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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re A.L., a Person Coming Under the  
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

S.V.,

Defendant and Appellant.

A136168, A137016, A137360

(Alameda County  
Super. Ct. No. OJ11017047)

S.V., the father of A.L., appeals from an order terminating his parental rights (A137360); and from orders denying his Welfare and Institutions Code<sup>1</sup> section 388 petitions (A137016; A136168). We have consolidated the appeals for our review. Father contends that the court erred in finding that he is not A.L.’s presumed father. We affirm.

**I. FACTUAL BACKGROUND**

A.L. was born in May 2011 and tested positive for cocaine, methamphetamines and heroin. A.L.’s mother acknowledged a long-term substance abuse problem. On May 31, 2011, the Alameda County Social Services Agency (the Agency) filed a section 300 petition alleging these facts and further alleging that mother did not obtain prenatal

<sup>1</sup> Unless otherwise indicated, further statutory references are to the Welfare and Institutions Code.

care and had no provisions for A.L.'s care, and that the whereabouts of the father were unknown. The Agency recommended that A.L. be detained.

The court adopted the Agency's recommendations on June 1, 2011. An uncontested dispositional and jurisdictional hearing was held on June 15, 2011. The Agency's report for the hearing noted that mother claimed that A.L.'s father was named "Tony." The court sustained the allegations of the section 300 petition and declared A.L. a dependent of the court.

On June 21, 2011, A.L. was released from the hospital and placed in a foster care home. The Agency continued to evaluate a possible relative placement with maternal relatives. On August 13, 2011, the Agency placed A.L. with his current foster-adopt parents.

The Agency's report for the six-month review hearing recommended that reunification services for the mother be terminated and that a section 366.26 hearing be set. Mother's whereabouts were unknown. She had not visited with A.L. On November 29, 2011, the court terminated reunification services and set the matter for a section 366.26 hearing. The court directed the Agency to conduct a due diligence search for mother.

In the process of the Agency's due diligence search, father learned of A.L. and was directed to call the Agency by mother's sister. The Agency arranged for paternity testing for father. Paternity testing confirmed father was A.L.'s biological father. Father expressed interest in having A.L. returned to him.

The Agency's report for the section 366.26 hearing recommended that the permanent plan be changed to family reunification and that reunification services be provided for father. On March 20, 2012, father petitioned pursuant to section 388 seeking reunification services and a declaration of presumed father status.

On March 29, 2012, the court indicated that it would not proceed with the section 366.26 hearing and set the matter for a hearing on father's section 388 petition. The court ordered visitation for father.

The Agency's status review report dated April 24, 2012 noted that father had attended every scheduled visit with A.L. and had been appropriate in his parenting during visits. The Agency again recommended that reunification services be provided to father.

In a memorandum dated May 8, 2012 on father's section 388 petition, the Agency reported that father continued to visit A.L. for twice weekly visitation and continued to express his desire to become a full-time parent to A.L. The Agency had learned that father had a prior history of arrests for driving under the influence (DUI) with a conviction in 2004. His most recent arrest was in 2008 but it was not "filed." The Agency contacted A.L.'s probation officer and confirmed that father was on a "No Services" caseload for five years. Father reported that he stopped drinking in 2008.

The Agency further stated that father was arrested on April 27, 2012 after an altercation with mother in which mother's hand was scratched. Father's attorney informed the Agency on May 2, 2012 that the charges related to the incident had been dropped but that father was being held for deportation. The Agency also learned that father's earlier story that he was in Canada after A.L. was born was false and that he had been deported to Mexico on May 3, 2012.

The Agency continued to recommend that the court find father to be the presumed father of A.L. It reported that it would work with Mexican authorities to evaluate father's living situation, and requested a continuance. The court denied the request for a continuance.

On May 11, 2012, the court set a hearing on father's section 388 petition. In a report dated May 25, 2012, the Agency recommended that the court find father to be the presumed father of A.L. and that the permanent plan of adoption be changed to placement of A.L. in father's home in Mexico. The Agency had arranged for a home assessment in Mexico.

The hearing on father's section 388 petition was held over several days. The court first considered whether father was a *Kelsey S.*<sup>2</sup> father. C.V., mother's sister, testified on

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<sup>2</sup> *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*).

father's behalf. C.V. testified that when mother told her she was pregnant, she said that "Tony" was the father. Mother asked C.V. not to tell father that she was pregnant. C.V. was present when A.L. was born. Mother again told her that "Tony" was the father. In September or October 2011, C.V. spoke by telephone to father in Mexico and told him that A.L. had been born. C.V. told him that the baby was born on drugs and had been taken away from mother and was in a foster placement. Father told her that the baby was his and that he had to hurry to get back to the United States. C.V. testified that approximately two to three months elapsed between the phone call and father's appearance in the dependency proceedings.

Father testified by telephone from Guadalajara, Mexico. He was currently employed as a transmission mechanic and lived in a four bedroom house with his parents and extended family. Father testified that he and mother decided to have a baby in September or October of 2010. Father was taken into custody in late October 2010 and was in the county jail during mother's pregnancy. While in jail, he learned through his brother that mother was pregnant with his child. He was released from custody in July 2011 and deported to Tijuana, Mexico. He contacted mother by telephone and asked her about the baby. Mother told him that the baby had been born. She then started to cry, said that he had abandoned her, and hung up.

Father subsequently spoke with C.V. who told him that the baby had been taken away from mother. He was then in Guadalajara visiting his mother who had a heart attack. Father stayed in Guadalajara for four months while his mother was in the hospital. He returned to the Bay Area in late November 2011 and lived with mother for about a month and a half to two months. Mother told him repeatedly that he was not the father of the baby, but father knew that he was. Mother would not tell father where the baby was, and he did not learn about the dependency proceedings until January 2012 when C.V. left a telephone message for mother that she had received a letter from the social services agency.

Father contacted the Agency and told the social services worker that he believed he was A.L.'s father. He appeared in court on the case in January 2012 and took a

paternity test thereafter. The Agency confirmed that he was A.L.'s father. He moved from a studio apartment to a house so that he would have space for A.L. and regularly visited him.

Father admitted that he initially told the Agency that he had moved to Canada after A.L.'s birth because he feared he would be deported if the Agency knew he had been in Mexico. On cross-examination, father acknowledged that he was arrested in October 2011 for a DUI offense he committed in December 2008. He also admitted that he had suffered four prior DUI convictions.

Robin Padilla, the social worker on A.L.'s case since December 2011, testified that father contacted her in January 2012. Father readily agreed to a paternity test. He told Padilla that he wanted to have A.L. in his care and that he also had paternal relatives who could be evaluated for placement. Father maintained regular contact with the Agency and was cooperative. Father reported to her that mother had prevented him from knowing about A.L. and had not told him that A.L. was in children's protective services. Mother repeatedly told father that he was not A.L.'s father. Father participated in regular visitation with A.L. and showed enthusiasm, comfort, and confidence in his parenting. The Agency recommended that the permanent plan be changed from adoption to return of A.L. to father's custody. Father continued to maintain contact with the Agency since he was deported. Father had a history of DUI but had been sober since 2008 and had suffered no further DUI arrests. He completed a Salvation Army recovery program in 2008. Father was arrested for a domestic violence incident involving mother in May 2012 and was deported. Padilla believed that there were no charges filed or that the charges were dropped.

The court found that father was not a *Kelsey S.* father. The court proceeded to a hearing on father's petition pursuant to section 388 to allow father the opportunity to demonstrate whether there were any changed circumstances or if a continued relationship between father and A.L. was in A.L.'s best interests.

The Agency's report for the section 388 and 366.26 hearing recommended that A.L. be moved to the custody of father who was residing in Mexico. On November 2,

2012, the court denied the section 388 petition. The matter proceeded to a section 366.26 hearing on December 4, 2012. The Agency reluctantly recommended that adoption be the permanent plan given the court's ruling on father's section 388 petition. The court followed the Agency's recommendation and terminated parental rights and ordered adoption as the permanent plan for A.L.

## II. DISCUSSION

The Uniform Parentage Act (UPA), Family Code section 7600 et seq., sets forth the statutory framework for judicial determinations of parentage and governs in dependency proceedings. (*In re D.A.* (2012) 204 Cal.App.4th 811, 824.) “The UPA distinguishes between ‘alleged,’ ‘biological,’ and ‘presumed’ fathers.” (*In re M.C.* (2011) 195 Cal.App.4th 197, 211.) Only a presumed father is a parent entitled to reunification services under section 361.5. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451.) “A biological father can be a presumed father, but is not necessarily one . . . .” (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.)

Family Code section 7611 provides several rebuttable presumptions under which a party may achieve presumed father status, including being married to the child's mother where the child is born during or soon after the marriage or receiving the child into his home and holding the child out as his natural child. An unwed father may also assert paternity rights if he is “an unwed biological father who comes forward at the first opportunity to assert his paternal rights after learning of his child's existence, but has been prevented from becoming a statutorily presumed father under section 7611 by the unilateral conduct of the child's mother or a third party's interference.” Such individuals are known as “*Kelsey S.*” fathers, and are entitled to presumed parent status under section 7611. (*In re M.C., supra*, 195 Cal.App.4th at pp. 213, 220.)

The status of a father in dependency cases determines the extent of his rights, including rights of participation in the proceedings. (*In re T.R., supra*, 132 Cal.App.4th at p. 1209.) A presumed father is entitled to appointed counsel, custody (unless there is a finding of detriment) and reunification services. (*Ibid.*) The party claiming entitlement

to presumed father status bears the burden of establishing, by a preponderance of the evidence, the facts supporting that claim. (*Id.* at p. 1210.)

Father contends that the evidence shows that he qualified for quasi-presumed father status under *Kelsey S.* He acknowledges that the trial court’s decision on presumed father status is typically reviewed under the substantial evidence standard. (See *In re M.C.*, *supra*, 195 Cal.App.4th at p. 213.) He argues, however, citing *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528, that the correct standard where the party with the burden of proof failed to prevail below is whether the evidence compels a judgment in his favor as a matter of law. The *I.W.* court reasoned that “[i]n the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact’s unassailable conclusion that the party with the burden did not prove one or more elements of the case [citations]. [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ [Citation].” (*Id.* at p. 1528.)<sup>3</sup> Under either standard of review, the trial court did not err in finding that father was not a quasi-presumed father.

The court in *In re M.C.*, *supra*, 195 Cal.App.4th at p. 213 explained the requirements for quasi-presumed father status. A quasi-presumed or *Kelsey S.* father must come “forward at the first opportunity to assert his paternal rights after learning of his child’s existence” when he has been prevented by the unilateral conduct of the child’s mother or a third party’s interference from learning of the child’s birth. (*Ibid.*) “The

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<sup>3</sup> Counsel for A.L. agrees that the correct standard of review is that set forth in *I.W.* The Agency opted not to file a brief in these appeals.

father's conduct both *before and after* the child's birth must be considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate 'a willingness himself to assume full custody of the child—not merely to block adoption by others.' [Citation.] A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child." (*Id.* at p. 220; quoting *Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

In *In re M.C.*, the father satisfied the *Kelsey S.* requirements because he held himself out as the father immediately upon learning that the mother was pregnant. (*In re M.C.*, *supra*, 195 Cal.App.4th at p. 220.) He acknowledged his paternity to the mother and others. (*Ibid.*) Although the mother left the father to pursue another relationship and did not tell the father of her whereabouts, when she renewed contact, the father promptly responded and began providing support for the child. (*Id.* at pp. 220–221.) He fully participated in the dependency proceedings and fought for the child's custody. (*Id.* at p. 221.) The court determined that the father had acted promptly to attempt to assume his parental responsibilities as fully as the mother would allow. (*Id.* at pp. 221–222.)

Here, by contrast, while father faced obstacles in confirming his paternity status and asserting his parental rights, his efforts came too late. We note that father was not altogether at fault as there was evidence that mother lied to father about his paternity and was obstructive in his efforts to learn more about A.L. She was incarcerated out-of-state during part of her pregnancy and was otherwise incommunicative and hard to locate. At the same time, however, father was incarcerated during mother's pregnancy and learned from his brother while he was in the county jail that mother was pregnant with his child and subsequently heard from mother's sister that A.L. was in foster care. There was also evidence that father was aware of mother's pregnancy from its inception. Indeed, he testified that he and mother decided to have a baby and he accompanied her to the hospital for a pregnancy test.

In any event, father was living in Mexico when A.L. was born. When he returned to the United States in November 2011, he repeatedly asked mother for information about A.L. but she again lied to him about his paternity. It was not until he intercepted a message that C.V. left for mother in January 2012 about a letter from the Agency, that he contacted the Agency and asserted he was A.L.’s father. Father thereafter established his paternity, cooperated with the Agency, participated in the dependency proceedings, and successfully visited with A.L. several times.

Although father sought to establish paternity and to hold out A.L. as his son, these acts came too late. Reviewing the record as a whole, we cannot conclude that the juvenile court erred in finding that father failed to “come[] forward at the first opportunity to assert his paternal rights.” (*In re M.C.*, *supra*, 195 Cal.App.4th at p. 213.) Father and mother discussed having a baby at the time mother became pregnant, and father—by his own admission—believed from the start that he was A.L.’s father. He nonetheless waited several months after being deported to Mexico before returning to the United States or otherwise seriously pursuing his paternity status. Accordingly, we must affirm the juvenile court’s order. On this record, father was not a presumed father under *Kelsey S.* under the substantial evidence standard or as a matter of law (i.e., the evidence was not “ ‘uncontradicted and unimpeached’ ” and of such a character and weight that the court was required to confer *Kelsey S.* status). (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

### III. DISPOSITION

The orders are affirmed.

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Rivera, J.

We concur:

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Reardon, Acting P.J.

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Humes, J.