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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re BLAKE G., a Person Coming Under
the Juvenile Court Law.

B236846

(Los Angeles County
Super. Ct. No. CK87145)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

BRENT G.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Timothy R. Saito, Judge. Affirmed.

Andre F.F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, Tracey F. Dodds, Principal County Counsel, for Plaintiff and Appellant.

Brent G. appeals from the juvenile court's order finding him the presumed father of Blake G., contending Family Code section 7540's presumption of paternity is inapplicable because he is sterile and there was insufficient evidence he was married to Blake's mother at the time of Blake's birth. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Blake was born at Riverside Community Hospital in November 2002. Melissa P. was listed as his mother; Brent as his father. The certificate of live birth, which used the same last name for both Blake and Brent, was signed by Brent, who verified the information it contained was true and correct.

The Los Angeles County Department of Children and Family Services (Department) received a referral on March 14, 2011 alleging eight-year-old Blake and his four-year-old half-sister, Arianna M., were suffering emotional abuse as a result of witnessing on-going domestic violence between their mother and Arianna's father, Brian M. The two children were detained and placed in the home of their maternal great-grandmother and great-grandfather. The Department filed a petition pursuant to Welfare and Institutions Code section 300, subdivisions (a) (serious physical harm) and (b) (failure to protect).

In its March 23, 2011 detention report the Department informed the court Melissa had indicated she originally believed Brent was the biological father of Blake, but a recent genetic test had determined he was not. The report continued, "Mother stated at this time she is not sure who the father may be."

On the date of the detention hearing Melissa completed a "parentage questionnaire" stating she had married Brent on September 20, 2002 and separated from him in 2003. At the hearing itself Melissa's counsel told the court Melissa was still married to Brent, their marriage had taken place prior to Blake's birth and Melissa and Brent were living together when the child was conceived and born. However, her attorney also asserted the presumption Brent is Blake's father was rebutted by a DNA test, completed in February 2011, indicating there is a zero percent probability of

paternity. Melissa added she had not been in a relationship with Brent for seven years. Because Brent was not present at the hearing (it was subsequently learned he was incarcerated), the court deferred making any paternity finding as to Blake.¹ The court ordered the children remain placed with their maternal great-grandparents.

The paternity issue was continued several times and ultimately resolved following briefing and a hearing on October 6, 2011. In the interim the court sustained an amended dependency petition, finding Melissa and Brian had engaged in violent altercations in the presence of the children and both had a history of drug abuse. Blake and Arianna were declared dependent children of the juvenile court and removed from Melissa's and Brian's custody. Family reunification services were ordered.²

With respect to the issue of Blake's paternity, with its April 20, 2011 jurisdiction/disposition report the Department submitted both the certificate of live birth signed by Brent and the DNA test results concluding there was a zero percent probability of his paternity. In the body of its report the Department indicated Melissa had said she met Brent in 1998 and they started living together in 1999. After providing the results of the genetic testing, on page four the Department commented, "It should be noted that Mr. G[.] is on the child's birth certificate and the mother reported that when the child was born she and Mr. G[.] were legally married." On page 14 of the same report, however, the Department stated, "According to mother she became pregnant with her son at the beginning of 2002. She and Mr. G[.] were legally married after the birth of her son.

¹ The court found Brian was the presumed father of Arianna.

² During the pendency of this appeal the juvenile court terminated its suitable placement order as to Blake and ordered a home-of-parent-mother placement under the continuing supervision of the Department. Because Melissa now resides in San Bernardino County, it appears the court also ordered the case transferred to the juvenile court in that county, which is within the Fourth Appellate District. That transfer does not affect our jurisdiction to resolve Brent's appeal. (See *In re Lisa E.* (1986) 188 Cal.App.3d 399, 404-405 [appellate court retains jurisdiction over appeal in dependency action even though case has been transferred to another county in different appellate district; decision is binding on the superior court in the transferee county].)

Mother reported that Mr. G[.] is not the biological father of Blake, as she had a casual relationship with another man while she was cohabitating with Mr. G[.] Blake was born while they were cohabitating and Mr. G[.] is the father mentioned on the Birth Certificate. It should be noted that mother stated that Mr. G[.] cannot have any children as he is sterile. According to mother Mr. G[.] had full knowledge that Blake was not his child.”

Following his release from prison Brent appeared in court and requested a ruling he was not Blake’s father. Brent’s appointed counsel thereafter filed a “motion seeking a declaration of the nonexistence of a father and child relationship.” The moving papers, which did not include a declaration from Brent, confirmed Brent was married to and living with Melissa at the time of Blake’s birth and acknowledged the generally conclusive presumption of paternity contained in Family Code section 7540³ applicable in that circumstance. Nonetheless, Brent’s counsel asserted Brent fell within the section 7541, subdivision (a),⁴ exception to the conclusive presumption of paternity because the DNA test performed in February 2011 established he was not Blake’s biological father. Counsel insisted the limitations period for such DNA testing set forth in section 7541, subdivision (b)⁵—two years from the child’s date of birth—was inapplicable because

³ Section 7540 provides, “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.”

Statutory references are to the Family Code unless otherwise indicated.

⁴ Section 7541, subdivision (a), provides, “Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.”

⁵ Section 7541, subdivision (b), provides, “The notice of motion for blood tests under this section may be filed not later than two years from the child’s date of birth by the husband”

Brent had not asked the court to order a blood/genetic test, one already existed and, in fact, had been performed prior to any involvement by the Department with the family.

The Department filed an opposition to Brent's motion, and the court heard argument on October 6, 2011. Brent did not appear. After hearing argument the court ruled the presumption of paternity in section 7540 applied in this case, concluding the genetic testing was not timely under section 7541, subdivision (b). The court reasoned the two-year limitations period in that section barred all DNA reports, whether ordered by the court or voluntarily obtained by the parties.⁶ Accordingly, the court found Brent was Blake's presumed father. (See § 7611 [man is a presumed father if he meets the conditions stated in § 7540].)⁷ Brent filed a timely notice of appeal.

CONTENTIONS

On appeal Brent has abandoned his contention the genetic test conducted more than eight years after Blake's birth is timely and rebuts section 7540's conclusive presumption of paternity because it was not ordered by the juvenile court under section 7541. Instead, he now argues the court erred in applying the section 7540 presumption because he is sterile and because there was conflicting evidence whether he had married Melissa before Blake was born.

DISCUSSION

1. Brent Has Forfeited Any Claim Section 7540 Does Not Apply Because He Is Sterile

In discussing the question of Blake's parentage in its initial jurisdiction/disposition report, the Department included Melissa's statement, "Mr. G[.] cannot have any children as he is sterile." The Department's report did not disclose the basis for Melissa's

⁶ In fact, "only blood tests authorized by section 7541 can overcome the conclusive presumption of paternity." (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 240; see § 7541, subd. (a) [specifying that blood tests "performed pursuant to Chapter 2 (commencing with Section 7550)" may rebut otherwise conclusive presumption of paternity in § 7540].)

⁷ The court subsequently accepted Brent's waiver of any family reunification services.

observation, and Brent's purported sterility was not addressed in his motion for a declaration of the nonexistence of a father-child relationship. Specifically, Brent did not assert section 7540's conclusive presumption of paternity was inapplicable because he is sterile. Accordingly, this argument has been forfeited. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [forfeiture doctrine applies in dependency proceedings]; *In re Wilford J.* (2005) 131 Cal.App.4th 742, 754 ["[a]n appellate court ordinarily will not consider challenges based on procedural defects or erroneous rulings where an objection could have been but was not made in the trial court"].)

Application of the forfeiture doctrine is particularly appropriate here. Case law defines sterility under section 7540 "in the strictest sense." (*In re Marriage of Freeman* (1996) 45 Cal.App.4th 1437, 1449.) Diminished or impaired fertility is not enough: "It is limited to cases where, by a preponderance of the evidence, a party can demonstrate that the presumed father could not produce live sperm count at the time of conception." (*Ibid.*) Because Brent failed to raise the issue in the juvenile court and relies in this court solely on an isolated, hearsay statement by Melissa in one of the Department's reports, rather than on expert medical testimony or even his own declaration describing his condition, we are unable to determine whether the assertion of sterility is based in fact, let alone how it measures against the strict definition properly accorded the term.

2. Substantial Evidence Supports the Juvenile Court's Finding Brent and Melissa Were Married At the Time of Blake's Birth

As discussed, the Department's jurisdiction/disposition report states both that Melissa had said she and Brent were legally married when Brent was born (on page four) and that she and Brent were legally married after Brent's birth (on page 14). Emphasizing the second statement while disregarding the first, Brent asserts the only evidence he was in fact married to Melissa before Brent's birth is a statement by Melissa's counsel at the detention hearing in March 2011 and argues, in effect, this evidence is insufficient to trigger the section 7540 conclusive presumption of paternity.

Brent significantly misrepresents the record. In addition to the statement on page four of the jurisdiction/disposition report that he ignores, Melissa herself completed a

parentage questionnaire on March 23, 2011 stating she had married Brent on September 20, 2002, a date prior to Blake's birth. Moreover, Brent conceded he was married to and living with Melissa at the time of Blake's birth in his motion seeking a declaration of the nonexistence of a father-child relationship. Consequently, even if the statement on page 14 of the jurisdiction/disposition report is not simply a mistake, substantial evidence supports the juvenile court's finding Blake is "the child of a wife cohabiting with her husband" within the meaning of section 7540. (See *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393 [when the factual basis for a juvenile court's finding or order is challenged on appeal, the reviewing court must determine if there is substantial evidence, contradicted or uncontradicted, that supports it]; *In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564 [same].)

DISPOSITION

The juvenile court's order is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.