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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

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

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

RUDY R.,

Defendant and Appellant.

F071925

(Super. Ct. No. 13CEJ300357)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Mary Dolas,  
Commissioner.

Michelle Jarvis, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Daniel C. Cederborg, County Counsel, and David F. Rodriguez, Deputy County  
Counsel, for Plaintiff and Respondent.

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\*Before Levy, Acting P.J., Gomes, J. and Peña, J.

Christian R. was removed from his mother's care when he was born because of his mother's drug use before and during her pregnancy. Mother informed the Fresno County Department of Social Services (the Department) that Rudy R. (father) was likely Christian's father. Father appeals from the juvenile court's order terminating his parental rights pursuant to Welfare and Institutions Code section 366.26,<sup>1</sup> asserting the juvenile court erred because it failed to determine if he was Christian's biological father, instead treating him at all times as an alleged father.

As we shall explain, the juvenile court erred when it failed to comply with the applicable statutes and rules of court requiring it to determine Christian's parentage. The juvenile court's failure occurred despite the request on two occasions by father's attorney to have paternity testing completed.

The more difficult issue is whether the juvenile court's error requires reversal of the order terminating father's parental rights. We conclude that because the record contains very little information about father, we must reverse the order.

### **FACTUAL AND PROCEDURAL SUMMARY**

The Department filed a petition alleging Christian came within the provisions of section 300, subdivisions (b) and (j) because mother's substance abuse prevented her from providing regular care for the child, and because mother had failed to complete reunification services with a previous child. A section 366.26 hearing had been scheduled for the older child approximately two months after the petition was filed. Mother also had two older children who were placed with relatives.

The petition explained Christian tested positive for methamphetamine at the time of his birth and, as a result, he was detained shortly after his birth. Mother admitted to the Department's representative that she smoked marijuana throughout her pregnancy. Christian was placed with a relative.

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<sup>1</sup>Further statutory references are to the Welfare and Institutions Code.

The jurisdiction/disposition hearing was held January 14, 2015. Counsel who appeared for the father stated she just received the file and had not spoken with father, nor did she know whether the attorney who had previously appeared on father's behalf had spoken with father because father was incarcerated in Northern California (Susanville). Counsel requested a continuance and, if the court was not inclined to continue the matter, stated father wanted a contested hearing. She did not know if a transportation order had been done, and she felt father should be present. Finally, she requested a DNA test to determine whether father was a biological father.

The juvenile court denied a continuance, noting father did not have standing to contest any of the recommendations because none of the allegations were directed at him, and because he was an alleged father, he was not entitled to any services. The juvenile court did not directly address the request for a paternity test, but suggested that if father desired to have his paternity status changed, counsel could file a petition. The juvenile court then found the allegations of the petition true and concluded Christian came within the jurisdiction of the juvenile court. Reunification services were denied to both parents, and the matter was set for a hearing pursuant to section 366.26 on April 22, 2015.

The hearing scheduled for April 22, 2015, was continued in progress until May 21, 2015. Father's appearance was ordered for this hearing. On May 3, father filed a "Prisoner's Statement Regarding Appearance at Hearing Affecting Parental Rights" in which father stated he did not want to be present at the hearing.

At the May 21 hearing, father's counsel requested a paternity test to protect his interest. She informed the juvenile court that she had heard from father's mother who stated father was due to be released in August and he was hoping to gain custody at that time.

The juvenile court noted father chose to not be present for the hearing and concluded the request was untimely and "not supported by any actual evidence." Father had been represented throughout the proceedings and therefore had ample opportunity to

make the request at an earlier time. The juvenile court concluded the request was untimely and not in the best interest of the minor. It also noted it was not clear what remedy father was seeking. The juvenile court then terminated the parental rights of both parents, finding it likely the child would be adopted.

### **DISCUSSION**

When the state acts by removing a child from a parent's custody because of neglect, abuse or a substantial risk thereof, in most cases that parent is entitled to services to overcome the problem leading to removal of the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.) In determining whether a parent is entitled to services, the Legislature balances numerous competing provisions, including the child's interest in a stable, permanent home in which the caretaker makes a full commitment to the child as well as a parent's compelling interest in the companionship, care, custody, and management of the child. (*In re Matthew C.* (1993) 6 Cal.4th 386, 400.)

Since the Legislature, which is in the best position to weigh these competing concerns (*In re Zacharia D.* (1993) 6 Cal.4th 435, 446), has passed into law a comprehensive scheme that balances these competing interests, it is incumbent on the juvenile courts of this state to follow this legislative scheme. In this case, the juvenile court's failure to do so requires us to reverse its order terminating father's parental rights.

We begin our analysis with the different categories of fathers defined both in the relevant statutes and by case law. The three categories of fathers are presumed, natural or biological, and alleged. (*In re Zacharia D., supra*, 6 Cal.4th at p. 448.) The difference between the three classes is significant because each category has different rights and benefits. A presumed father has greater rights than the fathers falling into the other categories. For example, a presumed father is entitled to custody of his minor children and is entitled to reunification services when he has lost custody of that child. (*Id.* at pp. 449, 451.) Neither a biological nor alleged father has these rights. As relevant here, however, a biological father may receive reunification services "if the [juvenile] court

determines that the services will benefit the child.” (§ 361.5, subd. (a).) An alleged father is not eligible for reunification services under the statutes, and has limited due process rights. (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.) Because an alleged father’s paternity has not yet been established, he does not have a current interest in the child. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1406.) However, due process requires that an alleged father be given notice and an opportunity to appear and attempt to change his paternity status. (*Id.* at p. 1408.)

In this case, the juvenile court at all times considered father to be an alleged father. Accordingly, it never considered whether it would be in the best interests of the child to provide reunification services to father. The issue is whether the juvenile court erred when it failed to determine if father was a biological father and not merely an alleged father.

The statutory provision protecting an alleged father’s right to due process is section 316.2. Subdivision (a) of this section imposes a mandatory duty on the juvenile court to inquire of the mother of a child the identity and address of all presumed or alleged fathers. This inquiry is to occur “[a]t the detention hearing, or as soon thereafter as practicable ....” Subdivision (b) of section 316.2 imposes on the juvenile court the obligation to notify each alleged father by certified mail return receipt requested notice that he could be the father of the child, the child is the subject of proceedings pursuant to section 300, and the proceedings could result in termination of parental rights. This section also states “Judicial Council form Paternity–Waiver of Rights (JV-505) shall be included with the notice.”

These statutory provisions are further addressed in California Rules of Court, rule 5.635. This rule imposes on the juvenile court the obligation to inquire about and attempt to determine the parentage of each child who is the subject of a petition filed under section 300 (rule 5.635(a)) and requires the juvenile court to conduct the same inquiry as imposed by section 316.2, subdivision (a) (rule 5.635(b)). The inquiry is to be made at

the initial hearing on the matter. (Rule 5.635(b).) If there has not been a prior determination of parentage for the child, “the juvenile court must take appropriate steps to make such a determination.” (Rule 5.635(e).) Finally, the clerk is required to mail by certified mail return receipt requested a copy of the petition, notice of the next scheduled hearing, and form JV-505.<sup>2</sup> (Rule 5.635(g).) The obligations imposed on the juvenile court by section 316.2 and rule 5.635 are mandatory, not discretionary. (*In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1118.)

The references to form JV-505 are significant.

“Judicial Council form JV–505 is entitled ‘Statement Regarding Paternity.’ The form has check boxes next to preprinted statements through which an alleged father can indicate his position with regard to paternity and representation by counsel. Concerning paternity, the form provides the alleged father with the following options: He can deny he is the father of the subject child; he can indicate he does not know if he is the father and can either consent to or request paternity testing; he can indicate he believes he is the child’s father and request that the court enter a judgment of paternity; or, he can indicate that he has already established paternity by either a voluntary declaration or a judgment of paternity. The Judicial Council form also contains an advisement to alleged fathers regarding reunification, the right to a court trial to determine paternity and the right to be represented by counsel at such trial. Further, the form instructs the alleged father: ‘If you wish the court to determine paternity or if you wish to admit that you are the father of the child, complete this form according to your intentions.’ [¶] ... [¶]

“The procedures set forth in section 316.2, subdivision (b), and rule [5.635] provide an alleged father with the notice to which he is entitled and the means by which to ‘assert a position and attempt to change his paternity status.’ [Citation.] Although appellant was not entitled to all of the constitutional and statutory rights of biological or presumed fathers, he was entitled to the opportunity to establish paternity that is afforded by these provisions.” (*In re Paul H., supra*, 111 Cal.App.4th at p. 761, fn. omitted.)

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<sup>2</sup>In its brief, the Department asserts this requirement was added by an amendment to the rule that took effect January 1, 2015, which was after the commencement of this case. The Department is wrong as this provision has been part of the rule at least since 2007.

The record demonstrates the juvenile court failed to comply with these obligations. It did not determine the parentage of Christian, it did not perform a paternity test when father made two separate requests, and it never mailed to father the JV-505 form.

The only issue in this case is whether these errors require reversal of the order terminating father's parental rights. Two cases cited by father provide the parameters for deciding this issue. *In re Paul H.*, *supra*, 111 Cal.App.4th 753 involved an individual who first found out he might be the father of a child subject to the juvenile court's jurisdiction after the disposition hearing at which the mother was not offered reunification services and a hearing was scheduled pursuant to section 366.26. The appellant informed the juvenile court he might be the child's father and was provided a "paternity program packet." (*In re Paul H.*, *supra*, 111 Cal.App.4th at p. 766.) The appellant attempted to work with the various agencies so a paternity test could be completed. The agencies were not responsive to the appellant's requests and inquiries. At the section 366.26 hearing, the appellant informed the juvenile court of all the steps he had taken in an attempt to determine if he was the child's biological father, and said he "always wanted the kid as [his]." (*Id.* at p. 757.) The juvenile court terminated the appellant's parental rights.

The appellate court first determined the juvenile court erred by failing to provide the appellant with form JV-505, thereby denying him access to the procedure which would have compelled court-ordered paternity testing. (*In re Paul H.*, *supra*, 111 Cal.App.4th at p. 761.) It then concluded the error was prejudicial because there

"was minimal information before the juvenile court regarding appellant's circumstances and background. It appears the social worker never interviewed appellant and provided no information to the juvenile court concerning his viability as a custodian for the minor. We cannot assume, based on this dearth of information, that had appellant established his paternity and been appointed counsel, he would not have received reunification services. [Citations.] Consequently, we conclude appellant was prejudiced by the juvenile court's failure to follow the procedures contained in section 316.2, subdivision (b) and rule [5.635]." (*Id.* at pp. 761-762.)

The appellate court in *In re Kobe A.* (2007) 146 Cal.App.4th 1113 concluded in its case the juvenile court's error did not result in prejudice to the appellant. The appellant was incarcerated shortly after the birth of the child. When the child was removed from the mother's custody, she identified the appellant as the father of the child. The juvenile court ordered reunification services for mother for an extended period, but eventually terminated her parental rights.

Throughout this process, the appellant was provided with several notices, but remained incarcerated and thus did not appear. Late in the process, he informed the court he would be seeking custody of the child upon his release from prison. The juvenile court terminated his parental rights and selected adoption as the permanent plan. (*In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1119.)

The appellate court concluded error had occurred.

“The clerk of the court failed to serve appellant with form JV-505, as the clerk is required to do by statute and court rule. The notices served by the Department did not provide appellant with the same or equivalent information about seeking an adjudication of his paternity, nor did they offer him the opportunity to seek the appointment of counsel to assist him in that process. Failure to provide the statutory notice denied appellant adequate notice of his rights and the ability to access the procedure for establishing paternity, obtaining reunification services, and ultimately seeking placement of his son in his home or with one of his relatives. [Citation.]” (*In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1122, fn. omitted.)

However, the appellate court concluded the error was harmless.

“Even if he had received the Judicial Council form advising him of the actions to take to establish his paternity status, appellant would not have been able to meet the statutory elements to be declared a presumed father under Family Code section 7611. He was not married to Kobe's mother, nor is there evidence or even a claim that he attempted to marry her, so he could not establish presumed status under subdivisions (a), (b) or (c). Under subdivision (d), a man can be a presumed father if '[h]e receives the child into his home and openly holds out the child as his natural child.' In an offer of proof, appellant's attorney stated appellant would testify that he 'has held himself out to be the father of Kobe. He will always hold himself out to be the father.' Appellant was incarcerated just two days after Kobe was born and remained incarcerated until four months before the section

366.26 hearing. He did not receive the child into his home within the meaning of Family Code section 7611, subdivision (d).

“More importantly, whether appellant was an alleged or presumed father, his criminal history left the court with limited discretion to provide him with reunification services. Section 361.5, subdivision (b) provides that reunification services need not be provided to a parent when the court finds ‘(12) [t]hat the parent or guardian of the child has been convicted of a violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code.’ We have taken judicial notice of appellant’s criminal record provided by the California Department of Justice, which shows that he had been convicted of second degree robbery with use of a firearm. That is a violent felony under Penal Code section 667.5, subdivision (c)(9). Section 361.5, subdivision (c) prohibits the court from ordering reunification for a parent who, like appellant, is described in paragraph (12) of subdivision (b) ‘unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.’ [Citation.]

“The undisputed facts in this case preclude any realistic possibility that the court would have found by clear and convincing evidence that reunification was in Kobe’s best interests. Appellant was incarcerated two days after Kobe’s birth in February 2001, and was not scheduled for release from prison until December 2005. Kobe was removed from his mother’s custody in December 2003. The maximum 18-month period for reunification would have ended before appellant’s release from prison. [Citation.]

“In addition, appellant had no relationship with Kobe. He had not supported the child financially. He made no effort to maintain contact with the child from the time he was incarcerated in 2001 until October 2005, when he sent Kobe letters from prison. His only personal contact with Kobe during the entire dependency case was on March 15, 2006, after he was released from prison. He appeared at Kobe’s school and demanded that Kobe be released to him. School officials asked Kobe to identify appellant. Kobe told school officials appellant was not his father, and that he did not have a father.

“Based on his incarceration, appellant was unable to provide a home for Kobe during the entirety of the reunification period. He had no relationship with the child. It is inconceivable that the court would have removed Kobe from his stable foster-preadoptive placement to place him with a father he did not know who had only recently been released from prison. [Citations.] Whether or not appellant sought to change his paternity status, the course of his relationship with Kobe and of the dependency case would not have been different. On this record, we

conclude appellant was not prejudiced by the juvenile court's failure to comply with the notice requirements of section 316.2 and California Rules of Court, rule [5.635]." (*In re Kobe A.*, *supra*, 146 Cal.App.4th at pp. 1123-1124.)

This case falls somewhere between *Kobe A.* and *Paul H.* Mother identified father as the person she believed was the child's biological father when she was first interviewed by the Department. Father was incarcerated throughout the majority, if not all, of the time the case was pending before the juvenile court. On the other hand, the case was instituted in December 2014 and the termination of parental rights occurred six months later. While the juvenile court failed to meet its statutory obligation to provide father with a form JV-505, father's counsel stated she had sent one to him. The record does not contain a completed form from father, although it does contain numerous other forms completed and submitted to the juvenile court by father. Father could not establish himself as a presumed father since he was not married to mother, was not named on the birth certificate, and could not meet the other statutory requirements to qualify as a presumed father.

However, the record contains almost no information about father other than he was incarcerated before Christian was born. It appears the Department never attempted to contact father at any time in these proceedings. The Department reported to the juvenile court the child could not be placed with father because he was incarcerated, and it did not make a paternity inquiry for the same reason. The Department never presented father's criminal history to the juvenile court, simply indicating it would be presented in the future if it became relevant.

Moreover, on two occasions father requested through his attorney a paternity test, the requests being either ignored or denied by the juvenile court. In addition, father, again through his attorney, indicated he would seek custody when he was released from prison, which was scheduled to occur shortly. It is true father did not contact Christian, but considering all of these proceedings occurred before Christian reached his first birthday, any such efforts would not have benefitted the child.

The juvenile court appeared to place great reliance on father's decision not to personally appear at the hearing, and its desire to complete the process as quickly as possible. However, we find its reliance on father's failure to appear to be misplaced because father was incarcerated. It is one thing to be nearby and absent oneself from such a proceeding, and quite another to be incarcerated in Northern California and choose to not appear at a hearing, especially since father was represented by counsel at each hearing. Moreover, father's counsel explained to the juvenile court the apparent reason father chose not to appear was that he was serving on a firefighting team, and if he appeared at the hearing he would lose his spot on this team.

While the issue of prejudice is a close one, we conclude the record contains too little information to support a finding of no prejudice. The juvenile court had virtually no information about father on which it could base a decision on whether he should be a part of Christian's life. Moreover, the confusion surrounding father's representation also raises significant questions. Father was initially represented by an attorney from the public defender's office. At the jurisdiction hearing, another attorney appeared from the public defender's office and stated the first attorney was ill and she was filling in for him, despite not having any knowledge about the case. Shortly after this hearing, the first attorney filed a declaration of conflict and a third attorney was appointed to represent father. This attorney never spoke with father, asserting she had a difficult time trying to make phone contact with him, in part because he was serving on the firefighting team. The best she could do was relay to the court information she had received from father's mother, which indicated his desire to be involved with Christian. Because of the juvenile court's desire to quickly resolve this case, the attorney appointed to represent father was not able to adequately represent father's interests because she did not know his intent. And because father's attorney did not know father's intent, the juvenile court did not either. It was therefore impossible for the juvenile court to make an informed decision before it terminated father's parental rights.

We are cognizant that upon remand the juvenile court may conclude father's parental rights should be terminated. However, this decision must be a fully informed decision and not a decision based only on father's status as an inmate. We are also cognizant the remand will delay the ability of the juvenile court to provide Christian with a permanent plan. Nevertheless, this delay could have been avoided had the juvenile court complied with the governing statutes and court rules requiring the juvenile court to determine a child's parentage.

### **DISPOSITION**

The order terminating father's parental rights is reversed and the matter is remanded to the juvenile court to determine Christian's parentage and to determine which services, if any, should be provided to father if he is Christian's biological father.