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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

In re J. H., a Person Coming Under the
Juvenile Court Law.

EL DORADO COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

E. S.,

Defendant and Appellant.

C070164

(Super. Ct. No.
SDP2010-0025)

E.S., father of the minor, appeals from the juvenile court's orders terminating parental rights and freeing the minor for adoption. (Welf. & Inst. Code, §§ 366.26, 395.)¹ He

¹ Undesignated statutory references are to the Welfare and Institutions Code.

contends the juvenile court erred in not holding a hearing to find him to be a presumed or *Kelsey S.*² father. He also contends that the reunification plan and the services provided were inadequate to meet his needs. Finally, he argues that the juvenile court erred by not placing the minor in his care at the 12-month review hearing and in terminating his parental rights without making the required finding that placement in his custody would be detrimental to the minor. We affirm.

BACKGROUND

On August 2, 2010, El Dorado County Department of Human Services (the Department) filed a section 300 petition on behalf of the then three-week-old minor due to mother's mental instability and inability to care for the minor. The minor was taken into protective custody.

Although mother identified another individual as the minor's father, father contacted the Department on August 5, 2010, and informed the social worker that he was "pretty sure" he was the minor's father. At father's request, the social worker arranged for genetic testing.

The jurisdiction and disposition hearing took place on September 22, 2010. Based on the genetic test results, the juvenile court found father to be the minor's biological father and appointed counsel for him (who was not present in court at the time). The juvenile court sustained the allegations in the

² *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*).

petition regarding mother, declared the minor a dependent child, found removal necessary, bypassed mother for services, and set a section 366.26 permanency planning hearing. Father was permitted twice monthly visits but was denied reunification services and informed he would need to contact his counsel to take action to be declared a presumed father or receive services.

On October 13, 2010, counsel for father filed a section 388 petition for modification of the disposition order. The petition requested father be provided reunification services in order to benefit the minor. The juvenile court found the request appropriate, vacated the section 366.26 hearing, and ordered reunification services for father. The reunification plan included a parenting program, a drug and alcohol assessment along with any ensuing recommendations for services or counseling, random drug testing, and visitation. Father's visitation was increased at the six-month review hearing to once a week for two hours. The social worker was authorized to increase visits further and she authorized two visits per week.

The 12-month review hearing took place on September 28, 2011. Father had not been visiting consistently. The juvenile court terminated reunification services, found continuance of the minor in the parental home would create a substantial risk of danger to the minor, and set a section 366.26 hearing.

By the time of the December 28, 2011, section 366.26 hearing, father had begun to visit the minor more regularly, bringing other family members with him. His visits had been

reduced from two hours twice per week to one hour once per week. Although the minor enjoyed having the focus of father's attention, she did not respond to father with much affection and appeared to see him as a pleasant visitor, rather than a primary care provider. The juvenile court found the minor adoptable, that no exceptions to adoption were present, and terminated parental rights.

DISCUSSION

I

Father's first contention is that the juvenile court erred by failing to consider placing the minor with him at disposition pursuant to section 361.2 as a non-offending, noncustodial parent.³

We begin with the established premise that placement with father under section 361.2 would have required that he first be found to be a presumed father or "Kelsey S. father" -- which he was not.⁴ (See *In re Zachariah D.* (1993) 6 Cal.4th 435, 451, 453-454.)

³ It is extraordinarily difficult to discern the precise assignments of error from father's lengthy and convoluted briefs. Long does not equate with clear. We do our best to untangle father's arguments based on the opening brief and the "clarifications" contained in the reply brief.

⁴ To the extent father argues that there is no reason he should have to be anything more than a biological father in order to obtain placement of the minor pursuant to section 361.2, we flatly reject his argument. Only a "parent" (i.e. a mother, presumed father or, alternatively, a Kelsey S. father) is entitled to assume immediate custody under section 361.2. (*In re Zachariah D.*, *supra*, 6 Cal.4th at pp. 451, 454; § 361.2;

Under the dependency statutes, presumed fathers have far greater rights than "mere biological" fathers. (*In re Zachariah D.*, *supra*, 6 Cal.4th at pp. 448, 451.) A man is a presumed father if he meets the criteria of Family Code section 7611. Under that statute, "a man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father unless he both 'receives the child into his home and openly holds out the child as his natural child.'" (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051, italics omitted; see *In re Zachariah D.*, *supra*, at p. 449; and Fam. Code, § 7611, subd. (d).) A "biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status as defined in [Family Code section 7611]." (*In re Zachariah D.*, *supra*, at p. 449, fn. 15.)

A biological father who does not qualify as a presumed father may nevertheless attain parental rights equal to those of the mother by showing that "he promptly stepped forward to assume full parental responsibilities for the child's well-being, including a financial, emotional or other commitment; the child's mother thwarted his efforts to assume his parental responsibilities; and he demonstrated a willingness to assume full custody of the child." (*In re Jason J.* (2009)

Fam. Code, § 7600 et seq.) Father's reliance on *In re J.S.* (2011) 196 Cal.App.4th 1069 as authority to the contrary, while acknowledging that the issue was not raised or addressed in that case, is inexcusable. As father highlights elsewhere in his brief, a case is not authority for a proposition not raised or addressed. (*People v. Mendoza* (2000) 23 Cal.4th 896, 915.)

175 Cal.App.4th 922, 932, fn. omitted.) Such an individual is often referred to as a *Kelsey S.* father.

Father was found to be the minor's biological father at disposition and was appointed counsel at that time. He did not claim or establish that he was a presumed father or a *Kelsey S.* father. (See *In re Elijah V.* (2005) 127 Cal.App.4th 576, 582 [failure to pursue *Kelsey S.* status in juvenile court bars claim on appeal].) Accordingly, he argues that the juvenile court had a sua sponte duty to continue the disposition hearing until appointed counsel could request a *Kelsey S.* hearing.⁵ We decline to impose such a duty on the juvenile court. Appointed counsel could, and did, file a section 388 petition for modification of the disposition if changed circumstances exist. Accordingly, if father qualified as a *Kelsey S.* father and was seeking immediate placement of the minor, counsel could have moved to modify the disposition on that ground. (See *In re Zachariah D.*, *supra*, 6 Cal.4th at pp. 454-455.) Counsel did not do so. Instead, a few weeks after disposition, counsel filed a section 388 petition seeking discretionary reunification services based on father's status as a biological father.

⁵ To the extent father also argues that the juvenile court had a sua sponte duty to hold a *Kelsey S.* hearing once it was aware of facts which may give rise to *Kelsey S.* status, we decline to impose such a duty on the juvenile court. A "party seeking status as a father under *Kelsey S.* must be clear he wants to be so declared." (*In re Elijah V.*, *supra*, 127 Cal.App.4th at p. 582.)

Father acknowledges the substance of his section 388 petition and now claims his counsel rendered ineffective assistance by failing to assert status as a *Kelsey S.* father and seek placement of the minor pursuant to section 361.2 in the petition.

In order to show ineffective assistance of counsel, the father "must demonstrate that counsel failed to perform with reasonable competence, and that it is reasonably probable a determination more favorable to the [claimant] would have resulted in the absence of counsel's failings." (*People v. Belmontes* (1988) 45 Cal.3d 744, 767; accord *People v. Fosselman* (1983) 33 Cal.3d 572, 583-584.) Based on the record before us, father cannot meet this burden.

To qualify as a *Kelsey S.* father, father had to show he promptly stepped forward to assume full parental responsibilities for the child's well-being, including a financial, emotional, or other commitment; the child's mother thwarted his efforts to assume his parental responsibilities; and he demonstrated a willingness to assume full custody of the child. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849; *Adoption of Michael H.*, *supra*, 10 Cal.4th at p. 1060.) "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 promptly attempt 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 omitted.) "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. [Fn. omitted.]" (*Ibid.*)

Here, the social worker's report indicated father had called and reported he might be the father based on the fact that he and mother had frequently engaged in sexual relations. He was requesting a DNA test and stated that he "wants the baby if it's mine, but if not then whatever. I just want to know if the kid is mine or not." He told the social worker that, after mother had become pregnant, she "got a weird attitude," did not want anything to do with him and disappeared. Mother, however, lived with her father, with whom father continued to have contact. He had not had any contact with mother since he purchased the pregnancy test and she told him she was pregnant. Father reported that, prior to these dependency proceedings, he had never seen the minor, never held her out as his own, never resided with her, never told people he was her father, had made no effort to pursue paternity, and never paid child support. Based on these facts, it is not reasonably probable he would have been found to qualify as a *Kelsey S.* father had counsel requested such a finding in the section 388 petition.

For all these reasons, father was not improperly prevented from having the minor placed with him at disposition pursuant to section 361.2 as a non-offending, noncustodial parent.

II

Father contends the juvenile court erred in terminating reunification services and finding that reasonable reunification services had been provided because the reunification plan was not properly tailored to fit his individual needs.

Initially, we address whether father is procedurally barred from raising this claim because he did not timely pursue a writ petition. No direct appeal lies from an order terminating reunification services and setting the permanency planning hearing. Review of such order is by way of petition for an extraordinary writ. (§ 366.26, subd. (l); Cal. Rules of Court, rule 5.720; *In re Cathina W.* (1998) 68 Cal.App.4th 716, 719.) However, due to the juvenile court's failure to orally advise father of his writ rights, good cause exists for father to raise his claim on appeal. (See *Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 259-260; Cal. Rules of Court, rules 5.590(b)(1), 5.708(n)(6), 5.720.)

Although father is not procedurally barred from raising his claim in this appeal by the requirement of pursuing a writ petition, he is nonetheless barred from raising his complaint.

A parent "waive[s] her right to complain [about a reunification plan] by consenting to the terms of the plan." (*In re Precious J.* (1996) 42 Cal.App.4th 1463, 1476.) If father felt that the recommended services were inadequate, "[h]e had the assistance of counsel to seek guidance from the juvenile court in formulating a better plan: 'The law casts upon the party the duty of looking after his legal rights and of calling

the judge's attention to any infringement of them. . . ."

[Citation.]" (*In re Christina L.* (1992) 3 Cal.App.4th 404, 416.) Father did not raise any objections to the specific elements of the reunification plan prior to its adoption by the juvenile court. By failing to assert his objections and seek appropriate amendments to the plan in the juvenile court, he forfeited his right to assert it was deficient on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Kevin S.* (1996) 41 Cal.App.4th 882, 885-886; *In re Joseph E.* (1981) 124 Cal.App.3d 653, 657.)

Additionally, not only did father fail to challenge the reunification plan in the juvenile court, he did not challenge it by filing an appeal from the juvenile court's order implementing the plan. He is procedurally barred for this additional reason, as he cannot challenge it on appeal from a subsequent order. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018.)

III

Father also contends the services provided by the Department were inadequate. Again, due to the juvenile court's failure to orally advise father of his writ rights, good cause exists for father to raise his claim on appeal. (See *Jennifer T. v. Superior Court*, *supra*, 159 Cal.App.4th at pp. 259-260; Cal. Rules of Court, rules 5.590(b)(1), 5.708(n)(6), 5.720.)

First, we note that father did not raise the adequacy of the services provided in the juvenile court. Instead, he argued that he substantially complied with the case plan, at least to

the best of his abilities and should, therefore, have the minor placed with him or be provided additional services in order to reunify with the minor. Accordingly, he has forfeited the issue on appeal. (*In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1110; *In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) In any event, his claim fails on the merits.

In evaluating the reasonableness of services, "[t]he standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances." (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547.) A juvenile court's finding regarding reasonable services is subject to review for substantial evidence. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010.)

The objectives of father's case plan included that father show his ability to have custody, maintain a relationship with the minor by following the conditions of the visitation plan, stay sober and drug-free, obey laws, pay attention to and monitor the minor's health, safety and well-being, and be nurturing and supportive during visits. Father's case plan required he participate in a parenting program, complete drug and alcohol assessment and follow any ensuing recommendations for services or counseling, comply with random drug testing, and visit the minor pursuant to the juvenile court's orders.

The social worker referred father to American Comprehensive Counseling for a parenting education class, for which she had received a court order for payment by the El Dorado County

Auditor. Father reported he was scheduled through American Comprehensive Counseling for "his eight hour parenting class on March 19, 2011." Instead, father completed a class entitled "Effects of Domestic Violence in the home on children" on March 28, 2011, which was not the parenting class father had indicated he was enrolled in to the social worker. The social worker maintained that he had not complied with the parenting class requirement.

Father argues that the class he took was, in fact, a parenting class. That position, of course, does not support his argument that he was not provided adequate services. Father also argues that, if the social worker did not believe that class was a parenting class, she should not have approved it beforehand. This argument ignores the fact that father told the social worker he was scheduled to take a different "parenting" class than the one he took. Contrary to father's assertion, the social worker was not obliged to seek a second court order to have father take an appropriate course once father failed to take the approved course in the first instance.

The second complaint father lodges regarding the services he was provided is that the social worker did not try to move him toward extended visits to facilitate bonding. But father had attended fewer than half of his authorized twice weekly visits with the minor and regularly cancelled visits with only a few hours notice. Because father was apparently unable to even attend the visits he had been given, the social worker cannot be

faulted for not organizing or seeking additional or extended visits for father.

IV

Father also contends that the minor should have been "returned" to him at the 12-month review hearing because there was no substantial evidence that placement with him would be detrimental to the minor. Again, due to the juvenile court's failure to orally advise father of his writ rights, good cause exists for father to raise his claim on appeal. (See *Jennifer T. v. Superior Court*, *supra*, 159 Cal.App.4th at pp. 259-260; Cal. Rules of Court, rules 5.590(b)(1), 5.708(n)(6), 5.720.) Nonetheless, his argument fails.

To begin with, as the biological father, not the presumed father, he had no right to custody or services. (*In re Zachariah D.*, *supra*, 6 Cal.4th at p. 451.) The juvenile court exercised its discretionary authority to offer services on the basis that services to father would benefit the minor. (§ 361.5, subd. (a).) The offer of services, however, did not transmute father into a "parent" or provide him with a presumptive right to custody. Accordingly, whether father was to continue to receive reunification services remained discretionary based on whether it would benefit the minor. (§ 361.5, subd. (a).)

In any event, whether using a "benefit to the minor" standard or a "detriment from return" standard, the juvenile court did not err by declining to place the minor with father. A major component of father's case objective was to maintain a

relationship with the minor by following the conditions of the visitation plan. In fact, the juvenile court specifically told father that the plan was for him to participate in the offered services and start seeing the minor more, so he could be prepared to take over the minor's care. Father was also to demonstrate the ability to assume the care and custody of the minor and pay attention to and monitor the minor's health, safety, and well-being. Each of these components is essential to the minor's safety and best interests.

Father, however, failed to achieve the goals necessary for the safe and beneficial placement of the minor in his care. The social worker reported that, throughout the supervised visitation, father failed to recognize safety hazards, often even when they were repeatedly pointed out to him.⁶ He was also not able to adjust to new levels of the minor's development without significant assistance.

Additionally, father failed to consistently visit the minor. Father's visitation was increased at the six-month

⁶ For example, father was feeding the minor cut grapes while she was jumping around. The visitation supervisor warned father to have the minor sit and eat so she would not choke. Father continued to feed her the grapes until the minor began to cough. Father responded by picking her up and asking the one-year old if she was choking. The supervisor asked what happened and father said the minor was choking. He did not, however, check if the minor was breathing or had a grape lodged in her throat until prompted by the supervisor. Afterwards, he stopped feeding the minor grapes but fed her Gerber puffs while she played around the office. Father also allowed the minor to play, unattended, with a plastic bag.

review hearing (from twice a month) to once a week for two hours. The social worker was authorized to increase visits further and she authorized two visits per week. Father, however, actually attended only a third of the authorized visits. He often did not schedule the visit, and frequently cancelled scheduled visits at the last moment. As a result, he failed to develop a significant bond with the minor or establish that he was able to take over her care.

Quite simply, it would be detrimental to place the minor with father when he has failed to demonstrate he can recognize safety concerns and address the minor's natural developmental progression. And it would be detrimental to place the minor with father and assume he can provide ongoing stability when he cannot provide stable visitation.

Thus, the evidence supports the juvenile court's decision declining to place the minor in father's care.

V

Finally, father contends the juvenile court failed to make a finding, by clear and convincing evidence, that awarding him custody would be detrimental to the minor. He contends that such a finding is necessary before termination of his parental rights and the failure to make that finding violated his due process rights. Father's argument fails, however, because he was not found to be the minor's presumed father or *Kelsey S.* father. Thus, as a "mere biological father" he has no due process right to a showing of his unfitness as a parent or detriment to the minor by clear and convincing evidence before

his parental rights are terminated.⁷ (*In re A.S.* (2009) 180 Cal.App.4th 351, 362; *In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 932-935.)

In any event, the juvenile court did make the finding of detriment as to father. At disposition, the juvenile court expressly found, by clear and convincing evidence, that removal was necessary as specified in section 361, subdivision (c)(1), to protect the minor as to *both mother and father*. The juvenile court again found placement with father would be detrimental to the minor at both the six-month and 12-month review hearings. Father's constitutional rights were not violated. (See *In re A.S.*, *supra*, 180 Cal.App.4th at p. 361.)

DISPOSITION

The orders of the juvenile court are affirmed.

BLEASE, Acting P. J.

We concur:

MAURO, J.

DUARTE, J.

⁷ A finding of detriment to the child is the equivalent of parental unfitness. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253.)