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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ABDUL S.,

Plaintiff and Appellant,

v.

RU. A.,

Defendant and Respondent.

G045199

(Super. Ct. No. 10P000548)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lon R. Hurwitz, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Abdul S., in pro. per.; and Jazmine Pelayo for Plaintiff and Appellant.

Law Offices of Brian G. Saylin and Brian G. Saylin for Defendant and Respondent.

* * *

Appellant Abdul S. filed a petition to establish his paternity of R.A. Respondent Ru. A., R.A.'s mother, filed a response asking the court to find Abdul is not R.A.'s father. According to Ru., she was separated from her husband from May 2007 to July 2007, she reconciled with him in July 2007, and her husband is the father of R.A., who was conceived in late August or early September 2007. During the trial, Abdul asked for the first time for genetic testing to prove his paternity. At the conclusion of the trial, the court found Ru.'s husband is R.A.'s presumed father and Abdul did not prove by clear and convincing evidence that he qualifies as a presumed father. The court specifically found Abdul's testimony about having accepted R.A. into his home and openly holding her out as his daughter (Fam. Code, § 7611, subd. (a); all statutory references are to this code) was refuted by Ru.'s testimony and did not amount to clear and convincing evidence. The court found Abdul's request for testing was untimely and denied Abdul's petition, finding Abdul did not prove by clear and convincing evidence he qualified as a presumed father. We affirm. (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932.)

I

FACTS¹

Abdul filed a petition to establish his paternity of R.A., the daughter of Ru. just a couple of days before R.A. turned two years old. The trial and the hearing on Ru.'s request for a domestic violence restraining order were held on January 28, 2011.

Ru. testified she separated from her husband in May 2007 and reconciled with him in July 2007. Thereafter she had an ongoing sexual relationship with him and he is neither sterile or impotent. At the time of her testimony Ru. was pregnant with

¹ As the appeal is from a judgment in favor of Rubab, conflicts in the evidence must be resolved in her favor, in compliance with the normal rules of appellate review. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 578, fn. 1.) The following facts are set forth in conformance with this principle of appellate review.

another child by her husband.

Without objection, Ru. said her doctor told her she conceived R.A. at the end of August or the beginning of September 2007. She said she resided only with her husband during that period of time. In Abdul's opposition to Ru.'s request for a domestic violence restraining order, he stated Ru. moved back with her husband in August 2007.

When Ru. was separated from her husband, she lived in an apartment. Abdul cosigned on the lease for the apartment, but Ru. denied Abdul ever lived with her. She said he did not live in the apartment, but he "did come to, like, stay for two, three nights by force." She did not elaborate on what she meant by Abdul's staying "by force." Although the lease for the apartment ran through November 2007, Ru. moved out of the apartment in July and reconciled with her husband. Her father moved into the apartment Abdul cosigned for and remained in the apartment under the lease.

Abdul said he was present at the hospital when R.A. was born and that Ru. told him he was the father. Ru.'s husband, however, is listed as R.A.'s father on her birth certificate and Ru. said she told hospital personnel her husband was the father.

Abdul maintained Ru. became pregnant in September 2007, while she was separated from her husband. On cross-examination, Abdul admitted he stated in his declaration in opposition to Ru.'s request for a domestic violence restraining order that she moved out of the apartment he cosigned for and moved back in with her husband in August 2007. Abdul also admitted he never lived with Ru. after August 2007.

Abdul said Ru. asked him for support of R.A. and he paid support to her, although he said he did not make any payments after June 2, 2010, and he did not have any documentary evidence showing he made any payments. Ru. denied ever receiving any support from Abdul.

Abdul asserted he was a presumed father under section 7611, subdivision (d), as he accepted R.A. into his home and openly held her out as his daughter. He said R.A. lived with him from May 2007 to September 2007, but the court pointed out R.A. was not born until May 2008. Abdul then said he travelled during the week and R.A. lived with him “a couple of times.” When asked what he meant by a couple of times, he replied, “I mean every time I visit her . . . or she visits me, because I was travelling for my job.” He said she stayed with him on weekends. Ru. testified she and R.A. never resided with Abdul for any period of time. Abdul attempted to introduce evidence he babysat R.A. at a shelter where she and her mother were living at some point, but the witness stated she never saw him babysitting.

After both parties rested, the trial court found Abdul did not establish by clear and convincing evidence that he was a presumed father or that Ru.’s husband is not R.A.’s father. The court denied the petition and then took evidence on Ru.’s request for a domestic violence restraining order against Abdul.

II

DISCUSSION

Whether a single man who purportedly fathered a child with a married woman may establish his paternity of the child — or even *attempt* to establish his paternity — is governed by provisions of the Family Code. (*Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36, 43.) A man is presumed to be the father of a child if “[h]e and the child’s natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.” (§ 7611, subd. (a).) If the husband and wife were cohabitating at the time of conception and the husband is not impotent or sterile, the husband’s “paternity would be ‘conclusively’ presumed [citation],” subject to exceptions not relevant here. (*Dawn D. v. Superior Court, supra*, 17 Cal.4th at p. 937, fn. 4; § 7540 [“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”].)

The presumption of the husband’s paternity may be rebutted if the husband and wife were not cohabiting at the time of conception. However, a male claiming to be the father of a child conceived during that period of time must first demonstrate *by clear and convincing evidence* that he qualifies as a “presumed father.” (*Dawn D. v. Superior Court, supra*, 17 Cal.4th at pp. 937-938, citing § 7630, subd. (a), and former § 7631 [repealed by Stats. 2010, ch. 588, § 2, eff. Jan. 1, 2011].) Section 7611 sets forth the requirements for qualification as a presumed father.² If the male fails to demonstrate

² “A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:

“(a) He and the child’s natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

“(b) Before the child’s birth, he and the child’s natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

“(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

“(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

“(c) After the child’s birth, he and the child’s natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

“(1) With his consent, he is named as the child’s father on the child’s birth certificate.

“(2) He is obligated to support the child under a written voluntary promise or by court order.

“(d) He receives the child into his home and openly holds out the child as his natural child.

by clear and convincing evidence that he qualifies as a “presumed father,” he is barred from proceeding any further in his effort to establish paternity, including requiring the mother and child to submit to DNA testing. (*Dawn D. v. Superior Court, supra*, 17 Cal.4th at pp. 937-938.)

Abdul contended below that Ru. was separated from her husband when she became pregnant and that he qualified as a presumed father. R.A. was born in May 2008. According to the evidence at the trial, she was conceived in the last week of August or the first week of September 2007. Ru. testified she reconciled with her husband in July 2007, and lived with him thereafter. Although this evidence was disputed by Abdul, it was sufficient to establish R.A. was conceived while Ru. and her husband were living together as husband and wife. As a reviewing court, “[w]e do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. [Citation.]” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Ru.’s testimony that she moved back in with her husband in July 2007, together with her testimony that he is not impotent or sterile — in fact she was pregnant with another child of his at trial — suffices to invoke the conclusive presumption of her husband’s paternity under section 7540 regardless of the standard of review. (*Kevin Q. v. Lauren W.* (2009) 175 Cal.App.4th 1119, 1136 [substantial evidence standard of review]; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 [“where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law”].)

“(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child’s father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

“(f) The child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied.” (§ 7611.)

But even had the court rejected Ru.'s testimony about living with her husband at the time R.A. was conceived, Abdul's petition would still fail. If Ru. conceived R.A. while she was separated from her husband, Abdul could attempt to establish his paternity *only if* he demonstrated by clear and convincing evidence he qualified as a "presumed father" under the Family Code. (*Dawn D. v. Superior Court, supra*, 17 Cal.4th at pp. 937-938.) "[T]o become a presumed father, a man who has neither married nor attempted to marry his child's biological mother must not only openly and publicly admit paternity, but must also *physically* bring the child into his home." (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051.) "Section 7611, subdivision (d) does not apply unless a child has been physically present for some period of time in his or her father's home" (*In re M.C.* (2011) 195 Cal.App.4th 197, 218.)

Abdul claimed he received the child into his home and openly held her out as his daughter (§ 7611, subd. (d)), but the court found his testimony did not rise to the level of clear and convincing evidence. Ru. denied she and R.A. ever lived with Abdul for *any* period of time. Abdul appeared to change his testimony and he maintained he held R.A. out as his own daughter when he returned to Orange County on weekends from working in other states and babysat R.A. Ru. said she did not recall Abdul ever babysitting R.A. In an effort to prove he babysat R.A., Abdul asked a witness, Sharon Wie, the director of a shelter where Ru. and R.A. apparently stayed at some point in time after R.A.'s birth, whether Wie ever saw him babysit R.A. She said she did not.

The court did not credit Abdul's testimony. And babysitting at a shelter does not suffice. As the trial court found Abdul did not produce clear and convincing evidence he accepted R.A. *into his home* as his child, he is precluded from attempting to establish his paternity. (*Dawn D. v. Superior Court, supra*, 17 Cal.4th at pp. 937-938.) Because Abdul did not prove himself to be a presumed father of R.A. and was not entitled to genetic testing to establish his paternity, we need not address whether the court

separately abused its discretion in denying Abdul's request for genetic testing because the request was made more than two years after the birth of R.A.

III

DISPOSITION

The judgment is affirmed. Respondent Ru. A. shall recover her costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.