Filed 5/23/12 In re D.S. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re D.S., a Person Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. G.S., Defendant and Appellant.	F064133 (Super. Ct. No. JJV055408C-02) **O P I N I O N**

THE COURT*

APPEAL from an order of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Amy-Marie Costa, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Kane, J., and Detjen, J.

INTRODUCTION

G.S. appeals from the juvenile court's order pursuant to Welfare and Institutions Code section 366.26 terminating his parental rights to D.S.[1] Appellant argues the trial court erred in failing to promptly determine his paternity status. Appellant further contends that the Tulare County Health and Human Services Agency (agency) failed to make a proper inquiry of his child's Indian ancestry pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). We reject appellant's contentions and affirm the juvenile court's judgment.

FACTS AND PROCEEDINGS

D.S. was prematurely born in July 2011, to Patricia M. (the mother), who is not a party to this appeal. A petition was filed pursuant to section 300 on July 8, 2011, alleging, inter alia: that the mother had positive drug tests while pregnant with D.S.; the mother had an extensive history of substance abuse; D.S. had special medical needs; the mother has a mental illness rendering her unable to care for D.S.; appellant was incarcerated and unable to provide support; and the mother had prior dependency proceedings that ended with the termination of her parental rights and the adoption of two older children. The petition set forth that appellant was D.S.'s alleged father.[2]

On July 11, 2011, appellant executed a form in which a box was checked indicating that he may have Indian ancestry but that he did not "have information on tribe." The mother executed a form on July 8, 2011, indicating that as far as she knew, she did not have Indian ancestry. Appellant was served with notice of the detention hearing.

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

[2] First and second amended petitions were filed on July 11, 2011, and on August 2, 2011, respectively, with substantially similar allegations. The first and second amended petitions also stated that appellant was an alleged father.

Although appellant was incarcerated and not present at the detention hearing, he was appointed and represented by counsel. The mother believed appellant was scheduled for release from his incarceration in August 2011. The mother told the court at the detention hearing that she had no Indian ancestry but believed appellant's mother had Indian heritage, but the mother did not "know what kind." The mother testified that appellant was D.S.'s father, she was not married to appellant, and appellant's name was not on the child's birth certificate because appellant never signed an acknowledgment of paternity. The juvenile court ordered D.S.'s detention. The minute order from the hearing includes the court's finding there was insufficient evidence that D.S. may be an Indian child covered by the ICWA.

The social worker's report for the joint jurisdiction/disposition hearing recommended that no services be given to the mother based on her previous failures to complete services and termination of parental rights for her two older children. The report noted that appellant was incarcerated in Delano State Prison, was not in a relationship with the mother, had not met the child, and had not signed the child's birth certificate. The social worker's recommended findings and orders to the juvenile court included a finding that there was insufficient reason to believe D.S. was an Indian child covered by the ICWA.

On August 4, 2011, the jurisdiction hearing was continued to September 1, 2011. Appellant's counsel informed the court that appellant was incarcerated in North Kern State Prison. The court had appellant's counsel prepare a transportation order and ordered the social worker to prepare a JV-505 statement of parentage form. Appellant executed the form on August 16, 2011, stating that he wanted counsel appointed to represent him, he did not know if he was the child's father, and he was requesting blood or DNA testing. Appellant also stated that he believed he was the child's father and requested the court to enter a judgment of parentage.

At the joint jurisdiction/disposition hearing on September 1, 2011, appellant executed a waiver of rights and submitted the matter on the social worker's report.[3] The juvenile court verified that appellant executed the waiver of rights form. Appellant verbally acknowledged that he was waiving his rights. The parties agreed to dismiss the allegation that appellant was unable to care for D.S. due to his incarceration.

Appellant requested a paternity test. The court noted that appellant's JV-505 form was contradictory because it requested DNA testing and also requested a judgment of paternity. Appellant's counsel told the court that appellant wanted paternity testing. The agency's counsel asserted appellant was still only an alleged father and that appellant should not receive reunification services unless his status changed.

The court found true allegations that the mother failed to complete reunification services and lost parental rights as to two older children, and the mother was under the influence of methamphetamine during her pregnancy with D.S. The court adopted the findings and orders submitted by the agency, with some modifications. Among the findings and orders adopted by the court were that appellant was an alleged father, and there was insufficient reason to believe D.S. was an Indian child covered by the ICWA.

The court ordered paternity testing for appellant. The case was set for a termination hearing pursuant to section 366.26. The court orally advised the mother and appellant of their right to file a writ petition to seek review of the court's orders. Appellant was personally served with notice of his right to seek writ review of the juvenile court's findings and orders. Appellant did not seek review by writ petition to this court.

The social worker's report for the section 366.26 hearing stated that D.S. was doing well in his foster home and his foster parents wanted to adopt him. Although allowed visits, the mother stopped visiting D.S. when the case was transferred to the

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[3] The mother also executed a waiver of rights and submitted the matter on the social worker's reports.

adoption unit. No other relative, including appellant, contacted the agency concerning visitation with D.S. His caregivers stated their desire to adopt D.S. and he is considered adoptable. D.S. appears to be very well adjusted and thriving in the caregivers' care. The child was being taken to Fresno for the testing of a confidential medical condition. The agency recommended the termination of parental rights with a permanent plan of adoption.

Although the paternity test results were not available for the social worker's section 366.26 report, they were available and attached as an addendum report. According to the test, appellant could not be excluded as D.S.'s biological father since they share genetic markers. The probability of appellant's biological paternity for D.S. was 99.99 percent compared to an untested, unrelated man of the same race.

The section 366.26 hearing was continued until December 29, 2011. The mother and appellant were both in custody, but present at the hearing. Appellant's counsel objected that the DNA testing of appellant took four months and that the agency did nothing to periodically follow up on or expedite the results. Counsel further argued that appellant could have received visitation or requested services.

Counsel for the minor argued that even if appellant had received the results of the paternity test sooner, this would not have automatically entitled him to receive services or visitation. Father was in custody and had no relationship with D.S. The minor's counsel believed the recommendation to terminate appellant's parental rights was appropriate. The agency's counsel pointed out that the paternity testing results were available on December 16, 2011, the hearing was on December 29, 2011, and appellant still did not file a petition pursuant to section 388.

The court concurred with the recommendations of the agency, noting that no exceptions to termination of parental rights applied to this case and no section 388 petition was filed by appellant. The court observed that appellant had a considerable criminal history and that even if a section 388 petition had been filed, based on the record before the court, it would not have been in the best interests of D.S. for appellant to

receive services. The court found it was likely D.S. would be adopted and terminated appellant's parental rights.

PATERNITY DETERMINATION

Appellant contends that he was incarcerated when the proceedings were initiated and that the agency failed to expedite the results of his paternity test. We disagree.

To become a presumed father, a man must fall within one of several categories set forth in Family Code section 7611. A man who has neither legally married nor attempted to legally marry the child's natural mother cannot become a presumed father unless: (1) he receives the child into his home and openly holds out the child to be his natural child, or (2) both he and the natural mother execute a voluntary declaration of paternity. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595 (*Francisco G.*).) Presumed fathers are entitled to custody and reunification services. A biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status as defined in Family Code section 7611. (*Francisco G., supra,* 91 Cal.App.4th at p. 596.)

An alleged father refers to a man who may be the father of the child, but whose biological paternity has not been established, or, alternatively, has not achieved status as a presumed father. Alleged fathers are entitled to notice of proceedings, which provides them the opportunity to appear and to assert a position. Presumed fathers possess far greater rights than alleged or biological fathers. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449 (*Zacharia D.*); *Francisco G., supra*, 91 Cal.App.4th at p. 596.) Only presumed fathers, not biological fathers, are parents entitled to reunification services and custody of a child. (*Zacharia D., supra*, 6 Cal.4th at p. 451; *Francisco G., supra*, 91 Cal.App.4th at p. 596.)

It is the parent's burden of proving the necessary elements for status as a presumed parent. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1653.) Appellant could not meet the statutory elements to be declared a presumed father under the Family Code (Fam. Code, § 7611). He and the mother were not married, nor was there any evidence

that they attempted to marry. Although a court may also declare a man a presumed father if he receives the child into his home and openly holds out the child as his natural child (Fam. Code, § 7611, subd. (d)), there was no evidence that appellant ever did so with D.S.

There is little doubt appellant is D.S.'s biological father. This status, however, only afforded appellant limited rights. As noted above, as a natural or biological father, appellant is not entitled to either placement or reunification services. (*Zacharia D.*, *supra*, 6 Cal.4th at p. 451.) The juvenile court, at best, could have ordered services for him if it determined services, including visitation, would benefit the child. (§ 361.5, subd. (a).) Here, there was no evidence that services for appellant would benefit D.S. Indeed, at the termination hearing, the juvenile court noted that appellant had a considerable criminal record and was incarcerated during part of the dependency proceedings. The court alternatively found that had appellant filed a section 388 petition, it was improbable that he would have shown it would be in D.S.'s best interests for appellant to be offered reunification services.

In addition, because D.S was less than three years old when he was first removed, services would be limited to six months. (§ 361.5, subd. (a)(2).) By the point of the section 366.26 hearing, D.S. was entitled to stability and permanence, which could be best achieved through adoption (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309) absent a compelling statutory reason for finding termination of parental rights would be detrimental to the child. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) Appellant presented no evidence in establishing a compelling statutory reason that termination of his parental rights would be detrimental to D.S. As for visitation, there was no evidence appellant had ever met D.S. or ever asked to visit him.

We reject appellant's argument that his ability to participate in the proceedings was limited by his incarceration. Incarceration is not an excuse for failing to exercise paternal responsibilities. (*Adoption of O.M.* (2008) 169 Cal.App.4th 672, 680-681.) Appellant was not even incarcerated during the entire course of the proceedings, having

been released from prison in August 2011 before being incarcerated again prior to the termination hearing. Appellant's failure to change his own status was not due to the actions of the mother, the agency, or any other party, but was attributable to his own conduct. (*Ibid*.)

We further reject appellant's argument that the agency and/or the juvenile court had a duty to expedite the results of the genetic testing. There is nothing in the record to support appellant's assertion that the agency could have expedited the results of the genetic testing. More importantly, it was appellant's obligation to advance his status as an alleged father to that of a presumed father. Appellant did nothing to do so. Appellant had notice of all of the hearings and was represented by counsel throughout the proceedings. Although appellant had notice and representation, he did not even attempt to visit D.S. during the entire course of the proceedings. On this record, father failed to show what steps he took to promptly come forward and work to change his status from an alleged father to a presumed father. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 611.)

ICWA

Appellant argues the ICWA notice was insufficient as a matter of law because a proper inquiry of parental Indian ancestry was never conducted by the agency. For the first time in this action, appellant challenges the court's findings on September 1, 2011, that the ICWA did not apply in this case. Respondent contends the court's ruling concerning the ICWA has long been final and appellant cannot complain at this late stage that the ICWA has been violated. Respondent further argues that the notice given by appellant provided too little information to require notice pursuant to the ICWA. We agree with respondent's assertions.

In *In re Pedro N.* (1995) 35 Cal.App.4th 183 at pp. 185, 189 (*Pedro N.*), we held that a parent who fails to timely challenge a juvenile court's action regarding the ICWA is foreclosed from raising the ICWA notice issues in a subsequent appeal once the court's ruling is final. The proper time to raise such issues is after the disposition hearing. The juvenile court's rulings and findings at the disposition hearing are appealable upon a

timely notice of appeal. We noted in *Pedro N*. that the parent there was represented by counsel and failed to appeal the juvenile court's orders from the disposition hearing. (*Pedro N*., *supra*, 35 Cal.App.4th at pp. 189-190.)

In the instant action, the juvenile court's ICWA finding was made at the disposition hearing on September 1, 2011. Appellant submitted the case on the recommendations and proposed ruling of the agency. Appellant never challenged the agency's proposed order that the ICWA was not applicable to this case. Appellant was notified in court of his right to file a writ proceeding for review in this court of the juvenile court's rulings. Appellant never did so. Appellant never sought review by the juvenile court of its ICWA ruling by a section 388 petition. Appellant did not assert at the termination hearing that the ICWA was applicable here. Appellant waited to challenge the adequacy of the ICWA notice for D.S. until he filed his appeal from the ruling at the section 366.26 hearing on December 29, 2011, terminating his parental rights.

Appellant was represented by counsel throughout these proceedings. The original petition notified appellant and his counsel that the provisions of the ICWA had been found inapplicable to D.S. Appellant and his counsel lodged no objection to the social worker's observations, or to the social worker's recommendation in the jurisdiction and early status review reports, that the ICWA did not apply.

The juvenile court's dispositional findings and orders on December 29, 2011, are final and no longer subject to attack by appellant. (*Pedro N.*, *supra*, 35 Cal.App.4th at pp. 185, 189-191.) Although appellant was entitled to file a writ pursuant to sections 366.26, subdivision (*l*) and 395 from the disposition orders issued on September 1, 2011, he did not.

Our holding in *Pedro N*. is fully applicable here. Appellant neither voiced any objection to the juvenile court nor filed a writ from that court's ruling at the disposition hearing. Appellant waited until now to object and by his silence has forfeited his right to complain in this appeal.

Appellant asserted that he may have Indian heritage but did not "have information on tribe." We agree with respondent that this allegation was too vague and provided too little information to require notice pursuant to the ICWA. (*In re J.D.* (2010) 189 Cal.App.4th 118, 124-125 [notice not necessary where relative could not identify a specific tribe]; *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538-1539 [notice not necessary where a remote ancestor identified as a Comanche princess, but no family member ever lived on reservation, attended an Indian school, participated in Indian ceremonies, or received services from an Indian health clinic].)

DISPOSITION

The orders of the juvenile court are affirmed.