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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.

H042911
(Santa Clara County
Super. Ct. No. JD22358)

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

Plaintiff and Respondent,

v.

SAMUEL M.,

Defendant and Appellant.

A.C. (mother) and Mario Z. are the biological parents of S.Z., and Samuel M. is the mother's boyfriend. Samuel appeals from an order of paternity. He contends that the juvenile court abused its discretion when it failed to recognize two fathers for S.Z. We affirm the order.

I. Factual and Procedural Background¹

A. Juvenile Dependency Petitions

In February 2014, the Department of Family and Children's Services (Department) filed a juvenile dependency petition which alleged that S.Z., 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 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 and ketamine were found in the home and easily accessible to two-year-old S.Z. 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. About two weeks later, the petition was amended to include allegations that Samuel was currently incarcerated on pending charges of possession of a firearm by a felon and hit and run.

B. Jurisdiction/Disposition and Addendum Reports

The mother told the social worker that Samuel was S.Z.'s father and that he did not sign her birth certificate because he was in custody when she was born. The mother explained that she was angry at Samuel when S.Z. was born, so she told the hospital that Mario was the father and gave S.Z. Mario's last name. According to the mother, after Samuel was released from custody when S.Z. was 14 months old, he began living with her and S.Z. and assumed a parental role. Though the mother had been in a residential drug program when she was pregnant with S.Z., she began using methamphetamine with Samuel when he was released from custody.

¹ This court has taken judicial notice of the record in case No. H041142.

The social worker obtained a copy of a judgment regarding parental obligations, which was filed six months after S.Z.'s birth, named Mario as S.Z.'s father, and required him to pay \$300 a month in child support.

In February 2014, S.Z. was placed into protective custody after police officers went to the mother's residence to conduct a probation search. They found the mother and S.Z. living in a filthy shed in which methamphetamine and ketamine were easily accessible to S.Z. The mother, who displayed objective symptoms of a central nervous stimulant, stated that Samuel had not lived in the shed for over three weeks. 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.

Samuel's criminal history between March 2008 and February 2014 included: 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, which listed Samuel as the restrained person and the mother as the protected person. The June 2013 order would expire in June 2016. The mother claimed that the order was an error and that Samuel had never "gotten physical" with her.

The results of a paternity test indicated that Mario was S.Z.'s biological father.

C. First Paternity Hearing

In May 2014, the juvenile court held a hearing to determine paternity for S.Z. The jurisdiction and addendum reports were admitted into evidence.

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.Z.'s father and that she was probably not his biological child, but he assumed responsibility for raising her. Samuel went to prison in March 2011 about three months before S.Z. was born and was released from custody when S.Z. was 14 months old. At that time, he took her into his home and provided her with daily care until January 2014. He also told his family, friends, and coworkers that S.Z. was his child. Samuel and the mother began using methamphetamine soon after he was released from custody.

Lisa T., Samuel's mother, testified that she considered herself S.Z.'s grandmother and was present at S.Z.'s birth. She provided care for S.Z. Monday through Friday between 6:00 a.m. and 5:00 p.m.

The mother testified that when she learned that she was pregnant with S.Z., 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.

D. Juvenile Court's Rulings

As to paternity, the juvenile court found that Mario had failed to meet his burden of establishing that he was a presumed father under Family Code section 7611, subdivision (d),² but that Samuel had done so. Mario was found to be S.Z.'s legal father based on the prior judgment and the paternity testing. The juvenile court also concluded that Samuel's presumption under section 7611, subdivision (d) was rebutted under section 7612, subdivision (d).

² All further statutory references are to the Family Code unless otherwise stated.

The juvenile court sustained the first amended petition. At the dispositional hearing, the mother was living with S.Z. in a residential drug treatment program. The juvenile court ordered that the mother retain custody of S.Z. and receive family maintenance services.

E. Prior Appeal

The mother, Samuel, and S.Z. appealed from the order.³ In case No. H041142, this court held that the juvenile court erred in failing to exercise its discretion under section 7612, subdivision (c) prior to making a determination under section 7612, subdivision (d). Accordingly, the case was remanded to the juvenile court to determine whether the recognition of only two parents would be detrimental to S.Z.

F. Second Paternity Hearing

A second paternity hearing was held in July 2015 when S.Z. was four years old. The evidence from the first paternity hearing was admitted. The mother testified that Samuel had spoken to S.Z. on a daily basis while he was incarcerated at Elmwood for approximately one year. She referred to him as “daddy.” However, Samuel was unable to speak with S.Z. while he was in prison. Samuel was expected to be released from prison in 2019. The mother intended to live with him if he did “the same things that [she] had to do to get [her] kids back in [her] life.”

Samuel testified that he has maintained contact with S.Z. through phone and mail. He had seen S.Z. on the previous Sunday, and she had said that he was her dad. Prior to that time, he had not seen her since she was two and a half years old. He will be released

³ On December 10, 2014, while the appeal was pending, the Department filed a status review report which stated that Mario had not visited S.Z. and had not contacted the social worker. The Department recommended that the juvenile court terminate reunification services for Mario.

from prison in either 2018 or 2019. Samuel intended to participate in substance abuse treatment, NA and AA meetings, and parenting classes while in prison. According to Samuel, S.Z. is at his mother's house once a week.

Lisa T., Samuel's mother, testified that she spends time with S.Z. three or four times per week. She considers S.Z. her granddaughter. S.Z. calls her either "mom" or "nana." Lisa is the legal guardian of Samuel's two sons and S.Z. considers them her brothers. Lisa described the visit with Samuel the previous Sunday. S.Z. did not want to give the phone to other family members to allow them to talk with Samuel. According to Lisa, Samuel and S.Z. love each other very much and he is the only father that she knows. When S.Z. spends the night at Lisa's house, she kisses Samuel's photograph.⁴

G. Juvenile Court's Ruling

The juvenile court found: "Mario and Samuel have continued to absent themselves from [S.Z.] mainly due to criminal incarceration. Samuel is presently incarcerated and will likely remain incarcerated until 2019. Mario's current whereabouts are unknown. Neither have maintained consistent contact or fulfilled daily obligations and duties as a parent to a young child. [S.Z.] is a healthy four year old developing on target in the care of her mother. The court recognizes that [S.Z.] has benefitted from an established relationship with Lisa [T.], the mother of Samuel. It is also clear to this court that the support from Lisa [T.] will endure, with or without any further order of the court. [¶] Recognizing only two parents would not be detrimental to [S.Z.]. Declining to name three parents for [S.Z.] would not result in any removal from a stable home or sever any significant bonds."

⁴ On the day of the second paternity hearing, the Department filed a status review report in which it recommended that the juvenile court dismiss the dependency case with family court orders awarding the mother sole physical and legal custody of S.Z.

II. Discussion

Samuel contends that the juvenile court abused its discretion when it found that recognizing only two parents would not be detrimental to S.Z.

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.” (Italics added.)

Section 7612, subdivision (c) authorizes the juvenile court to exercise its discretion in making this determination. Thus, this court reviews the order for abuse of discretion. Under this standard, “““a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. . . .” . . . “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.””” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

Here, there was substantial evidence to support the juvenile court’s exercise of its discretion. Samuel had not assumed a parental role in four-year-old S.Z.’s life for a substantial period of time, and thus recognition of only two parents would not be detrimental to her. In August 2012, Samuel began living with the mother and S.Z. when S.Z. was 14 months old. At that time, the mother and Samuel began using methamphetamine together. In June 2013, approximately 10 months later, a criminal protective order, which protected the mother from Samuel, was issued. They had a

“rocky” relationship and, despite the protective order, apparently continued to live together until January 2014. Samuel was incarcerated in February 2014 and was likely to remain incarcerated until 2019. Thus, the failure to recognize Samuel as S.Z.’s father did not result in the removal of S.Z. from a stable placement. Accordingly, there was no error.

In re Nicholas H. (2002) 28 Cal.4th 56 does not persuade us that the juvenile court abused its discretion in the present case. In *Nicholas H.*, the presumed father provided a loving home for the child though he admitted that he was not the biological father. (*Id.* at pp. 58, 61.) The mother did not provide adequate care for the child and the biological father had not indicated any interest in the child. (*Ibid.*) In contrast to *Nicholas H.*, here, Samuel provided care for S.Z. for a limited time while the mother was her primary caretaker. Moreover, unlike in *Nicholas H.*, the presumption under section 7611 was rebutted by a judgment establishing paternity by another man.

Samuel’s reliance on *In re J.O.* (2009) 178 Cal.App.4th 139 (*J.O.*) is also misplaced. In *J.O.*, the issue was whether the appellant’s “failure to care for or to provide financial support to his children warrant[ed] rebuttal of the presumption of paternity that arises under section 7611(d).” (*Id.* at p. 148.) Section 7611, subdivision (d) provides that a parent is presumed to be a child’s natural parent if “[t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.” *J.O.* held that there was insufficient evidence to rebut the presumption of paternity. (*J.O.*, at p. 151.) The present case, however, involves section 7612, subdivision (d). This statute provides that, unless the juvenile court finds that recognizing only two parents would be detrimental to the child, “a presumption under Section 7611 is rebutted by a judgment establishing parentage of the child be another person.” (§ 7612, subd. (d).) Here, the presumption under section 7611, subdivision (d) was rebutted by a prior judgment establishing that Mario was S.Z.’s father.

Relying on *In re P.A.* (2011) 198 Cal.App.4th 974, Samuel argues that the juvenile court erred because it failed to make factual findings and apply a balancing test to reconcile competing paternity interests. *P.A.* is readily distinguishable from the present case. In *P.A.*, there was no prior judgment establishing paternity by another man and the juvenile court failed to hold a hearing to resolve the conflicting paternity interests. (*Id.* at pp. 983-984.)

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

In re S.Z.
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