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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re Z.S. et al., Persons Coming Under the
Juvenile Court Law.

MARIN COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

L.S.,

Defendant and Appellant.

A139880

(Marin County
Super. Ct. No. JV25580, JV25581)

The juvenile court found appellant L.S. (father) to be the biological, but not presumed, father of two sisters.¹ He seeks reversal of the dispositional order and the order terminating his parental rights on the grounds that the court erred by denying him presumed-father status, preventing him from presenting additional evidence that he was the sisters' presumed father, and failing to fully inquire into his parental status or inform him that he could seek presumed-father status. We conclude that father cannot challenge the dispositional order because he failed to timely appeal from it. And, although we conclude that father can challenge the order terminating his parental rights, we affirm the

¹ Both girls have the initials Z.S. and to differentiate between them we refer to them as "older sister" and "younger sister."

order because father cannot show that the outcome would have been different if he had been deemed a presumed father.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

In April 2012, A.P. (mother)² left eleven-year-old older sister and eight-year-old younger sister in a teenager's care " 'for the weekend.' " The sisters were forced to leave the teenager's home after mother failed to return to get them. The sisters were unable to contact mother and stayed with a stranger for two days before they were retrieved by father and his sister. The Marin County Department of Health and Human Services (Department) filed a petition alleging the juvenile court had jurisdiction over the sisters under Welfare and Institutions Code³ section 300, subdivision (b) on the basis that mother had failed to provide them with adequate care. The sisters were not detained, however, and they returned to mother's care.

The detention report reported that mother had stated that father was older sister's biological father but another man, T.F., might be younger sister's biological father.⁴ According to mother, father "had little involvement" with the girls because he had been incarcerated for six years and was later in a treatment program. The report noted that father "ha[d] not expressed interest[] in being involved in the case plan, but this can be further discussed."

The detention hearing took place at the end of April. Father, making his only appearance in court throughout the proceedings below, attended with his court-appointed counsel. Counsel mentioned that father's parental status needed to be addressed because the detention report indicated an issue about younger sister's parentage. He remarked

² Mother is not a party to this appeal, and we omit facts relating to her except where relevant.

³ All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

⁴ The Department eventually located T.F. in an out-of-state prison, and paternity testing established he is not younger sister's biological father.

that he believed father's name was on younger sister's birth certificate, and he stated, "I know he and [mother] are married. But my understanding is they may have been married after the birth of . . . [younger sister], in 2003." Father then stated the date he married mother, which was about two months after younger sister's birth.

The juvenile court directed father or his counsel to speak with the social worker so parentage-related information could be included in the next report. In response to a series of questions by the court, father stated that he was living with mother when older sister was born, he did not pay child support, he had never been ordered to pay child support, and no other court order had found him to be either girl's father. The court explained to father that in dependency proceedings there are "five different kinds of fathers" and that "[i]f you're the presumed father you're entitled to services on behalf of your children, including the right to reunify with them."

Both parents submitted on the petition. Father's counsel requested that the juvenile court order visitation between the sisters and father, but father became angry when told the visits would be supervised and stated, "I don't even want to see them. I'll wait until all this is over." The court did not order visitation for father and stated it would consider visitation and "presumed fatherhood" at the jurisdictional hearing.

Mother and the sisters were living in the home of the sisters' maternal grandmother. In May 2012, the Department filed an amended section 300 petition after the grandmother made mother and the sisters leave the home because mother was using drugs, mother was then arrested, and father could not be reached. The amended petition alleged jurisdiction under section 300, subdivision (b) on the basis that mother was unable to provide adequate care and under section 300, subdivision (g) on the bases that mother had been arrested and father was unavailable. Father was later contacted, and he told the social worker that he was no longer in the treatment program, was "now homeless," and had no resources to care for the sisters. The sisters were detained and placed in foster care. Both parents submitted on the issue of detention.

The jurisdictional hearing took place in June 2012. At the hearing, father's stand-in counsel reported that father's usual counsel "ha[d] not heard from [father] in some

time.” At mother’s request, the allegation under section 300, subdivision (b) was amended and the allegation under section 300, subdivision (g) as to her was stricken. Mother submitted on the amended petition, and father’s counsel took no position on father’s behalf. The juvenile court found true by a preponderance of the evidence the allegations of the amended petition, including the allegation as to father under section 300, subdivision (g).

At the dispositional hearing later that month, father’s counsel reported that he still had not heard from father. The social worker also had been unable to contact father. Father’s counsel contended that father was the presumed father because of parents’ marriage. Noting that there was no “documentary evidence” of parents’ marriage, the juvenile court found that father was an alleged father. The court informed father’s counsel, “If you get more information and you want to file a [section] 388 petition [to request presumed-father status,] we’re more than open to providing him with services if he makes himself available, wants to participate[,], and can establish more than just alleged fatherhood.”

The juvenile court found that father had “not expressed a desire at this time to have custody of these girls” and that “[b]y clear and convincing evidence placement with [father] . . . would be detrimental to the safety, protection or physical or emotional wellbeing of both girls.” Although the court ordered reunification services for mother, it found that “[p]rovision of reunification services for [father would] not benefit either girl.” The court did, however, authorize father to have visitation with the girls if he contacted the Department to request it.

At the six-month-review hearing in January 2013, the juvenile court clarified that it had previously found father to be only an alleged father, and it affirmed that it was “not changing any orders at this moment.” Father’s counsel stated, “We don’t need to make orders [about parentage] at this point. But [father] was here at the detention hearing and the mother and the father are married.” The court reiterated that father could have visitation if he contacted the Department and the Department determined visitation was “appropriate.”

In February 2013, a status conference took place after father's counsel learned that a judgment of father's paternity had previously been entered in a child-support proceeding. Father's counsel requested that the juvenile court take judicial notice of the judgment. After some discussion of the judgment's ramifications for T.F., who at the time was also an alleged father, the court continued the hearing. The transcript of the continued hearing does not appear in the record, but the minute order states that father's counsel "request[ed] that this matter go off calendar."

The 12-month-review report filed in early May 2013 indicated that father had contacted the Department in late February and had stated he was in jail in San Francisco for a parole violation. Father expected to be released in late March, was opposed to the sisters' recommended placement with his sister, and wanted the sisters to "be handed over to his care [so] that he [could] enter into a residential program for homeless fathers and children in San Francisco." The social worker told father to contact the Department again when he was released from jail, but she had not heard from him as of the report's filing.

At the 12-month-review hearing held a few days after the report was filed, father's counsel stated that he had not "had recent contact with" father but knew he was incarcerated in San Francisco. Father's counsel reminded the juvenile court of the judgment of paternity from the child-support case, but after the Department argued that the judgment did not necessarily entitle father to presumed-father status, particularly in light of his lack of involvement in the case, the court stated that "[f]rom [its] perspective [father] remain[ed] [an] alleged father." The court again indicated that "[t]he status [could] change" if father presented additional evidence. The court continued the hearing for an unrelated reason.

The continued 12-month-review hearing took place on May 13. Father's counsel did not know whether father was still incarcerated, and he stated that he was unable to submit on father's behalf or set the hearing for contest. Mother submitted on the report, and the juvenile court terminated her reunification services and set a section 366.26 hearing for September 4.

At the outset of the proceedings on September 4, father's counsel stated that father was in jail in San Francisco but wanted to be present for the section 366.26 hearing. Counsel requested that the juvenile court set the hearing for contest and order that father be present. The sisters' counsel and the Department took the position that, as an alleged father, father did not have the right to set the hearing for contest. The Department also argued that father could not relitigate the issue of his parental status without filing a request to modify the court's previous finding. The court continued the section 366.26 hearing "[i]n an abundance of thoroughness" to review the record, including the child-support judgment, as it pertained to father's status.

At a status conference on September 9, the juvenile court reviewed documents from the child-support proceeding, which showed that a default judgment was entered against father in 2004. The evidence in that case that he was older sister's father was that mother had signed "a paternity declaration," and the evidence that he was younger sister's father was that parents had signed "a [POP] declaration."⁵ The court relied on the documents from the child-support proceeding to find that father had the status of biological father for both sisters. Father's counsel argued that father was a presumed father, but the court reiterated that it was not finding father to be the presumed father of either sister.

Father's counsel then argued that as a biological father, father should be permitted to set the section 366.26 hearing for contest and appear at it so that he could "ask the Court to order just a guardianship" instead of adoption as the sisters' permanent plan. The Department and the sisters' counsel questioned whether father had a right to set the hearing for contest, and the juvenile court granted their request for a continuance to research the issue.

At the next hearing on September 12, the juvenile court heard argument on the issue whether, as a biological father, father had the right to set the section 366.26 hearing

⁵ A POP (Paternity Opportunity Program) declaration is "a voluntary declaration of paternity." (*H.S. v. Superior Court* (2010) 183 Cal.App.4th 1502, 1505; see Fam. Code, § 7570 et seq.)

for contest and appear at it. Father’s counsel again indicated that father wished to appear at the section 366.26 hearing to state his position that he “would rather have a guardianship . . . than adoption.” The hearing was continued for the court’s ruling.

On September 13, the juvenile court ruled that as a biological father, father did not have the right to set the section 366.26 hearing for contest, and it therefore determined that it could proceed with that hearing. The court found by clear and convincing evidence that both sisters were likely to be adopted, and it approved the permanent plan of adoption and terminated mother’s and father’s parental rights. Father appealed.

II. DISCUSSION

A. *Father’s Appeal Will Not Be Dismissed Even Though Father’s Opening Brief Was Untimely.*

Initially, the Department argues that this court should dismiss the appeal under California Rules of Court,⁶ rule 8.220 because father’s opening brief was not timely filed. Although we agree that father’s brief was untimely, we decline to dismiss the appeal.

Under rule 8.220, “[i]f a party fails to timely file an appellant’s opening brief . . . , the reviewing court clerk must promptly notify the party by mail that the brief must be filed within 15 days after the notice is mailed and that if the party fails to comply, the court may . . . [¶] . . . dismiss the appeal.” (Rule 8.220(a).) The rule further provides that “[i]f a party fails to file the brief as specified in a notice under (a), the court may impose the sanction specified in the notice.” (Rule 8.220(c).)

Here, father’s opening brief was untimely under rule 8.220(a), the 15-day notice issued, and father failed to file his brief or seek an extension within the 15-day period. (See rule 8.220(c), (d).) But the notice did not specify dismissal as a possible sanction; it only specified that the appointment of father’s appellate counsel could be vacated without compensation. As father correctly points out, rule 8.220 allows us to impose only the sanction specified in the notice. (Rule 8.220(c); see rule 8.220(d).) We therefore decline to dismiss father’s appeal, and we turn to its merits.

⁶ All further rule references are to the California Rules of Court.

B. Our Review of Father’s Claims Is Limited by Father’s Failure to Seek Timely Appellate Review of Prior Final Orders.

The Department contends that father’s claims cannot be considered in this appeal because he failed to seek appellate review of the prior final orders he challenges. It is partially correct. For the reasons we explain below, we conclude father may challenge the September 2013 orders that found him to be a biological father and terminated his parental rights, but—with one exception—may not challenge the orders entered before September 2013. The one exception is that we conclude that father may also challenge the orders entered at the May 13, 2013 hearing setting the section 366.26 hearing because father was not properly notified of his right to challenge those orders.

In a dependency case, the dispositional order and all subsequent orders—except for an order setting a section 366.26 hearing—are “directly appealable without limitation.” (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150; see §§ 366.26, subd. (l)(1), 395.) In general, a reviewing court “may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order.” (*Meranda P.*, at p. 1151.) This waiver rule protects the “dominant concerns of finality and reasonable expedition” and, where parental rights have been terminated, the “vital policy considerations of promoting, at that late stage, the predominant interest of the child and state, preventing a sabotage of the process and preserving the legislative scheme of restricting appeals of final-stage termination orders.” (*In re Janee J.* (1999) 74 Cal.App.4th 198, 207.)

The waiver rule must be applied “unless due process forbids it.” (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208.) “First, there must be some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole. . . . Second, to fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed,” or else the waiver issue would “turn . . . into a review on the merits.” (*Id.* at pp. 208-209.) Other factors may

also weigh in the analysis. (See *id.* at p. 208 [declining to “try to catalogue all circumstances that might allow relaxation of the waiver rule”].)

A specific statutory rule applies to an order setting a section 366.26 hearing and “any [other] order, regardless of its nature, made at the hearing at which a setting order is entered.” (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1023-1024; § 366.26, subd. (l)(1).) These orders must be challenged by filing a petition for extraordinary writ review. (§ 366.26, subd. (l); *Anthony B.*, at pp. 1021, 1023-1024; see rules 8.450, 8.452.) Generally, a party cannot challenge such orders in an appeal unless the party timely filed a petition for writ review and “[t]he petition . . . was summarily denied or otherwise not decided on the merits.” (§ 366.26, subd. (l)(1)(A), (C), (l)(2).) But the failure to file a writ petition may be excused for “good cause,” such as where the juvenile court fails to inform the party of the right to file a writ petition to challenge the order setting the section 366.26 hearing. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-723.)

In applying these rules to father’s claims, we conclude that neither the waiver rule nor section 366.26, subdivision (l) prevents father from raising his first two claims. Father’s first claim is that the juvenile court erred by not finding he was the sisters’ presumed father based on the evidence before it. The Department contends that father cannot raise this claim now because he failed to seek appellate review of previous determinations that he was merely an alleged father. But the September 9 order finding that he was the sisters’ biological father superseded those rulings. Regardless whether the court was required to entertain father’s request for presumed-father status at that late date, it did so. Thus, neither the waiver rule nor section 366.26, subdivision (l) bars father’s timely appeal from the September 9 order.

Father’s second claim is that the juvenile court erred by not granting his request to attend the section 366.26 hearing and present additional evidence of his parental status. This claim is also properly raised because father timely appealed from the September 13 order terminating parental rights, and the claim does not challenge any pre-September 2013 orders.

Father's third claim, however, does implicate prior final orders of which he failed to timely seek appellate review.⁷ Father contends that beginning at the detention hearing, the juvenile court failed to conduct a proper inquiry into parentage and failed to provide him with a JV-505 Form, Statement Regarding Parentage, or otherwise fully inform him of his right to seek a determination of his parental status. Father acknowledges that the waiver rule would normally bar him from challenging any pre-September 2013 orders, but he offers three reasons why he should nevertheless be permitted to do so.

First, in a contention similar to the third claim itself, father argues that we should not apply the waiver rule because he received inadequate notice of his ability to “seek[] an adjudication of his paternity.” But the juvenile court told father at the detention hearing that presumed-father status would entitle him to reunification services and instructed him to provide more information about parentage to the Department. Moreover, father's counsel repeatedly raised the parentage issue on father's behalf, even when father was out of touch and not participating in the proceedings. Under these circumstances, we cannot conclude that any defects in the notice father received so “fundamentally undermined the statutory scheme” that he was “kept from availing himself . . . of the protections afforded by the scheme as a whole.” (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208.)

Second, father claims the waiver rule should not be applied because he was incarcerated during the 12-month-review hearing but “no action was taken to try to secure his presence at [it]” despite his expressed interest in receiving custody of the sisters.⁸ Father cites no authority for the proposition that the juvenile court or the Department was required “to try to secure his presence” at the 12-month-review hearing. As a result, he has waived this argument. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [appellant's failure “to support [a point] with reasoned

⁷ Father's notice of appeal identifies a number of orders entered in May 2013 and earlier, but his attempt to appeal from those orders is untimely.

⁸ In his opening brief, father also argued that he did not receive proper notice of the 12-month-review hearing, but he withdrew this contention in his reply brief.

arguments and citations to authority” waives it].) In any case, father’s absence from that hearing was due to his own actions. At the time, father was not in contact with either his counsel or the Department, and they did not know whether he was incarcerated or not. Father also concedes he was given proper notice of the hearing, yet there is no indication that he ever sought to attend the hearing. Again, we fail to see how father was “kept from availing himself . . . of the protections afforded by the scheme as a whole.” (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208.) We conclude the waiver rule bars father from challenging all appealable orders entered before September 2013.

Finally, father contends he should be able to challenge the May 13 orders because he did not receive notice of his right to seek writ review under section 366.26, subdivision (l). We agree. A juvenile court setting a section 366.26 hearing is required to “advise all parties of the requirement of filing a petition for extraordinary writ review . . . in order to preserve any right to appeal these issues.” (§ 366.26, subd. (l)(3)(A).) If a party is absent when the order is made, as father was, notice must be made “by first-class mail by the clerk of the court to the last known address” of that party. (§ 366.26, subd. (l)(3)(A); see also rule 5.590(b).) The record does not show that any such notice was mailed to father or that he was otherwise informed of his right to file a writ petition.

The Department argues that father nevertheless lacked good cause for failing to file a writ petition because his counsel attended the May 13 hearing and received notification of his client’s writ rights. The notice requirement cannot be satisfied by notice to a parent’s attorney, however, because only the parent has “ ‘[t]he burden . . . to pursue his or her appellate rights[,]’ ” and an attorney need not file a writ absent the client’s “specific direction” to do so. (*In re Cathina W.*, *supra*, 68 Cal.App.4th at pp. 723-724.) The failure to provide father with proper notice of his right to file a writ

petition is not excused by his attorney's presence when the section 366.26 hearing was set. Accordingly, we conclude that father may challenge the May 13 orders.⁹

C. Father's Claims Fail Because Father Has Shown No Prejudice From Not Being Declared the Sisters' Presumed Father.

Father is not entitled to relief on any of his three claims unless he can show that he suffered prejudice by not being found to be a presumed father. He can show no such prejudice, and we therefore reject his claims even if we assume without deciding that the juvenile court erred in the ways father contends.

In a dependency case, reversal of a juvenile court's order is warranted only when an error is not harmless.¹⁰ (*In re James F.*, *supra*, 42 Cal.4th at pp. 905, 915-916; *In re Celine R.* (2003) 31 Cal.4th 45, 60.) The applicable standard of review depends on whether the error implicates the federal constitution. When the federal constitution is not implicated, the error is harmless if "it is [not] reasonably probable the result would have been more favorable to the appealing party but for the error." (*Celine R.*, at p. 60.) But when the federal constitution is implicated, there is a split of authority on the applicable

⁹This conclusion has little effect on our review of father's claims. First, father does not seek to overturn any of the May 13 orders. Second, the May 13 orders have little relation to the merits of father's claims. As to his claim that he was denied presumed-father status, the operative ruling is the September 9 determination that he is the sisters' biological father, not any prior finding that he was an alleged father. And the May 13 orders have no bearing whatsoever on his claim that he was improperly denied the opportunity to attend and present evidence at the section 366.26 hearing. Finally, as to his claim that he was denied reunification services, the operative ruling is the June 2012 order denying him those services. This order was unaffected by the May 13 orders. The only impact of our conclusion that father can challenge the May 13 orders is that it extends by a few months the period of time over which we may assess the impact of any failure by the juvenile court to inquire into parentage or give notice of father's right to seek presumed-father status.

¹⁰ Automatic reversal of a juvenile court's order in a dependency case is potentially appropriate only for errors that amount to " 'structural defect[s] affecting the framework within which the trial proceeds' so that they 'defy analysis by "harmless-error" standards and can never be harmless.' " (*In re James F.* (2008) 42 Cal.4th 901, 914-916, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) Father presents no such errors here.

standard. We have held that such an error is harmless if it did not affect the result by “clear and convincing evidence.” (*Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1514-1515.) But Division Three of the Fourth District has concluded that such an error is harmless only if it did not affect the result “beyond a reasonable doubt.” (*In re Mark A.* (2007) 156 Cal.App.4th 1124, 1145.) Neither party addresses which standard should apply, but we need not revisit the issue because we conclude that any errors here were harmless under any of these standards.

“ ‘A father’s status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is entitled.’ ” (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) Presumed fathers are entitled to “ ‘appointed counsel, custody (absent a finding of detriment), and a reunification plan.’ ” (*Ibid.*) A biological father, in contrast, is not entitled to custody and is not entitled to services unless the juvenile court finds that these services would benefit the child. (*In re J.H.* (2011) 198 Cal.App.4th 635, 644; *Kobe A.*, at p. 1120.) Alleged fathers do not have “ ‘a known current interest’ ” in the proceedings, and their rights are even more limited, although they are “entitled to notice of the proceedings” and “an opportunity . . . to appear and assert a position.” (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715; *Kobe A.*, at p. 1120.)

Father first argues that the juvenile court’s determination that he was not the presumed father was “significant” based on his belief that he would have been entitled to reunification services had the court found him to be a presumed father. But father never contested the June 2012 denial of reunification services. And when father attempted to establish presumed-father status in September 2013, there was no suggestion that he did so to seek services. As best we can tell based on the representations of his counsel, father instead wanted to set the section 366.26 hearing for contest to argue that the sisters’ permanent plan should be guardianship instead of adoption. Rather than supporting father’s appellate claim that he wanted reunification services, the record shows that father never asked to receive services, absented himself from most of the proceedings, and failed to visit the sisters even though the court had indicated that he could.

Furthermore, father's apparent belief that he would have been entitled to reunification services if he had been deemed a presumed father is mistaken. Reunification services "need not be provided" to a presumed father in a number of circumstances, including "when the [juvenile] court finds by clear and convincing evidence . . . [¶] . . . [¶] . . . [t]hat the child has been found to be a child described in subdivision (g) of Section 300." (§ 361.5, subd. (b)(9).) Here, the court found that the sisters were under its jurisdiction under section 300, subdivision (g). Thus, father could have been denied reunification services even if he had been deemed a presumed father.

Father also claims he was prejudiced because he was prevented from seeking the sisters' placement with him. But a presumed father is not entitled to custody if it would be detrimental to a minor (*In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1120), and at the dispositional hearing the juvenile court found that placement with father would be detrimental to the sisters. Father never challenged this ruling. Although he makes much of the interest in custody he expressed to the social worker in February 2013, father never sought custody of the sisters in court. Finally, father was incarcerated throughout the relevant time period and was not in a position to assume custody. The section 366.26 report, which the court admitted at the September 13, 2013 hearing, states that "the Department has learned in the last months that [father] has recently been sentenced to approximately 20 years in prison." If this is the case, he remains unable to assume custody.

Father also suggests that he was prevented from seeking the sisters' placement with one of his relatives. But the sisters are now placed with father's sister, who is their prospective adoptive mother. Although it appears father did not approve of that placement, he does not identify any other relative whom he would have proposed as an alternative placement.

Finally, father suggests that if he had attained presumed-father status, his parental rights would not have been terminated. But as discussed above, father's apparent objective in seeking presumed-father status was to argue for guardianship instead of adoption, not to contest the termination of his parental rights. Even if father had actually

wanted to avoid termination of his parental rights, he does not explain how gaining presumed-father status late in the case would have enabled him to achieve his goal. We cannot imagine any scenario in which he could have avoided having his parental rights terminated, given his lack of entitlement to reunification services, his incarceration and resulting inability to care for the sisters, and his failure to participate in the case and the sisters' lives.

In sum, father has failed to establish that he experienced any harm resulting from not being found the sisters' presumed father. As a result, reversal is not warranted on any of the grounds he raises.

III.
DISPOSITION

The order terminating father's parental rights and the order finding that father is a biological father are affirmed.

Humes, J.

We concur:

Ruvolo, P.J.

Reardon, J.