Filed 9/20/12 C.S. v. Super. Ct. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

C.S., Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	B242890 (Los Angeles County Super. Ct. No. CK79607)

ORIGINAL PROCEEDINGS in mandate. Debra L. Losnick, Juvenile Court Referee. Petition denied.

Los Angeles Dependency Lawyers, Law Office of Marlene Furth, Danielle Butler Vappie and Diane Nicola for Petitioner.

No appearance for Respondent.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Kimberly A. Roura, Associate County Counsel, for Real Party in Interest.

C.S. seeks writ review and an immediate stay of an order setting a hearing under Welfare and Institutions Code section 366.26 as to A.U. (Cal. Rules of Court, rule 8.452.) We deny the petition and the request for an immediate stay.

FACTS AND PROCEDURAL BACKGROUND

1. *Dependency petition filed; detention.*

On November 2, 2009, the Department of Children and Family Services (the Department) filed a dependency petition with respect to four-month-old A.U. It alleged mother exposed the child to drug trafficking and left a drug pipe within access of the child, mother has a history of methamphetamine abuse and mother's home is filthy.

A.U. was placed in foster care. A.U. had no prior child welfare history but mother had several referrals alleging general neglect by her parents due to their use of heroin and methamphetamine and sexual exploitation while mother resided with friends of her parents.

2. *Detention hearing; T.H. is declared A.U.'s presumed father.*

At the detention hearing, mother filed a paternity questionnaire which stated T.H. had held himself out as A.U.'s father and openly accepted the child in his home but was not married to mother, did not sign papers establishing paternity at the hospital and was not living with mother at the child's conception and birth.

T.H. appeared in custody and filed a statement regarding parentage in which he declared his belief he is A.U.'s father and requested a judgment of parentage.

The juvenile court declared T.H. A.U.'s presumed father.

3. *Jurisdictional findings; proceedings under the case plan.*

The jurisdiction report indicated A.U. had been placed with maternal great aunt. Mother stated she lived with T.H. from 2007 until approximately February of 2009 when she asked him to leave because of his drug abuse. A.U. was born in June of 2009. T.H. visited the child regularly but was arrested in July or August of 2009 for possession for sale of methamphetamine and felony evasion.

The juvenile court sustained the dependency petition as to mother and granted mother family reunification services and permission to reside in maternal great aunt's home with A.U.

On May 28, 2010, the Department reported paternity testing had revealed T.H. is not A.U.'s biological father. That same date, the juvenile court denied T.H.'s request to vacate the presumed father finding.

A status review report filed November 4, 2010, indicated T.H. had advised the social worker that, in light of the finding he was not A.U.'s biological father, he did not wish to be considered her father. T.H. indicated he was arrested within 30 days of A.U.'s birth and has remained in jail. He does not have a relationship with A.U. or mother and may be incarcerated for 16 years.

On January 12, 2011, the juvenile court placed A.U. in mother's care and ordered mother to participate in family preservation services and to maintain an approved residence.

4. *Supplemental petition.*

On June 30, 2011, the Department filed a supplemental petition which alleged mother left the home of maternal great aunt with A.U. in May of 2011 after mother and maternal great argued about mother's failure to care for the child. The juvenile court terminated the home of parent order, placed A.U. with maternal great aunt and granted mother family reunification services.

On September 8, 2011, the juvenile court sustained the supplemental petition and ordered the Department to evaluate any appropriate extended family member for placement of A.U.

5. *C.S.*

A status review report filed January 9, 2012, indicated mother had advised the social worker she knew the identity of A.U.'s father, later identified as C.S., and wanted A.U. to be with him. Mother indicated C.S. recently had been released from prison and does not know A.U. Mother did not previously make this information available because mother did not like C.S.

On January 9, 2012, C.S. appeared, counsel was appointed to represent him and the juvenile court granted his request for paternity testing.

The jurisdiction report indicated maternal great aunt would not be able to provide long-term care for A.U. due to maternal great aunt's age. In the status review report filed January 9, 2012, maternal great aunt suggested placement of A.U. with maternal great aunt's cousin in Kentucky where A.U. could be raised with cousins of similar age.

On January 9, 2012, the juvenile court issued an order initiating an Interstate Compact for the Placement of Children (ICPC) with the Commonwealth of Kentucky.

On February 14, 2012, the Department requested an amended ICPC order designating paternal second cousin, one generation removed, Gloria A., and her husband as A.U.'s prospective caretakers in Kentucky.

On the same date, the juvenile court received the paternity test results and declared C.S. A.U.'s biological father.

On March 28, 2012, the Department filed a report which indicated C.S. visited A.U. during the last week of February and on March 7 and 13, 2012. His visits were monitored by maternal great aunt who stated the visits went well. C.S. indicated he felt comfortable visiting the child and maternal great aunt had stated he could visit any time. The Department reported C.S. "is very excited and has embraced the idea of being A.U.'s father."

On April 24, 2012, the Department reported C.S. had been asked to leave the home where he had been residing because the homeowner, one of A.U.'s prospective caregivers being evaluated by the Department, believed C.S. was using drugs. The social worker had been unable to contact C.S. and he did not return phone messages left for him. C.S. did not visit A.U. in April of 2012.

In a report filed July 10, 2012, the Department requested permission to place A.U. in Kentucky upon receipt of ICPC authorization.

6. *The 18-month review hearing*.

On July 10, 2012, the day of the 18-month review hearing, C.S. filed a petition under Welfare and Institutions Code section 388 which asked the juvenile court to vacate the paternity finding as to T.H. and to grant C.S. presumed father status. The petition asserted C.S. had "stepped up" and was visiting A.U. In the alternative, C.S. requested a hearing to permit the juvenile court to weigh the competing paternity interests, citing *In re P.A.* (2011) 198 Cal.App.4th 974. C.S. also requested family reunification services. C.S. asserted he began visiting A.U. after he was identified as her biological father and he was willing to provide for her. C.S. noted T.H. was not willing to have a relationship with A.U. and is unable to provide for her in any event because he is incarcerated.

C.S. attached to the petition a Statement Regarding Parentage (JV-505) dated March 28, 2012, which indicated C.S. had held A.U. out as his own child. While incarcerated, C.S. completed a program which included parenting and counseling. When he was released from prison on June 16, 2011, he found mother so he could visit A.U. He had his first visit with A.U. on July 15, 2011, and has visited her approximately eight to ten times. C.S. now has appropriate housing and is in the process of obtaining child care. C.S. voluntarily completed a six-month drug abuse rehabilitation program on January 10, 2012.

At the hearing, counsel for the Department objected to the relief requested by C.S., noting A.U. is now three years of age, C.S. failed to take prompt action after he came to court in January of 2012, and the relief sought was not in A.U.'s best interest. Counsel asserted C.S. made no attempt to inquire about A.U. even though he had a relationship with mother and was on notice he might have fathered a child.

The juvenile court found C.S. had disregarded numerous opportunities to file a petition under Welfare and Institutions Code section 388 before the 18-month review hearing. Thus, the request was not timely and it was not in A.U.'s best interest to upset the previous finding that T.H. is A.U.'s presumed father, which was supported by mother's paternity declaration under penalty of perjury.

When counsel for C.S. and mother objected, the juvenile court indicated the efforts expended by C.S. "do not comport with what's required, as far as this Court is concerned, in order to change the findings."

The juvenile court relieved counsel appointed to represent C.S., terminated family reunification services and directed the Department to walk the matter on, with notice to mother, when the ICPC was approved. The juvenile court set a selection and implementation hearing for November 16, 2012.

CONTENTIONS

C.S. contends the juvenile court erroneously failed to hold an evidentiary hearing on his petition and failed to hold a hearing to determine which of the competing fathers had the more meritorious claim. C.S. also contends the juvenile court prematurely relieved counsel appointed to represent him.

DISCUSSION

1. *Relevant law*.

a. *Welfare and Institutions Code section 388*.

A party seeking modification of an existing order of the juvenile court under Welfare and Institutions Code section 388 must show changed circumstances or new evidence that demonstrates the proposed change would promote the best interest of the child. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1119; Welf. & Inst. Code, § 388, subds. (a) & (d).)

The juvenile court must liberally construe the petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) Welfare and Institutions Code section 388 specifies a hearing must be held "[i]f it appears that the best interests of the child may be promoted by the proposed change of order . . . ." (Welf. & Inst. Code, § 388, subd. (d).) " 'The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.' [Citations.]" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) If the liberally construed allegations of the petition do not show changed circumstances or new evidence that the child's best interests will be

promoted by the proposed change of order, the court need not hold a hearing. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460-461; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) We review a summary denial of a Welfare and Institutions Code section 388 petition for abuse of discretion. (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348.)

b. *Paternity*.

There are three types of fathers in juvenile dependency law: presumed, biological, and alleged. (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) "Presumed father status ranks highest." (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) Only a presumed father is entitled to appointed counsel and reunification services. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.)

Paternity determinations are made within the framework of the Uniform Parentage Act (Fam. Code, §§ 7600 et seq.), which provides conclusive and rebuttable presumptions of paternity.[1] (*In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1113-1114.) A presumed father is a man who meets one or more specified criteria in section 7611. Relevant here is section 7611, subdivision (d), which creates a rebuttable presumption of paternity when a man receives a child into his home and openly acknowledges the child as his natural child. A biological father is a man whose paternity has been established, but who has not shown he is the child's presumed father.

A biological father may be accorded parental rights under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, if his attempts to achieve presumed parent status under section 7611, subdivision (d), are thwarted by a third party and he has made "a full commitment to his parental responsibilities – emotional, financial, and otherwise . . . ." (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) In determining whether to afford a biological father parental rights under *Kelsey S.*, the juvenile court considers the biological father's conduct before and after the child's birth, including whether he publicly acknowledged paternity, paid pregnancy and birth expenses commensurate with his ability to do so, and

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[1] Subsequent unspecified statutory references are to the Family Code.

promptly took legal action to obtain custody of the child. (*Id.* at p. 849.) He must demonstrate a full commitment to his parental responsibilities within a short time after he learned the biological mother was pregnant with his child and must demonstrate a willingness to assume full custody. (*Id.* at p. 849.)

"One who claims he is entitled to presumed father status has the burden of establishing, by a preponderance of the evidence, the facts supporting that entitlement." (*In re T.R., supra*, 132 Cal .App.4th at p. 1210.) Thus, a biological father has the burden to establish he is a presumed father under *Kelsey S.* (*Adoption of H.R.* (2012) 205 Cal.App.4th 455, 468; *Adoption of O.M.* (2008) 169 Cal.App.4th 672, 679-680.)

Section 7612 directs the juvenile court to weigh conflicting paternity presumptions. It states: "If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls." (§ 7612, subd. (b).)[2]

2. *The juvenile court committed no reversible error in summarily denying C.S.'s petition.*

C.S. contends his biological paternity of A.U. constituted changed circumstances and the requested change in order would benefit A.U. because T.H. was unwilling to have a relationship with the child. He argues he came to court and requested paternity testing after he became aware A.U. might be his child. Once testing showed his paternity, he visited regularly and, after he became acquainted with the child, he requested a change in the juvenile court's previous order. C.S. claims he had no obligation to assert a fatherhood claim before he was aware he was A.U.'s father. (*In re D.A.* (2012) 204 Cal.App.4th 811, 825.) He argues that, because mother first informed the

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[2] Section 7610 states the "parent and child relationship may be established as follows: [¶] (a) Between a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part. [¶] (b) Between a child and the natural father, it may be established under this part. [¶] (c) Between a child and an adoptive parent, it may be established by proof of adoption."

Department and the juvenile court of his existence in January of 2012, the evidence indicated C.S. did not know he was A.U.'s father until the results of paternity testing were received in February of 2012. Thus, according to C.S., he timely asserted his rights.

C.S. further contends the juvenile court should have conducted a hearing at which it weighed the competing paternity interests. (§ 7612, subd. (b).) C.S. claims that, because T.H. did not wish to be considered A.U.'s father, considerations of logic and policy favored an order declaring C.S. A.U.'s presumed father. C.S. concludes the juvenile court erred in failing to hold a hearing on his petition.

These arguments are not persuasive. The record demonstrates C.S. did not qualify as A.U.'s presumed father under section 7611, subdivision (d) as he had never accepted the child into his home. Although regular and consistent visitation can substitute for receiving a child into the home (*In re Cheyenne B.* (2012) 203 Cal.App.4th 1361, 1379; *In re A.A.* (2003) 114 Cal.App.4th 771, 786), the Department was aware of only four visits and, by his own account, C.S. had visited A.U. only 8 or 10 times after his release from prison in June of 2011. Further, all visits occurred in the home of maternal great aunt, C.S. failed to visit A.U. at all in April of 2012, and his petition does not state he visited after March of 2012. Such infrequent and inconsistent monitored visitation clearly was insufficient to constitute the functional equivalent of receiving A.U. into his home. Thus, the only basis on which C.S. could have claimed presumed father status was under *Kelsey S.*[3]

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[3] The Department claims C.S. forfeited any claim under *Kelsey S.* by failing to indicate in the juvenile court he was seeking presumed father status under that case. In support of this assertion, the Department cites *In re Elijah V.* (2005) 127 Cal.App.4th 576, which held that because "there is some overlap in the factors used to establish a man as a presumed father under [section 7611, subdivision (d)] and to establish a man as a father within the meaning of *Kelsey S.* . . ., a party seeking status as a father under *Kelsey S.* must be clear he wants to be so declared." (*In re Elijah V., supra*, at p. 582.)

Although *Kelsey S.* was not mentioned in C.S.'s petition or by counsel at the hearing on the petition, it is clear the juvenile court and the parties were addressing the *Kelsey S.* factors to determine whether C.S. qualified as a presumed father. We therefore address the merits of the *Kelsey S.* claim.

C.S.'s assertion he lacked knowledge he was A.U.'s father prior to his appearance in court in January of 2012 ignores C.S.'s obligation to inquire of mother as to whether their liaison had resulted in a child. (See *In re Zacharia D.* (1998) 6 Cal.4th 435, 452; *In re Vincent M.* (2008) 161 Cal.App.4th 943, 960-961.) C.S.'s claim also is contradicted by the Statement Regarding Paternity C.S. executed on March 28, 2012. It indicates C.S. "went and found" mother when he was released from prison "so that [he] could visit the child." Approximately a moth after C.S. was released from prison, C.S. visited M.A. at the home of maternal great aunt. Thus, shortly after his release from prison in June of 2011, C.S. knew or should have known his child was involved in dependency proceedings. Nonetheless, C.S. did not appear in the case until January of 2012. He did not file the request to change the paternity order until more than a year after his release from prison. This evidence supports the juvenile court's finding C.S. failed to assert his parental rights promptly.

The evidence also indicates C.S. did not attempt to assume his parental responsibilities as fully as the circumstances permitted. (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) Although, maternal great aunt permitted C.S. unlimited access to A.U. for visitation, he visited infrequently and apparently stopped visiting at the end of March 2012. Moreover, at about the same time C.S. apparently stopped visiting, the individual with whom C.S. had been residing and whose home was being evaluated for placement of A.U., asked him to leave the residence because she suspected he was using drugs. In April of 2012 the social worker reported C.S. was not returning phone calls.

In sum, the evidence demonstrated C.S. failed to come forward promptly to assert his parental rights and he failed to demonstrate a full commitment to his parental responsibilities.

Moreover, the juvenile court did not abuse its discretion in determining it would not be A.U.'s best interests to delay her case to consider whether C.S. should be declared her presumed father. Although T.H. indicated he did not desire a relationship with A.U., the relatives with whom A.U. was about to be placed in Kentucky were *paternal* relatives. The ICPC order originally issued by the juvenile court had to be amended to

reflect the proposed caretaker in Kentucky, in fact, was A.U.'s paternal second cousin, one degree removed, not a maternal relative. The juvenile court properly could consider that termination of T.H.'s presumed father status would deprive A.U. of this familial connection with her prospective caretakers.

Thus, even assuming the paternity test results constituted changed circumstances, the record showed C.S. could not qualify as A.U.'s presumed father under section 7611, subdivision (d) or *Kelsey S.* Based thereon, the juvenile court reasonably could conclude C.S. failed to establish the requested change of order would benefit A.U. Because C.S. failed to demonstrate the necessary prima facie showing, the juvenile court committed no error in summarily denying the petition.

3. *Counsel appointed to represent C.S. properly relieved.*

C.S. contends the juvenile court abused its discretion in relieving counsel appointed to represent him. He argues his right to elevate his status to presumed father did not cease upon the summary denial of his petition. He claims he might have been able to achieve presumed father status before the permanency planning hearing.

This claim is meritless. As was previously noted, only a presumed father is entitled to appointed counsel. (*In re T.R., supra*, 132 Cal.App.4th at p. 1209.) "[A] biological father's rights are limited to establishing his right to 'presumed' father status, and the court does not err by terminating a biological father's parental rights when he has had the opportunity to show presumed father status and has not done so. [Citation.]" (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.)

Here, C.S. failed to demonstrate he qualified as A.U.'s presumed father. Upon failing in that attempt, C.S. no longer was entitled to court appointed counsel. Thus, the juvenile court did not err in relieving counsel appointed to represent C.S.

DISPOSITION

The petition is denied. The request for a stay of the proceedings is denied.

Our decision is final immediately as to this court. (Cal. Rules of Court, rule 8.490(b)(3).)

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.