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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LOUIS G.,

Plaintiff and Respondent.

v.

LINDSEY D.

Defendant and Appellant.

B263239

(Los Angeles County
Super. Ct. No. ED92531)

E.O., as Guardian, etc. et al.,

Plaintiffs and Appellants,

v.

LOUIS G.,

Defendant and Respondent.

(Los Angeles County
Super. Ct. No. BN5959)

Adoption of C.O., a Minor.

(Los Angeles County
Super. Ct. No. BT057998)

E.O., as Guardian, etc. et al.,

Plaintiffs and Appellants,

v.

LOUIS G.,

Defendant and Respondent.

Guardianship of C.O., a Minor.

(Los Angeles County
Super. Ct. No. BP156878)

E.O., as Guardian, etc. et al.,

Petitioners and Respondents

v.

LOUIS G.,

Objector and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County,
Amy M. Pellman, Judge. Affirmed.

Gradstein & Gorman and Jane A. Gorman; John L. Dodd & Associates and John
L. Dodd for Plaintiffs and Appellants, and Petitioners and Respondents.

Janette Freeman Cochran, under appointment by the Court of Appeal, for
Appellant.

Christopher Blake, under appointment by the Court of Appeal, for Minor.

Andre F. F. Toscano for Plaintiff, Respondent, and Appellant.

INTRODUCTION

The issue in this appeal is whether Louis G., the biological father of Cash O., qualifies as a presumed father under standards articulated in *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*), and hence has the right to block the adoption of Cash by the putative adoptive parents, E. and T. O. Also at issue is whether the court abused its discretion in awarding the putative adoptive parents permanent guardianship over Cash. We affirm on all grounds because substantial evidence supported the court's determination that Louis qualified as a *Kelsey S.* father, and the court did not abuse its discretion in awarding permanent guardianship to the adoptive parents.

FACTS AND PROCEDURAL BACKGROUND

1. The Pregnancy

Both in their early twenties, Louis, a smog technician living with his parents in San Diego, and Lindsey, a Starbucks barista renting a room from a friend in San Diego, dated for six months between February 2013 and August 2013 and made plans to live together. On July 25, 2013, Lindsey discovered that she was pregnant with Louis's baby and told Louis about the pregnancy. A few days later, Lindsey broke up with Louis, telling him she did not want to see him at all, and cancelled their plans to move in together. Lindsey then moved to her father's residence and remained with her father for the duration of her pregnancy.

Based on conversations prior to the pregnancy, Louis expected Lindsey to have an abortion. After Louis texted Lindsey on August 22, 2013, offering to pay half of the abortion expenses, Lindsey responded that she was not going through with it and asked Louis to sign off on his parental rights so that the baby could be adopted. Lindsey promised the adoption "is not going to encumber you. This is not going to be a threat to you. You will be completely held harmless. You will not be emotionally involved in this. You will not be financially involved in this." Lindsey reiterated that the relationship was over on August 24, 2013, stating that she wanted no more contact with him.

The two continued to text message each other regarding abortion between August 22 and early October 2013. On October 2, 2013, Louis asked to be updated and Lindsey informed Louis about the baby's due date, pending prenatal appointments, and her recent trip to the emergency room with a threatened miscarriage. The next day, Louis met with Lindsey and her family. Louis asked Lindsey how the pregnancy was going. That day, Louis first informed his parents of the pregnancy. Lindsey told him that she decided to proceed with adoption and Louis responded that he was adamantly opposed to it. Louis's mother testified that at this time, Louis changed his partying life style. He began attending church regularly, became involved with a youth group, began spending more time at home and helping with chores, and infrequently went out partying with his old friends.

On October 28, 2013, Lindsey called Louis in response to a text message he sent, asking "how's it going?" They had a lengthy conversation, a third of which Louis spent trying to convince Lindsey that he should raise the child. Louis stated that he had set aside money for the baby, and Lindsey responded that she did not want the child to be raised in a broken home with two parents battling over him. Lindsey repeatedly indicated to Louis she did not want contact with him. Thereafter, communication between them was sparse. For a few months, Louis went to San Jose for work. While there, he lost his phone and did not try to contact Lindsey. Between November and March, Louis contacted Lindsey a total of five times.

Lindsey's mother, Laurie, texted Louis in November to set up a meeting with him. He responded that he was in San Jose working but would contact her when he returned to San Diego. On February 6, 2014, Louis met with Laurie, who informed Louis that Lindsey had selected the adoptive parents. On February 17, 2014, Louis contacted Laurie asking to meet the adoptive parents, indicating that he wanted to vet them and that meeting them would make him feel more comfortable. When he met with the adoptive parents on February 21, 2014, Louis immediately informed them that he was "going to fight" for his child.

Cash was due on March 31, 2014. On March 24, 2014, Louis asked Lindsey to allow him to be present for Cash's birth so that he could pray over Cash. Lindsey told him she would get back to him but never did. Cash was born in April 2014. The adoptive parents brought Cash home from the hospital and have had custody of him since.

During the pregnancy, Louis made about \$1,600 in monthly income (although he was unable to provide support from November 2013 through January 2014). Lindsey's father and the adoptive parents financially supported Lindsey throughout the pregnancy. Louis testified that he did not want to provide Lindsey with financial support because he did not want to finance the adoption, because Lindsey had pushed him away, and because he was saving his money to care for the child. He also believed that Lindsey's financial situation may have changed and she did not need his support based on her desire to have no contact with him. Although Louis never provided or offered to provide any financial support to Lindsey during the pregnancy, he saved \$2,000 to support Cash within a savings account. Louis also purchased \$1,100 in baby-related items and furniture; these items were obtained and set up in a room after Cash's birth.

2. Paternity and Adoption Actions

On February 11, 2014, just prior to his meeting with the adoptive parents, Louis filed a petition to establish a parental relationship with the help of a family court facilitator. In that petition, he sought to "[v]erify parenthood and stop any potential adoption." Lindsey was served with the petition on March 9, 2014. Louis initially failed to seek custody in the petition because the facilitator did not instruct him to check that box and failed to properly ask for DNA testing. These issues were later corrected.

On April 8, 2014, the adoptive parents filed a petition in Los Angeles to determine parental rights of Louis and to determine the necessity of his consent for purposes of adoption. On April 11, 2014, the adoptive parents filed their adoption request. On July 9, 2014, the Los Angeles Superior Court heard the petition, appointed counsel for Louis, and consolidated the cases. Louis's San Diego case was transferred to the Los Angeles court. While the petitions were pending, Louis began weekly visitation with Cash. At

Louis's deposition, he gave a \$500 check to the adoptive parents, but has not provided any other financial support to Cash.

Trial in the adoption action was held on October 7, 8, and 9, and December 4, 8, and 9, 2014. The court received into evidence the biological parents' telephone records, transcripts of several text messages Louis exchanged with Lindsey between August 2013 and February 2014, and transcripts of the biological parents' depositions. The adoptive parents, Louis, Lindsey, Lindsey's friend, and Louis's mother testified. In January 2015, the court filed its detailed, 28-page statement of decision, finding Louis to be a *Kelsey S.* father and denying the adoptive parents' petition for adoption.

3. Psychological Evaluation

Meanwhile, on August 5, 2014, the court appointed Dr. Nancy Kaser-Boyd to conduct a psychological evaluation pursuant to Evidence Code section 730 to assess the bonding between Cash and the adoptive parents, the potential effect on Cash if he was removed from the adoptive parents' home, and whether it was in Cash's best interests to remain in the adoptive parents' home or for Louis to maintain parental rights. In her September 25, 2014 report, Dr. Kaser-Boyd opined that Cash was bonded to and felt secure and happy with the adoptive parents, and had not likely bonded with Louis. Dr. Kaser-Boyd described the potential negative consequences and emotional trauma of removing Cash from the adoptive parents with whom he had lived since birth. Dr. Kaser-Boyd also described positive aspects of the adoptive parents' home life, and behavior by Louis suggesting instability.

4. Guardianship Action

On October 20, 2014, the adoptive parents petitioned for temporary and general guardianship of Cash in probate court. On October 29, 2014, the probate court ordered the transfer and consolidation of the guardianship actions with the pending adoption action. Following its January 2015 *Kelsey S.* finding in favor of Louis, the court ordered Dr. Kaser-Boyd to observe a visit between the adoptive parents and Cash, and between Louis and Cash, and to report her findings in testimony at the guardianship hearing. The family court heard the contested guardianship petitions in February 2015. The court

heard testimony from Dr. Kaser-Boyd, the adoptive father, Louis, and the paternal grandfather.

By this point in time, the adoptive parents had uninterrupted custody of Cash for 10 months, since his birth in April 2014. Louis engaged in visitation with Cash but had two 7-week periods where he did not visit Cash, from October 5 to November 23, 2014, and November 25, 2014 to January 12, 2015. During the latter period, Louis did not contact the adoptive parents or send a Christmas card, present, or money to Cash because he felt as if he was being pushed away by the adoptive parents. Louis did not visit during the first period because he guessed the adoptive parents did not want to continue visitation during the adoption trial. Louis did not visit during the second period because he believed the adoptive parents cancelled the visits and that he was not “on very comfortable terms” with them.

Citing Family Code section¹ 3041 and case law, the court stated that after the nonparents establish that they assumed the role of the child’s parents, the burden of proof shifts to the parent to show by a preponderance of the evidence that switching custody of the child to the parent would not be detrimental to the child and custody to the nonparent would not be in the child’s best interest. The court found that it was uncontradicted that the adoptive parents had assumed on a day-to-day basis the role of Cash’s parents, and that Louis did not meet his burden of proof in rebuttal. The court stated there was no testimony showing it would not be in the child’s best interests to be in the custody of the adoptive parents, and no expert testimony addressing whether placement with Louis would be detrimental. The court found it was detrimental to remove Cash from the adoptive parents, granted their petition for permanent guardianship of Cash, and ordered visitation for Louis and Lindsey with Cash.

¹ All subsequent statutory references are to the Family Code unless indicated otherwise.

DISCUSSION

The adoptive parents, Cash, and Lindsey² appeal the court’s denial of the adoption petition and its determination that Louis was a *Kelsey S.* father. Louis appeals the permanent guardianship order.

1. The Court Properly Denied the Adoption Petition, Finding Louis has *Kelsey S.* Rights

“When deciding whether a parent meets the requirements under *Kelsey S.*, appellate courts have reviewed the ruling for substantial evidence. . . . To the extent that the issue is a mixed question of law and fact, we exercise our independent judgment in measuring the facts against the applicable legal standard.” (*Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1539.) “When determining whether substantial evidence is present, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or determine where the preponderance of the evidence lies. [Citation.] We merely determine if there is any substantial evidence, contradicted or not, which will support the conclusion of the trier of fact. [Citation.] Substantial evidence is ‘reasonable, credible evidence of solid value such that a reasonable trier of fact could make the findings challenged’ [Citation.] The appellant must show the evidence is insufficient to support the trial court’s findings.” (*Ibid.*) When seeking *Kelsey S.* father status, the biological father bears the burden to establish the factual predicate for his rights. (*Adoption of O.M.* (2008) 169 Cal.App.4th 672, 679-680 (*O.M.*.)

“Under California law, an unwed biological father has a right to withhold consent to adoption of a child only if he meets the definition of a ‘presumed father.’ ” (*Adoption of A.S.* (2012) 212 Cal.App.4th 188, 202.) “ ‘If a man is the presumed father of a child, the child cannot be adopted without his consent [citation], unless the trial court finds, on statutorily specified grounds, that he is unfit. [Citation.]’ ” (*Adoption of H.R.* (2012) 205 Cal.App.4th 455, 465 (*H.R.*); *Adoption of Daniele G.* (2001) 87 Cal.App.4th 1392, 1394–1395 (*Daniele G.*.) Section 7611 outlines three statutory categories of presumed

² Lindsey joins in the adoptive parents’ arguments.

fathers: fathers who married or attempted to marry the mother, and fathers who received the child into their home and held the child out as their own. In *Kelsey S.*, the Supreme Court held that a biological father who wanted to take the child into his home, care for the child, and hold the child out as his own, but who was prevented from doing so by the mother's unilateral decisions, was entitled to the same parental rights as a presumed father. (*Kelsey, supra*, 1 Cal.4th at p. 825.)

For a biological father to qualify for *Kelsey S.* presumed father status, he must demonstrate that he promptly stepped forward to assume full parental responsibilities for his child's well-being, and he demonstrated a willingness to assume full custody of the child. (*Kelsey S., supra*, 1 Cal.4th at p. 849.) A "court should consider all factors relevant to that determination. The 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 promptly³ attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit." (*Id.* at p. 849, italics omitted). "[T]he 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." (*Ibid.*, fn. omitted.). The *Kelsey S.* Court emphasized that "[a] father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his . . . child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship.'" (*Id.* at pp. 838-839.)

³ In *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1060, the Supreme Court further clarified that "promptly" means "within a short time after he learned or reasonably should have learned that the biological mother was pregnant with his child."

a. Substantial Evidence Supports the Court’s Finding that Louis Was a Kelsey S. Father

The trial court found that Lindsey inhibited Louis’s ability to assume parental responsibilities by ending their relationship and insisting that he cease to have contact with her. We agree. Lindsey abruptly ended the relationship a few days after learning about the pregnancy and continued to push him away by firmly and repeatedly communicating she did not want contact with him. When she broke up with him on August 1, 2013, she told him she wanted no more contact with him. After the October 28, 2013 phone call, Lindsey responded to text messages by telling him to leave her alone. On November 16, 2013, Louis texted Lindsey goodnight, to which she responded, “why bother?” Louis responded that “there are few things that matter to me in this world. I can only fight it [so] much.” Lindsey replied, “Well try.” Louis reasonably understood these communications to mean he should leave her completely alone and not attempt to contact her further. Lindsey’s conduct and the surrounding circumstances made it very challenging for Louis to demonstrate his commitment to his parental responsibilities and prevented him from providing emotional support to Lindsey.

Nonetheless, substantial evidence shows that Louis did what he could to respect Lindsey during the pregnancy while asserting his right to parent Cash. From the very beginning, Louis steadfastly told Lindsey he opposed adoption. When Lindsey first told Louis in October 2013 she would place Cash up for adoption, Louis immediately asserted he wanted to raise the child and never wavered on that issue. Louis had lengthy discussions with Lindsey on multiple occasions in October to convince her that he should raise the child.

Lindsey’s friend, Alicia, who rented a room to Lindsey while she was dating Louis and made arrangements for Louis to also move into her house, testified to Louis’s desire to parent Cash. Alicia had come to know Louis well, as he was at her house on a daily basis to see Lindsey. Following their breakup, Louis often drove by Alicia’s house looking for Lindsey. Louis talked to Alicia at length when he stopped at Alicia’s house to return a house key, telling her, through tears, he “truly wanted to be a family unit with

[Lindsey] and the baby” and “would do whatever it took to be able to be in [Lindsey’s] life and the baby’s life.” In his few contacts with Lindsey, Louis asked how the pregnancy was going. He also visited her the day after he learned of her near-miscarriage in October 2013. He consistently communicated his desire to raise Cash even though Lindsey refused to entertain the idea. Lindsey’s conduct pushing Louis away placed Louis in the “catch 22” described in *Adoption of Baby Boy W.* (2014) 232 Cal.App.4th 438, 460 (*Baby Boy W.*), running the risk of irreparably damaging his relationship with the mother if he communicated his vigorous opposition to the adoption and asserted his rights over Cash. Other circumstances, including his 16- to 23-hour workdays in San Jose and the loss of his phone, compromised his efforts to stay in contact with Lindsey between November 2013 and January 2014.

Louis did, however, publicly acknowledged his paternity by informing his family, Lindsey, Lindsey’s mother and father, Alicia, and the adoptive parents, and by attempting to inform the adoption agency. Although he waited several months to take legal action to establish his parental rights believing Lindsey was not serious about adoption, he filed a parentage petition almost two months before Cash was born, upon learning, from Lindsey’s mother, that Lindsey was moving forward with adoption. Louis’s mistakes in pursuing the petition, such as his failure to request custody and genetic testing, are excusable given his limited understanding of the family court system as a young and inexperienced self-represented party. According to the trial court, Louis credibly testified that he thought he did all he needed to do to establish his parental rights.

Louis’s conduct was consistent with his stated intention to raise the baby. After learning Lindsey would not have an abortion, Louis told his family about the pregnancy, changed his partying lifestyle, and became a responsible, church-going homebody, as evidenced by Louis’s and Louis’s mother’s testimony. Louis also obtained his parents’ emotional, social, and financial support for his decision to raise the baby while continuing to live in his parents’ home. Louis and his parents created a plan for Louis’s parents to provide childcare when Louis was at work.

The adoptive parents and minor emphasize that Louis did not provide Lindsey with financial support. But, this failure was understandable in the face of Lindsey's insistence he not contact her and her statement to Louis that he "will not be financially involved in this." There was evidence of circumstances interfering with Louis's ability to provide Lindsey with financial support. During the pregnancy, Louis had to pay a \$300 traffic ticket and apparently went without or with very little income for the three-month period from November 2013 to January 2014. Despite these obstacles, Louis promptly set aside money for Cash in a savings account, paid \$500 to his sister for baby clothes and furniture, and paid \$600 to upgrade the crib and changing table. After Cash was born, Louis sent the adoptive parents \$500 and bought three gifts for Cash. Louis also asked to be present at Cash's birth and regularly visited Cash afterward.

Taken together, Louis's words and conduct both before and after the child's birth provide substantial evidence Louis promptly attempted to assume his parental responsibilities as fully as Lindsey and his circumstances permitted. Louis publicly acknowledged paternity, clearly expressed a desire and commitment to raise Cash, set aside money for Cash, purchased clothing and furniture for him, and took legal action to establish his parental rights immediately after he learned that Lindsey moved forward on the adoption.

The adoptive parents argue Lindsey's conduct played only a minor role in his failure to satisfy the *Kelsey S.* standard, likening Louis to the father in *O.M.* In *O.M.*, the court recognized that a father unable to meet the requirements for presumed father status under *Kelsey S.* may nevertheless qualify if the mother's unilateral conduct thwarted the father's effort. (*O.M.*, *supra*, 169 Cal.App.4th at p. 680.) Although the mother in *O.M.* took some action to preclude the father from asserting his parental rights, the court concluded it was primarily the father's arrests and incarceration, rather than the mother's conduct, that frustrated his ability to fulfill his parental responsibilities, and affirmed the trial court's denial of presumed-father status on that basis. (*Ibid.*)

The present case is readily distinguishable from *O.M.* Here, Louis was not engaging in conduct resulting in arrests or incarceration. To the contrary, he changed his lifestyle to avoid partying and act responsibly. Unlike the *O.M.* father, Louis prepared for Cash's birth by creating a plan to care for the baby, by investing in baby furniture and clothing, and by saving \$2,000 for Cash. Moreover, the trial court's finding that Louis was credible in testifying that Lindsey prevented him from fully assuming his parental responsibilities cannot be reevaluated on appeal. (*Baby Boy W.*, *supra*, 232 Cal.App.4th at pp. 452-453 [“ ‘We do not evaluate the credibility of witnesses, attempt to resolve conflicts in the evidence or determine the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the . . . court's order and affirm the order even if there is other evidence supporting a contrary finding.’ ”].)

The adoptive parents' arguments based on *H.R.* and *Baby Boy W.* are not persuasive. Notwithstanding the biological father's failure, in *H.R.*, to provide financial assistance and his less than ideal relationship with the mother, the court found he qualified as a *Kelsey S.* father because he: participated in prenatal care as far as the mother would allow, attempted to marry the mother, furnished a room for the baby, immediately filed a paternity action when the mother terminated the relationship and blocked him from receiving information about their unborn child, and maintained contact with the child as often as possible following birth. (*H.R.*, *supra*, 205 Cal.App.4th at p. 468.) The adoptive parents argue that Louis should not qualify as a *Kelsey S.* father because he made no effort to participate in prenatal appointments and filed the paternity action to block the adoption, rather than to seek custody. However, the trial court found credible Louis's testimony that he filed for paternity as a precursor to adoption (a finding we cannot reevaluate). And unlike the mother in *H.R.*, Lindsey immediately pushed Louis away, refusing to speak to him let alone include him in medical appointments.

In *Baby Boy W.*, *supra*, 232 Cal.App.4th at pages 456-461, the father qualified as a *Kelsey S.* father because he was willing and able to assume full custody of the child with the help of his family, moved across country to be near the child a week after learning of

the child's birth and secured full-time employment within a month after that, and purchased and sent mother some baby supplies. The fact that the father only sent the mother money after he became aware of the legal requirement and none of the money sent came from his own funds was not dispositive because the mother never asked for money, and the father was a college student, of limited means. (*Id.* at p. 457.) The adoptive parents argue that Louis has done less than the father in *Baby Boy W.* because he advocated for abortion, neglected to set aside any significant portion of his earnings for Cash, and failed to pay Lindsey's pregnancy expenses.

We note that Louis's initial support of abortion does not inform our *Kelsey S.* analysis. Louis testified that abortion was Lindsey's decision and right, and that he respected that right. Consistent with the requirement of prompt action under *Kelsey S.*, Louis asserted his parental rights as soon as Lindsey decided against abortion. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) As noted above, Louis reasonably perceived that Lindsey did not want money or contact with him. His decision to save money for the baby and spend over \$1000 on baby furniture and clothing was reasonable under the circumstances. The trial court regarded Louis's savings and preparations as significant given his income, and substantial evidence supports this finding.

We also disagree with the adoptive parents' and minor's contention that the trial misapplied the law, shifted its focus to Lindsey, and erroneously relieved Louis of his responsibilities. To the extent the trial court focused on Lindsey's conduct, it did so appropriately, to evaluate whether she inhibited Louis's efforts to assume his parental responsibilities. As explained by the Supreme Court, we evaluate whether the father "promptly attempt[ed] to assume his parental responsibilities as fully *as the mother will allow and his circumstances permit.*" (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849, italics added.) Lindsey's conduct was plainly pertinent to evaluating Louis's conduct and his ability to satisfy *Kelsey S.* standards.

We conclude that substantial evidence supports the court's determination that Louis is a *Kelsey S.* father with parental rights over Cash. We therefore affirm the court's denial of the adoptive parents' petition to adopt Cash.

b. The Court Applied the Correct Standard of Proof

Cash argues that the trial court should have required Louis to prove his *Kelsey S.* status by a heightened clear and convincing standard of proof and urges reversal because the court “fundamentally misapplied the burden of proof.” Cash contends the heightened burden of proof is necessary based on the conflicting constitutional interests or rights of the mother and father, citing the mother’s constitutional right to abortion as held in *Roe v. Wade* (1973) 410 U.S. 113. According to Cash, there is a “close interplay” between *Kelsey S.* and *Roe v. Wade*, and therefore, based on conflicting constitutional rights of the father and mother in this case, the heightened clear and convincing standard applies to Louis’s burden of proof. Although Cash provides no authority for the heightened burden and concedes that the California Supreme Court has not addressed the issue, Cash urges this court to adopt it.

We are unpersuaded. It is well established that under the Uniform Parentage Act (UPA), a man claiming entitlement to presumed parent status has the burden of establishing by a preponderance of the evidence the facts supporting his entitlement. (*In re J.O.* (2009) 178 Cal.App.4th 139, 147-148; *R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 774; *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652.) *Kelsey S.* placed unwed biological fathers on even footing with presumed fathers claiming rights under the UPA. We see no reason to apply a different standard to biological fathers and conclude the trial court applied the correct standard of proof in this case.

2. Guardianship

Louis asserts that the court erred in awarding the adoptive parents guardianship.⁴ “ ‘The issue of custody is one committed to the discretion of the trial court. [Citations.] Only in an exceptional case, in which the record so strongly supported a party’s claim to custody that a denial of that claim by the trial court would constitute an abuse of discretion may an appellate court itself decide who should be granted custody’ ” (*Guardianship of Vaughan* (2012) 207 Cal.App.4th 1055, 1067; *Guardianship of L.V.* (2006) 136 Cal.App.4th 481, 488 [“It is an inquiry that is particularly founded on application of the trial court’s experience with human conduct.”].)

The court may appoint a guardian for a minor when it is necessary or convenient. (Prob. Code, § 1514, subd. (a).) In making its determination on a guardianship petition, the court is guided by sections 3020 et seq. and 3040 et seq., which govern custody awards. (Prob. Code, § 1514, subd. (b).) Under Section 3040, subdivision (a) “Custody should be granted in the following order of preference according to the best interest of the child . . . : [¶] (1) To both parents jointly . . . or to either parent [¶] (2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.”

⁴ As Cash’s legal guardians, the adoptive parents have complete care and control over Cash. “When the court appoints a guardian, the authority of the parent ‘ceases.’ (Fam. Code, § 7505, subd. (a).) The court has discretion to grant visitation [citation], but otherwise parental rights are completely suspended for the duration of a probate guardianship [citation]. The guardian assumes the care, custody, and control of the child. (Prob. Code, § 2351, subd. (a).) There is no periodic court review of the placement, as there is in dependency proceedings. [Citation.] Nor is the parent given the reunification services that the county provides to parents of dependent children. [Citation.] [¶] Unless ended by court order, the guardianship continues until the child ‘attains majority or dies.’ (Prob. Code, § 1600, subd. (a).) The court may terminate the guardianship on a petition by the guardian, a parent, or the child, based on the child’s best interest. (Prob. Code, § 1601.) The fitness of the parent to assume custody is not a controlling consideration.” (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1123-1124.) Probate Code section 1516.5 enables the guardian to adopt the child after the child has been in the guardian’s physical custody for two years, if the court finds that the child would benefit from being adopted by his guardian.

Section 3041 governs contested custody proceedings and provides that parents are first in the order of preference for a grant of custody, but a showing of de facto parent status by a nonparent creates a rebuttable presumption that it would be detrimental to place the child in the custody of a parent and the best interest of the child requires nonparental custody. (§ 3041, subs. (a), (c), (d).) Section 3041, subdivision (c) states, “ ‘detriment to the child’ includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time.” The Legislature specified that the removal of a child from a guardianship placement may be detrimental even if the child’s parents are fit to care for the child. (§ 3041, subd. (c) [“A finding of detriment does not require any finding of unfitness of the parents.”]; see *Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1123.)

The presumption against removal is established by section 3041, subdivision (d), which provides that “if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.” What constitutes the best interest of a child presents an inherently factual issue. (*Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1159–1161 [whether parental custody is detrimental to minor or whether award of custody to nonparent is required to serve child’s best interests are factual questions].)

a. Louis Failed to Meet His Burden of Proof

Louis does not dispute the court’s finding by the preponderance of the evidence that the adoptive parents have assumed a parental role in Cash’s life for the purposes of section 3041, subdivisions (c) and (d). Rather, Louis argues that he “has met his burden of proof showing it was not detrimental to [Cash] to be in [Louis]’s custody and it was not in [Cash]’s best interest to remain in the [adoptive parents]’s custody.” Louis asserts that although a child may suffer short term and long term negative effects when removed

from stable placement, the evidence in this case shows that “removal is not detrimental to [Cash] and nonparental custody is not required to serve his best interest.” Louis points out that his claim of custody would not require immediate placement with him arguing that the court should have implemented “a transition plan.”

The trial court heard evidence that custody with the adoptive parents was in the best interest of the child. The testimony of Dr. Kaser-Boyd substantially supported the court’s decision to award the adoptive parents guardianship and there was no evidence that moving the child to the custody of the father would not be detrimental. In her September 25, 2014 report, Dr. Kaser-Boyd opined that Cash was bonded to and felt secure and happy with the adoptive parents and that it was unlikely that Cash had bonded with Louis after only five visits. Dr. Kaser-Boyd explained that removing Cash from the adoptive parents, with whom he had lived since birth, would be “equivalent to losing a parent to death,” creating a sense that “the world is insecure and that relationships are insecure.” (Italics omitted.) She predicted that, in the short term, Cash could suffer loss of appetite, sleep disturbances, excessive crying, and failure to reattach to a new caretaker. She predicted possible long term effects such as excessive childhood anxiety, trust issues, insecurity about relationships, and behavioral problems. According to Dr. Kaser-Boyd, the adoptive parents “provide a mature and stable family nest which appears to be entirely focused on the baby. They have had a long marriage which appears to be very happy. In their home, Cash will have a two-parent household, with much support from extended family and the community. He has the best chance of a secure and enriched childhood in this setting.” (Italics omitted.)

Dr. Kaser-Boyd believed, on the other hand, that a transfer to Louis’s custody meant that Cash would be “virtually raised by his grandparents” because Louis works long hours and does not have enough income to live independently of the paternal grandparents. (Italics omitted.) She stated that Louis showed a pattern of instability over the last eight years, with behavioral problems in high school, defiance toward authority figures, inconsistent employment, and a history of excess alcohol use, but opined that

these issues “do not cause significant concerns for a visitation type of relationship.”
(Italics omitted.)

Dr. Kaser-Boyd pointed out that Cash was at the most vulnerable age for a switch in caregivers in terms of potential consequences to his feelings of trust and attachment. She opined that removing Cash from the adoptive parents would create a “significant threat and stress and that can affect [Cash] psychologically and even biologically.” Based on her observations of interactions between Cash and the parties, she opined that Cash had a secure attachment to the adoptive parents, but exhibited stranger anxiety when he was around Louis. Dr. Kaser-Boyd’s testimony and report indicated that Cash’s best interests were served by remaining in the adoptive parents home, and that he would likely be emotionally and mentally hurt by removal.

Louis presented no expert testimony to rebut Dr. Kaser-Boyd. His evidence was limited to testimony from his family that he had improved his lifestyle and that his parents were willing to provide childcare while Louis worked. Although Louis correctly notes that Dr. Kaser-Boyd testified to “potential” negative effects and conceded that the child is less likely to have issues if the transfer is to parents who he developed trust for through visitation and if he has warm and attuned caregivers who have empathy and can understand the child is grieving the loss of previous caregivers, he is unable to cite to any evidence in the record that he and his parents can or will provided the necessary empathy. His mere assertions that his family could provide these specific conditions for Cash is not sufficient to demonstrate the court abused its discretion in awarding the adoptive parents guardianship. As mentioned above, testimony and the psychological report supported the court’s decision regarding Cash’s best interests.

b. The Court Properly Considered the Guardianship Petition

Louis also argues that “in deference to [Louis]’s parental preference for custody the court could and should have dismissed the [guardianship] petition as neither necessary nor convenient, and then proceed under section 3041.” Louis asserts that because the Family Code does not require a guardianship to award custody to a nonparent, the appointment of guardians for Cash was not necessary. According to

Louis, “[t]he court could have made the same orders it did, without appointing the [adoptive parents] as guardians of [Cash].” He asserts that “the guardianship order was not necessary because it leads to an unfair result to [Louis] who had just achieved *Kelsey S.* status. The guardianship order essentially rendered [Louis]’s status meaningless because he may not be able to obtain custody of [Cash].” For support, Louis cites *Erika K. v. Brett D.* (2008) 161 Cal.App.4th 1259 (*Erika K.*) and *Daniele G.* Neither case supports Louis’s contention.

In *Erika K.*, the biological mother sought to regain custody of after abandoning her daughter who was meanwhile in the care of a nonrelative, nonparent caregiver for four years; the caregiver was awarded custody under section 3041 even though she did not separately petition for guardianship. (*Erika K.*, *supra*, 161 Cal.App.4th at pp. 1265-1266.) The mother appealed, arguing that nonparental custody orders cannot be made outside of guardianship petitions and the court rejected that argument. (*Id.* at p. 1269.) While *Erika K.* confirms that a family court may make custody orders without ordering guardianship, we find no support in that case for Louis’s contention a court cannot decide a guardianship petition opposed by a *Kelsey S.* father.

Louis failed to argue below and fails to analyze on appeal why guardianship would not be necessary or convenient for the child, i.e. in the child’s best interests under the present set of facts. (See *Guardianship of Pankey* (1974) 38 Cal.App.3d 919, 927 [Issue of whether it is necessary or convenient to appoint a guardian of the person of a minor who has a parent living is complex; the crucial criterion is the best interests of the child.].) Contrary to Louis’s argument, the guardianship petition was both necessary and convenient: as explained above, it was in Cash’s best interests to remain in the adoptive parents’ home. For that determination, Louis’s focus on his parental preference for custody is irrelevant.

The other case cited by Louis, *Daniele G.*, likewise fails to support his argument. In *Daniele G.*, the biological father of an infant objected to her adoption and the court refused to allow the adoption to proceed. The prospective adoptive parents then filed a petition for guardianship. Although the trial court found that guardianship was in the best interests of the child, it denied the guardian petition based on the biological father's constitutional rights under *Kelsey S.* (*Daniele G.*, *supra*, 87 Cal.App.4th at pp. 1394-1395.) The appellate court reversed the denial of guardianship to the adoptive parents, recognizing that while "as a matter of substantive due process, the parental rights of a *Kelsey S.* father cannot be terminated without a finding that he is unfit. [Citations.] A guardianship, however, does not require the termination of either parent's rights. To the contrary, the guardianship itself may be terminated at any time, based on a showing that termination of the guardianship is in the child's best interests." (*Id.* at pp. 1406.)

Although *Daniele G.* supports the trial court's determination in this case that the adoptive parents should have guardianship notwithstanding Louis's status as a *Kelsey S.* father, Louis argues "the reasoning in *Daniele G.* is no longer valid" because the notion that guardianship "may be terminated at any time" has been impacted by the passage of Probate Code section 1516.5, allowing guardians, who have custody of a child for at least two years, to obtain a declaration the child is free of parental custody and control if the court finds adoption is in the best interests of the child. While we recognize section 1516.5 provides a new remedy for long term guardians who wish to adopt, we fail to see how that remedy makes a difference in this case or undermines the holding in *Daniel G.* that a guardianship opposed by a *Kelsey S.* father is governed by the best interests of the child standard.

Based on the foregoing, we conclude that the court did not abuse its discretion in awarding permanent guardianship to the adoptive parents. The guardianship proceeding was not unfair to Louis and provided him with the same due process available to all parents in guardianship proceedings.

DISPOSITION

The trial court's orders finding Louis G. to be a *Kelsey S.* father, denying the adoption petition, and appointing the adoptive parents to be Cash's permanent guardians are affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HOGUE, J.*

I concur:

ALDRICH, Acting P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.