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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

DAVID F.,

Petitioner,

v.

**SUPERIOR COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,**

Respondent;

**SAN FRANCISCO HUMAN SERVICES
AGENCY et al.,**

Real Parties in Interest.

A136713

**(San Francisco County
Super.Ct.No. JD103387)**

_____ /
David F. — father of A.K. (daughter) — petitions for writ relief (Cal. Rules of Court, rule 8.452) to reverse the juvenile court’s order denying his motion for presumed father status, denying his section 388 petition, and setting a Welfare and Institutions Code section 366.26 hearing.¹ David contends: (1) the denial of his motion for presumed father

¹ Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code. Joanne K., also known as A.D., (mother) is not a party or petitioner in this matter and is mentioned only where relevant to the issues raised in father’s writ petition. (*In re V.F.* (2007) 157 Cal.App.4th 962, 966, fn. 2, superseded on other grounds as stated in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57-58.) We deny the San Francisco Human Services Agency’s (the Agency) request for judicial notice of David’s

status was erroneous; (2) the denial of his section 388 petition without a hearing violated due process; and (3) the visitation order unlawfully delegated judicial authority to daughter's therapist.

We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Detention, Jurisdiction, and Disposition

Daughter was born in 2005. In a December 2010 petition, the Agency alleged daughter came within section 300, subdivisions (b) and (g) because mother's mental health condition rendered her unable to care for daughter and because "alleged father has not sustained his paternity." The petition alleged daughter's father was "unknown." The juvenile court detained daughter after a contested detention hearing, placed daughter in foster care, and ordered a paternity inquiry.

In its January 2011 disposition report, the Agency recommended the court deny reunification services for "alleged father, David" because he had "not obtained presumed father status" and because his whereabouts were unknown. According to the Agency, mother said David "has never been involved in [daughter]'s life." On January 18, 2011, David contacted the Agency and said he "was interested in contact with [daughter], and possibly partial custody. . . . He said the only reason he hasn't seen her since she was about a year old is because . . . mother took off with her to Canada, and he is not able to cross the border for legal reasons. He said that . . . mother told him that she would not allow him to have visits with . . . daughter." When David spoke to daughter's social

"Affidavit of Corpus Denial and Fraud" because the document was not before the trial court. "Generally, "when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered." [Citation.]" (*California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 803 (*California School Bds. Assn.*), quoting *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) The Agency has "not cited any exceptional circumstances that would justify a deviation from this rule" here. (*California School Bds. Assn., supra*, 192 Cal.App.4th at p. 803.) We deny the request for the additional reason that the document "would not affect our analysis[.]" (*Ibid.*; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544.)

worker, he was in Illinois under “house arrest” but planned to return to the Bay Area “as soon as possible.” The Agency reported David agreed to take a paternity test, “which was discussed with his attorney. A [c]ourt order would be necessary for an out-of-state paternity test” but David did not contact the social worker until April 2011. During that April 2011 conversation, David said he was “still very interested in having contact with daughter” but did not ask how she was doing. The social worker gave David information about the disposition hearing.

David was not present at the June 2011 disposition hearing but his attorney appeared on his behalf. The court determined daughter came within section 300, subdivisions (b) and (g), specifically that David had not sustained his paternity (§ 300, subd. (g)). The court declared daughter a dependent of the court and ordered her to remain in foster care. The court declined to order reunification services for David. David’s attorney received various petitions and status review reports filed by the Agency and appeared at numerous court hearings on David’s behalf from April 2011 to March 2012.

David’s Motion for Presumed Father Status

The court continued the 6-month and 12-month review hearings numerous times. In April 2012, David appeared on the date set for the 12-month review hearing with his attorney and the court ordered paternity testing.² A few days later, David filed a motion for presumed father status. David argued he was a presumed father under Family Code section 7611, subdivision (d) because he demonstrated a “full commitment to his paternal responsibilities.”³

David submitted a declaration in support of the motion averring he: (1) lived with mother for six months before daughter’s birth and took mother to prenatal visits; (2) was in the delivery room when daughter was born and selected her name; (3) lived with

² In August 2012, a paternity test confirmed David was daughter’s biological father.

³ Pursuant to Family Code section 7611, subdivision (d), “[a] man is presumed to be the natural father of a child if he . . . [¶] receives the child into his home and openly holds out the child as his natural child.”

mother and daughter for six months after daughter was born and introduced daughter to his friends and family; and (4) provided financial and emotional support for daughter in the six months after her birth. David explained that he decided to send mother and daughter to Seattle after mother “became very emotionally troubled[.]” Shortly thereafter, mother “falsely claimed to have moved to Canada[.]” David was unable to visit mother and daughter in Canada because he could not obtain a passport. David averred he had not seen daughter since she moved to Seattle with mother.

Daughter and the Agency opposed the motion. The Agency urged the court to deny David’s motion even though he was daughter’s biological father because, among other things: (1) he was not named on daughter’s birth certificate; (2) there was no voluntary declaration of paternity; (3) he “has been almost entirely absent from [daughter]’s life;” and (4) he knew about the dependency proceedings and was “absent during [daughter]’s multiple placement changes.”

David’s Section 388 Petition

David’s paternity was established in August 2012. In early September 2012, David filed a section 388 petition (form JV-180) requesting the court vacate daughter’s placement with her maternal grandmother and permit daughter to “reside permanently” with him “after an appropriate transition plan.” He claimed allowing daughter to reside with him would be “physically and emotionally beneficial to her [because] she can . . . be introduced to and have contact with her siblings” and visit with her maternal grandparents. David alleged he had established paternity and “secured a safe and permanent home” where daughter could reside with him and his fiancée. He supported the petition with a letter from his therapist, who stated David was “emotionally mature, thoughtful and kind-hearted” and would “make a very good father if his daughter is placed in his care.” David’s fiancée, Crystina, submitted a declaration in support of the petition describing how well David interacted with her niece and how loving and supportive he is. Several friends submitted declarations describing David as clean, organized, trustworthy, upright, and loving. Finally, David submitted photographs of his home and a description of his various business ventures.

The court set a September 2012 hearing date for the motion for presumed father status, the section 388 petition, and the 12-month review.

Hearing on David's Presumed Father Motion and Section 388 Petition

At the hearing, David testified he met mother about a year and a half before daughter was born. They lived together before mother became pregnant and while she was pregnant. David supported mother financially while she was pregnant and took her to three prenatal appointments. Although David was present as daughter was born, and named her, he is not named on her birth certificate. David lived with mother and daughter for about a year after daughter's birth. David stayed at home with daughter while mother worked and introduced daughter to his family and friends.

At some point, David began to have an "external struggle" with the manager of the apartment building where David lived with mother and daughter. In approximately 2006, David "made a plan" to relocate mother and daughter to Seattle while he remained in San Francisco. Mother and daughter moved to Seattle. In 2008 or 2009, mother stopped communicating with David. At some point, mother told David she was moving to Canada; David did not have a passport "because [of] . . . felonies in [his] past" but he tried to enter Canada with "just an ID card." He "was turned away at the border."

David did not find out where mother was until he "discovered that there was a proceeding happening here and that business was being forced against my daughter." At that time, he was living in Illinois under "house arrest." David learned about the dependency proceeding in early January 2011, about two months after the Agency detained daughter. He received a letter from his court-appointed attorney notifying him his parental rights might be terminated, but he did not contact the Agency about daughter. In early April 2011, his sentence completed, David returned to San Francisco. He went to the San Francisco Superior Court clerk's office and learned a case with the "name given from [his] elders within the Nation of [Moorish]" had been dismissed in 2006.

While he was at the clerk's office, mother called and said, "'What is your angle on this case?'" In response, David told mother he wanted to see daughter and thought it was "wrong" that mother was not allowing him to see her. David claimed mother said

daughter was fine and asked David to “stand down” because his presence would “mess up” the story she had been telling the court. Mother also demanded David pay a “ransom” of \$5,000 to see daughter. At that point, David decided to “back [] up because [he had] a piece of paper . . . that said [the case] was over” and because he wanted mother “to save face.” David obtained an apartment and “got everything back together . . . to receive [daughter]” but mother did not want to bring daughter to him.

David made his first court appearance in April 2012. He spoke to a child welfare worker, inquired about daughter, and asked to see her. He “promptly” took a paternity test; a few months later, he learned another test would need to be taken and he promptly responded to the second request for testing.

At the conclusion of the hearing, the court denied David’s motion for presumed father status. The court explained, “This is a case of a seven year old, and [David] has not been involved in her life.” The court noted David could have done several things once he learned of the dependency proceeding, “the most basic being following up with the social worker when he received the letter and following up in April of 2011 to establish paternity[.]” The court also concluded it was not reasonable for David to rely on the document from the clerk’s office stating a case with his name on it had been dismissed in 2006, when he was still living with daughter.

The court determined David knew about the dependency proceedings in January 2011 and “made no efforts to establish his paternity until April of 2012. [¶] Given how long this case has been here and where this case is now — and it is only now for the last five or six months that [David] has come forward — I am denying his presumed father request.” The court then concluded David’s section 388 petition was “[e]ssentially mooted.” The court explained, “[e]ven if there were a change of circumstances, I am not going to set this for an evidentiary hearing [¶] I do not find that [David has] met the burden to show that it would be in [daughter]’s best interest to . . . vacate out-of-home placement permitting [daughter] to reside permanently with [David] after an appropriate transition plan.”

Regarding visitation, the Agency and daughter advocated for a slow transition because daughter did not know David's identity. The Agency urged the court to order daughter to begin individual therapy before commencing visits with David. The court stated, "I don't find it . . . in [daughter's] best interest to start therapeutic visitations [¶] I want to hear further from the therapist how even the introduction to the concept of having a father is going and how [daughter] is adjusting not only to that but to all the other recent changes that she is going through." The court ordered the Agency would "definitely" have "discretion to start therapeutic visits with [David] when the therapist determines it to be appropriate." The court terminated reunification services for mother and set a .26 hearing.

DISCUSSION

Substantial Evidence Supports the Denial of David's Motion for Presumed Father Status

"[O]nly a presumed, not a mere biological, father is a 'parent' entitled to receive reunification services under section 361.5." (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451 (*Zacharia D.*)) "[P]arental rights are generally conferred on a man not merely based on biology but on the father's connection to the mother [and/or] child through marriage (or attempted marriage) or his commitment to the child." (*Id.* at p. 449, quoting *In re Sarah C.* (1992) 8 Cal.App.4th 964, 974.) A natural father may become a presumed father if he receives the child into his home and openly holds out the child as his natural child. (Fam. Code, § 7611, subd. (d); *Zacharia D.*, *supra*, 6 Cal.4th at p. 449; *In re Phoenix B.* (1990) 218 Cal.App.3d 787, 790, fn. 3.)

To determine "whether a man has 'receiv[ed a] child into his home and openly h[eld] out the child' as his own [citation], courts have looked to such factors as whether the man actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had

acknowledged the child; whether he provided for the child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental.” (*In re J.H.* (2011) 198 Cal.App.4th 635, 646, quoting *In re T.R.* (2005) 132 Cal.App.4th 1202, 1211.) We review the court’s presumed parentage determination for substantial evidence. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1651-1653 (*Spencer W.*); *In re M.C.* (2011) 195 Cal.App.4th 197, 213; cf. *In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1116 [reviewing determination of presumed father status for abuse of discretion].)

David contends the court erred by denying him presumed father status because he received daughter into his home and publicly acknowledged her as his own pursuant to Family Code section 7611, subdivision (d). We disagree. Although David lived with and cared for daughter for between six months and one year after her birth, he had no contact with daughter for the six years preceding the hearing. (See *Spencer W.*, *supra*, 48 Cal.App.4th at p. 1651; *In re Sarah C.*, *supra*, 8 Cal.App.4th at pp. 972-973.) David did not seek to have himself listed on daughter’s birth certificate and he did not take legal action to seek custody of daughter until April 2012, almost a year-and-a-half after he learned of the dependency proceedings. He declined to appear in person at many hearings, was absent during daughter’s multiple placement changes, never contacted daughter’s social worker to inquire about daughter’s well-being, never requested reunification services, and did not seek to establish paternity until just before the .26 hearing was set. (*In re A.A.* (2003) 114 Cal.App.4th 771, 786-787.) Substantial evidence supports the court’s conclusion that David was not a presumed father.

It is well settled that “[s]ection 7611, subdivision (b) . . . requires something more than a man’s being the mother’s casual friend or long-term boyfriend: he must be ‘someone who has entered into a familial relationship with the child: someone who has demonstrated an abiding commitment to the child and the child’s well-being regardless of his relationship with the mother.’” (*In re D.M.* (Oct. 24, 2012, H038322) ___ Cal.App.4th ___ [2012 WL 5233504].) “A biological father is not entitled to custody or to reunification services merely because he wants to establish a personal relationship with

his child.” (*Id.* at p. ____.) Here, “there is no indication [daughter] view[s] [David] as a true *family* member. The record is clear that [David] lacks a ‘substantial familial relationship’” to daughter because he had not seen daughter — who was seven during the relevant proceedings — since she was about a year old. (*In re A.A.*, *supra*, 114 Cal.App.4th at p. 787, quoting *In re Sarah C.*, *supra*, 8 Cal.App.4th at p. 975.) Thus, the court properly determined David was not a presumed father.

David contends this case is similar to *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*) because he was precluded from attaining presumed father status by “a combination of . . . mother’s deception and the information he relied upon from the clerk’s office.” In *Kelsey S.*, our high court held “[t]he statutory distinction between natural fathers and presumed fathers is constitutionally invalid *only to the extent* it is applied to an unwed father who has sufficiently and timely demonstrated a full commitment to his parental responsibilities.” (*Id.* at p. 849.) As discussed in detail above, David did not “sufficiently and timely demonstrate[] a full commitment to his parental responsibilities” and, as a result, *Kelsey S.* has no application here. (*Id.* at p. 849.)⁴

The Denial of David’s Section 388 Petition Was Not an Abuse of Discretion

Pursuant to section 388, a parent of a dependent child may, “upon grounds of change of circumstance or new evidence,” petition the juvenile court to change, modify, or set aside any court order. (§ 388, subd. (a).) The petition must allege why the requested change is “in the best interest of the dependent child.” (§ 388, subd. (b).) “If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held[.]” (§ 388, subd. (d).) The court, however, may deny a section 388 petition without a hearing when the petition fails to make a “prima facie showing of a change of circumstances and that the proposed change

⁴ David’s claim that he “should have been afforded the opportunity to require the [A]gency to meet its constitutional burden to prove that he was unfit to assume custody of [] daughter under . . . Section 366.21, et seq.” has no merit. The Agency had no burden to prove David was “unfit to assume custody” of daughter. (See *Zacharia D.*, *supra*, 6 Cal.4th at pp. 453-454.)

of order is in the best interest of the child.” (*In re D.R.* (2007) 155 Cal.App.4th 480, 487 (*D.R.*); *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; Cal. Rules of Court, rule 5.570(d).) We review the lower court’s summary denial of a section 388 petition for abuse of discretion. (*D.R.*, *supra*, 155 Cal.App.4th at p. 487; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205.) “The “denial of a section 388 motion rarely merits reversal as an abuse of discretion. [Citation.]” (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.)

David contends “an evidentiary hearing should have been granted” and cites *In re Lesly G.* (2008) 162 Cal.App.4th 904, 912. He does not, however, explain why that case applies here, nor does he demonstrate how the court abused its discretion by denying the petition without a hearing. Nor has David demonstrated it was in daughter’s best interest to reside with him “permanently . . . after an appropriate transition plan.” We conclude the court did not abuse its discretion by denying David’s section 388 petition without a hearing because David failed to make a prima facie showing that changing daughter’s placement was in her best interest. (See, e.g., *In re Angel B.* (2002) 97 Cal.App.4th 454, 465 [section 388 petition properly denied where evidence did not show a parent-child bond from child’s perspective]; *Zacharia D.*, *supra*, 6 Cal.4th at p. 455 [section 388 petition properly denied where father “had done almost nothing to develop a relationship with [the child]”].)

*The Court Did Not Improperly Delegate Judicial
Authority to Daughter’s Therapist*

It is well settled visitation is an essential part of a reunification plan. (*In re James R.* (2007) 153 Cal.App.4th 413, 435 (*James R.*)). “The juvenile court has the sole power to determine whether visitation will occur[.]” (*Christopher H.*, *supra*, 50 Cal.App.4th at pp. 1008-1009; *James R.*, *supra*, 153 Cal.App.4th at p. 436.) The court “may not delegate its power to grant or deny visitation” to the social worker, therapist, or the child. (*Christopher H.*, *supra*, 50 Cal.App.4th at p. 1009; *In re S.H.* (2003) 111 Cal.App.4th 310, 317.) “When the court abdicates its discretion in that regard and permits a third party, whether social worker, therapist or the child, to determine whether any visitation will occur, the court violates the separation of powers doctrine.” (*In re S.H.*, *supra*, at pp.

317-318, fn. omitted, italics added.) While a therapist may not determine whether visitation should occur, he or she “may be allowed the limited discretion to determine when court-ordered visitation should begin.” (*Id.* at p. 318, fn. 10; *In re Chantal S.* (1996) 13 Cal.4th 196, 203-204 (*Chantal S.*))

Father contends the court erred by delegating judicial authority to daughter’s therapist to determine whether visitation should occur.⁵ He is wrong. The visitation order did not unlawfully delegate judicial authority to daughter’s therapist to determine whether visitation would occur. Instead, the order directed the therapist to initiate therapeutic visitation immediately after the therapist “determines it to be appropriate.” (*See Chantal S., supra*, 13 Cal.4th at p. 214.) It is well-settled that a court may grant a therapist “limited discretion to determine when court-ordered visitation should begin.” (*In re S.H., supra*, 111 Cal.App.4th at p. 318, fn. 10.)

Mother relies on *In re Donovan J.* (1997) 58 Cal.App.4th 1474 (*Donnovan J.*). In that case, the appellate court reversed a visitation order stating, “Father has ‘no visitation rights without permission of minors’ therapists.” The appellate court concluded the order “neither requires that the therapists manage visitation ordered by the court, nor sets criteria (such as satisfactory progress) to inform the therapists when visitation is appropriate. Instead it conditions visitation on the children’s therapists’ sole discretion. Under this order, the therapists, not the court, have unlimited discretion to decide whether visitation is appropriate.” (*Id.* at p. 1477.) The *Donnovan J.* court explained that a court may “base its determination of the appropriateness of visitation on input from therapists” but cannot delegate its duty to “make the actual determination” regarding visitation to therapists. (*Id.* at p. 1478.)

⁵ David also contends the court “did not articulate a factual support for its order, and there was no evidence presented that would suggest that visitation . . . would have been detrimental[.]” We reject these arguments because they are unsupported by any authority. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007, fn. omitted [failure to support contention with authority “constitutes a waiver of the issue on appeal”].)

Here, and in contrast to *Donnovan J.*, the court did not condition visitation on the therapist's permission or consent. Instead, the court directed the therapist to initiate visitation when the therapist determined the parties were ready. While visitation must be as frequent as possible, it must also be "consistent with the well-being of the minor." (*James R.*, *supra*, 153 Cal.App.4th at p. 435.)

DISPOSITION

The writ petition is denied on the merits. Because the .26 hearing is set for February 4, 2013, this opinion is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(3).)

Jones, P.J.

We concur:

Simons, J.

Needham, J.