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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

E. C.,

Plaintiff and Respondent,

v.

J. J.,

Defendant and Appellant.

E054125

(Super.Ct.No. HED017064)

OPINION

APPEAL from the Superior Court of Riverside County. Irma Poole Asberry,
Judge. Reversed.

Law Offices of E. Toby Bowler and E. Toby Bowler; Tenner Johnson and J. Craig
Johnson for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

For years, defendant and appellant J.J. (Defendant) has been forced to defend
himself in litigation brought by A.T. (Mother) regarding plaintiff and respondent E.C.
(Child). Mother engaged in extramarital relations with Defendant, which resulted in the

birth of Child in 2000. After Child's birth, Mother's husband, P.C. (Husband), filed for dissolution of his marriage to Mother. While the dissolution was pending, Mother, under threat of exposing Defendant's paternity, convinced Defendant to enter into a "confidential" agreement to provide financial support for Child. Separately, Mother settled her dissolution with Husband by agreeing there were only two children born of the marriage. Thus, the settlement did not recognize Child as Husband's responsibility. Nonetheless, neither Mother nor Husband took any legal action to have the paternity of Child declared by the court during the first two years of Child's life.

Over the years, Mother sought increases in child support, among other things, from Defendant. By 2005, Defendant obtained a judgment of nonpaternity (Riverside Superior Court case No. SWD00375), and his counsel then raised the conclusive presumption contained in Family Code¹ section 7540 in defense of Mother's various child support actions. Because the marital settlement agreement acknowledged only two children, not three, Husband was not providing child support for Child. Thus, when Defendant ceased providing child support, Mother was not receiving any financial support for Child from her father, alleged, presumed or biological. After running out of options available for her to seek child support from Husband and Defendant, Mother had Child initiate this current action against Defendant, and later Mother and Husband, via

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

joinder, for the purpose of establishing paternity, seeking child support, attorney fees and costs.

Despite the previous orders and judgments regarding the adult parties to this litigation, the trial court found that Child was entitled to file a separate paternity action in order to avoid being rendered fatherless. Accordingly, the court appointed a guardian ad litem and counsel to represent Child. Prior to ruling on the substantive issue of paternity, on May 25, 2011, the court ordered that (1) Defendant pay Child's attorney fees in the amount of \$11,884; (2) Mother pay Child's attorney fees in the amount of \$1,500.54; and (3) Husband pay \$0 towards Child's attorney fees because he is indigent.

Defendant appeals, contending the trial court erred in ordering him to pay Child's attorney fees and costs prior to determining the issue of paternity.

I. PROCEDURAL BACKGROUND AND FACTS²

Mother was married to Husband in 1994. The couple separated in May 2000, and four months later Mother gave birth to Child. The birth certificate named Husband as Child's father. In November 2000, Husband filed for dissolution of marriage. In 2001 Mother requested that the Department of Child Support Services (the Department) file a

² In 2007 this court considered issues between Defendant and Mother regarding a confidential agreement entered into between them. (*A.C. et al. v. J.J.* (Mar. 8, 2007, E039609 [nonpub. opn.].) We take judicial notice of our opinion in case No. E039609 filed on March 8, 2007, to the extent necessary to supplement the factual background. Additionally, there is a petition for writ of mandate and/or prohibition pending before this court in case No. E056988. Likewise, we take judicial notice of the record contained in the petition for writ of mandate.

paternity action against Defendant, and such action was filed on March 15, 2001. A few weeks later, Mother and Defendant entered into a confidential agreement to establish child support. The agreement required that (1) Defendant pay \$625 per month to Mother; (2) both parties maintain strict confidentiality with respect to the issues of paternity and the existence and terms of the agreement; and (3) “the parties did not intend to file suit or other legal proceedings against each other regarding paternity, child support or custody.” On May 16, 2001, the paternity action was dismissed.

On April 29, 2002, a judgment for dissolution of marriage between Mother and Husband was entered. Mother and Husband stipulated there were only two children of the marriage. There was no mention of Child. On October 17, 2002, contrary to the agreement between Mother and Defendant, Mother filed a petition to establish paternity against Defendant in Riverside County Superior Court case No. SWD000375. A contested hearing was held on January 9, 2004. The trial court found that Husband was the legal father of Child because he “‘held [Child] out in public places, in public settings to third parties, as being his child’ and had developed a parental relationship with her.” Conversely, the court found there was no parent-child relationship between Defendant and Child. The court invoked its discretionary right to deny the genetic evidence because “‘no notice of motion for genetic testing was brought within the two (2) year period specified by [Family Code], [s]ection 7541(b).’” According to the court, Child “is a child of the marriage between [Mother] and [Husband] while [Mother] was cohabitating with her [Husband] who was not impotent or sterile[;] therefore, [C]hild was conclusively

presumed to be a child of the marriage, which compels the conclusion that [Husband] is [Child's] legal father.” On February 10, 2005, a judgment of nonpaternity was entered declaring that Defendant is not the father of Child.

In March 2005, Mother sued Defendant for breach of contract to furnish support. In July 2007, Mother filed an Order to Show Cause (OSC) to establish child support in the dissolution action between Husband and Mother. In October 2007, summary judgment in Mother's action for breach of contract to furnish support was granted in favor of Defendant. In June 2008, Husband sought to consolidate Mother's prior petition to establish paternity of Child against Defendant with his dissolution case against Mother. Five months later, Mother requested that Child be made a party to the dissolution action and that counsel be appointed for Child. In February 2009, the trial court denied the request to consolidate the paternity case with the dissolution case and appointed counsel for Child. The court also set a hearing on the motion to set aside the February 10, 2005 nonpaternity judgment as to Defendant.

On April 1, 2009, the trial court upheld the judgment of nonpaternity, as well as all previous orders upon law, on the ground that “the two year blood testing time window had expired and thus the court applied the conclusive presumption. There is no legal authority allowing the court to go back in time and set [such judgment] aside.” Nonetheless, the court also found that Husband “was not given the opportunity to be heard and was denied due process in the case issuing the judgment of nonpaternity of [Defendant] and ruling that [Husband] was the father of [Child].” The court ordered the

Department to “open a separate paternity case and be added as a party to the dissolution case.”

On June 23, 2009, Child filed a petition to establish paternity and set aside the prior judgment of nonpaternity as to Defendant and consolidate such case with the current case against Defendant. One month later, Child filed an OSC regarding child support, attorney fees and costs. Child also moved for joinder of Mother. Defendant’s motion to quash Child’s proceedings was denied on the grounds that Child “has standing to bring an action for paternity and support against her parents. The determination of issues between [M]other and [Husband] in prior legal proceedings do not constitute res judicata against the minor child.”

On March 22, 2010, the court heard three motions in Child’s case to establish paternity against Defendant, namely, (1) Child’s OSC to establish child support, attorney fees and costs; (2) Child’s motion for attorney fees and sanctions; and (3) Mother’s OSC regarding performance of Evidence Code section 730 evaluation, attorney fees and costs. It concluded that Child may file a separate paternity action, Child is not bound by the res judicata effect of either the dissolution judgment or Defendant’s nonpaternity judgment, Husband should be joined as an indispensable party, and the court will conduct a paternity trial to resolve the competing paternity presumptions and declare a legal father for Child.

On May 25, 2011, the trial court granted Child's motion for attorney fees, ordering that (1) Defendant pay the amount of \$11,884; (2) Mother pay the amount of \$1,500.54, and (3) Husband pay \$0 because he is indigent. Defendant appeals.

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ORDERING
DEFENDANT TO PAY CHILD'S ATTORNEY FEES IN CHILD'S
PATERNITY ACTION?

According to the record, Child requested attorney fees pursuant to section 3153. Such section is found under Division 8 [Custody of Children], Part 2 [Right to Custody of Minor Child], Chapter 10 [Appointment of Counsel to Represent Child]. If counsel is appointed to represent the "interests of the child in a custody or visitation proceeding" (§ 3150, subd. (a)), then counsel is entitled to reasonable compensation as determined by the court and "paid by the parties in the proportions the court deems just." (§ 3153, subd. (a).) Although Child cited section 3153 in support of her request for fees, the trial court, on its own, invoked the Uniform Parentage Act (UPA), namely, sections 7605, 7635, and 7640, and ordered Defendant to pay the majority of Child's attorney fees. The court cited *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 443 [after the paternity issue had been fully resolved the court awarded of attorney fees in the custody and child support proceedings], *Robert J. v. Catherine D.* (2005) 134 Cal.App.4th 1392, 1399-1400 [after parties stipulated to paternity the court was authorized to award attorney fees for proceedings to determine custody and visitation], and *Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 686 [denial of attorney fee request after paternity issue resolved].

Section 7605 allows for an award of attorney fees in “any proceeding to establish physical or legal custody of a child or a visitation order.” (§ 7605, subd. (a).) Section 7635 allows for the appointment of a guardian ad litem for a child who is a party to any action to determine the existence or nonexistence of a father and child relationship. Subdivision (d) of this same section authorizes appointment of counsel in any proceeding where custody and visitation are at issue. (§ 7635, subd. (d).) Section 7640 allows the court to order payment of reasonable fees of “counsel, experts, and the child’s guardian ad litem, and other costs of the action and pretrial proceedings, including blood tests, to be paid by the parties . . . in proportions and at times determined by the court.

Defendant challenges the trial court’s actions, arguing that (1) sections 3150 and 3153 allow for the appointment of minor’s counsel when there is a conflict between the parents regarding the issues of custody and visitation; (2) section 7605 does not mention the appointment of minor’s counsel but merely allows for an allocation of the fees and costs after determination of paternity in any proceeding where the issues of custody and visitation arise; (3) section 7635 provides for the appointment of minor’s counsel when the issues of custody and visitation arise (§ 7635, subd. (d)); and (4) section 7640 contains a simple fee allocation provision that does not expressly provide for the appointment of minor’s counsel. Defendant bears the burden of showing the court abused its discretion by granting Child’s request for an award of attorney fees. (*Kevin Q. v. Lauren W.*, *supra*, 195 Cal.App.4th at pp. 642, 686.)

Defendant contends that “[i]n an attempt to manufacture authority to appoint counsel, the trial court cited to [Child’s] UPA petition, which requested mediation regarding a parenting plan and reasonable visitation.” However, Defendant argues that the petition may not place visitation and custody in issue before there has been a determination of paternity. According to Defendant, “none of the work performed by minor’s counsel to date deals with custody or visitation issues, much less the specific scope of issues for which minor’s counsel is authorized under . . . section 3151[, subdivisions](b)-(c).” Moreover, Defendant faults the trial court for failing to determine the parties’ ability to pay at the time counsel was appointed, within 30 days after the appointment, or at the next subsequent hearing. (Cal. Rules of Court, rule 5.241(b)(2).) He complains that Child’s counsel failed to file a declaration indicating compliance with California Rule of Court, rule 5.242. Overall, Defendant argues he was “deprived of the right to contest the appointment at the outset.”

Based on the record before this court, we agree with Defendant. To begin with, we note that “if the court determines that a party does not have a parental relationship with the child at issue, then custody, visitation, and support orders are unnecessary. In such a case, the determination of paternity may, in fact, signal that the paternity action has ended.” (*Robert J. v. Catherine D.*, *supra*, 134 Cal.App.4th at p. 1399.) According to the record, the issue of paternity was resolved several years ago when Husband failed to file a motion for blood tests under section 7541 within two years of Child’s birth. Moreover, on at least two different occasions, the trial court considered the issue of

paternity and found that (1) Husband was Child's legal father, and (2) Defendant was not. Nonetheless, Mother continues to come back to the court seeking a gluttonous number of bites at the apple. Her latest attempt is through Child's petition for paternity. However, given the February 10, 2005 judgment of nonpaternity as to Defendant, he has no parental relationship with Child. As such, the trial court abused its discretion in ordering Defendant to pay Child's attorney fees and costs.

III. DISPOSITION

The trial court's ruling of May 25, 2011, as modified on June 7, 2011, which orders Defendant to pay Child's attorney fees, is reversed as to Defendant only. The matter is remanded for the trial court to reconsider its allocation of attorney fees as to the remaining parties. Each party is to bear his/her own attorney fees and costs on appeal.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.