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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

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

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

T.M.,

Defendant and Appellant.

C069349

(Super. Ct. No.
JD231495)

In July 2010, E.M. (minor) was born premature, positive for THC and opiates, and addicted to methadone. At the commencement of dependency proceedings, his mother GB (mother) identified T.M. and K.B. as alleged fathers. At a combined contested paternity and disposition hearing, the juvenile court set aside the declaration of paternity signed by T.M. and adjudged biological father K.B. the presumptive father.

T.M. appeals, contending the juvenile court's finding that K.B. qualifies as a presumptive father under Family Code¹ section 7611, subdivision (d) is unsupported by the evidence. (Welf. & Inst. Code, §§ 358, 395.) As we will explain, we disagree and shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the paternity hearing, T.M. had been living with mother and minor's older half sibling, J.S., for four and a half years. K.B., who mother had known for 15 years, had a three-year sporadic romantic relationship with mother, primarily when T.M. was incarcerated (as he was for several separate periods during the relevant time).

Mother's Pregnancy and Minor's Birth

Around December 2009, mother discovered she was pregnant with minor. K.B. was present when she took the home pregnancy test. Mother took another test in the presence of T.M. Mother led each man to believe that he was minor's biological father.

Upon discovering mother was pregnant, K.B. told his friends and family of the pregnancy and that he was the father. He also went to one of mother's prenatal appointments. T.M., however, was also at the appointment and both men were surprised and

¹ Further undesignated statutory references are to the Family Code.

angry to find the other there. K.B. took a parenting class with mother. K.B. and mother also discussed a 50/50 parenting plan.²

After minor was born, he remained in the hospital for two months for medical reasons. T.M. was present when minor was born and continued, thereafter, to visit him in the hospital. K.B. found out about minor's birth from a friend but was unable to determine where mother and minor were located. About a month later, mother finally told K.B. where minor was and K.B. visited once. He also had minor's name, birth date, and birth weight and length tattooed on his arm.

Mother told K.B. she had left the father's name blank on minor's birth certificate. In fact, mother had put T.M.'s name on the birth certificate and she and T.M. signed a declaration of paternity the day after minor was born.³ Mother also told K.B. that minor bore her last name, but K.B. discovered from minor's medical card that minor bore T.M.'s last name.

When minor was released from the hospital in August 2010, K.B. drove mother and minor home and spent the night. T.M. was incarcerated at the time. From the time K.B. brought minor home from the hospital to the time of T.M.'s release from incarceration in November 2010, K.B. spent approximately 10

² K.B. has another son, aged two, who he visits twice weekly and speaks to daily. T.M. has a nine-year-old daughter who resides with her mother and who T.M. has not seen in six years.

³ In signing the declaration of paternity, mother attested, under penalty of perjury, that T.M. was "the only possible father" of minor.

nights at mother's home with minor and visited approximately 30 times. He visited "[a]s much as [mother] would let [him]." The visits occurred at both mother's house and at K.B.'s house. K.B. and mother were still discussing sharing custody.

Mother's Marriage to T.M.

When T.M. was released in November 2010, mother told K.B. to "fuck off." She married T.M. in December 2010, and made it clear to K.B. that he no longer had any business being in minor's life and told him he could no longer see minor. He believed it would have been a "big problem" if he had defied mother and tried to visit anyway, as she was married to another man.

K.B. did not take legal action to seek custody, however, because he believed everything would work out--that mother was "not going to be mad at [him] forever," had not really meant what she said, and would later allow him to visit again. He had known her for 15 years and they went through regular periods of discord. Indeed, mother admitted she had not actually intended to keep K.B. apart from minor.

Unbeknownst to K.B., a Judgment of Paternity was entered on December 21, 2010, finding T.M. minor's father. By this time, however, mother had doubts that T.M. was minor's biological father. T.M. was incarcerated again in April 2011.⁴

⁴ It appears T.M. was also incarcerated for some period of time in February 2011.

Section 300 Petition and Initial Court Proceedings

On April 14, 2011, after months of failed drug testing by mother and an attempt at informal supervision by the Department of Health and Human Services (Department), a section 300 petition was filed on behalf of minor. Mother initially identified both T.M. and K.B as alleged fathers.

K.B. had been trying, unsuccessfully, to get in contact with mother by calling her or her family at least once a week since February 2011. He appeared at the initial hearing after the section 300 petition was filed and promptly resumed visiting minor.

Neither mother nor T.M. informed the juvenile court or the Department that T.M. was an adjudicated father. K.B. told the Department that he hoped to be proved the father of the minor and "given the chance to care for [him]." The juvenile court ordered paternity testing.

In May 2011 DNA testing established K.B. as the biological father of minor. K.B. promptly requested placement of minor in his home. The Department assessed K.B. and his home and determined minor could be safely placed with K.B. with no additional services. The Department requested the juvenile court order placement of minor with K.B. as the nonoffending parent, under supervision, while offering mother services.

In the interim, the juvenile court received a response to its initial parentage inquiry to the Sacramento County Department of Child Support Services and was informed that T.M. was the adjudicated father of minor. Mother *then* informed the

court that T.M. had signed a declaration of paternity. The juvenile court found T.M. the adjudicated father and K.B. the biological father of minor and appointed counsel for K.B.

Both K.B. and minor moved the juvenile court to set aside the Judgment of Paternity declaring T.M. minor's father. Mother and T.M. opposed the motions.

Paternity and Disposition Hearing

The juvenile court held a contested paternity and disposition hearing on September 19, 20, and 21, 2011. T.M. had again been released from incarceration earlier in the month and had moved in with his brother. K.B., T.M., and mother each testified; the juvenile court expressly found mother's testimony not credible.

After the hearing, the juvenile court set aside the declaration of paternity based on consideration of the relevant factors set forth in Family Code section 7648, subdivisions (a) through (h). The court found: (a) minor would have little recollection of T.M. given the amount of time that had passed since T.M. had last cared for him; (b) only a short time had passed since T.M. signed the paternity declaration; (c) the duration of T.M.'s relationship with minor was about five months, exclusive of the time T.M. was incarcerated; and (d) T.M. took no action to keep the biological father from being determined. With respect to the benefit or detriment to minor, and "all other" factors, the court found that T.M. had not recognized, or protected minor from, mother's drug use and had continued to fail to acknowledge mother's drug abuse problem in

any meaningful way, despite minor's having been born with illegal drugs in his system. T.M. did not cooperate with attempts at informal services, despite mother's obvious drug abuse problem, and testified he was not concerned about her drug use as long as she did not use in front of the children. The court also found T.M.'s numerous parole violations showed poor judgment, given that he was paroled in another county and could not legally be in Sacramento County, yet he had violated parole repeatedly by coming to Sacramento and had received numerous parole violations of increasing severity for absconding. Further, in contrast to T.M., K.B. could provide minor with a stable home and had demonstrated his parenting abilities based on his active and positive relationship with his older son.

The juvenile court then found K.B. to be the presumed father of minor pursuant to Family Code section 7611, subdivision (d). The court found that K.B. had held minor out as his own, as demonstrated by his tattoo and the fact that he had told family and friends he was minor's father. The court further found that, to the extent K.B. had failed to take minor into his home as required by Family Code section 7611, subdivision (d), that failure had been due to mother's actions preventing him from doing so, within the meaning of *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*). The juvenile court also found T.M. qualified as a presumed father under Family Code section 7611, subdivisions (b) and (c), but ultimately selected K.B. as minor's presumed father based on minor's best interests,

for the same reasons supporting setting aside the declaration of paternity.

Thereafter, at disposition, the juvenile court placed minor with K.B., with services to both mother and K.B.

DISCUSSION

T.M. contends the juvenile court erred in finding K.B. the presumed father of minor.

I

The Law

"The dependency system recognizes four classes of fathers: alleged, natural, presumed, and de facto." (*In re E.O.* (2010) 182 Cal.App.4th 722, 726.) "Only presumed fathers are entitled to reunification services and to possible custody of the child. [Citation.] In order to become a presumed father, a man 'must' fall within one of the categories enumerated in . . . section 7611. [Fn. omitted.] [Citations.]" (*In re E.O., supra*, 182 Cal.App.4th at pp. 726-727.)

Here, the juvenile court found K.B. to be a presumed father as enumerated in section 7611, subdivision (d)--that he "receive[d] a child into his home and openly h[eld] the child out as his natural child." (§ 7611, subd. (d); *In re Nicholas H.* (2002) 28 Cal.4th 56, 58.)

"A man who claims entitlement to presumed father status has the burden of establishing by a preponderance of the evidence the facts supporting his entitlement. [Citation.] '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.” [Citation.]” (*In re J.O.* (2009) 178 Cal.App.4th 139, 147.) We review the juvenile court’s findings for substantial evidence. (*In re A.A.* (2003) 114 Cal.App.4th 771, 782.)

II

Analysis

In this case, it was undisputed that K.B. told friends, family and “anyone that would listen” that he was minor’s father as soon as he discovered mother was pregnant. He continued to hold minor out as his own after birth, going so far as to tattoo minor’s name, birthdate, birth weight and length on his arm. While there may be other, perhaps more conventional, methods to publically declare one’s child as one’s own, K.B.’s tattoo was significant.

The statute also generally requires that a father physically receive the child into his home. (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051.) But where the father could not do so because of forces beyond his control, such as the mother’s actions to thwart him or the child’s removal by a county’s department of social services, the father’s failure to receive the child into his home does not necessarily defeat a claim of presumed fatherhood under section 7611, subdivision (d). (*In re Andrew L.* (2004) 122 Cal.App.4th 178, 191; *In re Jerry P.* (2002) 95 Cal.App.4th 793, 807, 811; see *Kelsey S.*, *supra*, 1 Cal.4th at p. 825.) The fundamental question under section 7611, subdivision (d) is whether the alleged father has “promptly come[] forward and demonstrate[d] a full commitment

to his parental responsibilities -- emotional, financial, and otherwise' [Citations.] The focus is on whether the natural father 'has done all that he could reasonably do *under the circumstances*' to demonstrate his commitment to the child. [Citations.]" (*In re Andrew L.*, *supra*, 122 Cal.App.4th at p. 191.)

Mother and K.B. never lived together. (RT 119) But K.B. *did* stay some nights with minor and also received minor into his home for visitation. (C.f. *In re A.A.*, *supra*, 114 Cal.App.4th at pp. 786-787.) To the extent K.B. did not receive minor more completely into his home or otherwise fully establish his paternal role, the record supports the juvenile court's finding that he was prevented from doing so by mother's actions.

During pregnancy, mother and K.B. discussed sharing custody of minor. K.B. visited minor in the hospital once he was able to ascertain where minor was located, and brought mother and minor home upon minor's discharge. Thereafter, he visited very regularly (30 times in approximately three months) and as often as mother would allow, including 10 overnight visits. The visits occurred in both mother's and K.B.'s homes. During this time, mother and K.B. were still discussing shared custody.⁵ This arrangement continued until T.M. was released from

⁵ T.M. makes much of K.B.'s testimony that he had not wanted "full" custody--meaning to mother's exclusion--prior to the initiation of these dependency proceedings. This fact is not significant to our analysis. Further, K.B. *did* seek placement promptly after these proceedings were initiated.

incarceration and mother profanely severed contact with K.B. For the next few months, prior to the initiation of these proceedings, K.B. tried to contact mother at least weekly but was unsuccessful.

While K.B. did not take immediate legal action to resume contact with minor, the juvenile court could reasonably find that excusable under the circumstances. K.B. had known mother for 15 years and they had a conflicted relationship that had repaired itself in the past. K.B. did not believe mother really intended to sever his relationship with minor and mother admitted that she did not. K.B. had no knowledge of T.M.'s adjudicated paternity. K.B. testified that, prior to the dependency proceedings, he never thought his custody rights were at risk or that T.M. wanted to take away his right to be minor's father. K.B. had a stepfather and testified that he believed T.M. and minor would have that same relationship.

T.M. relies on mother's testimony to characterize K.B.'s visits with minor as primarily visits with *her*, as well as to diminish the quality of K.B.'s contact with minor during those visits and claim K.B. shunned opportunities for more contact with minor. But the juvenile court expressly disbelieved mother's testimony, finding her self-serving, guarded, and not fully disclosing.

In sum, we find substantial evidence supports the juvenile court's finding that K.B. qualifies as a presumptive father under Family Code section 7611, subdivision (d).

DISPOSITION

The judgment is affirmed. To the extent that the Judgment of Paternity finding T.M. minor's father has not yet been vacated, the trial court is directed to vacate the Judgment of Paternity.⁶

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

HOCH, J.

⁶ We are unable to determine from this record whether the Judgment of Paternity was properly vacated after the declaration of paternity was set aside.