Filed 11/9/09 In re A.G. CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A.G. et al., Persons Coming Under the Juvenile Court Law.	
IMPERIAL COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. LUIS G. et al., Defendant and Respondent; A.G. et al., Appellants.	D054986 (Super. Ct. No. 18729)

APPEAL from an order of the Superior Court of Imperial County, Poli Flores, Jr., Commissioner. Reversed.

Children T.G. and A.G. entered the juvenile dependency system in 2004, when T.G. was two and one-half years old and A.G. was not yet one year old. Nearly five years later, in February 2009, the court granted the Welfare and Institutions Code

section 388[1] petition of alleged father Luis G., declaring that he was entitled to reunification services and vacating an order setting a section 366.26 hearing. The children are now eight and six years old. They appeal. We reverse.

BACKGROUND

In 2004 the Imperial County Department of Social Services (the Department) filed a dependency petition after the children were found in a filthy motel room, dirty and inadequately clothed. Their mother, Diana M., had been arrested and the children were in the care of alleged drug users.[2]

Luis was served with a copy of the petition and notice of the proceedings. The court appointed counsel for him at the detention hearing and he was represented by counsel at all times. Luis was produced from prison for the jurisdictional hearing in May 2004. By October he had been released from prison[3] and attended several more hearings. In December the court reminded Luis that he was still an alleged father. Luis also attended the January 2005 setting of the section 366.26 hearing. His counsel submitted on the Department's report and stated that Luis supported Diana's reunification efforts.

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1 All statutory references are to the Welfare and Institutions Code.

2 The petition also alleged that Luis was incarcerated on a parole violation for his assault of Diana while she was pregnant with A.G. At the jurisdictional hearing the court found the allegations of the petition true "as they relate to [Diana]." It dismissed an allegation that Luis left the children without provision for their care and support.

3 As a condition of parole, Luis was required to complete a 52-week anger management class before having contact with Diana or A.G. The record does not disclose whether he completed that requirement.

Meanwhile, the children were in five detentions and placements before February 2005, when they were moved to the home of Luis's mother, Josephine G. Luis did not attend the section 366.26 hearing in May although the court had ordered him to return.[4] The court again noted that Luis was still an alleged father. It ordered permanent plans of guardianship with Josephine and terminated jurisdiction. In September Luis was arrested for violating parole. In January 2006, with Luis's knowledge, Josephine moved the children to the home of Luis's brother and sister-in-law (the G's) who had previously helped care for the children.

The children strengthened their bond with the G's over the next two years. Luis did not visit the children until September 2006. He telephoned them from time to time, but a call at Christmas in 2007 upset T.G. Due to their sparse contact with Luis, the children never developed a bond with him.

In February 2008 Luis was arrested for another parole violation and incarcerated. In March Diana filed a section 388 petition seeking termination of the guardianship and a new section 366.26 hearing.[5] In April the court appointed new counsel for Luis. In May the court set a section 366.26 hearing and granted Luis's request for visitation. At the hearing Luis's counsel referred to Luis as a presumed father.

In June 2008 Luis was released from prison. In July he attended a hearing after a long period of nonattendance. His attorney repeated that Luis was a presumed father. She

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4 Nor did he attend most of the subsequent hearings.

5 The court denied the petition 10 months later, in January 2009.

requested supervised visits and placement consideration and said she planned to file a section 388 petition. Luis visited the children a few times in mid-2008 after a two-year absence. Their final visit was in July. In August Luis told the social worker that he wanted the children placed with Diana. The G's wanted to adopt the children.

In September 2008 Luis filed his section 388 petition. It asserted that he was and always had been the children's presumed father.[6] The petition asked the court to vacate the order setting the section 366.26 hearing, grant Luis reunification services, and order the children placed with Diana. At a hearing in September Luis's counsel and the Department's counsel stipulated that Luis was a presumed father.[7] At later hearings Luis's counsel repeated that Luis was a presumed father and claimed the court had so found, although there had been no such finding.

The court granted Luis's section 388 petition in February 2009, five months after it was filed. The court vacated the order setting the section 366.26 hearing and directed the Department to prepare a reunification plan for Luis.

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6 In support of this assertion, the petition claimed that Luis was named on the children's birth certificates, but no copies of the birth certificates were attached to the petition. Luis attached a copy of a February 2007 child support order as proof that he was a custodial parent, but in February 2007 the children were juvenile court dependents. The petition stated that the Department "always treated [Luis] as the one and only biological/presumed father." Such treatment would not make Luis a biological or presumed father.

7 The children's counsel did not join in the stipulation.

DISCUSSION

This case proceeded in the juvenile court with fundamental misconceptions about dependency proceedings.[8] The court ignored the overarching principle that dependent children are entitled to a speedy resolution of their status. (*In re Malinda S.*, *supra*, 51 Cal.3d at p. 384.) More than five years after entering the dependency system, T.G. and A.G. are without the security of a permanent home. During that time Luis made virtually no effort to establish a relationship with the children. Only after Diana filed her section 388 petition did Luis claim, through new counsel, that he was automatically entitled to presumed father status.[9] His attorney eventually persuaded the Department's attorney to agree with this erroneous claim, and then advanced the equally erroneous claim that the court had declared Luis a presumed father. The court apparently believed these claims, impliedly found that Luis was a presumed father, and on that basis concluded that he was entitled to reunification services. The court erred.

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8 While not germane to the issues here, the court, Luis's new trial counsel and the Department's counsel all recited that "the allegation *against* [Luis] was dismissed." Dependency cases, however, are not filed against parents; they are filed to protect children. (*In re Malinda S.* (1990) 51 Cal.3d 368, 384, superseded by statute on another ground as stated in *People v. Otto* (2001) 26 Cal.4th 200, 207.) "[A] jurisdictional finding good against one parent is good against both." (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.)

9 Luis never requested a finding or attempted to establish that he was the biological father. (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 959.) Such a finding, of course, is not a prerequisite to presumed father status. (*In re Nicholas H.* (2002) 28 Cal.4th 56, 63.) For that reason, among others, we need not discuss Luis's contention that the juvenile court omitted the required paternity inquiry during the first dependency.

Luis had the burden of establishing presumed father status by a preponderance of evidence. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1653.) Although he was given notice of the proceedings and was represented by counsel, he made no effort to attain presumed father status during the reunification period. He therefore remained an alleged father. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) As such, he was not entitled to reunification services. (*Id.* at p. 451; *In re Jason J.* (2009) 175 Cal.App.4th 922, 932, mod. 2009 Cal.App. LEXIS 1291.) He was only entitled to notice and the opportunity to appear and attempt to change his paternity status. (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) He was accorded those rights.

Moreover, to prevail on his section 388 petition, Luis had the burden of establishing, by a preponderance of evidence, that circumstances had changed and it would be in the children's best interests to vacate the setting order and grant him services. (*In re Vincent M.*, *supra*, 161 Cal.App.4th at pp. 947, 955.) Luis made no such showing. The court abused its discretion by granting his section 388 petition. (*Id.* at p. 956.)

DISPOSITION

The order granting Luis's section 388 petition, ordering reunification services, vacating the section 366.26 hearing, and impliedly finding that Luis was a presumed father is reversed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

IRION, J.