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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.J.,

Defendant and Appellant.

E055547

(Super.Ct.No. J241436)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Stacy A. Moore, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

D.C. (Mother) was married to Na.S (Father) when N.S. was born. R.J., the appellant in this case, claimed to be N.S.'s biological father. At a contested

jurisdictional/dispositional hearing, the juvenile court found that R.J. was the biological father, but not the presumed father, and found that Father was the presumed father. R.J. now claims on appeal as follows:

1. The juvenile court committed reversible error when it failed to find he qualified as a presumed father under Family Code section 7611, subdivision (d).
2. The jurisdictional finding under Welfare and Institutions Code section 300, subdivision (b) that he had a history of drug use was not supported by the evidence.
3. The juvenile court should have granted him, as the biological father, reunification services pursuant to Welfare and Institutions Code section 361.5, subdivision (a).
4. Notice under the Indian Child Welfare Act (ICWA) was deficient.

I

PROCEDURAL AND FACTUAL BACKGROUND

A. *Detention*

On October 28, 2011, four-year-old N.S. and her 22-month-old brother, J.M., who is not a subject of this appeal, were detained by San Bernardino County Children and Family Services (the Department). Father and R.J. were both listed as alleged fathers.

A referral was received by the Department that J.M. had several bruises on his body and what looked like finger marks on his buttocks. N.S. stated that a bruise on J.M.'s back was caused by Mother hitting him with a spoon. Mother admitted that she did hit J.M. She claimed she had been physically abused as a child and by J.M.'s father.

Father was listed as N.S.'s father on her birth certificate. Father and Mother were married at the time N.S. was born. Mother claimed that R.J. had raped her, and she became pregnant with N.S. as a result. Mother had paid for a paternity test, which showed that R.J. was N.S.'s father. R.J. had a history of drug use and had been convicted of marijuana use in 2006.

N.S. reported that Mother kept a large baggie of what could be marijuana and made her own cigarettes. N.S. reported that she had also been hit with belts and hangers.

R.J. submitted an ICWA-020 form stating that he might have Cherokee ancestry. Mother submitted a form that she might also have Indian ancestry.

On November 1, 2011, the Department filed a Welfare and Institutions Code section 300 petition against Mother, Father, and R.J. for N.S. It alleged against Mother under section 300, subdivision (a) that she hit N.S. and N.S.'s sibling. It also alleged for Mother a failure to protect (§ 300, subd. (b)) due to her failure to provide adequate clothing and housing, her illegal drug use, and her history of domestic violence. It was alleged against R.J., who was listed as the biological father, a history of drug use and that he had raped Mother, resulting in the birth of N.S. It was alleged against Father that his ability to parent N.S. was unknown since he could not be located. Finally, it was alleged against Father and R.J. under section 300, subdivision (g) that they failed to provide support and that their whereabouts were unknown.

A hearing was held on November 2, 2011, and R.J. was present. The juvenile court inquired into R.J.'s Indian ancestry, and he responded there was some ancestry on his mother's side of the family. He provided his mother's name, date of birth, and phone

number to the Department. He was instructed to give all contact information regarding any relatives to the court that day.

R.J. requested placement of N.S. with him. He claimed he had been in contact with N.S. for the previous four years. The juvenile court found a prima facie case and ordered N.S. detained, to remain in the custody of the Department. R.J. and Mother were to submit to drug testing. R.J. was granted visitation. R.J. was to be assessed for placement. ICWA notices were given.

B. Proceedings Leading up to Jurisdictional/Dispositional Hearing

In a jurisdictional/dispositional report filed on November 15, 2011, the Department recommended that N.S. remain in the custody of the Department but that R.J. be given family reunification services. R.J. denied that he raped Mother and claimed that she only said that because she was married to Father when the paternity results were received.

The Department reported that R.J. had a history of drug use and had been convicted of drug use in March 2006. On November 7, 2011, R.J. reported he had not used marijuana for two to three months. However, a drug test from that day was positive for marijuana.

The Department had tried to contact R.J. on four separate occasions but was unsuccessful. N.S. had a complication with her eye. R.J. claimed he had taken her for treatment two years prior and was told she needed surgery, but he had done nothing to get her the surgery. Mother claimed N.S. just needed to wear glasses to correct the problem. Mother also tested positive for marijuana on November 8, 2011.

R.J. claimed that N.S. had lived with him for five months two years prior. R.J. lived with his mother. He and his mother had had a long history of contacts with the Department when he was a child, including a lack of medical treatment for a mass on R.J.'s arm that resulted in numerous broken bones. R.J. was unemployed.

R.J. requested a contested jurisdictional/dispositional hearing on the issues of paternity and the allegations in the Welfare and Institutions Code section 300 petition. Mother also requested a contested hearing.

A first addendum report was filed in anticipation of the contested hearing. The recommendation was that N.S. be placed in out-of-home care and that Mother receive reunification services. N.S., her brother, and a newborn baby sister were all living with a maternal aunt.

According to the addendum report, R.J. had given the Department an address in Victorville where he alleged he lived. A Victorville Sheriff's detective had attempted to go to the location to investigate Mother's claim that she was raped by R.J., but R.J. did not live there. A social worker interviewed R.J. on November 7, 2011. A paternity test that R.J. claimed to have taken was not given to the Department. R.J. was not listed on N.S.'s birth certificate; Father was listed as the father, and he was married to Mother at the time of the birth. R.J. asked the social worker when he would be allowed to apply for welfare for N.S. He was informed he could not receive welfare since N.S. was not in his custody. The social worker had been unable to get in touch with R.J. since that interview. Father's whereabouts were still unknown.

R.J. had attended one visit with N.S. since the beginning of the dependency proceedings. He had not attended or requested additional visits. Mother claimed that N.S. had never lived with R.J.

The Department filed points and authorities regarding paternity. It relied upon Family Code sections 7540 and 7541.¹ It claimed that R.J. could not challenge Father's presumed-father status because there was a conclusive presumption under Family Code section 7540 since Father was married to and cohabitating with Mother when N.S. was born. Further, there was no evidence that R.J. or Mother had requested that a blood test on N.S. be performed within two years of N.S.'s birth, as required by Family Code section 7541. The Department requested that R.J. be declared a nonparty to the action and entitled to no services.

C. *Contested Jurisdictional/Dispositional Hearing*

At the contested hearing conducted on January 24, 2012, the juvenile court addressed the paternity of N.S. It asked R.J.'s counsel to produce the paternity testing documents that he claimed to possess. Counsel for R.J. stated that she had been advised by R.J. that those documents were in storage and could not be retrieved for the hearing.

¹ Family Code section 7540 provides as follows: "Except as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." Family Code section 7541, subdivision (a), provides for an exception, notwithstanding section 7540, that "if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed . . . , are that the husband is not the father of the child, the question of the paternity of the husband shall be resolved accordingly." Subdivision (b) of Family Code section 7541 requires that such blood tests be performed within two years of the child's birth.

However, counsel argued that Mother agreed that R.J. was the biological father and that such paternity testing had occurred.

R.J.'s counsel argued that if R.J. was the biological father, the juvenile court could grant him reunification services if it was in N.S.'s best interests. R.J.'s counsel agreed that although R.J. might not be able to fully rebut the presumption that Father was the presumed father, he should be offered family reunification services. The paternity issue could be dealt with at a later time.

The juvenile court reiterated that there were no documents for the paternity testing. R.J. then asked for a continuance to obtain the documents. The juvenile court denied the request for a continuance as R.J. had had ample opportunity to provide the documents and was well aware that the hearing was being held to establish paternity.

The juvenile court then asked if Family Code section 7611 (which provides the standards for establishing a presumed father) was applicable in the instant case rather than the conclusive presumption in Family Code section 7540. The Department argued that Family Code section 7611 applied when there was no marriage involved and that section 7540 should apply. In the instant case, Mother and Father were married, Father was at the hospital when N.S. was born, and Father signed the birth certificate. R.J. believed that Family Code section 7611 should be applied.

The juvenile court felt it was in the position to "take some limited testimony regarding the paternity issues, just on the very narrow basis of the factors for the 7611. I do believe that the presumption would apply. [¶] . . . [P]erhaps some of those factors

under 7611 may have some impact for the court's determination as to whether or not it has been rebutted."

Mother was called to testify. She was currently married to Father. Mother and Father got together in 2004 and were together when N.S was conceived. They were married one month prior to N.S.'s birth to ensure that Father would be N.S.'s legal father. Mother insisted that she had been raped by R.J. and had wanted to get an abortion. Father and his family convinced Mother to have the baby. Father was with Mother at the hospital for N.S.'s birth and signed the birth certificate. Father treated N.S. as his own child during the time he and Mother were together.

Mother and Father were no longer together, but they were not legally divorced. In December 2007, Mother had run into R.J. at a grocery store. Mother told R.J. they should get a paternity test. The test results indicated that he was the father. R.J. became involved in N.S.'s life for a period of time. N.S. called R.J. "daddy." She would stay with R.J. on weekends at a home belonging to R.J.'s girlfriend. However, Mother explained that R.J.'s involvement with N.S. in the prior two years had been minimal. R.J. had never financially supported N.S. Mother had tried several times to get R.J. to put himself on N.S.'s birth certificate as the father, but he had refused.

R.J. testified. He had no idea that he had fathered N.S. until he ran into Mother at the store. He did not know that Mother was married. He immediately agreed to take a paternity test. He started taking care of N.S. as soon as he found out he was the father. He provided clothes for her and would take her out with him. R.J. and Mother had an

informal arrangement for visitation. He consistently visited with N.S. R.J. introduced N.S. to his family as his daughter.

R.J. claimed he was consistent with visitation during the prior two years, but it was difficult because Mother kept moving and would not tell R.J. when she moved. R.J. recalled that Mother had talked to him about putting his name on N.S.'s birth certificate, but he did not file the papers because he claimed he lost touch with Mother and N.S. R.J. was willing to pay child support.

R.J. admitted that he was aware that Mother was pregnant and that he did nothing to become the legal father during the pregnancy. R.J. and Mother were together only one night. R.J. had made no attempt to determine if Mother was pregnant after they had sexual relations. R.J. claimed he had seen N.S. eight times in the prior two years.

At the close of evidence, the Department argued that Father had a conclusive presumption of paternity. Even if there was a rebuttable presumption under Family Code section 7611, R.J. could not overcome it. R.J. knew Mother was pregnant and never inquired if he was the father. R.J. did not seek to have custody and did not petition the court for a change on the birth certificate. R.J. was a mere visitor who came in and out of N.S.'s life. Moreover, the court had not been given a paternity test confirming that R.J. was in fact the biological father.

R.J. argued that he had rebutted the presumed status of Father, who was only married to Mother and was named on the birth certificate. Relying on Family Code section 7611, subdivision (d), R.J. received N.S. into his home and held her out as his

own, and by clear and convincing evidence that rebutted the presumption. Mother and R.J. acknowledged the paternity test.

R.J.'s counsel indicated that the case would be different if Father were present and asking to maintain a relationship with N.S. By finding Father the presumed father and terminating R.J.'s relationship, N.S. would essentially be fatherless.

In making its ruling, the juvenile court acknowledged the presumption in Family Code section 7540 and that Mother and Father were cohabitating at the time of N.S.'s conception, and Father had not been impotent or sterile at that time. The juvenile court noted, however, "[T]he court is in the position in some instances, and the court does believe that this would be one of those instances, where 7540 of the Family Code would not necessarily have to apply. That the State's interest would be in promoting marriage and supporting the family unit would not necessarily be served by that event." It noted that Father was not present and had not made himself available to parent N.S.

The juvenile court then looked to the fact that R.J. had made minimal efforts to establish a relationship with N.S. R.J. failed to do anything to establish his paternity, he did not take financial responsibility for N.S., and he did not visit consistently. The juvenile court ruled, "Essentially the court has looked at the fact that he has made minimal efforts to establish a relationship with this minor. For that reason the court will not declare him the presumed father. We'll allow the presumption to stand under 7540, that [Father] is the presumed father of the child." R.J. was declared the biological father of N.S. The juvenile court tentatively denied reunification services to R.J.

Mother waived her right to a hearing on the petition and entered a waiver of her rights. R.J. entered an admission of the section 300, subdivision (b) allegation, and the remaining allegations against him in the section 300 petition were dismissed. He was listed as the biological father. The juvenile court found some of the allegations in the petition true against Mother and dismissed other findings.

R.J. presented his own testimony to convince the juvenile court to grant him reunification services. R.J. did not enter a drug treatment program after testing positive for marijuana because he did not know if he would be provided money to do the program. He was willing to continue to drug test, enter a drug program, and abstain from smoking marijuana. He claimed to have missed visits with N.S. because his car broke down. He had not seen N.S. for three weeks. R.J. said he would be consistent with visitation and would attend a parenting class.

The Department admitted that it had no authority for the fact that a biological father was not entitled to services when there was a presumed father, but it believed that the intent of the law would be that no services be offered. The juvenile court denied services to R.J., finding it was not in N.S.'s best interest. R.J. was awarded monthly visitation. R.J. appeals from the jurisdictional/dispositional order.

II

PRESUMED FATHER STATUS

R.J. contends on appeal that the juvenile court erred when it denied him presumed father status pursuant to Family Code section 7611, subdivision (d).

“The Uniform Parentage Act (the Act), . . . [embodied in] Family Code section 7600 et. seq., establishes the framework by which California courts make paternity determinations. It provides for conclusive and rebuttable presumptions of paternity.” (*In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1113-1114, fn. omitted (*Kiana A.*)). A child can have only one presumed father. (*Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1223.)

As stated, *ante*, Family Code section 7540 provides for a conclusive presumption of paternity when a child is born into a marriage. “Under section 7541, requests for blood tests to rebut the conclusive presumption of paternity must be made within two years of the child’s birth and can only be made by the husband, the child, the mother or a ‘presumed father’ as defined in sections 7611 and 7612.” (*Kiana A., supra*, 93 Cal.App.4th at p. 114.)

Father was married to Mother at the time of N.S.’s birth and appears on the birth certificate. R.J. concedes he did not have a paternity test completed within the two-year window set forth in Family Code section 7541. However, R.J. claims there was no evidence that Mother and Father were cohabitating at the time of N.S.’s conception. That supposition is belied by the record in this case. Mother clearly testified that she and Father were living together at the time of conception and that he was capable of having children. Father qualified as the presumed father under Family Code section 7540.

“The conclusive presumption of [Family Code] section 7540 is a social policy statement made by the Legislature to protect the integrity of the family unit.” (*Kiana A., supra*, 93 Cal.App.4th at p. 1115.) However, “[a] court may refuse to apply the

conclusive presumption when its underlying policies are not furthered. [Citations.]” (*Ibid.*) Here, the juvenile court considered whether R.J. was a presumed father under Family Code section 7611, subdivision (d) in light of the fact that Father had not presented himself in court to take responsibility for N.S.

Under Family Code section 7611, “a man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father unless he both ‘receives the child into his home and openly holds out the child as his natural child.’ [Citation.]” (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051, italics omitted, citing Fam. Code, § 7611, subd. (d).) In order to demonstrate a full commitment to his parental responsibilities, the biological father must immediately attempt to assume full parental responsibilities as soon as he reasonably knows of the pregnancy. (*In re Julia U.* (1998) 64 Cal.App.4th 532, 541.) “A court should also consider the father’s public acknowledgment of paternity, his payment of pregnancy and birth expenses commensurate with his circumstances, and prompt legal action to seek custody of the child. [Citation.]” (*Ibid.*)

In reviewing a juvenile court’s determination regarding presumed father status, “we review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the order. [Citation.] We do not reweigh the evidence but instead examine the whole record to determine whether a reasonable trier of fact could have found [otherwise].” (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1650.)

Here, R.J. admitted that he was aware that Mother was pregnant and obviously knew he had engaged in sexual relations with her, but he failed to make any effort to determine if he was the father of N.S. It was not until Mother advised him that he might be the father that he agreed to take a paternity test. After he took the paternity test, he did form a relationship with N.S. However, he never paid any support for her. Further, he made absolutely no effort to obtain custody of her. In fact, he failed to take the necessary steps to have him listed as her father on her birth certificate. During the dependency proceedings, R.J. had only one visit with N.S. and did not request further visitation. There is nothing in the record to conclusively show that Mother thwarted his efforts to see N.S.

As such, the juvenile court properly concluded that R.J. had not attained presumed father status. Even if the juvenile court felt that the conclusive presumption of Family Code section 7540 should be disregarded because Father was not present in the proceedings, it does not follow that R.J. qualified as a presumed father. As such, the juvenile court properly concluded that R.J. was only a biological father.

III

REMAINING ISSUES ON APPEAL

We briefly address R.J.'s remaining issues raised on appeal: (1) the jurisdictional finding pursuant to Welfare and Institutions Code section 300, subdivision (b), that his drug use impacted his ability to care for N.S., was not supported by the evidence; (2) he was improperly denied reunification services; and (3) the ICWA notice was insufficient.

The Department contends that R.J. does not have standing to raise the aforementioned issues because he is merely a biological father. “[A] biological father’s rights are limited to establishing his right to ‘presumed’ father status, and the court does not err by terminating a biological father’s parental rights when he has had the opportunity to show presumed father status and has not done so. [Citation.]” (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.) However, “[a]ny person having an interest recognized by law in the subject matter of the judgment, which interest is injuriously affected by the judgment’ is considered a ‘party aggrieved’ for purposes of appellate standing.” (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1035 [holding grandmother, although not a party, has standing to seek appellate review of the denial of her request for placement].) Arguably, R.J. has not been injuriously affected by the judgment because he could not establish that he was a presumed father and in all probability would not have been granted custody. However, we choose to briefly review R.J.’s claims, as they are easily disposed of.

As for the jurisdictional finding, R.J. admitted the allegation against him made in the Welfare and Institutions Code section 300, subdivision (b) petition. He cannot claim on appeal that there is insufficient evidence when he admitted the allegation.

Moreover, “a jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. [Citation.] This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent. [Citation.]” (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.) “[A]n appellate

court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence.

[Citations.]” (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492.) Here, R.J. does not challenge the juvenile court’s finding that it had jurisdiction over N.S. based on Mother’s conduct. We need not reach R.J.’s challenge to the juvenile court’s jurisdictional finding.

As for the denial of reunification services, only a presumed father *is entitled* to reunification services under Welfare and Institutions Code section 361.5. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) If services would benefit the child, they can be granted to a biological father. (Welfare & Inst., § 361.5, subd. (a).) We fail to see how reunification services in the instant case would have benefitted N.S. R.J. failed to establish that he was a presumed father and could not attain such status. R.J. had done nothing to support N.S. and had only brief periods where he was engaged in a relationship with her. He had recently failed a drug test and had not actively sought visitation with N.S. There was little or no evidence that granting services to R.J. would benefit N.S.

Finally, as to the ICWA notice, at the time of the jurisdictional/dispositional hearing, the juvenile court determined that ICWA *might* apply. ICWA notice was sent to the Cherokee Nation in Oklahoma based on R.J.’s claim of Cherokee ancestry. On November 16, 2011, the Department was sent a letter from the Cherokee nation requesting further information. The juvenile court noted that ICWA notice had been initiated, and there is nothing in the record before this court as to what further information was or was going to be provided to the Cherokee tribe. At this point, it is

premature to find the notice was inadequate as it is impossible to determine from the record what further notice was given. We reject R.J.'s claim.

IV

DISPOSITION

The orders of the juvenile court are affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.