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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

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

H041142  
(Santa Clara County  
Super. Ct. No. 114 JD22358)

SANTA CLARA COUNTY  
DEPARTMENT OF FAMILY AND  
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

A.C. et al.,

Defendants and Appellants.

A.C. (mother) and Mario Z. are the biological parents of S.Z., and Samuel M. is the mother's boyfriend. Samuel, the mother, and Samantha appeal from an order finding that Mario is Samantha's legal father. We conclude that the juvenile court failed to exercise its discretion pursuant to Family Code section 7612, subdivision (c)<sup>1</sup> and reverse.

<sup>1</sup> All further statutory references are to the Family Code unless otherwise stated.

## **I. Factual and Procedural Background**

### **A. The Juvenile Dependency Petitions**

On February 11, 2014, the Department of Family and Children's Services (Department) filed a juvenile dependency petition which alleged that S., who was born in June 2011, came within the jurisdiction of the juvenile court under Welfare and Institutions Code section 300, subdivision (b) (failure to protect). The petition alleged that on February 7, 2014, the mother, who had a lengthy history of methamphetamine abuse and had lost custody of her two older children due to her substance abuse, was arrested for possession of a controlled substance, being under the influence of a controlled substance, and child endangerment. It was also alleged that a large quantity of methamphetamine, multiple methamphetamine pipes with residue, and ketamine were found in the home and easily accessible to S. The petition referred to Samuel as the alleged father. The petition further alleged that Samuel had a lengthy history of methamphetamine abuse, there was an outstanding arrest warrant for him, and his whereabouts were unknown.

On February 28, 2014, the Department filed an amended juvenile dependency petition. This petition added the allegation that Samuel had a criminal history, which included felony convictions for possession of a controlled substance, possession of a firearm by a felon, and carrying a loaded firearm, and misdemeanor convictions for infliction of corporal injury on a spouse/cohabitant, use of a controlled substance, and possession of controlled substance paraphernalia. It was also alleged that Samuel was currently incarcerated on pending charges of possession of a firearm by a felon and hit and run.

## **B. The Jurisdiction/Disposition and Addendum Reports**

The jurisdiction/disposition report, dated March 5, 2014, recommended that the first amended petition be sustained, S. be placed out of the home, and the mother receive family reunification services. The social worker also requested that a paternity test be ordered. The report stated that S. had been placed with her maternal grandparents.

On February 10, 2014, the mother told the social worker that Samuel was S.'s father and that he did not sign her birth certificate because he was in custody when she was born. S. was given the last name of her former boyfriend, Mario, by mistake. The mother explained that she was angry at Samuel when S. was born, so she told the hospital that Mario was the father. She also stated that she was unaware of any judgment regarding parental obligations.

On February 24, 2014, the social worker received a copy of a judgment regarding parental obligations, which had been filed on December 20, 2011. The judgment named Mario as S.'s father. When the social worker asked the mother about Mario's whereabouts, she responded that she did not have any information about him. The social worker eventually interviewed Mario, who stated that he and the mother had previously been in a relationship. While he was in juvenile hall, she told him that she was pregnant and he was the father. Mario was aware of the judgment naming him as S.'s father and he always acknowledged her as his child. He saw her about a month after her birth and on an almost daily basis until she was approximately a year old. At that point, the mother became angry with him due to his contact with an ex-girlfriend and did not allow him to have further contact with S.

The report summarized the mother's criminal history between March 2008 and February 2014. It also summarized Samuel's criminal history for the same period: two felony convictions for possession of a controlled substance, five felony convictions for theft or unauthorized use of a vehicle, two felony convictions for theft or extortion

involving a vehicle, a felony conviction for carrying a loaded firearm, a misdemeanor conviction for infliction of a corporal injury on a spouse or cohabitant, and two misdemeanor drug convictions. There was also a criminal protective order with an expiration date of June 3, 2016. It listed Samuel as the restrained person and the mother as the protected person. However, the mother told the social worker that the order was an error and that Samuel had never “gotten physical” with her. Mario had no misdemeanor or felony convictions as an adult.

The report also referred to the circumstances of the mother’s arrest. Police officers went to the mother’s residence to conduct a probation search and found the mother and S. living in a filthy shed. There was a large amount of methamphetamine, methamphetamine pipes with residue, and ketamine, which were easily accessible to S. The mother, who displayed objective symptoms of a central nervous stimulant, stated that Samuel had not lived in the shed for over three weeks. She explained that Samuel had left because he had a warrant for his arrest. The mother admitted that the methamphetamine and drug paraphernalia belonged to her and that they were accessible to her child. The mother also stated that she was self-medicating due to her “rocky” relationship with Samuel.

However, when the mother discussed her arrest with the social worker, she stated that the police had taken the methamphetamine, ketamine, and drug paraphernalia out of boxes and placed them within S.’s reach. The mother also stated that she began using marijuana and methamphetamine when she was 16 years old, but entered a residential program when she was pregnant with S. She began using methamphetamine again when S. was a year old. At that time, Samuel was released from custody and she began using methamphetamine with him.

The social worker interviewed Samuel, who told her that he had abused methamphetamine for approximately seven years and that he was currently in custody on

charges of hit and run and felon in possession of a firearm. He also stated that he believed that he would not be released any time in the near future.

The social worker contacted Mario, who stated that he had not seen S. in over 18 months. Mario stated that he used marijuana daily and had a current medical marijuana card. He had almost daily visits with S. until she was a year old. He also expressed regret that he did not take any action to stay in S.'s life when the mother stopped him from seeing her.

An addendum report was filed on May 9, 2014. There were various attachments to this report, including a judgment regarding parental obligations. The judgment, which was filed on December 20, 2011, ordered Mario to pay monthly support of \$300.

Another addendum report provided the results of a paternity test, which indicated that Mario was S.'s biological father.

A second addendum report summarized the social worker's interview with Mario. Mario told the social worker that he began regular visitation with S. when she was a month old. He picked up the mother, S., and one or both of S.'s half siblings, and took them to his residence. The majority of the visits were overnight, and if not overnight, the visit would last all day. Mario fed S., changed her diaper, bathed her, held her, and played with her. The mother terminated Mario's contact with S. when she was 10 to 11 months old, because he continued to have contact with an ex-girlfriend. After the mother moved, Mario was unable to locate her and she did not return his phone calls.

A third addendum report recommended that S. be placed out of the mother's home and that family reunification services be provided. The social worker requested that any recommendations regarding services for the father be postponed until a paternity finding had been made. This report also summarized two visits between S. and Mario in positive terms. However, the social worker stated that it would take more than two visits in order for S. to develop an attachment to Mario. The social worker also stated that the visits did

not pose any detriment to S. and that it might be beneficial for her to have a positive and close relationship with Mario.

### **C. The Paternity Trial**

On May 9, 2014, the juvenile court held a trial to determine paternity for S. The jurisdiction report and the addendum reports were admitted into evidence.

Nancy Nation, the social worker, testified that Samuel's mother was concerned that S. might be confused by visitation by Mario. In Nation's report, she indicated that she assumed that S. had no memory of Mario due to the amount of time between his last contact and his first visit on April 25, 2014. Mario agreed with the social worker that it would not be beneficial to S. to have a relationship with her and then terminate it if he was not the biological father. He also expressed a commitment to being a part of S.'s life and providing care and support if paternity results confirmed that he was the biological father. Samuel never indicated that his commitment to S. was conditional.

Nation also testified regarding Mario's supervised visits with S. According to the visitation logs, S. did not call Mario "daddy" during the visits. Mario was attentive to her and she went running to him at the second visit. He was gentle and encouraging with her.

Samuel testified that he and the mother had been together since November 11, 2010, and he considered her his wife. He was aware that the mother had signed a paternity affidavit naming Mario as S.'s father shortly after her birth. He was also aware that S. was probably not his biological child, but he assumed responsibility for raising her. He and the mother "gave [Mario] the opportunity to show himself, and he had doubts, and the baby really didn't resemble him, and so he excused himself from her life."

Samuel went to prison in March 2011 for two counts of grand theft auto, about three months before S. was born. While he was incarcerated, he communicated with the

mother about S. and he acknowledged S. as his child to his friends, family, and coworkers. After he was released from prison, S. was 14 months old and he took care of her. S. called him “Dad.” When Samuel began his relationship with the mother, she was not using methamphetamine. However, they were using drugs together by the end of 2012.

Samuel was not in the home when S. was placed into protective custody. He had been absent for three to four weeks because he had an outstanding warrant. As to the pending charges, he had hired an attorney who told him that he was “going to blow [Samuel’s] case out the water” and “get [him] into a program.”

Lisa T., Samuel’s mother, testified that she considers herself S.’s grandmother and was present at S.’s birth. She provides care for her Monday through Friday between 6:00 a.m. and 5:00 p.m. She was aware that S. was not Samuel’s biological child. S. loves playing and being around her son and he spends a lot of time with her. Lisa T. believed it would be confusing to S. if anyone other than her son was presented as being her father.

The mother testified that when she learned that she was pregnant with S., she believed that Mario was the father. After she told him about her pregnancy by means of a text message, he responded that the child was not his and to leave him alone. She told Samuel about Mario’s response, and Samuel told her that he would take care of her and the baby. After S. was born, she sent Mario a message on Facebook. The mother and S. began living with Samuel in August 2012. After the mother began living with Samuel, she felt that Mario “had no business to know what’s going on with [S.] . . . .”

Elva P. testified that she is S.’s maternal grandmother. S. and the mother lived with her when S. was three or four months old until she was a year old. She never observed Mario visiting S. at her home.

### **D. The Juvenile Court's Ruling on Paternity**

The juvenile court found that Mario had failed to meet his burden of establishing that he was a presumed parent, but that Samuel had done so under section 7611, subdivision (d). The juvenile court then concluded that this presumption was rebutted by a judgment establishing that Mario was S.'s parent pursuant to section 7612, subdivision (d). The juvenile court also stated that it was then "left with no presumed parentage. Therefore, there's no basis for this Court to invoke 7612(c), and the Court is not inclined to do so."

### **E. The Juvenile Court's Subsequent Rulings**

The juvenile court sustained the first amended petition and continued the case for disposition. At the time of the dispositional hearing, the mother was living with S. in a residential drug treatment program. The juvenile court ordered that the mother would retain custody of the child and would receive family maintenance services. The juvenile court also ordered supervised visitation for Mario as well as other reunification services. As to Samuel, the juvenile court took his request for de facto parent status under submission and later denied it.

## **II. Discussion**

Samuel, the mother, and S. contend that the paternity order must be reversed, because the juvenile court failed to exercise its discretion under section 7612, subdivision (c).

"Dependency law recognizes four types of fathers: alleged, de facto, biological, and presumed. [Citation.] Only a presumed father is entitled to appointed counsel, custody (if there is no finding of detriment) and reunification services. [Citation.] A

biological father who is not a presumed father may be granted services but it is not mandatory. [Citations.]” (*In re D.M.* (2012) 210 Cal.App.4th 541, 544.)

Here, the evidence supports the juvenile court’s finding that Samuel met the requirements of a presumed parent under section 7611, subdivision (d). This statute provides that “[a] person is presumed to be the natural parent of a child” when “[t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.” (§ 7611, subd. (d).) This “presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence.” (§ 7612, subd. (a).) Relying on subdivision (d) of section 7612, the juvenile court concluded that the presumption was rebutted by a judgment establishing that Mario was S.’s parent.

We must now determine whether the juvenile court properly interpreted section 7612, subdivision (d). ““As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature’s intent so as to effectuate the law’s purpose. [Citation.] We begin by examining the statute’s words, giving them a plain and commonsense meaning. [Citation.]” [Citation.]” (*People v. Scott* (2014) 58 Cal.4th 1415, 1421.)

Section 7612, subdivision (d) provides: “Unless a court orders otherwise after making the determination specified in subdivision (c), a presumption under Section 7611 is rebutted by a judgment establishing parentage of the child by another person.” Thus, section 7612, subdivision (d) requires the juvenile court to make a determination as to the applicability of subdivision (c) *prior* to making a determination under subdivision (d). Section 7612, subdivision (c) gives the court discretion to find that a child has more than

two parents “if the court finds that recognizing only two parents would be detrimental to the child.”<sup>2</sup>

The Department argues that the juvenile court properly exercised its discretion under section 7612, subdivision (c) in the present case. We disagree.

The juvenile court found that Samuel’s presumed status was rebutted “by a previous parentage order and, therefore, under 7612(d) the presumption is rebutted. [¶] The Court is then left with no presumed parentage. Therefore, there’s no basis for this Court to invoke 7612(c), and the Court is not inclined to do so.” Thus, the juvenile court failed to exercise its discretion under section 7612, subdivision (c) prior to making its determination under subdivision (d) of that section.

“A failure to exercise discretion is an abuse of discretion. [Citation] [¶] When a trial court’s failure to exercise its . . . discretion . . . is based on a mistaken belief regarding its authority to do so, the appropriate relief on appeal is to remand so that the trial court may exercise its discretion . . . . [Citation.] ‘[A]ppellate courts do not have the power to substitute their discretion for that of the trial court . . . .’ [Citation.]” (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 99-100.) Accordingly, we must remand this case for further proceedings.

Though we find that the juvenile court erred when it failed to exercise its discretion under section 7612, subdivision (c), we express no opinion on whether the

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<sup>2</sup> Section 7612, subdivision (c) provides: “In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.”

recognition of only two parents would be detrimental to S. That determination lies within the discretion of the juvenile court.<sup>3</sup>

### **III. Disposition**

The order is reversed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Márquez, J.

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<sup>3</sup> Samuel also appeals from an order denying his request for de facto parent status. However, since the matter is remanded, we need not resolve this issue.