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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re BRIANNA J., a Person Coming
Under the Juvenile Court Law.

B267672

(Los Angeles County
Super. Ct. No. DK10915)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JIMMY M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Terry Truong,
Juvenile Court Referee. Affirmed.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and
Appellant.

Mary C. Wickham, County Counsel, R Keith Davis, Acting County Counsel and
Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and Respondent.

Jimmy M. appeals the juvenile court's order, made after a joint jurisdiction and disposition hearing, denying his claim for presumed father status and finding him only the alleged father of six-year-old Brianna J. Jimmy contends the court prejudicially delayed in considering his parentage claim and then erred in finding him an alleged, rather than the presumed, father of Brianna. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Dependency Petition and Detention Hearing

On April 22, 2015 the Los Angeles County Department of Children and Family Services (Department) filed a petition pursuant to Welfare and Institutions Code section 300¹ on behalf of then-five-year-old Brianna and her younger siblings, four-year-old Jaclyn M. and three-month-old Johnny M., alleging their mother, Maribel J., and her live-in companion (Jaclyn and Johnny's father), Juan M., had a history of domestic violence and had engaged in violent altercations in front of all three children. The petition also alleged Maribel had a history of illicit drug use, including abuse of methamphetamine, Juan had a history of marijuana and alcohol abuse and their substance abuse issues rendered them both incapable of providing regular care and supervision of all three children.

At the April 22, 2015 detention hearing Maribel completed a parentage questionnaire in which she identified Jimmy as Brianna's father and answered yes to the question whether he had held himself out openly as Brianna's father. She answered no to questions whether Jimmy was listed on Brianna's birth certificate, whether she and Jimmy had been married or lived together when Brianna was conceived or born and whether he had provided financial assistance for Brianna's care. Jimmy was incarcerated at the time of the detention hearing and did not appear. Based on Maribel's answers to the questionnaire, the court found Jimmy to be an alleged father of Brianna. The court detained all three children, and the Department placed them together in the care and

¹ Statutory references are to this code unless otherwise stated.

custody of Juan's sister pending a jurisdiction hearing. The court ordered monitored visitation for Maribel, Juan (with Jaclyn and Johnny) and Jimmy (with Brianna only).

2. The Progress Hearing, Pretrial Conference and Jurisdiction Hearing

a. Jimmy's first request for a parentage order

At a progress hearing on May 18, 2015 Jimmy's counsel reported Jimmy was scheduled to be released from custody before the jurisdiction hearing and would not contest the court's exercise of dependency jurisdiction. Jimmy's counsel also submitted on Jimmy's behalf Judicial Council form JV-505, Statement Regarding Parentage, in which Jimmy declared he was Brianna's father, Brianna had lived with him for three months in his home when she was two years old, he openly held himself out as her father and had given financial support for Brianna's necessities. In accordance with California Rules of Court, rule 5.635(h),² Jimmy requested the court enter a judgment of parentage finding him to be Brianna's father.

Observing that Jimmy's statements in his parentage form conflicted with those made by Maribel in her parentage questionnaire, the court stated it would address parentage at a future date when Maribel was present. The court set July 20, 2015 as the new date for the jurisdiction hearing and July 13, 2015 for a pretrial resolution conference (PRC). The court also clarified that Jimmy's monitored visitation was to begin once he was released from custody.

b. The PRC and jurisdiction/disposition hearing: Jimmy's second and third requests for a parentage order

Jimmy appeared with his counsel at the July 13, 2015 PRC and again requested a finding he was the presumed father of Brianna under Family Code section 7611, subdivision (d). Notwithstanding its earlier order continuing the hearing on Jimmy's parentage request and apparently believing it had already ruled against him, the court

² California Rules of Court, rule 5.635(h), provides, if an alleged father appears in a dependency matter and requests a finding of paternity through Judicial Council form JV-505, the court must determine "(1) [w]hether that person is the biological parent of the child; and (2) [w]hether that person is the presumed parent of the child, if that finding is requested."

advised Jimmy's counsel to file a section 388 petition requesting a modification of the court's prior order that Jimmy was an alleged father only.

Pursuant to the court's instructions, at the July 20, 2015 jurisdiction hearing Jimmy filed a section 388 petition requesting the court modify its parentage finding. Realizing it had not yet ruled on Jimmy's request, the court asked the parties to address the parentage issue before turning to jurisdiction. Both Maribel and Jimmy testified, and both affirmed the statements they had made in their parentage questionnaires: Maribel insisted Brianna had never lived with Jimmy. Jimmy testified Maribel had left Brianna with him at his house (in which he resided with his parents) when Brianna was two years old; Brianna had lived with him for six months (four months longer than he had originally stated in his May 18, 2015 parentage request); and he had provided financially for her support. Asked by the court whether he had any proof of his statements, Jimmy stated Brianna's maternal uncle and maternal grandfather were present in the courtroom and would testify on his behalf and confirm his account. Without hearing any further testimony, the court ordered Jimmy's counsel to provide it with declarations "from anyone you deem fit, and I will consider the issue again." The court temporarily declared Jimmy an alleged father and proceeded to conduct the jurisdiction hearing.

The court sustained the domestic violence and drug abuse allegations pertaining to Maribel and Juan. At disposition the court declared all three children dependents of the court, found them to be a sibling group, removed them from Maribel and Juan's custody and placed them with Juan's sister. Despite declaring Jimmy an alleged father only at the time of disposition, the court considered whether placement with Jimmy would be detrimental to Brianna—the standard applied to a noncustodial parent seeking custody under section 361.2—and determined that placing Brianna in Jimmy's care and custody would be detrimental to Brianna's safety, protection and well-being. The court denied Jimmy reunification services on the ground he was not entitled to such services as an alleged father, but ordered monitored visitation for him with discretion to the Department to liberalize his visitation with Brianna. Jimmy filed a notice of appeal from all findings and orders made by the court on July 20, 2015.

3. The October 28, 2015 Parentage Order

Based on the juvenile court's instructions, on October 28, 2015 Jimmy submitted additional declarations—from Brianna's maternal uncle and maternal grandfather, as well as his own—as part of a section 388 petition requesting the court make or modify its prior "temporary" finding declaring him an alleged father rather than a presumed father. Jimmy declared in his affidavit he had been part of Brianna's life since she was born. According to Jimmy, when Brianna was "just a few months old," Maribel had left her in the care of her maternal grandparents; and he gave the maternal grandparents \$100 a month for Brianna's care. Then, in October 2011, after the maternal grandmother was deported to Mexico and no longer able to care for Brianna, Maribel left her with Jimmy at his home, where he resided with his parents. Maribel never contacted Jimmy during this time, and Jimmy did not know if and when Maribel would return. Maternal uncles Mario J. and Fernando J. visited Brianna regularly at his home. Several months after Brianna started living with Jimmy, Maribel returned for Brianna because Maribel was in danger of losing her welfare benefits. Two months after Maribel picked up Brianna from Jimmy's home, the maternal grandfather telephoned Jimmy to inform him that Brianna was now living in Tijuana with her maternal grandmother. Jimmy continued to receive reports about Brianna from her maternal uncles, and he continued to provide financial assistance for Brianna's care. Brianna returned to Los Angeles to begin school when she was approximately five years old and resided with her maternal relatives, not Maribel. At the time Brianna was detained, Jimmy was incarcerated. As soon as he learned about the dependency proceedings, he began efforts to gain custody of Brianna. Jimmy insisted Brianna should be with him or her maternal grandfather.

Maternal uncle Mario J. confirmed Jimmy's account. According to Mario, Maribel took Brianna to Jimmy's house when she was two years old and "left her there for months." He also confirmed that Jimmy had provided the family with \$100 every month for Brianna's support while she was living with her maternal grandmother. The maternal grandfather provided a brief declaration that Brianna had lived with him "since

she was born” and had lived with his wife in Tijuana “at my expense” for three years. He did not mention Jimmy.

Both Brianna’s counsel and the Department argued Jimmy had not met his burden to prove his status as a presumed father under Family Code section 7611, subdivision (d). The court agreed, stating, “I do not find that there has been sufficient evidence for this court to find that [Jimmy] is a presumed father in this case.”³ The court also granted Juan and Maribel’s request (which the children’s counsel supported and Jimmy opposed) to transfer the matter to San Bernardino County where Maribel, Juan and the children now reside.

Jimmy filed a notice of appeal from the October 28, 2015 order denying his section 388 petition for a new parentage order. On January 7, 2016 this court ordered the appeals consolidated.

DISCUSSION

1. Governing Law and Standard of Review

The Uniform Parentage Act (UPA) (Fam. Code, § 7600 et seq.), which governs parentage determinations (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 116), identifies the parent-and-child relationship as “the legal relationship existing between a child and the child’s natural or adoptive parents.” (Fam. Code, § 7601.) In determining whether a person qualifies as a natural parent, the dependency court recognizes and differentiates among three categories of parents: an alleged parent, a biological parent and a presumed parent. (*In re H.R.* (2016) 245 Cal.App.4th 1277, 1283; accord, *In re D.P.* (2015) 240 Cal.App.4th 689, 695.)

A person who may be the biological parent of a child but has not achieved presumed parent status is an alleged parent. (*In re H.R.*, *supra*, 245 Cal.App.4th at

³ The court also found Jimmy had not shown he had a constitutional right under the equal protection and due process clauses to be declared a presumed father. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849 [parent who attempts to satisfy statutory requirements of presumed parent but is thwarted in that effort by other parent may, under certain conditions, have a constitutional right to be declared a presumed parent].)

p. 1283; *In re J.O.* (2009) 178 Cal.App.4th 139, 146-147.) An alleged parent has a narrow range of rights in dependency proceedings, generally limited under the due process clause to notice of the proceedings so that he or she may appear and have the opportunity to challenge his or her parentage status. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1408.) An alleged parent is not entitled to appointed counsel, custody or reunification services. (*In re H.R.*, at p. 1283; *In re D.A.* (2012) 204 Cal.App.4th 811, 824.) A biological parent, one who has established maternity or paternity but has not achieved presumed parent status, is still an alleged parent, but with the additional opportunity for reunification services when the court determines such services will benefit the child. (§ 361.5, subd. (a).) A presumed parent, in contrast, “ranks highest” of all three categories and enjoys a full panoply of rights attendant to parenthood, including entitlement to appointed counsel, custody (assuming the court has not made a detriment finding) and reunification services. (*In re H.R.*, at p. 1283; *In re D.P.*, at p. 695; see generally *In re Nicholas H.* (2002) 28 Cal.4th 56, 65 [presumed parent status is intended to preserve the important relationship created between an alleged parent and child when the alleged parent has treated that child as a son or daughter].)

The UPA provides several statutory grounds for establishing a presumption of parenthood. (See, e.g., Fam. Code, §§ 7540, 7571-7572, 7611.) As pertinent here, Family Code section 7611, subdivision (d), provides “[a] person is presumed to be the natural parent of a child if he or she “receives the child into his or her home and openly holds out the child as his or her natural child.” The presumption afforded by Family Code section 7611, subdivision (d), is an evidentiary one affecting the burden of proof. (*In re J.O.*, *supra*, 178 Cal.App.4th at pp. 147-148.) That is, the burden is on the person seeking presumed parent status to demonstrate the foundational facts—the parent held out the child as his or her natural child and received the child into his or her home—giving rise to the presumption. (*R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 773; *S.Y. v. S.B.* (2011) 201 Cal.App.4th 1023, 1031; *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1653.) Once established to the fact-finder’s satisfaction, the presumption of natural parenthood arises and the burden shifts to person opposing the presumption to rebut it in

an appropriate action. (Fam. Code, § 7612, subd. (a) [the “presumption under [s]ection 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence”].)

When, as here, the juvenile court rules the person seeking presumed parent status has failed to meet his or her burden of proof, the question on appeal, as in all failure of proof cases, is “whether the evidence compels a finding in favor of the appellant[s] as a matter of law.” (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1163; accord, *In re I.W.* (2010) 180 Cal.App.4th 1517, 1528.)

2. *Jimmy Was Not Entitled to Presumed-parent Status as a Matter of Law*

Jimmy contends he qualified as a presumed parent under Family Code section 7611, subdivision (d), because he openly acknowledged Brianna as his child and received her into his home for a significant period of time. (See *In re J.O.*, *supra*, 178 Cal.App.4th at p. 151 [“[s]ection 7611(d) requires nothing more than that the presumed father candidate receive the children into his home and openly hold them out as his natural children”]; *Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, 374 [Fam. Code, § 7611, subd. (d), does not contain a duration requirement; “receipt of the child into the home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship, but it need not continue for any specific duration”], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7.) Although both Jimmy and Mario testified Jimmy openly acknowledged Brianna as his own child and received her into his home for a significant period of time, Maribel testified Brianna never lived with Jimmy. Jimmy urges us to disregard that testimony as incredible, particularly in light of Maribel’s denials of her own drug use, which the court obviously disbelieved when it sustained the allegations in the section 300 petition and asserted jurisdiction based on her conduct. However, there is no indication the court disbelieved this aspect of Maribel’s testimony. Resolving all evidentiary conflicts and implying all findings in favor of the court’s order, as we must (*In re Laura F.* (1983) 33 Cal.3d 826, 833; *In re A.A.* (2008) 167 Cal.App.4th 1292, 1313), we have no choice but to infer the court credited Maribel’s testimony that Brianna had never

lived with Jimmy. That evidence, standing alone, was sufficient to defeat Jimmy's claim. On this record Jimmy simply cannot establish the evidence at trial compelled a finding in his favor as a matter of law. (*Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769; *In re Aurora P.*, *supra*, 241 Cal.App.4th at p. 1163.)⁴

Jimmy also asserts the court deprived him of the opportunity to obtain custody of Brianna under section 361.2 by failing to rule on his parentage claim at the jurisdiction/disposition hearing. However, as discussed, the court considered Jimmy's request for custody of Brianna using the standard applicable to presumed parents under section 361.2 and found by clear and convincing evidence that it would be detrimental to Brianna to grant Jimmy custody. Jimmy does not directly challenge that finding. In any event, because the court found Jimmy was not a presumed father, a finding we affirm, any improper delay in deciding the issue was not prejudicial.⁵

Finally, Jimmy contends the juvenile court erred in finding the Family Code section 7611 presumption had been rebutted in this case since there was no competing claim by a presumed father. (See *In re J.O.*, *supra*, 178 Cal.App.4th at p. 150 [absent competing claims to presumed father status, it was inappropriate to find presumption,

⁴ Nothing in our opinion should be read as precluding Jimmy, should he acquire new or additional evidence to support his parentage claim, from filing another section 388 petition in the San Bernardino juvenile court to modify the court's prior determination and find him Brianna's presumed father. (See § 388; *In re D.B.* (2013) 217 Cal.App.4th 1080, 1093.)

⁵ Despite Jimmy's proper parentage request, the juvenile court failed to determine whether he was Brianna's biological father, as required by California Rules of Court, rule 5.635(h)(1). To the extent Jimmy contends the court's omission prejudiced him because, as a biological father, he was entitled to reunification services if the court determined that such services would benefit Brianna (§ 361.5, subd. (a)), any error in this regard was harmless. Jimmy was allowed visitation with Brianna, and he fails to identify other reunification services that should have been ordered or that would have been appropriate given his status as a nonoffending parent. Nevertheless, to the extent a rule 5.635(h)(1) finding may have other implications in this or future proceedings, upon a renewed request that question must be addressed by the juvenile court in San Bernardino County where the case has been transferred.

once established, properly rebutted when to do so would leave a child without two parents].) Contrary to Jimmy's contention, the juvenile court found Jimmy had failed to prove entitlement to the presumption in the first instance, not that the presumption, once established, had been rebutted. There was no error.

DISPOSITION

The July 20, 2015 and October 28, 2015 orders are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.