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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JASMINE M., a Person Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

JORGE M. et al.,

Defendants and Appellants.

G047516

(Super. Ct. No. DP020821)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Deborah J. Servino, Judge. Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant Jorge M.

Brent Riggs, under appointment by the Court of Appeal, for Defendant and Appellant Rosa A.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie J. Agin, Deputy County Counsel, for Plaintiff and Respondent.

* * *

Jorge M. (father) appeals from the juvenile court's order terminating his parental rights and freeing his daughter Jasmine (born in June 2007) for adoption. Father contends the court erred when it denied his request to continue the Welfare and Institutions Code section 366.26 hearing (all further statutory citations are to the Welfare and Institutions Code). He argues the record does not reflect the Orange County Social Services Agency (SSA) provided him with legal notice of the hearing. (§ 294.)¹

I

FACTUAL AND PROCEDURAL BACKGROUND

SSA filed a petition on February 1, 2011, alleging Jasmine had “suffered, or there is a substantial risk” of suffering “serious physical harm or illness . . . as a result of the failure or inability of . . . her parent . . . to supervise or protect [her] adequately” and “by the inability of the parent . . . to provide regular care for [her] due to the parent’s . . . mental illness, developmental disability, or substance abuse.” (§ 300, subd. (b).) Specifically, the petition alleged a bystander found three-year-old Jasmine unsupervised and attempting to cross a highly congested residential street on the morning of January 30, 2011. Officers located mother about two hours later asleep in her apartment. According to a witness, mother awoke around 8:00 a.m., noticed Jasmine was missing, went downstairs to look for her, but returned without Jasmine and went back to sleep. According to police reports the apartment door lacked a security or safety device to prevent a child from leaving. Based in part on mother’s inconsistent statements and other evidence, officers arrested mother for child endangerment.

¹ Mother joins in the arguments raised in father’s briefs pursuant to California Rules of Court, rule 8.200(a)(5).

Father, who lived in Perris, California, stated he and mother, who had never been married, separated a year earlier. Father claimed he saw Jasmine regularly. Mother and paternal relatives reported father was an alcoholic. His criminal record included a conviction for driving under the influence in 2005 and an arrest for public intoxication in September 2010.

SSA placed Jasmine in the home of paternal uncle, Jose, and his wife, who lived across the street from father in Perris. At the detention hearing, father requested Jose's address be used for notice purposes. The court ordered father to notify SSA and/or the court in writing of any address changes and advised him the court could proceed in his absence if proper notice was given.

Before the jurisdictional hearing, the parents waived their rights and father entered a no contest plea to the allegations of the amended petition. Mother submitted. The juvenile court found the allegations in the amended petition to be true, removed Jasmine from her parents' custody, and approved a case plan, including family reunification services.

Neither parent complied with the terms of the case plan. Mother repeatedly tested positive for methamphetamine during the reunification period. Father, who had not signed the case plan or fulfilled any of its requirements, disappeared. He had visited Jasmine only sporadically and stopped visiting her in March 2011. Paternal relatives informed the social worker around July 2011 that father was in a residential drug and alcohol treatment facility. In November 2011, father reported he was at an inpatient substance abuse treatment program in Norwalk. He did not respond to a request for the address or phone number of the facility. In December, he informed SSA he left the Norwalk facility and moved to a new one in Santa Ana, but he did not have the address or phone number. The social worker later spoke to the Santa Ana facility's director, who informed her father had not been admitted and the facility would not be able to admit him.

In January 2012, Jasmine's caregiver reported father had been arrested and deported to Mexico. The social worker obtained a cell phone number and called father in Mexico. He stated he was living with friends and provided an address in Tijuana. Father advised he could not return to the United States legally but was willing to pursue case plan objectives in Mexico. The social worker e-mailed a request to the Mexican consulate in Santa Ana to request services for father, mailed father a copy of the current case plan, and advised him to contact his local social services office in Mexico. She told him he could call her collect.

The caregivers reported they could no longer care for Jasmine due to other commitments. After a team meeting, SSA made arrangements to place Jasmine in the San Diego home of a maternal great uncle and aunt, who expressed interest in providing Jasmine a permanent home.

At the 12-month review hearing in March 2012, the juvenile court terminated father's reunification services. Father did not attend the hearing but his lawyer stated he had spoken to father. The court directed counsel to inform father a permanent plan would be developed at the next hearing if Jasmine was not returned home, including possible referral for termination of parental rights. Father's lawyer objected to termination of reunification services and told the court he would send father the writ advisement. The court directed SSA to "provide notice to all parties as required by law." The court continued the case to June 13, 2012, for an 18-month review.

At the 18-month review on June 13, 2012, which father did not attend, the juvenile court terminated mother's reunification services and scheduled a section 366.26 hearing for October 11, 2012. Father's counsel explained his client remained in Mexico. The court granted father's request to have phone calls with Jasmine.

A minute order from the July 25, 2012 notice review hearing reflects the court continued the hearing to August 8, 2012, "to notice paternal grandparents and to receive an update regarding father's whereabouts." An August 8, 2012 report advised

that paternal uncle Jose informed the social worker father was an inpatient at a Tijuana substance abuse treatment facility. The social worker contacted the facility. The admissions director informed her father had been enrolled for two months, was at a Rosarito facility, and he was not allowed to receive calls, visitors, or mail. But the director stated he would make sure father received notice of the section 366.26 hearing if the social worker mailed it to him. The clerk's transcript contained a proof of service reflecting the social worker sent the section 366.26 hearing notice by first class mail to the Tijuana facility.

On August 23, the parties stipulated "SSA exercised due diligence in its efforts to locate and notice father (First class mail notice to Mexico). Court orders notice through Counsel." The court entered the "order[] as recommended." SSA filed a proof of service reflecting personal service of notice of the section 366.26 hearing on August 24 on father "c/o Nithin Reddy, PD" (father's counsel).

The section 366.26 hearing commenced October 11, 2012. Father was not present. His lawyer, Nithin Reddy, moved to continue the hearing: "I know that this case came from [another department] and it was assigned to previous attorney Joaquin Nava. I spoke to Mr. Nava where he noted to me in the file that we had contact with the father. Mr. Nava had contact with the father and he was in rehab center in Mexico and was interested in being here today and having him testify. [¶] However, I called the number I have from him, said voice mail was not set up. I left a message with his family member, Jose [M.] [the paternal uncle/Jasmine's former caretaker]. I haven't heard back. [¶] And I also called the rehab center today and verified he left three weeks ago after the completion of that program but they have no updated contact information for him. [¶] So I guess I'd like more time to try to get him, your honor." SSA's and Jasmine's counsel objected there was no good cause to continue, noting "nothing that counsel has said [] suggest[s] that [a] continuance of a week or a day or even a month would insure father's presence."

The court concluded good cause did not exist to continue the hearing and denied father's request. Based on the parties' stipulation and receipt of SSA's report for the section 366.26 hearing, the juvenile court found Jasmine was likely to be adopted and termination of parental rights would not be detrimental to the child. The court also found the parties had received proper notice. Father objected to termination of parental rights. Mother and Father appealed.

II

DISCUSSION

Father contends the juvenile court erred in failing to continue the section 366.26 hearing because SSA and the juvenile court did not comply with section 294's notice requirements, and there is no evidence father received actual notice of the hearing. We disagree.

Section 294 requires notice of a selection and implementation hearing to the presumed and alleged father: "Service of the notice shall be completed at least 45 days before the hearing date. Service is deemed complete at the time the notice is personally delivered to the person named in the notice or 10 days after the notice has been placed in the mail, or at the expiration of the time prescribed by the order for publication. [¶] (2) Service of notice in cases where publication is ordered shall be completed at least 30 days before the date of the hearing." (§ 294, subd. (c)(1).)²

Section 294, subdivision (f) provides: "Notice to the parents may be given in any one of the following manners: [¶] (1) If the parent is present at the hearing at which the court schedules a hearing pursuant to Section 366.26, the court shall advise the

² "The notice shall contain the following information: [¶] (1) The date, time, and place of the hearing. [¶] (2) The right to appear. [¶] (3) The parents' right to counsel. [¶] (4) The nature of the proceedings. [¶] (5) The recommendation of the supervising agency. [¶] (6) A statement that, at the time of hearing, the court is required to select a permanent plan of adoption, legal guardianship, or long-term foster care for the child." (§ 294, subd. (e).)

parent of the date, time, and place of the proceedings, their right to counsel, the nature of the proceedings, and the requirement that at the proceedings the court shall select and implement a plan of adoption, legal guardianship, or long-term foster care for the child. The court shall direct the parent to appear for the proceedings and then direct that the parent be notified thereafter by first-class mail to the parent's usual place of residence or business only. [¶] (2) Certified mail, return receipt requested, to the parent's last known mailing address. This notice shall be sufficient if the child welfare agency receives a return receipt signed by the parent. [¶] (3) Personal service to the parent named in the notice. [¶] (4) Delivery to a competent person who is at least 18 years of age at the parent's usual place of residence or business, and thereafter mailed to the parent named in the notice by first-class mail at the place where the notice was delivered. [¶] (5) If the residence of the parent is outside the state, service may be made as described in paragraph (1), (3), or (4) or by certified mail, return receipt requested. . . . [¶] (7) *If a parent's identity is known but his or her whereabouts are unknown and the parent cannot, with reasonable diligence, be served in any manner specified in paragraphs (1) to (6), inclusive, the petitioner shall file an affidavit with the court at least 75 days before the hearing date, stating the name of the parent and describing the efforts made to locate and serve the parent.* [¶] (A) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends adoption, service shall be to that parent's attorney of record, if any, by certified mail, return receipt requested. . . . Whe[n] notice is to the attorney of record . . . , the court shall also order that notice be given to the grandparents of the child, if their identities and addresses are known, by first-class mail." (Italics added.)

Father's trial counsel did not object that SSA failed to comply with section 294's notice requirements. A timely objection, however, would not have succeeded. As noted above, based on the parties' August 23, 2012 stipulation, the juvenile court found that "SSA exercised due diligence in its efforts to locate and notice father (First class

mail notice to Mexico). [¶] Court orders notice through Counsel.” SSA thereafter filed a proof of service reflecting SSA’s Naty Flores personally served father “c/o Nithin Reddy, PD” (father’s counsel) on August 24. The stipulation, order and personal service on father’s counsel satisfied section 294, subdivision (f)(7). It was the functional equivalent of an affidavit describing the efforts made to locate and serve father.

Moreover, based on the comments of father’s attorney at the section 366.26 hearing, the court could infer father received actual notice of the hearing. Father’s lawyer Reddy stated prior counsel “had contact with the father and *he was in rehab center in Mexico and was interested in being here today* and having him testify.” (Italics added.) The record reflects counsel was in contact with father after his deportation to Mexico. We discern no due process violation.

In any event, any conceivable violation of section 294’s notice requirements was harmless. The record demonstrates Jasmine was generally adoptable, and likely to be adopted by her current caretakers. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650 [child’s age, physical condition, mental state, and other matters make it likely she will be adopted].) Father claims Jasmine’s placement with the maternal relatives “appeared to be tenuous.” Given the lack of a home study, father asserts Jasmine could have been “replaced immediately into an adoptive home, despite the fact she was thriving in the home of” the caretakers, and a “brief continuance . . . would have provided SSA with an opportunity to determine whether Jasmine could remain in the” caretaker’s home.

SSA noted three prior child abuse referrals involving the current caretaker, the maternal great uncle Julio. As described in SSA’s report, the incidents involved an “angry outburst” and the uncle’s use of arguably improper discipline (e.g., a belt) against his older teenage daughters in 2004, 2006, and 2011. SSA categorized the incidents as “inconclusive” or “unfounded.” There was no indication the girls suffered significant injury, nor did the incidents lead to criminal charges. Julio stated he had changed his

discipline techniques and expressed willingness to take additional parenting and anger management classes. SSA expressed no indication at the hearing or before that it intended to remove Jasmine from her present caretakers. It therefore appeared unlikely these prior incidents would derail Jasmine's adoption. In any event, father does not explain how a continuance of undefined length to allow his presence at the hearing would have assisted SSA in determining whether to remove Jasmine from her current placement.

We also note there was little or no evidence to support the so-called "benefit exception" to termination of his parental rights. (See § 366.26, subd. (c)(1)(B)(i) [juvenile court may decline to terminate parental rights if termination would be detrimental to the child because the parent has maintained regular visitation and contact with the child and the child would benefit from continuing the relationship]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 425.) Jasmine did not reside with her father at the time she was taken into protective custody, and the jurisdictional report reflected she did not appear bonded or attached to him. Father's visits and other contact during the reunification period were sporadic and he stopped visiting her in March 2011. He also ignored directives to keep SSA and the court apprised of his whereabouts. Nothing in record suggested Jasmine would suffer harm by termination of father's parental rights.

In short, we agree with Jasmine's counsel's observation below that nothing suggested a continuance would have resulted in father's presence at the hearing, nor does anything suggest a delay was in Jasmine's best interests. (§ 352; Cal. Rules of Court, rule 5.550.)

III

DISPOSITION

The order terminating parental rights is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.