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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

F. M.,

Defendant and Appellant;

L.F.,

Defendant and Respondent.

G049725

(Super. Ct. No. DP024367)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Gary G. Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant
and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su,
Deputy County Counsel, for Plaintiff and Respondent.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant
and Respondent.

No appearance for Minor.

* * *

INTRODUCTION

F.M., the biological father of now 23-month-old M.F., appeals after the juvenile court denied him presumed father status and excluded him from further juvenile dependency proceedings. (Welf. & Inst. Code, § 395.)¹ We affirm. Although the juvenile court erred by excluding F.M. from further proceedings, under the circumstances of this case, the court's error was harmless. Our review was aided by the court's thorough minute order and an excellent record in the reporter's transcript.

BACKGROUND

I.

THE JUVENILE DEPENDENCY PETITION

In November 2013, the Orange County Social Services Agency (SSA) filed a juvenile dependency petition (the petition) which alleged that then 13-month-old M.F. came within the jurisdiction of the juvenile court under section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). The petition alleged that on October 31, 2013, M.F. was in her mother's (Mother) arms when they both were pushed from or jumped out of a moving vehicle driven by F.M. The petition referred to F.M. as an alleged father of M.F. After M.F. and Mother were ejected from the vehicle, F.M. continued driving away. Mother suffered head trauma and died from her injuries; M.F.

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

suffered injuries including bruising and abrasions to various parts of her body. M.F. was detained by SSA and placed with a relative.

The petition further alleged that the following day, F.M. turned himself into the Santa Ana Police Department. He was arrested on felony hit-and-run charges and was incarcerated. F.M. stated that he, Mother, and M.F. had lived “a transient lifestyle and had been staying at different places, including sleeping in their vehicle.”

The petition also alleged M.F.’s other alleged father, L.F., was incarcerated and had “a criminal history that includes arrests and/or convictions for: Vehicle Code 12500(a)—drive without a license; Penal Code 415(1)—fight/challenge fight public place; Penal Code 490.1(a)—petty theft under \$50 without prior; and Penal Code 459—burglary.” L.F. had a history of using marijuana, but he stated he had not used marijuana in a couple of years.

The petition stated M.F. has been left without any provision for support as Mother is deceased and both alleged fathers, F.M. and L.F., were incarcerated and unable to arrange for her care and support.

II.

SUMMARY OF JURISDICTION REPORT AND ADDENDUM REPORTS

On October 31, 2013, after Mother and M.F. were ejected from the vehicle F.M. was driving and he drove away, M.F. was transported to the hospital; her picture was later publicized in the news in an attempt to solicit information that would identify her. Members of Mother’s family, L.F.’s family, and F.M.’s family came forward and requested visitation with and/or placement of M.F. M.F. was placed with the maternal relatives with whom she has remained and has been doing well. L.F.’s mother babysat M.F. twice a week.

L.F. was incarcerated at the time of the October 31, 2013 incident. L.F. stated he and Mother had been in a relationship since 2011 and he had known Mother

since she was 17 years old. He and Mother lived in an apartment for four or five months before Mother went to Mexico and met F.M. She returned from Mexico and was pregnant; she told L.F. the baby was his. L.F. and Mother thereafter continued their relationship. After L.F. was laid off from his job, he moved in with his mother, and Mother lived with the maternal grandmother. L.F. spent the night with Mother at the maternal grandmother's house several times per week.

L.F. was present at the hospital when M.F. was born in 2012. L.F.'s name is on M.F.'s birth certificate. Since M.F. was born, he has held M.F. out as his own. He often stayed at the maternal grandmother's house and helped care for M.F. by bathing, feeding, and changing her and putting her to sleep. He cared for her when she was sick. He stated he loved M.F. and, no matter what, he would take care of her.

The maternal grandparents spoke very highly of L.F., stating that M.F. was L.F.'s "adoration." He was very attentive and loving to M.F. He worked two jobs to buy things M.F. needed. On an unspecified date, L.F. signed a voluntary declaration of paternity.

Three months after L.F. was arrested and incarcerated in March 2013, Mother contacted F.M. who came to the United States to be with her. L.F. thought Mother was upset with L.F. because he was incarcerated and she became stressed and lonely.

Maternal relatives reported that F.M. did not treat Mother well; he was controlling, aggressive, and violent. He took away Mother's cell phone and her money. He popped Mother's tires on one occasion. He would not permit Mother to wear certain clothing unless he was around, and he followed her everywhere. F.M. gave Mother more affection and attention than M.F. who was an "aside."

About one month before the October 31, 2013 incident, F.M. arrived at the maternal grandfather's house and wanted to take Mother and M.F. with him. When Mother refused, F.M. tried to pull her out of the house. Mother's family members pushed

F.M. off of Mother. Mother told M.F.'s maternal aunt that F.M. did not work to buy anything for Mother or M.F.; Mother worked to support them. Two weeks before the October 31, 2013 incident, Mother had a bruise on one eye. When asked if F.M. had hit her, Mother did not respond.

F.M.'s family reported that F.M. held M.F. out as his daughter and cared for her, but he did not tell them about her until she was six to eight months old. F.M. stated that Mother was suicidal and jumped out of the car. He explained that after she jumped out of his car, he did not stop because when he returned, he saw Mother and M.F. were okay; he said Mother was sitting upright and holding M.F., and he was scared so he drove off again. Witnesses to the incident, however, stated that once Mother fell to the ground, she never got up. Witnesses did not see F.M. return to the scene. F.M. was criminally charged with multiple counts, including child abuse and endangerment, as a result of the incident. The prosecutor reported the evidence did not suggest F.M. pushed Mother out of the car.

SSA recommended that presumed father status for F.M. be bypassed under section 361.5, subdivision (b)(9), because he had willfully abandoned M.F., causing her to be placed in serious danger, when he drove away after Mother and M.F. were ejected from the car. SSA recommended that should the juvenile court find L.F. to be M.F.'s presumed father, he should be provided reunification services.

III.

FOLLOWING A CONTESTED PATERNITY HEARING, THE JUVENILE COURT
DECLARES L.F. THE PRESUMED FATHER OF M.F. AND ORDERS F.M.
IMMEDIATELY EXCLUDED FROM ALL FURTHER DEPENDENCY PROCEEDINGS;
THE COURT SUSTAINS THE ALLEGATIONS OF THE PETITION, DECLARES M.F. A
WARD OF THE COURT, AND ORDERS REUNIFICATION SERVICES FOR L.F.

F.M. filed an application to set aside L.F.'s voluntary declaration of paternity and also requested a paternity hearing. F.M. produced a completed

acknowledgement of paternity, which appeared to bear Mother's handwriting and signature and reflected an intent to change the father's name on M.F.'s birth certificate to F.M.

Following a contested paternity hearing, the juvenile court found that L.F. was M.F.'s presumed father and stated that F.M. "is excluded for all purposes." The court did not relieve F.M.'s counsel from representing F.M. at that time.

After F.M. was excluded from the proceedings, the court held the jurisdiction and disposition hearing; L.F.'s counsel submitted on the reports before the court. The court thereafter found the allegations of the petition true by a preponderance of the evidence and sustained the petition. The court declared M.F. a dependent child of the Orange County Juvenile Court, vested custody of M.F. with SSA, and ordered that L.F. be provided reunification services. F.M. appealed.

DISCUSSION

F.M. argues that after the juvenile court declared L.F. to be M.F.'s presumed father, the court erred by excluding F.M. from all further dependency proceedings regarding M.F. We agree the juvenile court erred by excluding F.M., but the error was harmless.

A presumed father is entitled to reunification services; a biological father may be offered services if doing so would benefit the child. (§ 361.5, subd. (a).) Family Code section 7611 provides that "[a] person is presumed to be the natural parent of a child if the person meets the conditions provided . . . in any of the following subdivisions." Subdivision (d) of Family Code section 7611 provides: "The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child." Family Code section 7612, subdivision (a) provides, "a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence."

Subdivision (b) of Family Code section 7612 provides: “If two or more presumptions arise under Section 7610^[2] or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 603 [“Although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, ‘there can be only one presumed father.’”].)

Here, at the paternity hearing, the juvenile court stated it found L.F. to be M.F.’s presumed father. The court further stated that even if F.M. were qualified to be a presumed father, the court would conclude the presumption in L.F.’s favor, as compared to any presumption in F.M.’s favor, was founded on the “weightier considerations of policy and logic.” (Fam. Code, § 7612, subd. (b).) The court’s minute order stated: “Court finds at this stage based on the totality of circumstances largely due to the failure of [F.M.] to promptly attempt to establish himself as father, his failure to receive the child into his home and there is no evidence that he had his child with him until five (5) months later after he was back in the United States as early as January. There is no evidence whatsoever that [F.M.] provided support at all financially, emotional[ly], morally, spiritually to this child during that time. [¶] Court finds that counsel has failed to establish that [F.M.] is the father under [Family Code section]7611(d). The court will exclude him as the father for these purposes. [F.M.] cannot attack the declaration of paternity because he does not have standing to do that. [¶] Court heard argument of [F.M.]’s counsel as to setting aside the declaration of paternity.”

² Family Code section 7610, subdivision (a) provides: “The parent and child relationship may be established as follows: [¶] (a) Between a child and the natural parent, it may be established by proof of having given birth to the child, or under this part.”

The minute order further stated: “Court believes [F.M.]’s counsel’s burden to show by preponde[ra]nce that to disturb the current presumption of paternity by way of the declaration of paternity that would be best for the child. Court looking at the criteria does not think that anything that has been presented would support that particular finding. Presumption as it prevails based on the consideration of policy and logic. [¶] Court finds [F.M.]’s counsel has failed to present evidence to satisfy the requirement to come to that presumption. [¶] Court finds [L.F.] presumed father of child.” (Boldface omitted.)

F.M. does not challenge the juvenile court’s finding that L.F. is M.F.’s presumed father. F.M. solely challenges the court’s order excluding him from participating in further dependency proceedings following the paternity hearing.

We agree the juvenile court erred by excluding F.M. from the jurisdiction and disposition hearing. Unlike an alleged father who has no biological connection to the child, and thus has no interest in the proceedings or entitlement to counsel, a biological father is entitled to notice and to be present. (§§ 345, 349, 290.1.)

We conclude, however, that under the circumstances of this case, the error was harmless. (Cal. Const., art. VI, § 13.) Although the juvenile court excluded F.M. from being present at further dependency proceedings, the court did not relieve F.M.’s counsel from continuing to represent F.M.’s interests with regard to M.F. At the conclusion of the paternity hearing, after L.F. was found to be M.F.’s presumed father and the court excluded F.M. from further participation, F.M. did not object to being excluded. Instead, F.M.’s counsel stated that *if* the court had found F.M. to be M.F.’s presumed father, which it did not, and F.M. had been allowed to participate in the jurisdiction and disposition hearing, counsel would have presented evidence and argued to strike the section 300, subdivision (g) count of the petition. Counsel further stated, “by virtue of that,” he would have then “argue[d] that the bypass theory alleged by the agency d[id] not apply.” Counsel also stated he would have “made other arguments as to why

the bypass 3 [*sic*] alleged by the agency d[id] not apply.” He concluded by stating: “With that, I would submit.”

The petition alleged M.F. came within the jurisdiction of the juvenile court under, inter alia, section 300, subdivision (g) because both alleged fathers, F.M. and L.F., were incarcerated and unable to arrange for M.F.’s care and support. SSA had recommended in an addendum report that the juvenile court bypass presumed father status for F.M. under section 361.5, subdivision (b)(9) which states that reunification services need not be provided to a parent when the court finds by clear and convincing evidence “[t]hat the child has been found to be a child described in subdivision (g) of Section 300; that the parent or guardian of the child willfully abandoned the child, and the court finds that the abandonment itself constituted a serious danger to the child; or that the parent or other person having custody of the child voluntarily surrendered physical custody of the child pursuant to Section 1255.7 of the Health and Safety Code. For the purposes of this paragraph, ‘serious danger’ means that without the intervention of another person or agency, the child would have sustained severe or permanent disability, injury, illness, or death. For purposes of this paragraph, ‘willful abandonment’ shall not be construed as actions taken in good faith by the parent without the intent of placing the child in serious danger.”

In response to F.M.’s counsel’s comments, the juvenile court stated counsel’s comments were appreciated and the court had presumed counsel “had a defense available.” The court explained, “I will tell you that, as I mentioned before, the court was not considering whether or not bypasses apply under these circumstances for either candidate parent. I think that that should be a consideration that’s separate and apart from making a determination regarding paternity. [¶] As you pointed out earlier, I think correctly, that that should not—aside from specific indications in the code which precludes a paternity finding where there’s been a violation of a particular statute in order to cause the pregnancy, I don’t think that considerations of the consequences regarding

the bypass should be part of the determination as to paternity. If we were to do that, as you pointed out, we'd have an awful lot of children without [Family Code section]7611 fathers." The court then asked counsel, "[i]s there anything else?" F.M.'s counsel stated: "I should have, also, mentioned I would have asked for relative placement too, but that's it." The court responded: "All right. And then, counsel, we've concluded the paternity portion of this matter."

After F.M. and his counsel left, the juvenile court conducted a very brief jurisdiction and disposition hearing at which L.F.'s counsel submitted the matter on the reports before the court and the signed stipulation. The court thereafter sustained the petition, declared M.F. a dependent of the juvenile court, vested custody of M.F. with SSA, and provided L.F. family reunification services.

Nothing in the record suggests that had F.M. and his counsel been present at the jurisdiction and disposition hearing, the juvenile court's orders would have been any different. F.M.'s counsel raised the issues he would have presented at that hearing, and the juvenile court addressed them. No new evidence or argument was presented following their exclusion from further proceedings.

In his appellate briefs, F.M. does not explain how the juvenile court's error in excluding him from the jurisdiction and disposition hearing caused him prejudice, except that he argues his due process rights were violated because the petition was sustained in his absence. F.M. makes this argument without identifying any evidence or argument he would have offered at the hearing had he been present, much less explaining how that evidence or argument might have affected the outcome of that hearing.

In the absence of any prejudicial error, we affirm the juvenile court's order.

DISPOSITION

The order is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.