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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re T.S., a Minor.

C.S.,

Plaintiff and Respondent,

v.

B.S.,

Objector and Appellant.

H036940
(Monterey County
Super. Ct. No. A4796)

Following a contested hearing, the Monterey Superior Court declared child T.S. free from the parental custody and control of his father, B.S., on the ground of abandonment. (See Fam. Code, § 7800 et seq.)¹ On appeal, father contends that the judgment must be reversed because (1) the record does not reflect that the trial court considered appointment of counsel for T.S. (§ 7861) and (2) the court investigator's reports, which the court was required to consider (§ 7851, subd. (d)), did not contain mandated information concerning T.S. (§ 7851, subds. (b), and (c)). Appellant does not attack the substantiality of the evidence to support the court's factual findings.

¹ All further statutory references are to the Family Code unless otherwise specified.

We agree that the asserted errors occurred but conclude they were harmless. Accordingly, we will affirm.

I

Legal Background

"Statutes authorizing an action to free a child from parental custody and control are intended foremost to protect the child. (*In re Sherman M.* (1974) 39 Cal.App.3d 40, 45) Typically, such statutes are invoked for the purpose of terminating the rights of one or more biological parent, so the child may be adopted into a stable home environment. (See § 7800 ['The purpose of this part is to serve the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life']; *In re Daniel M.* (1993) 16 Cal.App.4th 878, 883–884 . . . (*Daniel M.*.) In any event, the best interests of the child are paramount in interpreting and implementing the statutory scheme. (See *Daniel M., supra*, at pp. 883–884) Indeed, our Legislature has declared that the statutory scheme 'shall be liberally construed to serve and protect the interests and welfare of the child.' (§ 7801.)" (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 162.)

"A proceeding may be brought under [Family Code, Division 12, Part 4 (§ 7800 et seq.)] for the purpose of having a child under the age of 18 years declared free from the custody and control of either or both parents if the child comes within any of the descriptions set out in this chapter." (§ 7820.) "An interested person may file a petition under this part for an order or judgment declaring a child free from the custody and control of either or both parents." (§ 7841, subd. (a); see § 7841, subd. (b) ["interested person" includes "a person who has filed, or who intends to file within a period of 6 months, an adoption petition . . ."].)

Abandonment is one ground for bringing a proceeding to free a child from parental custody and control: "A proceeding under this part may be brought if . . . [¶] [t]he child has been left by both parents or the sole parent in the care and custody of

another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child." (§ 7822, subd. (a)(2).) "The . . . failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents. In the event that a guardian has been appointed for the child, the court may still declare the child abandoned if the parent or parents have failed to communicate with or support the child within the meaning of this section." (§ 7822, subd. (b).) The trial court's findings must be supported by clear and convincing evidence. (§ 7821; see *In re Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010 [But "appellate court applies a substantial evidence standard of review to a trial court's findings under section 7822 [fn. omitted] [Citation]"].)

"A declaration of freedom from parental custody and control pursuant to this part terminates all parental rights and responsibilities with regard to the child." (§ 7803.)

II

Procedural History

On November 12, 2010, petitioner C.S. filed separate petitions to declare T.S. free from parental custody and control of his mother and his father. The petitions stated that T.S. had been left in the care and custody of C.S. for more than six months, without any provision for his support. Appellant was allegedly incarcerated at Pleasant Valley State Prison. According to the petitions, C.S. had been appointed as minor's legal guardian in September 2007 and she was seeking to adopt minor. On November 12, 2012, petitioner also filed an adoption request in which she identified herself as T.S.'s maternal grandmother and guardian.

On November 16, 2010, the court ordered the Family Court Services Investigator Jim Fisher to investigate and file written reports with the court. (See § 7850.) The investigator's report as to each petition was filed on March 25, 2011.

The investigator's reports indicated that T.S. was born in April 2004. It was reported that appellant had "acknowledge[d] being in and out of the children's lives due to criminal and drug behavior" Appellant did not "deny an extensive criminal background and note[d] that his release date [from prison] is October 5, 2015." The investigator reported that there was "no indication that [appellant] ha[d] provided any support for the child" except for "a token amount during the time the parents were together."

According to the report with respect to appellant, the investigator had learned through petitioner C.S.'s attorney that, according to C.S., from the time the child came to live with her in 2007 and until her filing of the petition in November 2010, she had received two telephone calls from appellant (the most recent in mid-2008) and no letters, gifts, or cards. Her telephone number and address had not changed during that period. She had never received any support from appellant. The investigator concluded that "freedom from [appellant's] parental rights does not seem inappropriate."

A hearing was held on March 30, 2011 and the investigator's reports were admitted into evidence. C.S. testified in her own behalf. Several witnesses testified in mother's behalf. Appellant testified in his own behalf.

The court's statement of decision contained its findings. T.S., the youngest of mother's four sons, was born in April 2004. He lived with his mother and two brothers for the first three years of his life. Appellant lived with the family at times. Appellant had not contributed support for T.S. since approximately 2006.

"In 2007 both parents became heavily involved in drugs." Appellant voluntarily signed legal guardianship of T.S. over to petitioner C.S., who became the temporary guardian in September 2007 and the permanent guardian in January 2008. Appellant had

been in and out of jail since 2007 for numerous criminal offenses. At the time of the hearing in 2011, appellant was serving a prison sentence "with an anticipated release date in 2015."

The court further found that "[a]t one point in 2008, [appellant] called [C.S.] requesting visitation." After contacting T.S.'s counselor, C.S. told appellant that he should meet with the counselor first. "There were no further telephone calls from [appellant]." On January 18, 2011, after the petition was filed, appellant wrote a letter to T.S. intended "to be delivered to the child by way of [mother]."

The court determined that "the requirements for abandonment under Family Law Code section 7822 were met" with regard to appellant. The trial court stated: "The evidence shows that [appellant], even when he was not incarcerated, has failed to support [his child] since 2006. [Appellant] has made only token efforts to contact [T.S.] by placing two phone calls to the petitioner in 2008 and writing an undelivered letter to [T.S.] on January 18, 2011, well after [appellant] became aware of the petition to terminate his rights." The court concluded there was "clear and convincing evidence that [appellant] failed to support the child for the statutory period, failed to communicate with the child for the statutory period, and intended to abandon the child."

In the judgment, the court reiterated that there was clear and convincing evidence that T.S. should be declared free from the parental custody and control of appellant in that appellant had left the child in C.S.'s care and custody for a period of over six months without any provisions for the child's support and without communication, with the intent to abandon the child. The court stated it was "in the best interest of the child that he be declared free from the custody and control of his father [B.S.], and there [was] no less detrimental alternative to provide for the child's best interests." The court ordered T.S. freed from appellant's parental custody and control.

As to mother, the court found that the evidence of mother's intent to abandon minor was less than clear and convincing. The judgment denied the petition to free T.S. from mother's parental custody and control.

III

Discussion

A. Forfeiture

Appellant argues that this court should not find that he waived or forfeited his claims of error by failing to raise them below because of the "fundamental nature" of the errors and his trial counsel's ineffective assistance in failing to raise these claims below. At the hearing below, appellant's trial counsel stipulated to the admission of the investigator's reports.

In *In re Noreen G.* (2010) 181 Cal.App.4th 1359, the guardians successfully petitioned to terminate the parents' parental rights under Probate Code section 1516.5.² On appeal, the parents complained that the investigator's report pursuant to section 7851 was flawed. (*Id.* at p. 1379.) The reviewing court first observed that the parents had "forfeited their right to complain of inadequacies in the report by failing to object at trial. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846)" (*Id.* at pp. 1379-1380.) Nevertheless, in view of the mother's incompetency of counsel claim, the reviewing court considered this assignment of error. (*Id.* at p. 1380.)

In *Neumann v. Melgar, supra*, 121 Cal.App.4th 152, the mother filed a petition to declare her two children free from the father's parental custody and control on the ground

² Under subdivision (a) of Probate Code section 1516.5, a proceeding to have a child declared free from the custody and control of one or both parents may be brought under section 7800 et seq. if certain statutory requirements are satisfied. Probate Code section 1516.5, subdivision (b), provides: "The court shall appoint a court investigator or other qualified professional to investigate all factors enumerated in subdivision (a). The findings of the investigator or professional regarding those issues shall be included in the written report required pursuant to Section 7851 of the Family Code."

of abandonment. (*Id.* at p. 156.) During the trial court proceedings, the father did not offer the evaluator's report into evidence and did not ask the court to consider the report, interview the older child, or consider appointment of counsel for the children. (*Id.* at p. 163.)

The appellate court in *Neumann* recognized: "Issues not raised at trial usually will not be considered on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 . . . [father's failure to raise inadequacy of social worker's report in proceeding terminating his parental rights]; *Heidi T., supra*, 87 Cal.App.3d at p. 876 . . . [order terminating parental rights not vacated on grounds that the trial court had failed to ascertain the children's express desires and appoint them counsel, where mother had not raised the issues in the trial court].)" (*Id.* at pp. 163-164, fn. omitted.) Despite the father's failure to raise any of these errors below, the appellate court determined that "the principles of waiver and estoppel" should not be applied because "the procedural protections" were intended to promote the children's best interests and the father's "failure to remind the court of its statutory obligations to the children should not be permitted to frustrate the Legislature's aim of protecting the children's best interests." (*Id.* at p. 164.) Even if the forfeiture rule applied, the appellate court made clear that it was exercising its discretion to consider the father's claims of error on appeal. (*Ibid.*)

The well-established general rule is that a party's failure to object in the trial court results in a forfeiture of the claim of error on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590, 591, fn. 7.) Although application of the forfeiture rule is not mandatory, "the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) The California Supreme Court has held that dependency matters are not exempt from the forfeiture rule. (*Id.* at p. 1293.) The court cautioned against lightly excusing a failure to preserve a claim in the trial court: "Although an appellate court's discretion to consider forfeited claims extends to dependency cases

[citations], the discretion must be exercised with special care in such matters.

'Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code.' (*In re Chantal S.* (1996) 13 Cal.4th 196, 200) Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance. (§ 366.26.)" (*Ibid.*)

We see no reason to conclude that the forfeiture rule does not apply to proceedings to free a child from parental custody and control, which also involve the well-being of children and considerations of permanence and stability relevant to their best interest. Appellant has not persuaded us that the forfeiture rule is inapplicable or should be excused. In any case, we find no reversible error.

B. Judicial Failure to Consider Appointment of Counsel for Child

Section 7861 provides: "The court shall consider whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child require representation by counsel, the court shall appoint counsel to represent the child, whether or not the child is able to afford counsel. The child shall not be present in court unless the child so requests or the court so orders." "Section 7861 continues former Civil Code Section 237.5(a) without substantive change." (Cal. Law Rev. Com. com., 29G West's Ann. Fam. Code (2004 ed.) foll. § 7861, p. 424.)

Citing *Neumann v. Melgar*, *supra*, 121 Cal.App.4th 152, appellant argues that this court must reverse the judgment and direct the trial court to consider appointment of counsel for the minor. In *Neumann*, the appellate court determined that "section 7861 makes clear that the court has a *nondiscretionary* duty to at least *consider* the appointment" and "[b]ecause the record fails to demonstrate whether there was a need to appoint independent counsel, we must conclude the failure to appoint counsel was error. [Citations.]" (*Id.* at p. 171.) After finding multiple errors, including the court's failure to consider the evaluator's report at all and its failure to interview the oldest child, the

appellate court reversed. (*Id.* at pp. 171-172) It stated: "Because the paramount concern in a proceeding to declare the children free from parental custody and control is the children's best interests, the trial court's errors compel us to vacate the judgment." (*Id.* at p. 171.)

Unlike the court in *Neuman*, the lower court in this case considered the investigator's report and it had no duty to interview T.S. (§ 7891).³ While we agree the court erred in failing to consider appointment of counsel for T.S., we do not agree that we must reverse.

In *In re Richard E.* (1978) 21 Cal.3d 349, 353 (*Richard E.*), the father appealed from the judgment freeing his son from parental custody and control, arguing that the appellate court was required to reverse the judgment because the court had failed to appoint counsel for his son pursuant to former Civil Code section 237.5 (*id.* at pp. 351, 353), which then provided that "the judge 'may' appoint an attorney to represent the minor" (*Id.* at p. 353.) The California Supreme Court determined that the trial court's failure to appoint counsel was error in the "absence of a showing on the issue of the need for independent counsel for a minor," apparently because there was no evidentiary "basis upon which the court could exercise its discretion not to appoint counsel" (*Id.* at pp. 354-355.) The court nevertheless concluded that "failure to appoint counsel for a minor in a freedom from parental custody and control proceeding does not require reversal of the judgment in the absence of miscarriage of justice. [Citation.]" (*Id.* at p. 355; see Cal.Const. art. VI, § 13 ["No judgment shall be set

³ Section 7891 provides in part: "(a) Except as otherwise provided in this section, if the child who is the subject of the petition is 10 years of age or older, the child shall be heard by the court in chambers on at least the following matters: [¶] (1) The feelings and thoughts of the child concerning the custody proceeding about to take place. [¶] (2) The feelings and thoughts of the child about the child's parent or parents. [¶] (3) The child's preference as to custody, according to Section 3042. [¶] (b) The court shall inform the child of the child's right to attend the hearing. However, counsel for the child may waive the hearing in chambers by the court."

aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"].)

The Supreme Court in *Richard E.* explained: "A proceeding to free a child from parental custody and control is essentially accusatory in nature, directed to challenges against the parent -- not against the child. [Citation.] . . . [T]he issue at a hearing is whether a parent is fit to raise the child. To that end are directed all the arguments of opposing parties, parents claiming they are fit and petitioners claiming otherwise, and with each side generally contending it is protecting the best interests of the child. It is thus likely that in a particular case the court will be fully advised of matters affecting the minor's best interests, and little assistance may be expected from independent counsel for the minor in furtherance of his client's or the court's interests." (21 Cal.3d at p. 354.) It found no reversible error: "There is nothing in the record of the instant proceeding suggesting the minor was prejudiced because he was not represented by independent counsel. The court concluded on substantial evidence in accordance with the probation report that awarding custody to either parent would be detrimental to [the child]. On the other hand, the father was afforded full opportunity to demonstrate that his continuing custody of [the child] would be in [the child's] best interests." (*Id.* at p. 355.)

In *In re Mario C.* (1990) 226 Cal.App.3d 599, a proceeding to terminate parental rights under former Civil Code section 232, this court observed that former section 237.5 was amended in 1981 and, as amended, "expressly require[d] courts to consider the need for counsel; if there is such a need, the court must appoint independent counsel to represent the child." (*Id.* at p. 606.) This court recognized that "[t]he only discretion the court retains is to determine whether the child's interests would be best served by such an appointment" and the trial court had failed to comply with its obligation under former section 237.5 to consider whether counsel should be appointed for the children. (*Ibid.*) We determined that "the *Richard E.* prejudice test should also be applied to violations of

the present statute" since "[n]othing in the language of present [now former] section 237.5 makes a violation of its terms reversible per se." (*Ibid.*) Based on the record, we concluded that the appellant mother had failed to demonstrate that any prejudice resulted from the trial court's failure to comply with former section 237.5. (*Id.* at p. 608.)

In *In Adoption of Jacob C.* (1994) 25 Cal.App.4th 617, a case discussed by both parties, the father's wife filed petitions to terminate the mother's parental rights and adopt the children. (*Id.* at p. 621.) The mother contended, and the appellate court agreed, that the trial court had erred in refusing to appoint counsel for the minors under former Civil Code section 237.5 and in failing to conduct an in-chambers interview with her older child to determine his feelings and thoughts under former Civil Code section 234. (*Id.* at pp. 619-620, 625.) The court concluded the trial court had committed reversible error in not appointing counsel for the children since the error "adversely affected their rights and interests to the extent that a miscarriage of justice occurred." (*Id.* at p. 625.) In reaching that conclusion, one of the critical considerations was the unusual circumstance that petitions were uncontested because the trial court had barred the mother from participating in the hearing on the petition to terminate her parental rights since she had disappeared and concealed her daughter during the previous proceedings. (*Id.* at pp. 623-624, 626.) That is a unique circumstance that is not present in this case. Another consideration was that the trial court had never interviewed the older child, who was over 10 years old, as required by statute. (*Ibid.*) As indicated, the lower court in this case had no statutory duty to interview T.S., who was much younger. (§ 7891, see ante, fn. 3.) The appellate court believed that the failure to appoint counsel was not reversible error in the absence of a showing of prejudice (*id.* at p. 625) but did not apply the *Watson* standard of review.

More recently, on appeal from the juvenile court's orders terminating parental rights and referring siblings for adoptive placement following a dependency hearing under Welfare and Institutions Code section 366.26 to select and implement a permanent

plan, the children argued that the court should have appointed a separate attorney for the oldest sibling and another counsel for the younger siblings. (*In re Celine R.* (2003) 31 Cal.4th 45, 55.) The California Supreme Court concluded that "the failure to appoint separate counsel for separate siblings is subject to the same harmless error standard as error in not appointing counsel for the children at all." (*Id.* at p. 59.) It reiterated California's general standard of review of state law error, stating: "The California Constitution prohibits a court from setting aside a judgment unless the error has resulted in a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) We have interpreted that language as permitting reversal only if the reviewing court finds it reasonably probable the result would have been more favorable to the appealing party but for the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836 . . .)" (*Id.* at pp. 59-60.) It then held that, in dependency matters, "[a] court should set aside a judgment due to error in not appointing separate counsel for a child or relieving conflicted counsel only if it finds a reasonable probability the outcome would have been different but for the error." (*Id.* at p. 60.)

We see no reason that California's *Watson* standard of review is not applicable here. In this case, the judgment followed a contested hearing at which appellant testified and was represented by counsel. The record does not reflect that it would have been an abuse of discretion to not appoint counsel for T.S. if the court had duly considered such appointment. Moreover, at the time of the hearing in March 2011, T.S. was almost seven years old and he had not been in contact with appellant for many years. There was no evidence, and the court made no finding, suggesting that appellant had any sort of meaningful contact or parental relationship with T.S. or there was any prospect of T.S. living with appellant. The error of not considering appointment of counsel for T.S. is harmless since there is no reasonable probability the court would have reached a result more favorable to appellant if it had considered appointment of counsel for T.S. and even appointed counsel for him. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Incomplete Investigator's Report

1. Claim of Error

The investigator must provide "to the court a written report of the investigation with a recommendation of the proper disposition to be made in the proceeding in the best interest of the child." (§ 7851, subd. (a).) The report is required to include the following information regarding the child: "(1) A statement that the person making the report explained to the child the nature of the proceeding to end parental custody and control. [¶] (2) A statement of the child's feelings and thoughts concerning the pending proceeding. [¶] (3) A statement of the child's attitude towards the child's parent or parents and particularly whether or not the child would prefer living with his or her parent or parents. [¶] (4) A statement that the child was informed of the child's right to attend the hearing on the petition and the child's feelings concerning attending the hearing." (§ 7851, subd. (b).) "If the age, or the physical, emotional, or other condition of the child precludes the child's meaningful response to the explanations, inquiries, and information required . . . , a description of the condition shall satisfy the requirement" (§ 7851, subd. (c).) This section requires the court to "receive the report in evidence" and to "read and consider its contents in rendering the court's judgment." (§ 7851, subd. (d).) Section 7851 continues without substantive change language in former Civil Code section 233. (See Cal. Law Rev. Com. com., 29G West's Ann. Fam. Code (2004 ed.) foll. § 7851, p. 419; Stats. 1981, ch. 810, § 1, pp. 3143-3144.)

The investigator's report plainly did not comply with subdivisions (b) and (c) of section 7851. Appellant maintains that this error requires reversal.

2. Automatic Reversal Not Required

Appellant makes a variety of arguments that the incomplete report is an error requiring reversal per se.

a. *No Due Process Violation*

Citing *In re Valerie W.* (2008) 162 Cal.App.4th 1, 13-14 and *In re Crystal J.* (1993) 12 Cal.App.4th 407, 412, appellant contends that the judgment must be automatically reversed because the statutory requirements of section 7851 are "an important component of [his] due process protection."

In *Valerie W.*, a dependency case, the parents asserted that the juvenile court erred in terminating their parental rights under Welfare and Institutions Code section 366.26 (selection of permanent plan) in part because the court's adoptability finding was not supported by substantial evidence. (*Id.* at p. 4.) In reaching the conclusion that the juvenile court's finding of adoptability was not supported by substantial evidence, the court found multiple deficiencies in the statutorily-mandated assessment report. (*Id.* at pp. 4, 13-14.) It noted the report failed to assess the eligibility and commitment of any identified prospective adoptive parent and it did not include "a social history for each applicant, a description of the relationship between the children and each applicant, the motivation of each applicant for seeking adoption and, as relevant here, the motivation of the applicants for seeking a 'joint adoption.' (§ 366.21, subd. (i)(4), (5) [now (i)(1)(D) and (i)(1)(E)].)" (*Id.* at pp. 13-14.)

Valerie W. does not aid appellant, who is *not* challenging the sufficiency of the evidence to support the trial court's findings. In addition, the appellate court in *Valerie W.* did not conclude that the inadequate assessment report violated the parents' procedural due process rights.

In *Crystal J.*, the appellate court did not disagree with "the proposition that parenting is a fundamental right the impairment of which requires strict adherence to procedural due process. (See *In re Angelia P.* (1981) 28 Cal.3d 908, 915 . . .)" (*In re Crystal J.*, *supra*, 12 Cal.App.4th at p. 412.) Even so, the court rejected the mother's claim that "the deficiencies in the assessment reports constituted a violation of procedural

due process." (*Ibid.*) In dicta, the court opined: "Where an investigative report is required prior to the making of a dependency decision, and it is *completely* omitted, due process may be implicated because a cornerstone of the evidentiary structure upon which both the court and parents are entitled to rely has been omitted. (See *In re Linda W.* (1989) 209 Cal.App.3d 222, 226–227 . . .)" (*Id.* at p. 413.) But the court concluded: "Where, however, the assessment report *is* prepared, *is* available to the parties in advance of the noticed hearing, and *does* address the principal questions at issue in the particular proceeding, errors or omissions in the report cannot be characterized in terms of denial of due process. (See *In re Heidi T.* (1978) 87 Cal.App.3d 864, 875 . . . [possible deficiencies in assessment report harmless error in light of other evidence]; *In re Robert J.* (1982) 129 Cal.App.3d 894, 901-902 . . . [irrelevant material in a report deemed not prejudicial because of independent evidence supporting the trial court's ruling].) Deficiencies in an assessment report surely go to the weight of the evidence, and if sufficiently egregious may impair the basis of a court's decision to terminate parental rights. Such deficiencies, however, will ordinarily not amount to a deprivation of procedural due process." (*Id.* at p. 413.)

We have no quarrel with appellant's position that he could not be deprived of parental rights without procedural due process. "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (*Troxel v. Granville* (2000) 530 U.S. 57, 66 [120 S.Ct. 2054].) But "[o]nce it is determined that due process applies, the question remains what process is due. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593]; see *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy* (1961) 367 U.S. 886, 895 [81 S.Ct. 1743].) "The 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may

deem adequate for determining the preconditions to adverse official action.' [Citations.]" (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [102 S.Ct. 1388].) Due process does not safeguard "the meticulous observance of state procedural prescriptions" and a mere error of state law is not a denial of due process. (See *Rivera v. Illinois* (2009) 556 U.S. 148, 158 [129 S.Ct. 1446] [erroneous seating of juror over defendant's peremptory challenge was not due process violation].)

The fundamental requirements of procedural due process are notice and "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citations.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [96 S.Ct. 893].) The U.S. Supreme Court has held that, "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." (*Santosky v. Kramer, supra*, 455 U.S. at pp. 747-748.) In addition, California cases indicate that, in proceedings to free a child from a parent's custody and control, due process requires that the parent receive a copy of the investigation report (see *In re Linda W.* (1989) 209 Cal.App.3d 222, 227 [former Civ. Code § 233]) and the parent be given "the opportunity to cross-examine the investigative officer *and* the sources from which that person obtained the information inserted into the report. [Citation.]" (*In re Gary U.* (1982) 136 Cal.App.3d 494, 501 [former Civ. Code § 233]; see *In re George G.* (1977) 68 Cal.App.3d 146, 156-158.) Appellant has not demonstrated that the incomplete investigative report was an error of constitutional magnitude.

b. *Superior Court Did Not Act in Excess of its Jurisdiction or Commit "Structural Error"*

Appellant also asserts that "the minor's feelings and thoughts must be a key component of the trial court's decision-making process." He argues that reversal is automatic because the court acted in excess of its jurisdiction by terminating appellant's parental rights based on a defective report not containing the information required by

subdivisions (b) and (c) of section 7851 and the error cannot be quantitatively assessed. Similar arguments were rejected in *In re Noreen G.*, *supra*, 181 Cal.App.4th 1359.

In *Noreen G.*, the parents complained that the investigator's evaluation and report were deficient under section 7851 because the investigator had not interviewed either of them and the investigator had "deferred any formal recommendation on the petition until the hearing and a therapeutic evaluation of the minors was completed" (*Id.* at p. 1379.) The appellate court rejected the parents' assertions that the court acted in excess of its jurisdiction and the error was reversible per se. (*Id.* at p. 1380.)

The appellate court in *Noreen G.*, *supra*, 181 Cal.App.4th 1359 stated that "[t]he court is not stripped of jurisdiction if an *incomplete* report is filed. (See *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1419 . . .)" (*Ibid.*) It further explained: "Per se reversal is required only in rare cases where the structural integrity of a trial is compromised. (*People v. Flood* (1998) 18 Cal.4th 470, 501–502 . . . ; *People v. Bell* (1996) 45 Cal.App.4th 1030, 1066 . . .) Errors such as the one at issue here that may be quantitatively assessed in the context of the evidence to determine prejudice are not structural defects. (See *In re James F.* (2008) 42 Cal.4th 901, 917 . . .) To the contrary, the fundamental rule in California is that judgments cannot be set aside 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13; see also *People v. Steele* (2000) 83 Cal.App.4th 212, 224 . . .)" (*Ibid.*) It recognized: "[T]he parents must affirmatively demonstrate prejudice to prevail on appeal. (*In re M.F.* (2008) 161 Cal.App.4th 673, 680 . . . ; *In re Melinda J.*, *supra*, 234 Cal.App.3d 1413, 1419 . . .) Reversal is appropriate 'only if we conclude ". . . it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" [Citations]' (*In re Marriage of Jones* (1998) 60 Cal.App.4th 685, 694 . . . ; see also *Neumann v. Melgar*, *supra*, 121 Cal.App.4th 152, 170 . . .)" (*Id.* at p. 1381.)

Appellant attempts to distinguish *Noreen G.* by pointing out that the investigator in *Noreen G.* did not interview the parents before trial because she was unable to locate them, the appellate court in *Noreen G.* observed that "section 7851 does not explicitly require the investigation and report to include an interview with the parents" (*id.* at p. 1380), and the mother and the investigator testified at trial. Despite the factual differences between this case and *Noreen G.*, appellant still has not established that the court acted in excess of its jurisdiction.

"A court acts in excess of jurisdiction 'where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 . . .)" ⁴ (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624.) "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." (*Abelleira v. District Court of Appeal, supra*, 17 Cal.2d at p. 291; see Civ. Code, §§ 1067, 1068, 1102.) Appellant had not demonstrated by reference to legislative history or any other authority that the Legislature intended the filing of an incomplete investigative report under section 7851 to have jurisdictional implications. A judgment freeing T.S. from parental custody and control was not an act that exceeded the defined power of the court.

⁴ "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. [Citation.]" (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) Appellant is not arguing that the court lacked jurisdiction in this strict sense.

We must also reject appellant's claim that the defective report required automatic reversal because it resulted in "the complete absence of the required information" and cannot be quantitatively assessed. This argument seems to have been derived from inapt U.S. Supreme Court language that differentiates between federal constitutional errors that are trial errors subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824] and structural errors requiring automatic reversal.⁵ (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308 [111 S.Ct. 1246].)

In *In re James F.* (2008) 42 Cal.4th 901, the California Supreme Court warned against importing "structural error" principles, which appellant cites at length, into noncriminal proceedings. In that case, the juvenile court appointed a guardian ad litem for father in child dependency proceedings and subsequently terminated his parental rights. (*Id.* at pp. 906, 910.) The Supreme Court considered whether the erroneous "procedure used to appoint a guardian ad litem for a parent in a dependency proceeding

⁵ Courts "typically designate an error as 'structural,' therefore 'requir[ing] automatic reversal,' only when 'the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." ' *Recuenco*, 548 U.S., at 218-219, 126 S.Ct. 2546 (quoting *Neder*, 527 U.S., at 9, 119 S.Ct. 1827)." (*Rivera v. Illinois*, *supra*, 556 U.S. at p. 160.) As the U.S. Supreme Court has observed, "'structural errors' are 'a very limited class' of errors that affect the ' "framework within which the trial proceeds," ' *Johnson*, *supra*, at 468, 117 S.Ct. 1544 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)), such that it is often 'difficul[t]' to 'asses[s] the effect of the error,' *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n. 4, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). See *Johnson*, *supra*, at 468-469, 117 S.Ct. 1544 (citing cases in which this Court has found 'structural error,' including *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (total deprivation of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (lack of an impartial trial judge); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (violation of the right to a public trial); and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (erroneous reasonable-doubt instruction))." (*U.S. v. Marcus* (2010) ___ U.S. ___, ___ [130 S.Ct. 2159, 2164-2165]; see *U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 148-149 [126 S.Ct. 2557] [two classes of federal constitutional error].)

require[d] automatic reversal of an order terminating the parent's parental rights, or whether instead the error [was] subject to harmless error review." (*Id.* at pp. 904-905.) The court rejected the argument that the error was "structural." (*Id.* at pp. 916-918.) It determined that "significant differences between criminal proceedings and dependency proceedings provide reason to question whether the structural error doctrine that has been established for certain errors in criminal proceedings should be imported wholesale, or unthinkingly, into the quite different context of dependency cases. (See *In re Celine R.*, *supra*, 31 Cal.4th at pp. 58–59 . . . [rejecting analogy to criminal cases and applying harmless error analysis to improper joint representation of children in dependency case]; *In re Sade C.* (1996) 13 Cal.4th 952, 991 . . . [stating that criminal defendants and parents in dependency proceedings 'are *not* similarly situated'].)" (*Id.* at pp. 915-916.) The court held that "a juvenile court's error in the process used for appointment of a guardian ad litem for a parent in a dependency proceeding is a form of trial error that is amenable to harmless error analysis." (*Id.* at pp. 918-919.)

The error of submitting an incomplete investigator's report to the court in this case is most similar to the erroneous exclusion of evidence. In criminal appeals, even the erroneous exclusion of evidence in violation of the Sixth Amendment right to confront witnesses is subject to harmless-error analysis under *Chapman v. California*, *supra*, 386 U.S. 18, 24 and is not a "structural error." (*Neder v. U.S.* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827]; *Crane v. Kentucky* (1986) 476 U.S. 683, 691 [106 S.Ct. 2142]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-684 [106 S.Ct. 1431].) The submission of an incomplete investigator's report is also a form of trial error, the effect of which may be assessed in light of the evidence. It is not reversible per se.

c. *Harmless Error*

Appellant insists that, even if the error is not reversible per se, the error was not harmless. He first contends that the *Chapman* standard of review applies and the error

cannot be considered harmless because there is "no other clear indication" of T.S.'s feelings in the record. There has been no showing that federal constitutional error subject to the "harmless beyond a reasonable doubt" standard set forth in *Chapman* occurred in this case. We apply California's *Watson* standard of review.

Although the investigator's report did not include certain information regarding T.S.'s thoughts and feelings or, alternatively, state that "the age, or the physical, emotional, or other condition of the child" precluded T.S.'s "meaningful response" (§ 7851, subs. (b) and (c)), the omitted information was irrelevant to the issue of abandonment. (See § 7822, subs. (a)(2), (b); see also Evid. Code, § 210.) The record does not disclose any basis for supposing that T.S.'s thoughts and feelings concerning the proceedings, his attitude toward appellant, his preference with regard to living with appellant, and his feelings regarding attending the hearing (see § 7851, subd. (b)) would likely have affected the court's evaluation of the child's best interest given the history and circumstances.

At the hearing, appellant testified that, from T.S.'s birth (2004) until 2007, he was on parole and he was "back and forth to prison" with violations. T.S.'s mother testified that, for the first three years of T.S.'s life, they lived with mother's grandmother. Appellant lived with his family at times.

C.S. testified that T.S. had been living with her since April 12, 2007. Appellant admitted that he was in San Benito County jail on April 20, 2007. Since May 2007, when appellant signed guardianship papers for C.S. according to his recollection, appellant had been in and out of jail. According to his testimony, appellant was able to get out of jail on July 3, 2007 but was again incarcerated from February 15, 2008 until April 4, 2008. He indicated that he had been incarcerated continuously since September 20, 2008 and he was moved from San Benito County jail to state prison on February 9, 2010. Appellant acknowledged at the hearing that, since signing the guardianship papers, appellant had

not spoken to T.S. and T.S. had not visited him. T.S. was six years old at the time of the investigator's report and hearing in March 2011.

It is not reasonably probable that the court would have reached a result more favorable to appellant if the investigator had complied with section 7851's requirements concerning speaking with T.S. and filed a complete report. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.)

D. Ineffective Assistance of Counsel

Appellant now asserts that his trial attorney provided ineffective assistance by failing to raise the court's duty to consider appointment of counsel for T.S. and the defects in the investigator's report. For purposes of this appeal, we assume appellant had a constitutional right to counsel and the standards established by *Strickland v. Washington, supra*, 466 U.S. 668 [104 S.Ct. 2052] (*Strickland*) and its progeny apply to appellant's claim. (But see *Lassiter v. Department of Social Servs. of Durham Cty.* (1981) 452 U.S. 18, 31-32 [101 S.Ct. 2153] [the right of due process under the federal Constitution does not require "the appointment of counsel in every parental termination proceeding" and "whether due process calls for the appointment of counsel for indigent parents in termination proceedings [is] to be answered in the first instance by the trial court, subject . . . to appellate review"].)

Under *Strickland*, appellant must establish deficient performance and prejudice. (*Strickland v. Washington, supra*, 466 U.S. at p. 687.) Counsel has wide latitude in making tactical decisions and is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (*Id.* at p. 690.) Appellant "must show that counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id.* at p. 688.)

"When . . . counsel's reasons are not apparent from the record, we will not assume inadequacy of representation unless counsel had no conceivable legitimate tactical

purpose. [Citation.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 558.) In this case, it is conceivable that the attorney had reason to believe that T.S.'s thoughts and feelings regarding the proceeding and appellant and appointment of counsel for him would not be helpful to appellant.

In addition, the record does not establish a reasonable probability that the result of the proceeding would have been different had appellant's counsel objected to the errors now being raised on appeal given the evidence. (See *Strickland v. Washington* (1984) 466 U.S. at p. 694 [To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome"], *Harrington v. Richter* (2011) ___ U.S. ___, ___ [131 S.Ct. 770, 791-792] ["In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome . . ."; "The likelihood of a different result must be substantial, not just conceivable. [Citation.]".])

DISPOSITION

The judgment is affirmed.

ELIA, J.

WE CONCUR:

PREMO, Acting P. J.

MIHARA, J.