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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re N.B., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

N.B.,

Defendant and Appellant.

E072820

(Super.Ct.No. J272174)

OPINION

In re N.B., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

Y.M. et al.,

Defendants and Respondents;

N.B.,

Appellant.

E072821

(Super.Ct.No. J250752)

APPEAL from the Superior Court of San Bernardino County. Winston S. Keh and Christopher B. Marshall, Judges.* Affirmed.

Kelly E. DuFord, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General. and Robin Urbanski and Yvette M. Martinez, Deputy Attorneys General, for Plaintiff and Respondent the People.

Michelle D. Blakemore, County Counsel, and Svetlana Kauper, Deputy County Counsel, for Plaintiff and Respondent San Bernardino County Children and Family Services.

No appearance for Defendants and Respondents Y.M. et al.

* The minor challenges Judge Marshall's order changing the lead agency to the Probation Department, Judge Keh's order regarding the minor's placement through the Probation Department, and Judge Marshall's order dismissing the dependency.

When N.B. (minor) was 10, he was removed from his parents' custody and a dependency petition regarding him was sustained. When he was 13, he assaulted a teacher. Since then, his criminal behavior has escalated. Thus, three successive delinquency petitions regarding him have also been sustained.

In general, Welfare and Institutions Code section 241.1 (section 241.1) prohibits treating a child as both a dependent and a delinquent at the same time. It provides an exception, however, that allows a county to permit such "dual status," provided the county adopts a protocol for doing so. The protocol must follow one of two "systems": it may deal with the child exclusively in delinquency court, or it may designate, for the individual child, a "lead court" and a "lead agency" — either the dependency court plus the child welfare agency, or the delinquency court plus the probation department.

For most of the life of this case, San Bernardino County (County) had a protocol that provided for dual status and a lead court/lead agency system. Hence, the juvenile court accorded the minor dual status. At first, it designated dependency and Children and Family Services (CFS) as the lead court and the lead agency. In January 2019, however, it changed the lead to delinquency and the Probation Department (Probation).

The minor moved to change the lead back to dependency and CFS. On April 30, 2019, however, the County adopted a new protocol. That protocol now permits only single status. It also specifically provides that, if a minor is adjudicated a delinquent, any dependency as to that minor must be dismissed. The dependency court therefore dismissed the dependency.

The minor appeals. He contends that the juvenile court erred in dismissing the dependency, because it did not have an adequate section 241.1 report, because it did not hold an evidentiary hearing, and because only the delinquency court, not the dependency court, had jurisdiction to dismiss. We will hold that none of these requirements apply when dismissal is mandatory under a county's single status protocol.

The minor also contends (rather vaguely) that he was denied notice and an opportunity to be heard. We find no such denial, or at least none that has been preserved for appeal.

Finally, the minor contends that Probation erred by failing to consider placing him with a relative. We will hold that his trial counsel forfeited this contention; alternatively, on this record, placement with a relative was manifestly inappropriate.

I

STATEMENT OF FACTS AND PROCEDURE

The minor was born in 2002.

In August 2013, when the minor was 10, he was detained and a dependency petition concerning him was filed (Case No. J250752).

In December 2013, the dependency court took jurisdiction based on the father's "unsafe life style and violent criminal history," the mother's "erratic behavior," domestic violence, failure to support, and leaving the minor with an unsuitable custodian.

In October 2014, at the 12-month review hearing, the dependency court terminated the parents' reunification services and selected a planned permanent living arrangement as the minor's permanent plan.

In June 2017, a delinquency petition was filed against the minor (Case No. 137520-00), alleging petty theft.¹ (Pen. Code, § 488.) In July 2017, it was dismissed on the ground that the minor would be better served in dependency.

In August 2017, a second delinquency petition was filed against the minor (Case No. J272174) alleging robbery (Pen. Code, § 211) and elder abuse (Pen. Code, § 368, subd. (b)(1)). He admitted the lesser offense of grand theft (Pen. Code, § 487, subd. (c)), was adjudicated a ward, and was placed on probation in the custody of CFS.²

In August 2018, the minor admitted a violation of probation. At disposition, he was given dual status, with CFS as the lead agency.

In October 2018, a third delinquency petition was filed against the minor (Case No. 18-000178), alleging a criminal threat. (Pen. Code, § 422, subd. (a).)³ In November 2018, the minor admitted the allegation, as a misdemeanor.

In December 2018, the 241.1 Committee recommended keeping the minor on dual status but changing the lead agency to Probation. At a hearing on the recommendation,

¹ This petition was filed in Kern County.

² The minor states that, at this time, he was granted dual status. The record does not support this, unless his placement with CFS is viewed as de facto dual status.

³ This petition was filed in Stanislaus County. In November 2018, the case was transferred to San Bernardino County.

on December 18, 2018, the minor's delinquency counsel objected to the recommendation and requested a contested hearing. CFS responded by moving to dismiss the dependency instead, leaving only the delinquency. The dependency court granted the motion.

On December 26, 2018, the delinquency court held a dispositional hearing. However, because crucial witnesses were absent, it continued the hearing. This meant that it had to order the minor released. (Cal. Rules of Court, rule 5.782(a).) Because his parents were not available to take custody, it placed him in the custody of CFS.

As mentioned, however, the dependency had already been dismissed. On December 28, 2018, in order to be able to take custody, CFS filed a supplemental dependency petition. (Welf. & Inst. Code, § 387.) On January 22, 2019, the dependency court found that it had jurisdiction under the supplemental petition.

On January 29, 2019, the dependency court held a hearing on the 241.1 Committee's recommendation. The minor's delinquency counsel objected that the delinquency court, not the dependency court, should determine the lead agency. She also objected to the recommendation and requested a contested hearing. Nevertheless, the dependency court ordered dual status and changed the lead agency to Probation.

In April 2019, a fourth delinquency petition was filed against the minor (Case No. 137520-01) alleging possession of cocaine in a juvenile facility (Welf. & Inst. Code,

§ 871.5, subd (a)) and simple possession of cocaine (Health & Saf. Code, § 11350, subd. (a)).⁴ The minor admitted the charge of simple possession.

On April 30, 2019, the 241.1 Committee once again recommended keeping the minor on dual status, with Probation as the lead agency.

That same day, at a dispositional hearing, the delinquency court ordered the minor placed through Probation. The minor's delinquency counsel indicated that she was going to ask the dependency court to change the lead agency to CFS. The delinquency court clerk set a hearing on her request for May 7, 2019 in dependency court.

Also on April 30, 2019, the County adopted a new section 241.1 protocol. As we will discuss in more detail in part II.A, *post*, it prohibited dual status; it also provided that, when a minor is adjudicated a ward, any dependency as to that minor must be dismissed.

Accordingly, on May 3, 2019, CFS filed a motion to dismiss the dependency.

On May 7, 2019, the dependency court held a combined hearing, on both the minor's motion for a change of lead agency and CFS's motion to dismiss. It noted the new 241.1 protocol. It ruled that the minor was not entitled to an evidentiary hearing on the motion to dismiss. At the request of the minor's delinquency counsel, it then granted a continuance to May 14, 2019.

⁴ This petition was filed in Kern County. Later in April 2019, the case was transferred to San Bernardino County.

On May 14, 2019, the minor’s delinquency counsel objected that it was up to the delinquency court, not the dependency court, to decide whether to dismiss the dependency. She also objected that the section 241.1 reports were inadequate. She requested a full evidentiary hearing.

The dependency court ruled again that an evidentiary hearing was not required. It noted that San Bernardino had become a “single status” county. It also noted that, on January 29, 2019, the delinquency court had been designated the lead court and Probation had been designated the lead agency. It therefore dismissed the dependency.

The minor appealed from the orders on April 30 (ordering the minor placed through Probation), May 7 (denying an evidentiary hearing on the dismissal), and May 14, 2019 (once again denying an evidentiary hearing on the dismissal, and dismissing the dependency).⁵

II

THE DISMISSAL OF THE DEPENDENCY

The minor contends that the dependency court dismissed the dependency without complying with various requirements for dismissal.

⁵ The minor also purported to appeal from an order on January 22, 2019 (finding dependency jurisdiction under the supplemental petition). As to this order, however, his appeal was untimely. (Cal. Rules of Court, Rule 8.406(a)(1).)

Moreover, he purported to appeal from an order on April 29, 2019. The only such order merely continued the delinquency dispositional hearing. His opening brief does not challenge that order.

A. *Legal Background Regarding Dual Status.*

The state, in the exercise of its dependency jurisdiction, can take custody of a child on the ground that the child has been harmed or is at risk of harm. (Welf. & Inst. Code, § 300 et seq.) Alternatively, in the exercise of its delinquency jurisdiction, it can take custody of a child on the ground that the child has engaged in criminal (or disobedient or truant) behavior. (Welf. & Inst. Code, § 600 et seq.) “[S]ome minors who come before the court seem to fall under *both* systems.” (*In re W.B.* (2012) 55 Cal.4th 30, 46.)

Section 241.1 requires each county’s probation department and child welfare agency, in consultation with the presiding judge of the juvenile court, to develop a written protocol for deciding whether to designate such a child a dependent or a delinquent. (§ 241.1, subds. (a), (b).)

As to any child who appears eligible for both statuses, the county probation department and the child welfare services department must determine, in accordance with the protocol, “which status will serve the best interests of the minor and the protection of society. The recommendations of both departments shall be presented to the juvenile court . . . , and the court shall determine which status is appropriate for the minor.” (§ 241.1, subd. (a); see also *id.*, subd. (c); Cal. Rules of Court, rule 5.512.)

The protocol may allow for a child to be both a dependent and a delinquent at the same time — a “dual status” minor. (§ 241.1, subd. (e).) Such a protocol may adopt either an “on-hold” system or a “lead court/lead agency” system. (§ 241.1, subd. (e)(5).) In an on-hold system, dependency jurisdiction is put on hold or suspended and the child

is automatically treated as a delinquent. (§ 241.1, subd. (e)(5)(A).) In a lead court/lead agency system, the dependency court may be designated as the lead court, with the child welfare agency as the lead agency, or the delinquency court may be designated as the lead court, with the probation department as the lead agency. (§ 241.1, subd. (e)(5)(B).)

Absent a dual status protocol, however, “a minor [may not be] simultaneously both a dependent child and a ward of the court.” (§ 241.1, subd. (d).)

Initially, San Bernardino County adopted a dual status protocol, with a lead court/lead agency system. (WIC 241.1 Protocol (Oct. 2012) at pp. 10-12, available at <https://www.courts.ca.gov/documents/san_bernardino_dual_status_protocol_updated.pdf>, as of Oct. 9, 2020.) It also established a 241.1 Committee, made up of representatives of CFS and of Probation, which assesses minors eligible for both statuses and makes recommendations to the juvenile court. (*Id.* at p. 3.)

In 2019, however, the County adopted a new protocol; it became effective on April 30, 2019. (WIC 241.1 Committee Single Status Protocol (Sept. 2019): <https://www.sb-court.org/sites/default/files/Divisions/Juvenile/WIC241_1CommitteeProtocol.pdf>, as of Oct. 9, 2020 (Protocol).) Under the Protocol, San Bernardino is now a single status county. As it explains, “[t]his means that a youth may not be both a ward and a dependent simultaneously.” (*Id.* at p. 2.) It also provides that, if a “[y]outh is declared a ward,” “[t]he [d]ependency petition will be dismissed.” (*Id.* at p. 11.)

B. *The Adequacy of the Section 241.1 Assessment Report.*

The minor contends that the dependency court erred by dismissing the petition because the 241.1 Committee's assessment report was inadequate.

Section 241.1 requires the child welfare agency and the probation department to assess a child before making a status recommendation. (*Id.*, subds. (b)(1), (b)(2), (c), (e); see also Cal. Rules of Court, rule 5.512.) The joint assessment report must include:

“(1) A description of the nature of the referral;

“(2) The age of the child;

“(3) The history of any physical, sexual, or emotional abuse of the child;

“(4) The prior record of the child's parents for abuse of this or any other child;

“(5) The prior record of the child for out-of-control or delinquent behavior;

“(6) The parents' cooperation with the child's school;

“(7) The child's functioning at school;

“(8) The nature of the child's home environment;

“(9) The history of involvement of any agencies or professionals with the child and his or her family;

“(10) Any services or community agencies that are available to assist the child and his or her family;

“(11) A statement by any counsel currently representing the child; and

“(12) A statement by any CASA volunteer currently appointed for the child.”

(Cal. Rules of Court, rule 5.512(d).)

This court has held that the trial court errs if it makes a status determination based on an inadequate assessment. (*In re R.G.* (2017) 18 Cal.App.5th 273, 292.)

However, this court has also held that these requirements do not apply when a county transitions from a dual status protocol to a single status protocol. (*In re S.O.* (2020) 48 Cal.App.5th 781, 787-790.) Section 241.1 authorizes a county to adopt a dual status protocol, and it gives such a protocol the force of law. Here, the Protocol provides that, once a minor is declared a ward, his or her dependency must be dismissed. The 241.1 Committee is required to do an assessment only “when assessing or recommending which petition should be dismissed or resolved *short of wardship/dependency . . .*” (Protocol at p. 13, italics added.)⁶ That was not the case here. A full assessment report would be an exercise in futility. Even assuming, for the sake of argument, that an assessment report is required, the failure to provide one is harmless under any standard.

⁶ At oral argument, the minor’s counsel asserted that, even though the Protocol was adopted in April, before the hearing, it was not released until September, after the hearing. Counsel for CFS responded that, at the time of the hearing, all of the agencies involved were aware of the Protocol.

We need not resolve this factual issue. The dependency court noted, on the record, that the Protocol had been adopted and that it provided for single status. No one requested a continuance; no one objected to applying the Protocol in this case. In any event, even if we were to reverse, on remand, the juvenile court would be required to follow the Protocol, so it would make the same rulings. Thus, assuming it was error to follow the Protocol before it had been formally released, the error has since become moot.

C. *Denial of an Evidentiary Hearing.*

The minor contends that the dependency court erred by dismissing the dependency without an evidentiary hearing.

Welfare and Institutions Code section 390 states: “A judge of the juvenile court in which a petition was filed . . . may dismiss the petition or may set aside the findings and dismiss the petition if the court finds that the interests of justice and the welfare of the minor require the dismissal, and that the parent or guardian of the minor is not in need of treatment or rehabilitation.”

Allen M. v. Superior Court (1992) 6 Cal.App.4th 1069 held that a child welfare agency does not have the absolute right to dismiss a dependency petition. (*Id.* at p. 1071.) Rather, “when the [agency] wishes to dismiss a petition . . . it must notify all interested persons in order to afford each the opportunity to object and be heard. If a parent or minor does object, resolution of the matter is properly by an order to show cause hearing requiring the [agency] to establish why the petition should be dismissed. The evidence may be presented by declaration and, if necessary, by testimony. . . . [T]he primary focus of the court is the determination of whether dismissal is in the interests of justice and the welfare of the minor.” (*Id.* at p. 1074.)

Here, however, the motion to dismiss was not brought under Welfare and Institutions Code section 390. It was not based on a particularized examination of “the interests of justice and the welfare of the minor.” Rather, it was based on the Protocol’s requirement that, once a minor is declared a ward, his or her dependency must be

dismissed. As discussed in part II.B, *ante*, the Protocol has the force of law by virtue of section 241.1. Thus, this provision of the Protocol is an *alternative* (but equally statutory) ground for dismissal.

Under the Protocol, the only relevant fact is that the minor has been declared a ward. Thus, there is no point to holding an evidentiary hearing. As we held with respect to an assessment report, an evidentiary hearing would be futile. We therefore conclude that one is not required.

D. *Dismissal by the Dependency Court Rather than the Delinquency Court.*

The minor contends that only the delinquency court, and not the dependency court, had jurisdiction to dismiss the dependency petition.

Ordinarily, it would seem to be a truism that the dependency court has jurisdiction to dismiss a dependency petition. The minor argues, however, that here, the petition was dismissed because the juvenile court determined that he should be treated as a delinquent rather than a dependent. He then argues that, under *In re Marcus G.* (1999) 73 Cal.App.4th 1008, the status issue must be decided by the last court to acquire jurisdiction. (*Id.* at pp. 1013-1014.) *Marcus G.* explained: “[T]he later petition . . . creates the potential for dual jurisdiction. Likewise, the determination of the appropriate status is to be made by the juvenile court that is acting upon that second petition.” (*Id.* at p. 1013.)

Here, however, there was no status issue for either branch of the juvenile court to decide. It had already been decided — in the Protocol — that the minor’s status had to

be delinquency. Thus, it remained appropriate for the dependency court to dismiss the dependency.

Even assuming, for the sake of argument, that the wrong court made this ruling, the minor cannot show prejudice. The error was not jurisdictional. *Marcus G.* was not concerned about lack of jurisdiction; it was merely concerned that the dependency court did not have an adequate record. (*In re Marcus G.*, *supra*, 73 Cal.App.4th at pp. 1013-1014.)

The delinquency court and the dependency court are both just the juvenile court, wearing different hats. (See *In re Chantal S.* (1996) 13 Cal.4th 196, 200.) In fact, the juvenile court is just the superior court, except to the extent that its jurisdiction has been statutorily limited. (*People v. Superior Court* (1930) 104 Cal.App. 276, 281.)

Because the (assumed) error was not jurisdictional, it was only a matter of procedure, subject to harmless error analysis. Under the Protocol, the dependency had to be dismissed. The minor has not shown prejudice from fact that the dependency court, rather than the delinquency court, ordered the dismissal. (Cal. Const., art. VI, § 13.)

Finally, even assuming *Marcus G.* does apply here, the *dependency* court was the last court to acquire jurisdiction. The 2013 dependency petition had been dismissed on December 18, 2018. At that point, there was no potential for dual jurisdiction. It was CFS's filing of a supplemental petition, on December 28, 2018, that created this potential. Hence, the dependency court could properly decide any status issue.

III

DENIAL OF DUE PROCESS NOTICE AND AN OPPORTUNITY TO BE HEARD

The minor contends that “when the dependency court changed the minor’s lead status to probation,” he was denied notice and an opportunity to be heard, as required by due process. (Capitalization altered.) He is not very specific about when or how this supposedly occurred. Accordingly, out of an abundance of caution, we address three possible occasions.

A. *The Dismissal of the Dependency on December 18, 2018.*

The minor refers to the dismissal of the dependency on December 18, 2018. A dismissal is different, however, from a change of lead. In any event, the minor did not file a timely appeal from that dismissal.

B. *The Change of Lead on January 29, 2019.*

On January 29, 2019, the dependency court did change the lead agency to Probation. The minor, however, does not mention this date or this ruling.

Once again (see fn. 5, *ante*), the minor did not file a timely appeal from the January 29, 2019 order. Moreover, the minor’s counsel was present at that hearing, but she did not object based on lack of notice and an opportunity to be heard. Thus, she forfeited this argument. “It is well-established that a lack of notice can be forfeited by failure to object, even when it is claimed that it violated due process. [Citation.]”

(*People v. Nguyen* (2017) 18 Cal.App.5th 260, 271.)

C. *The Dismissal of the Dependency on May 14, 2019.*

The minor does clearly assert that “the court failed to allow Minor’s counsel a meaningful opportunity to be heard before ordering the dismissal of the 300 petition on May 14, 2019” Once again, however, a dismissal is different from a change of lead agency.

And once again, the minor’s counsel did not object based on lack of notice and an opportunity to be heard; thus, she forfeited the minor’s present argument.⁷

Last but not least, due process was satisfied. CFS had filed a written motion to dismiss, so plainly the minor had notice. And the dependency court held a hearing on the motion, at which it heard argument, so plainly the minor had an opportunity to be heard. The dependency court did rule that the minor was not entitled to an *evidentiary* hearing; as we have already held in part II.C, *ante*, however, that ruling was perfectly correct.

IV

FAILURE TO CONSIDER PLACEMENT WITH A RELATIVE

The minor contends that Probation erroneously failed to consider and investigate placement with a relative.

⁷ On the day of the hearing, the minor was AWOL. His counsel did object that proceeding in his absence would deprive him of “notice and an opportunity to be heard.” The dependency court ruled that he had been properly noticed and simply chose not to be present. We do not understand the minor to be challenging this ruling. He is making a very different argument.

The minor complains, in part, about his placement on December 26, 2018, when the original dependency was dismissed. As he acknowledges, however, “the placement decision of December 26, 2018, is not timely for purposes of appeal.”

The minor therefore complains mainly about his placement on and after May 14, 2019, when the second dependency was dismissed.⁸ His trial counsel, however, forfeited this contention by failing to raise it below. (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1252.) She raised only a very different contention — that because Probation had failed to consider placement with family members, the minor should not be placed through probation at all, and that “the remedy to that is release.” Indeed, she *conceded* that, if the minor was placed through probation, “there are no options . . . other than group homes and out-of-state placements and locked placements.”

This is not to say that, but for forfeiture, this contention would have merit.

“[O]nce the court issues a placement order,” “[i]t is the responsibility . . . of the probation agency to determine the appropriate placement” (Welf. & Inst. Code, § 727, subd. (a)(4).) The probation agency may place the minor with a relative, a nonrelative extended family member, a foster home, a licensed community care facility, a foster family agency, a group home, or a short-term residential therapeutic program. (*Ibid.*)

⁸ Probably the relevant date is actually April 30, 2019, when the delinquency court held a dispositional hearing and ordered the minor placed through Probation.

The record here shows that either Probation properly concluded that placement with a relative was not appropriate, or its failure to consider placement with a relative was harmless.

The probation officer's dispositional report noted that the minor had been in two foster placements and ten group homes. "Most of the youth's placements have lasted only a few months due to his poor behavior, which included AWOLS and defiance" His criminal history included six arrests, and it was escalating. Most recently, he had absconded while under house arrest; when located, he was in the company of gang members. He had refused to cooperate with therapy, drug counseling, and a psychiatric assessment. He was enrolled in school but generally did not attend. The report concluded: "The youth has been given numerous opportunities to flourish in the least restrictive setting . . . ; however, he consistently chooses to abscond and commit new law violations."

The report stated that Probation had given first priority to placement with a relative, followed by placement with a foster family, with a group home, and with a residential treatment center. Thus, it appears that Probation did consider placement with a relative, but ruled it out as inappropriate. There was no need to investigate particular relatives, as the minor claims Probation should have done.

Even assuming Probation never actually considered placement with a relative, that failure is harmless. On this record, placement with a relative — any relative — was plainly inappropriate. As the probation officer's section 241.1 report stated, "The youth

would benefit from being placed in a structured environment that provides him with therapeutic services such as substance abuse counseling, individual counseling, family counseling, and anger management classes.” No relative could possibly provide that.

V

DISPOSITION

The orders appealed from are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

CODRINGTON

J.

RAPHAEL

J.