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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ASHLEY J. et al., Persons Coming Under
the Juvenile Court Law.

GERARDO L. et al.,

Petitioners and Respondents,

v.

BRIAN J.,

Objector and Appellant.

F071693

(Super. Ct. No. VAD007926)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Bret D. Hillman, Judge.

Carolyn Hurley, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Petitioners and Respondents.

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INTRODUCTION

Appellant Brian J. (father), appeals from the trial court's termination of parental rights pursuant to Family Code section 7822.¹ Father contends the trial court erred prejudicially when it failed to issue a transport order despite his request to be present at the hearing; did not appoint counsel for the minors; and accepted a Family Court Services report when that agency failed to interview him. He also contends the evidence is insufficient to support the trial court's determination that he intended to abandon his children and that termination of his parental rights was in the best interests of the children.

We conclude the trial court erred prejudicially when it failed to order that father be transported to court for the hearing as he requested and as required by Penal Code section 2625. Consequently, we reverse and remand.

FACTUAL AND PROCEDURAL SUMMARY

On January 2, 2015, Gerardo L., the stepfather of Ashley and Jacob (stepfather), filed a petition pursuant to section 7822. The petition alleged that father was an alcoholic, drug abuser, was in and out of jail for domestic violence, and had been estranged from the children since 2001. In another section of the petition, however, it stated that father had last had contact with the children in July 2012. Stepfather also filed adoption requests for both Ashley and Jacob.

Attached to the section 7822 petition was a letter from father to the children's mother, stating that he had heard stepfather wanted to adopt the children. The letter went on to state father would allow stepfather to adopt if mother would "waive and close the case against" him for back child support. Father's letter also stated that he loved the children very much, "but I think this is best for them."

¹ References to code sections are to the Family Code unless otherwise specified.

A citation ordering father to appear at a hearing on the petition scheduled for February 11, 2015, was apparently issued by the clerk of the court on January 2, 2015. However, initially no proof of service was filed indicating the citation was served. On February 3, 2015, stepfather filed a declaration stating service of the petition was effected on father at Deuel Vocational Institute, where father was incarcerated; the original proof of service was not filed.

A letter dated February 4, 2015, was sent by father, apparently to the court. Father alleged the petition contained false statements. Father stated that he had paid support for the children through March 6, 2014, when he was incarcerated; he was not a drug abuser; and mother had “kept” the children from him and also moved five hours away with the children, making visitation difficult. Father concluded by stating he loved his children, “most likely” would consent to the adoption, but still was considering “what is best for them at this time.”

On February 11, 2015, the trial court found that father had yet to be properly served with the petition and continued the matter to March 26. Stepfather was directed to see that service was effected on father for the March 26, 2015, hearing and that a proof of service was filed. A proof of service without a file stamp appears in the court records, indicating that father was served on February 27, 2015.

A letter from father dated March 1 was received by the trial court on March 6, 2015. The letter confirmed receipt of the petition and notice of the March 26 hearing date. Father stated that he was currently incarcerated, inquired about an order for transportation, requested counsel to represent him, and asked for a continuance. The trial court appointed the public defender to represent father, but not until the March 26 hearing, at which time the court also continued the hearing to April 30, 2015.

On April 1, 2015, stepfather filed a declaration with the trial court stating that father had sent a letter to mother and a separate letter to the children; the letters were attached. Stepfather alleged that the letters constituted a violation of a domestic violence

restraining order in place against father; the letter to the children was intercepted by stepfather and not shown to the children.

Father's letter to mother stated that he was sorry for his actions and asked for her forgiveness. Father asked mother to please allow the children to see father's family and said he wished mother and stepfather well and hoped the marriage was a good one.

In father's letter to his children, he stated that he loved them both, was sorry he allowed alcohol to control and ruin his life, asked for their forgiveness, and asked them to please write to him. Father admitted that he was in prison for hitting his girlfriend and stated that maybe prison was "a blessing in disguise." He claimed to be ready to turn his life around and live free of alcohol, stated that he will be receiving anger management and alcohol abuse counseling, and indicated he had a release date of November 2016 or earlier. Father also asked the children if they wanted to be adopted by stepfather; indicated he would relinquish rights if they wished to be adopted; but then stated they would be 18 years old soon and able to make their own decisions.

Family Court Services prepared a report pursuant to section 7851, which required that a report be prepared with a recommendation as to the best interests of the children. Mother and stepfather were interviewed and indicated the children wanted to be adopted by stepfather. Mother claimed her first two marriages ended because of domestic violence; she had two children from each marriage. Mother had obtained a restraining order against father, which expired in September 2015.

As to father's children, mother had been granted sole legal and physical custody by stipulation of the parties in June 2012. Father obtained a change in visitation in 2012 and was able to visit the children twice that year after the change in visitation. Mother stated father only provided sporadic support.

Stepfather reported two convictions for driving under the influence (DUI), one in 2008 and one in 2011. His driver's license was suspended as a result of the DUI and he was attending DUI offender classes. At the time of the preparation of the report, no

response had been received yet from an inquiry to child welfare authorities and Livescan pertaining to criminal records regarding stepfather.

Both Ashley and Jacob were interviewed separately. They both indicated they wished to be adopted by stepfather. Family Court Services recommended granting the petition and allowing stepfather to adopt.

On April 14, 2015, the court clerk stated that an order for an appearance by CourtCall and instructions for calling in were mailed to father. The standard form had the portion providing for transport of the prisoner crossed out. The order provided that father may appear by CourtCall for the April 30 hearing, but no time for the hearing was specified. The instructions sent to father do not appear in the clerk's record.

At the April 30, 2015 hearing, counsel for father indicated that he was unable to call his client at the institutional facility; his only method of communication with his client was by letter. Counsel indicated there were matters he wished to discuss with his client so that father could "make a fully informed decision," but because of communication issues that had not occurred. Mail from father to his attorney took between three to six days to arrive.

Counsel had hoped to have a conversation with his client that day, before the hearing began. He stated, "I want a chance to speak with him." Counsel indicated to the trial court that for a prisoner to access CourtCall was difficult; it's "not as simple as making a simple phone call." Counsel did not know why father was not available by CourtCall. Counsel objected to the matter going forward "when I don't have the assistance of my client in court because at this point, he's our only witness on our side of things."

The trial court indicated that father "had a month" in which to communicate with counsel and set up the CourtCall. Stepfather asked the trial court to proceed because father "hasn't communicated with the Court." The trial court indicated it did not have any way of calling father.

Counsel stated that he had not been appointed until March 26, even though the petition was filed in January. Counsel noted the issues in communicating with father and opined that there was no “need to proceed this morning.” The children were both teenagers and there was no emergency requiring action on the petition.

The trial court found that father hadn’t “stated anything as a defense to the action.” The trial court found by clear and convincing evidence that no support had been paid and father had left the children in the care and custody of mother for the statutory period. The trial court granted the petition and indicated stepfather could proceed with the adoption.

A report was prepared for the stepparent adoption by Family Court Services. The report stated that mother and stepfather had been married less than one year; stepfather had three DUI’s, not just the two that he self-reported earlier; stepfather was on probation; fees ordered to be paid in connection with the latest DUI were in collection; stepfather’s ex-wife had a restraining order against him; and stepfather owed child support arrears to the ex-wife. Despite these issues, the report opined that mother and stepfather appeared to have a stable relationship; both children desired to be adopted; and the report recommended the adoption go forward.

Father filed a notice of appeal from the termination of parental rights on June 2, 2015. That same day, father also filed a request for appointed counsel to represent him in the appeal.

DISCUSSION

Father filed a 54-page opening brief; no respondent’s brief was filed. Father contends the trial court erred prejudicially when it failed to issue a transport order despite his request to be present at the hearing; did not appoint counsel for the minors; and accepted a Family Court Services report when that agency failed to interview him. He also contends the evidence is insufficient to support the trial court’s determination that he intended to abandon his children or to establish that termination of his parental rights was in the best interests of the children.

Penal Code Section 2625

Penal Code section 2625, subdivision (a) provides that this code section applies to any “individual in custody.” Subdivision (d) of that code section provides that upon receipt by a court of “a statement from the prisoner or his or her attorney indicating the prisoner’s desire to be present during the court 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.” (Italics added.)

Subdivision (d) of Penal Code section 2625 also states that “No proceeding may be held under Part 4 (commencing with Section 7800) of Division 12 of the Family Code ... and no petition ... may be adjudicated without the physical presence of the prisoner or the prisoner’s attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden”

Subdivision (g) of this code section states that because of the significance of parental rights, a prisoner’s physical attendance is preferable to any teleconference procedures.

As early as February 3, 2015, the trial court had evidence that father was incarcerated in Deuel Vocational Institute. On March 6, 2015, the trial court was in receipt of a letter from father indicating he was incarcerated, inquiring about an order for transportation for the hearing on the petition, and asking for appointed counsel. The trial court did not act on the request for counsel until March 26, 2015, and continued the hearing at that time to April 30, 2015.

The trial court did not act on father’s request to be present for the hearing on the petition until April 13, 2015, when it signed an order allowing father to appear by CourtCall on April 30, but failed to specify a time for the hearing. Despite father’s inquiry about an order for transport, the trial court crossed out the portion of the form ordering transport and did not order transport of father. The order permitting appearance by CourtCall was mailed to father on April 14, 2015, approximately two weeks before the scheduled hearing. The record reflects that it took about five days for mail to be

delivered between father and the court, so presumably the order for CourtCall arrived at Deuel Vocational Institute around April 19, 2015, 11 days prior to the hearing.

At the hearing on April 30, 2015, father's counsel objected to the matter going forward because father was not made available and he was the "only witness on our side of things."

The California Supreme Court has definitively determined that Penal Code section 2625 *requires* that the incarcerated parent be present for the hearing, or have affirmatively waived the right to appear. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 623–624.) Here, father was not present and he did not affirmatively waive the right to appear. When an incarcerated parent's statutory right to be present at a proceeding where parental rights may be terminated has been violated, as it was in father's case, the error is analyzed under a harmless error analysis. (*Id.* at pp. 624–625.) We cannot definitively conclude the error here was harmless.

In order to terminate parental rights pursuant to section 7822, the trial court must find that a parent has left their child with the other parent or a third party, without provision for support or communication for a period of at least one year, and with the intent to abandon the child. (*In re E.M.* (2014) 228 Cal.App.4th 828, 838–839.) The party who files a section 7822 petition has the burden of proving by clear and convincing evidence that all elements of section 7822 have been met. (*Id.* at p. 841.)

While the trial court indicated that father hadn't presented any defense, he wasn't afforded the ability to present evidence supporting his position because he was not transported for the hearing as required by the statute. Family Court Services did not interview father; thus, father's information and evidence was not presented in that report either.

Father's letters to the court and his children did reveal possible grounds for denial of the petition; father asserted he made payments towards child support through March 6,

2014, less than a year before the filing of the petition. Mother acknowledged receiving child support, although she deemed it “sporadic.”

Father also asserted that mother “kept” the children from him, indicating an apparent belief on his part that mother was interfering in some way with his ability to communicate with the children. Mother told Family Court Services that father had visitation with the children at mother’s discretion. In other documents, stepfather claims mother had a restraining order against father, dating to 2012, that precluded any contact from father with the children.

If child support payments were made and if there was interference with father’s attempts to communicate with his children, including obtaining court orders precluding communication, then grounds for finding that father abandoned the children may not be present. (*In re E.M.*, *supra*, 228 Cal.App.4th at pp. 840–841.)

Moreover, while the trial court may reach the same result after father has an opportunity to present testimony and other evidence, we cannot conclude that no other result is possible. (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 626.) If father produces some evidence establishing no intent to abandon his children and overcomes section 7822, subdivision (b), then the trial court may find that the requirements of section 7822 are not satisfied.

Conclusion

Although we are reversing the trial court’s order terminating parental rights for failure to comply with the provisions of Penal Code section 2625, we are mindful that a reversal does not affect the day-to-day living arrangements of the children. Presumably, the children are residing and will continue to reside with their mother and stepfather.

On remand, the trial court shall immediately reappoint counsel for father and shall ensure that, if father is still incarcerated, an order for transport pursuant to Penal Code section 2625 is issued for any hearings on the petition and that father is present with counsel, or has signed a knowing waiver of the right to be present.

In light of our conclusion that the failure to comply with Penal Code section 2625 is dispositive, we need not address the other issues raised by father in this appeal.

DISPOSITION

The April 30, 2015, order terminating father's parental rights is reversed and the matter is remanded for further proceedings. The trial court shall immediately reappoint counsel for father and shall ensure that, if father is still incarcerated, an order for transport pursuant to Penal Code section 2625 is issued for any hearings on the Family Code section 7822 petition and that father is present with counsel, or has signed a knowing waiver of the right to be present.

KANE, J.

WE CONCUR:

LEVY, Acting P.J.

FRANSON, J.