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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

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

KINGS COUNTY HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

A.C.,

Defendant and Appellant.

F072389

(Kings Super. Ct. No. 05JD0034)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kings County. Jennifer Lee Giuliani, Judge.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Colleen Carlson, County Counsel, and Rise A. Donlon, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Franson, J., and, Peña, J.

A.C. is the stepfather of Joseph E. the subject of this appeal. A.C. (appellant) appeals from the August 25, 2015, order of the juvenile court denying his petition brought under Welfare and Institutions Code section 388,¹ seeking to be designated Joseph E.'s presumed father and to be provided services to reunify with him. We affirm.

PROCEDURAL AND FACTUAL SUMMARY

In August 2014, then five-year-old Joseph E. was taken into protective custody along with his newborn half sister, J.M., because their mother, Ana, used methamphetamine throughout her pregnancy with J.M. Ana identified Adam S. as Joseph E.'s biological father.² She said Adam S. was not involved in Joseph E.'s life. She identified appellant (her boyfriend) and Joseph M. (her "soon to be ex husband") as potential fathers for J.M.

Appellant appeared at the detention hearing conducted pursuant to a dependency petition filed by the Kings County Human Services Agency (agency) on behalf of Joseph E. and J.M. and the juvenile court appointed him counsel. He told the court he believed he was J.M.'s father. He did not claim to be Joseph E.'s father, but said "I am his daddy." The juvenile court found Adam S. to be Joseph E.'s alleged father and Joseph M. and appellant to be J.M.'s alleged fathers. The court ordered genetic testing for appellant and Joseph M.

In September 2014, the agency filed its report for the jurisdictional/dispositional hearing ("the combined hearing") and recommended the juvenile court exercise its dependency jurisdiction over the children and deny Ana reunification services (§ 361.5, subd. (b)(10)).

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² The Kings County Human Services Agency subsequently verified Adam S.'s biological paternity.

The juvenile court convened the combined hearing in September 2014. Appellant appeared and advised the juvenile court through his attorney that he wanted to establish biological paternity as to J.M. and possibly presumed father status as to Joseph E. The juvenile court adjudged the children dependents and continued the hearing to October 2014 to rule on disposition and paternity.

In October 2014, the juvenile court ordered the children removed from Ana and denied her reunification services as recommended. The court also set a section 366.26 hearing for February 2015. The court continued the paternity hearing to December 2014 because the results of genetic testing had not been received. Appellant's attorney asked the court to find that appellant was Joseph E.'s presumed father as appellant claimed he provided support for Joseph E., resided with him for years and was the only father he knew. The court declined to do so but set the December 2014 paternity hearing as a contested hearing.

By December 2014, genetic testing had established that Joseph M. was J.M.'s biological father. At the contested hearing, the juvenile court found Joseph M. to be J.M.'s presumed father, vacated its section 366.26 hearing as to J.M. and ordered reunification services for Joseph M. The court found that appellant was not J.M.'s father, excluded him from any further proceedings and relieved his attorney.

In January 2015, Ana's attorney filed a section 388 petition,³ asking the juvenile court to change its order and grant her reunification services as to Joseph E. The juvenile court granted Ana a hearing on her petition.

Meanwhile, the agency filed its section 366.26 report, advising the juvenile court that Joseph E. was not considered adoptable at that time because his caretaker was not

³ "A section 388 petition" refers to the preprinted form "Request to Change Court Order" (JV-180) which a petitioner is required to file in order to request a modification. (Cal. Rules of Court, rule 5.570(b).)

willing to adopt him and because he had behavioral problems. His maternal grandparents were interested in adopting him but were still in the process of being evaluated for placement. The agency recommended the juvenile court place Joseph E. in long-term foster care while it continued to search for an adoptive home. The agency also recommended the juvenile court deny Ana's section 388 petition.

The juvenile court continued the section 366.26 hearing and convened it in March 2015 along with the hearing on Ana's section 388 petition. Appellant was present in the courtroom and introduced as Ana's fiancé. The court acknowledged that appellant wanted to request presumed father status based on his relationship with Joseph E. The court stated that he would first have to file a "JV-505" ("Statement Regarding Parentage (Juvenile)") (hereafter "JV-505"). The court continued the hearing to April 2015.

Ana testified she was in a residential drug treatment program in January 2009 when she gave birth to Joseph E. At the time, she was married to Aaron R. She graduated from the program the following February and she and Joseph E. moved in with her mother. Ana stayed with her mother for two months and then left to live with appellant, leaving Joseph E. with her mother. Over the ensuing six years, Ana was in and out of custody. During that time, Joseph E. was in her care for a total of nine months cumulatively. At all other times, he was in the care of her mother or sister. At the conclusion of the hearing, the juvenile court denied Ana's section 388 petition and ordered Joseph E. to remain in long-term foster care with the eventual goal of adoption.

In June 2015, appellant filed a section 388 petition asking the juvenile court to find that he was Joseph E.'s presumed father and order reunification services for him. He attached a JV-505 in which he stated that Joseph E. lived with him from February 2009 to August 2014 and that he (appellant) told his parents, siblings, aunts, uncles and friends that Joseph E. was his child. He stated that he picked Joseph E. up from school and daycare and played sports with him, read to him and took him to the movies. He also stated he provided food, money, toys and clothes for Joseph E. and that Joseph E.

celebrated Christmas, Thanksgiving, Easter and birthdays with his family. He stated “If I was put into a room with any other person and you ask my son Joseph to go to your Daddy, he would come straight to me. Also, I [met] Joseph [E.] when he was a month old. He is now 6 [years] old and I have raised him since he was 4 month[s] old.”

The agency recommended the juvenile court deny appellant’s request for presumed father status. In an interim report, the agency stated that, although Joseph E. identified appellant as “dad,” he also viewed Joseph M. and his “daddy in jail (Adam)” as fathers, also. The agency also informed the court that appellant and Ana had recently married and opined that providing appellant reunification services would not serve Joseph E.’s best interests. If the court did so, the agency cautioned, Joseph E. could potentially be placed with Ana even though she was denied reunification services.

In August 2015, the juvenile court conducted a contested hearing on appellant’s section 388 petition. Appellant testified that in 2011 he moved into the home of Joseph E.’s maternal grandmother where Joseph E. was already living. He lived with Joseph E. there for a year in 2011 to 2012. Prior to 2011, he visited and played with Joseph E. every day, explaining that he and Ana had been together since 2009. In 2012, he moved out of the grandmother’s home but maintained a relationship with Joseph E. and saw him twice a week for a while and then once a month. He referred to Joseph E. as his son and Joseph E. referred to him as “Daddy.” Appellant also told his family and friends that Joseph E. was his son. However, he, his family and friends always knew that Joseph E. was not his biological child. He provided financial support for Joseph E. by buying him shoes and clothes and whatever else he wanted. He also provided Ana money whenever he had it to take care of Joseph E. He conceded, however, that Joseph E.’s maternal grandmother provided most of Joseph E.’s support. He had not filed any documents with the court seeking custody or visitation.

The juvenile court denied appellant’s request to be designated Joseph E.’s presumed father. This appeal ensued.

DISCUSSION

A parent may, upon grounds of change of circumstance or new evidence, petition the juvenile court under section 388 in the same action in which the child was found to be a dependent child “for a hearing to change, modify, or set aside any order” previously made. (§ 388, subd. (a)(1).) In bringing the petition, the parent has the burden of proving by a preponderance of the evidence that changed circumstances exist and that the proposed modification would serve the child’s best interest. (*In re A.A.* (2012) 203 Cal.App.4th 597, 611-612.)

The new evidence or changed circumstances that appellant sought to establish was that he qualified as Joseph E.’s presumed father, which would entitle him to reunification services. He further sought to prove that providing him reunification services would serve Joseph E.’s best interests because they had a father/son relationship.⁴ The juvenile court found appellant failed to prove that he qualified as a presumed father. We concur.

Family Code section 7611 sets forth the presumptions under which a man may be declared a presumed father. Appellant claims a presumption of paternity under subdivision (d) of the statute which provides: “A person is presumed to be the natural parent of a child if the person meets the conditions ... in any of the following subdivisions: [¶] ... [¶] (d) The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.” (Fam. Code, § 7611, subd. (d).) A man seeking presumed father status has the burden of proving the foundational

⁴ Though not raised in this appeal, we question whether a section 388 petition was the proper action for establishing presumed father status in this case. The juvenile court did not make any findings or orders as to appellant vis-à-vis Joseph. Further, the finding appellant identified for modification in the JV-180 was the juvenile court’s finding that Adam S. was Joseph E.’s alleged father. Since a finding that appellant was Joseph E.’s presumed father would have no effect on the court’s finding that Adam S. was Joseph E.’s alleged (or even biological father), there was not technically an order or finding subject to change or modification.

facts of the presumption by a preponderance of the evidence. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1653.)

Appellant contends he proved the foundational facts to establish the presumption, citing evidence the maternal grandmother's house was his home, that he received Joseph E. into his home in 2011, and that he told his family and friends Joseph E. was his son. The juvenile court, however, found appellant served "some form of parental father role" to Joseph E. but that it did not rise to the level of presumed father.

When the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, the question on appeal is whether the evidence was sufficient, as a matter of law, to compel a finding in favor of the appellant. "Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was sufficient to support a finding.'" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Thus, in order to establish there was new evidence regarding his paternity, appellant had to show that the undisputed facts compelled a finding he was Joseph E.'s presumed father as a matter of law. (*Id.* at pp. 1528-1529.)

The undisputed facts in this case do not compel a finding appellant is Joseph E.'s presumed father. Appellant moved into the maternal grandmother's home in 2011 and lived there with Joseph E. for an unspecified period of time in 2011 to 2012. However, Joseph E. was already living in the home and being cared for and financially supported by the grandmother when appellant moved in. Such evidence does not compel a finding that appellant "received" Joseph E. into his home. Further, though appellant referred to Joseph E. as his "son," appellant and his family and friends knew at all times that Joseph E. was not his biological child. Thus, the court was not compelled to find that appellant held Joseph E. out as his "natural" child.

Having concluded appellant failed to establish presumed father status as a matter of law, we need not address his contentions the juvenile court erred in considering other factors in reaching its finding and whether reunification services would serve Joseph E.'s best interest.

DISPOSITION

The order is affirmed.