” (*Ibid.*) In the instant case, father’s counsel did not object when the court noted that father was previously ordered to be present, and that it intended to proceed in his absence. Father’s counsel did not appear to know at that time that father was incarcerated. He simply told the court that “he’s not here today.” Father’s counsel went on to inform the court that the allegation that father’s whereabouts were unknown was to be dismissed and that father was not contesting the remaining allegations. Father’s counsel submitted “by way of report on those allegations on behalf of [his] client.” We conclude that, “Because [father] had appointed counsel present to represent his interests at the jurisdictional/dispositional hearing, he was afforded the requisite due process right of a parent to be heard.” (*Axsana S.*, *supra*, 78 Cal.App.4th at p. 271.)

To the extent that father argues the court exceeded its jurisdiction when it proceeded without him, even though he was represented by counsel, such argument fails. Once the prisoner-parent has received notice and the opportunity to be present, “Penal Code section 2625 did not bar the court from proceeding in his absence provided his attorney was present.” (*Axsana S.*, *supra*, 78 Cal.App.4th at p. 271; see *In re Rikki D.* (1991) 227 Cal.App.3d 1624, 1629, overruled on other grounds by *Jesusa V.*, *supra*, 32 Cal.4th at p. 624, fn. 12.)

In sum, father had notice of the disposition hearing and did not request to be transported for the hearing. Furthermore, he was represented by counsel at the hearing. Accordingly, father was not denied any statutory or constitutional rights when the court proceeded with the disposition hearing in his absence.

DISPOSITION

The order of the juvenile court terminating the parental rights of mother and father is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.