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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAVIER CANDIOTTI,

Respondent,

v.

PATRICK VEAS,

Appellant,

ANA MARIE CANEPA,

Claimant and Respondent.

D060300

(Super. Ct. No. D524360)

APPEAL from a judgment of the Superior Court of San Diego County,
Maureen F. Hallahan, Judge. Affirmed.

This case concerns a paternity action involving a two-year-old child, S., whose mother died unexpectedly. After the mother's death, Javier Candiotti and Patrick Veas litigated the right to be named S.'s legal father.

Javier is S.'s biological father. He lived with S.'s mother prior to S.'s birth, attended doctor appointments, prepared a nursery, and financially supported S.'s mother during her pregnancy. Patrick began living with S. and his mother three months after S.'s birth, held the child out as his own, and cared for the child for at least a portion of S.'s first two years of life.

After multiple hearings and carefully considering the evidence presented, the court found Javier is S.'s legal father. Patrick appeals from the ensuing judgment of paternity in favor of Javier and challenges various findings supporting the judgment. We find his contentions lack merit and affirm.

BACKGROUND

The record on appeal is somewhat meager. For example, in at least one of the transcripts included in the record, reference is made to a "zillion declarations" that were filed with the court. While the record before us includes a few declarations, some of these declarations concern tangential issues not pertinent here (e.g., ex parte proceedings, an opposition to a motion for joinder, and a motion to quash). In addition, some of these declarations reference exhibits that are not included in the record. Apparently, there was a hearing on May 20, 2011 wherein the parties presented evidence to support their respective positions regarding S.'s best interest. Surprisingly, a transcript of this hearing is not in the record.

Despite the sparseness of the record, we are fortunate to have the benefit of a well reasoned and thorough 16-page "Findings and Order After Hearing and Judgment of Paternity" that includes a somewhat detailed discussion of the facts and evidence before

the court. The parties here do not dispute the facts in the findings and judgment. Instead, they disagree about the conclusions and findings based on these facts. As such, we rely heavily on the facts in the findings and judgment in our discussion of the background of this matter.

Sharon D. and Javier were in a romantic relationship when Sharon became pregnant with S. Sharon told Javier that he was the father of the baby. They participated in prenatal classes during Sharon's pregnancy and attended her doctor appointments. Javier and Sharon lived together and prepared the nursery. Javier's mother hosted a baby shower for Sharon. Javier and Sharon lived together until August 26, 2009. They apparently separated, and Sharon obtained a temporary restraining order against Javier on August 28, 2009.

On August 31, 2009, Sharon gave birth to S. Javier saw the child in the hospital that day.

Sharon and Patrick, who had previously been in a romantic relationship with each other, rekindled their romance in October 2009, when S. was two months old. Sharon and her child moved in with Patrick a month later. On May 20, 2010, Sharon and Patrick executed a voluntary declaration of paternity (VDP) wherein they both declared, under penalty of perjury, that Patrick was the child's father. Patrick also is listed on the birth certificate as the child's father.

After S. was born, Sharon hid both S. and herself from Javier. Once she received some money from Javier, Sharon stopped returning Javier's calls and did not respond to Javier's e-mails. Javier was unaware that Sharon was living with Patrick and did not

know that Sharon and Patrick had executed a VDP. He also hired a private investigator to find Sharon and S.

Sharon and Patrick's relationship progressed with the couple becoming engaged with a wedding date in the fall of 2010. In addition, because of a job opportunity for Patrick, the couple decided to move to Houston, Texas. When Patrick was in Houston looking for housing, Sharon collapsed while jogging and passed away a few days later on August 5, 2010. S. was less than a year old.

About a week after Sharon's death, Patrick and S. moved to Houston. Patrick offered to pay for Sharon's mother, Ana Maria Canepa, to fly out to Houston twice a month. Patrick kept in contact with Ana by sending her pictures of the child and updates, until he began receiving mean spirited text messages from Sharon's family, about one month after moving to Houston with S. Patrick eventually returned to California with S.

Javier filed a petition to establish parental relationship with S. on August 11, 2010. In the petition, Javier asked the court to: (1) determine that he had a parent-child relationship with S., (2) declare he was the child's legal father and be awarded joint custody, and (3) change the child's last name. Patrick opposed the petition.

On September 29, 2010, Javier filed an order to show cause to set aside the VDP and to correct the birth certificate. Specifically, Javier requested the court order genetic testing and if he was the biological father that the VDP be set aside. Javier claimed that Sharon had fraudulently signed the VDP. The hearing on Javier's motion to set aside the VDP and to correct the birth certificate was set for a hearing on November 8, 2010.

On November 1, 2010, Patrick filed a motion to quash service of Javier's summons and petition as to Patrick due to lack of jurisdiction over him because he was not properly joined to the action and to dismiss Javier's paternity action on the basis that Sharon had died prior to the filing. The hearing on Patrick's motion was set for November 8, 2010.

On November 8, 2010, the court: (1) denied Patrick's motion, found Patrick was a properly named party, and was properly served; and (2) continued the hearing to December 2, 2010 on Javier's request for DNA testing, to set aside the VDP, and to correct the birth certificate.¹

At the December 2, 2010 hearing, the court: (1) found Javier had standing to participate in the paternity action and to request genetic testing; (2) ordered genetic testing of the child, Javier, and Patrick; (3) established a shared visitation schedule for S. with Patrick and Ana based on Patrick's proposal; (5) denied Javier's request to visit S.; and (6) declined to set aside the VDP. The court continued the hearing on Javier's request to set aside the VDP.

In December 2010, genetic testing showed Javier was S.'s biological father. At a hearing on January 25, 2011, Patrick's counsel did not contest that Javier was the child's biological father. The court then set an evidentiary hearing for April 4, 2011, on Javier's motion to set aside the VDP and to determine whether Javier and Patrick were both

¹ The record refers to Ana filing a joinder to the action, but no joinder is included in the record. In its order following the December 2 hearing, the court granted Ana's joinder. Ana, however, has not filed a brief in the instant appeal.

presumed fathers. The court also set a hearing on May 20, 2011 to determine which individual would be named the legal father based on the child's best interest, if necessary.

On April 4, 2011, Patrick's attorney began the hearing by stating that the only issues to be decided were whether the VDP should be set aside and if Patrick was a presumed father under Family Code² section 7611, subdivision (d). Javier's attorney agreed these were the only two issues before the court at the April 4 hearing. Patrick's attorney further represented to the court that the parties stipulated that Javier was a presumed father.

The court issued its findings and orders setting aside the VDP on the basis of extrinsic fraud because Javier had no opportunity to challenge the VDP. It also found Patrick was a presumed father under section 7611, subdivision (d); granted Patrick's request for the appointment of a child development psychology expert; granted Javier visitation with S. during Ana's visitation time; and set a hearing for May 20, 2011 on the issue of which presumed father was S.'s legal father based on the child's best interest.

It is unclear from the record what occurred at the May 20, 2011 hearing because the parties did not include a transcript from those proceedings. However, it appears that, Dr. Robert A. Simon, the court appointed expert and a psychologist, submitted a report detailing his assessment of S.'s best interests. Dr. Simon recommended S.'s interests would best be "facilitated by continuity and maintenance of early critical relationships." In other words, Dr. Simon was of the opinion that S. should remain with Patrick.

² All statutory references are to the Family Code unless otherwise specified.

Beyond Dr. Simon's report, it is not clear from the record if Dr. Simon testified at the May 20 hearing, although Patrick alludes to this in his opening brief, or what other evidence was presented to the court at that hearing.

On July 11, 2011, the court filed a detailed and thoroughly reasoned "Findings and Order after Hearing and Judgment of Paternity" in which the court made several factual findings, ultimately entering a judgment of paternity in favor of Javier, ordering Patrick to deliver S. to Javier, vacating all custody and visitation orders involving S. and Patrick, and granting temporary joint legal and physical custody and visitation between Ana and Javier.

Patrick timely appealed.

DISCUSSION

I

PATRICK'S CONTENTIONS

Patrick raises multiple issues on appeal. He contends Javier did not have standing to challenge the VDP. Further, he asserts, even if Javier had standing, sufficient grounds did not exist to set aside the VDP. Patrick also claims the court erred in ordering genetic testing because Javier lacked standing to request the testing. In addition, Patrick insists the court erred in finding that Javier was a presumed father under section 7611. Finally, he maintains the court abused its discretion in its application of the balancing test under section 7612, subdivision (b) to resolve competing presumptions of paternity.

Although Patrick raises these issues, the real focus on appeal, as it was in the family court, is the determination of who is S.'s legal father. Indeed, the record reflects

this fact as the parties have omitted any pleadings addressing the standing issues. As such, we find these standing issues forfeited on appeal. In addition, we determine that the parties unambiguously stipulated Javier was a presumed father under section 7611 during the April 4, 2011 hearing. Finally, we conclude the court did not abuse its discretion in resolving the competing presumptions of paternity.

II

FORFEITURE

On appeal, the judgment of the trial court is presumed to be correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) Accordingly, if the judgment is correct on any theory, we will affirm it regardless of the trial court's reasoning. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19; *Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777.) If we affirm the judgment on certain grounds, we generally need not address alternative grounds for affirmance. (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 513.) All intendments and presumptions are made to support the judgment on matters as to which the record is silent. (*Denham, supra*, at p. 564.) An appellant has the burden to provide an adequate record and affirmatively show reversible error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) If an appellant does not provide an adequate record to support a contention of insufficiency of the evidence to support a finding, that contention may be deemed forfeited. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Goldring v. Goldring* (1949) 94 Cal.App.2d 643, 645.) Furthermore, it is the appellant's duty to support arguments in his or her briefs by references to the record on appeal, including citations to specific pages in the record.

(Duarte v. Chino Community Hospital (1999) 72 Cal.App.4th 849, 856 (Duarte).)

Moreover, an appellant has the burden of providing an adequate record and of showing that error occurred and was prejudicial. (*Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295-1296; Aguilar, supra, at p. 132.*) If an argument is not supported with necessary citations to the record on appeal, that portion of the brief may be stricken and/or the argument may be deemed forfeited. (*Duarte, supra, at p. 856.*)

Here, Patrick asserts Javier lacked standing to file a paternity action prior to setting aside the VDP. In addition, he argues that Javier lacked standing to seek genetic testing or set aside the VDP in any event. However, he does not cite to anywhere in the record where he made these arguments to the family law court. Indeed, the record does not contain a single pleading that Patrick filed that substantively addressed the standing issues he now raises. At best, we can glean that the court, at a December 2, 2010 hearing, found that Javier had "standing to participate in a paternity action, and to start with, to request DNA testing and to request set aside of the voluntary declaration of paternity." However, we cannot tell what arguments Patrick made to challenge Javier's standing. Also, it is not our duty to scour the record to support Patrick's contentions. (See *Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1246* ["The appellate court is not required to search the record on its own seeking error." [Citation.]".]) Accordingly, we conclude Patrick forfeited his standing arguments. (See *Duarte, supra, 72 Cal.App.4th. at p. 856.*)

III

THE PARTIES STIPULATED THAT JAVIER WAS A PRESUMED FATHER

Patrick next contends the court committed "grievous" reversible error by making the "wrong[] finding that the parties had 'stipulated' to Javier's status as a 'presumed father' after genetic tests revealed that Javier was the biological father." Although he admits his counsel stipulated to the fact that Javier was a presumed father at the April 4, 2011 hearing, Patrick insists this stipulation was referring to the stipulation the parties made at the January 25, 2011 hearing, which only related to Javier's status as the biological father.

At the January 25, 2011 hearing, Patrick's counsel stipulated that Javier was S.'s biological father. Javier's counsel also inquired about what would occur at the next hearing if the parties stipulated that both Patrick and Javier were presumed fathers. The court did not want to address any hypothetical possibilities, but stated it would consider any other written stipulations the parties filed. The January 25 hearing ended without a stipulation as to Javier's status as a presumed father.

At the April 4, 2011 hearing, the court began the hearing by addressing the parties as follows:

"All right. I do have -- before we begin today, this is a long cause evidentiary hearing to determine issues with respect to paternity in this case, whether [Javier], the biological father, will be deemed the father or Patrick . . . , the presumed father, will be deemed the father. And I now have reviewed the motion in limine, declarations in part, including witnesses and other evidentiary objections."

Patrick's attorney was first to address the court:

"First of all, I'd like to clarify. It was my understanding that this hearing today was to determine whether -- to be [Javier's] motion to have the voluntary declaration of paternity set aside and whether my client is a presumed father. And that was the narrow scope of today's hearing. [¶] We stipulated to the fact that [Javier] is a presumed father based on the results of the DNA test, and that was done in December, and we stipulated on January 25th."

If Javier was to prove that he was a presumed father under section 7611, subdivision (d), he would have to present evidence that he "receive[d] the child into his home and openly [held] out the child as his natural child." (See *In re M.C.* (2011) 195 Cal.App.4th 197, 212.) Patrick's attorney, however, argued that such evidence on behalf of Javier was unnecessary and there was no need for many of Javier's listed witnesses to testify that day. Specifically, she again mentioned the stipulation that Javier is a presumed father: "Any testimony as to the background or participation in child's life, again, we've already stipulated to the fact that [Javier] is a presumed father. I don't know that any of that testimony would lead to any relevant facts." Thus, Patrick's counsel understood the difference between Javier being the biological father and a presumed father under section 7611 and explicitly represented to the court that there was no need for Javier to present evidence to prove he was a presumed father under subsection (d) of the applicable statute. We struggle to contemplate a more clear intention of a party to stipulate to a fact.

After hearing Patrick's counsel's initial arguments, the court asked Javier's counsel, "Okay. Now, do you agree with [Patrick's counsel] that the sole issue today is whether or not [Patrick] is considered a presumed father under the statutes?" Javier's counsel

responded, "I agree that that's one of the issues. And also to set aside the voluntary declaration of paternity."

Based on a plain reading of the transcript, it is clear that both parties agreed that Javier was a presumed father and limited the issues before the court at the April 4 hearing. We are not concerned about any confusion between the parties about what was actually stipulated to at the January 25 hearing. They clearly understood what they were agreeing to at the April 4 hearing, going so far as to limit the evidence offered at the hearing accordingly.

Because we determine the parties stipulated to the fact that Javier was a presumed father, we need not address Patrick's additional argument that the court committed reversible error by granting presumed father status based on Javier's biological paternity.

IV

EXTRINSIC FRAUD

Patrick also contends the court abused its discretion in setting aside the VDP on the basis of extrinsic fraud. He claims there was a lack of evidence of extrinsic fraud, and Javier was never denied his opportunity to assert his parental rights. We disagree.

A VDP permits unwed parents to acknowledge the man's biological paternity of their child. Once executed, a voluntary declaration of paternity "establish[es] the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction." (§ 7573.)

However, a VDP is not beyond challenge. Indeed, "[r]ecognizing the possibility of second thoughts and error," the Legislature has provided circumstances under which a

VDP can be rescinded or challenged. (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1019.)

For example, either parent may rescind the declaration within 60 days simply by filing a form. (§ 7575, subd. (a).) In addition, a court may set aside a VDP when court ordered blood tests (§7550 et seq.) establish that the declarant is not the child's father, unless the court finds setting aside the declaration would not be in the child's best interests.

(§ 7575, subd. (b)(1); *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 858.) Also, in deciding whether a VDP should be set aside, the court is not restricted from acting as a court of equity. (§7575, subd. (c)(4).) It is the court's use of its equitable power to set aside the VDP that Patrick challenges here.

"Under certain limited circumstances a court, sitting in equity, can set aside or modify a valid final judgment obtained by fraud, mistake, or accident." (*City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1066.) Therefore, an equitable collateral attack on a VDP is available on the grounds of extrinsic fraud. (*In re William K.* (2008) 161 Cal.App.4th 1, 10; see also *County of Orange v. Superior Court* (2007) 155 Cal.App.4th 1253, 1261 ["In order to vacate a judgment [of paternity] after the statutorily imposed time limits, extrinsic fraud must be shown."].)

"Extrinsic fraud occurs when a party is deprived of his opportunity to present his claim or defense to the court, where he was kept in ignorance or in some other manner fraudulently prevented from fully participating in the proceeding. [Citation.] Examples of extrinsic fraud are: concealment of the existence of a community property asset, failure to give notice of the action to the other party, convincing the other party not to obtain counsel because the matter will not proceed (and it does proceed). [Citation.]" (*In*

re Marriage of Varner (1997) 55 Cal.App.4th 128, 140.) On the other hand, "Fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary, but has unreasonably neglected to do so. [Citation.] Such a claim of fraud goes to the merits of the prior proceeding which the moving party should have guarded against at the time." (*In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 937-938.)

In a VDP, the mother is required to swear that "the man who has signed the voluntary declaration of paternity is the only possible father" of her child. (§ 7574, subd. (b)(5).) Here, Patrick and Sharon signed the VDP, but the record shows that Sharon knew that Patrick was not the biological father. Further, the court noted that although Patrick believed he was S.'s biological father, this belief had "no real basis." Patrick's and Sharon's signing of the VDP thus was fraudulent.

Patrick, nevertheless, argues the fraud is intrinsic and insufficient to set aside the VDP. We are not persuaded. Sufficient evidence of extrinsic fraud exists. After S.'s birth, Sharon hid him from Javier. Javier hired a private investigator, but was unable to find Sharon and S. Javier did not know that Sharon and S. had moved in with Patrick. Nor did he know that Sharon and Patrick had executed a VDP. Based on these facts, the court found that Javier was denied the opportunity to oppose the VDP.

Glossing over these facts and the court's finding, Patrick argues that Javier was not prohibited from asserting a paternity claim at any time prior to the execution of the VDP. Patrick's argument misses the mark. The issue is not whether Javier had an opportunity

to assert a paternity claim, but whether he was prohibited from challenging the VDP. We agree with the court that he was. He had no notice that Sharon and Patrick had executed the VDP and was not provided with any opportunity to challenge it. In addition, it appears that he was unaware of S.'s and Sharon's whereabouts for almost a year after S. was born. In short, Javier was denied an opportunity to challenge the VDP, and the court did not abuse its discretion in setting the VDP aside on the grounds of extrinsic fraud.

V

THE COURT DID NOT ABUSE ITS DISCRETION UNDER SECTION 7612, SUBDIVISION (B) IN RESOLVING COMPETING PRESUMPTIONS OF PATERNITY

Section 7612, subdivision (b) states: "If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls." When presented with conflicting claims of paternity under section 7612, subdivision (b), the court must make factual findings as to each claim, and then determine which one is entitled to greater weight. (See *Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36, 51-52.) In doing so, "no single factor--whether social or biological--controls resolution between competing presumed fathers." (*Id.* at p. 52.) Further, because the weighing of the evidence is entrusted to the family law court's discretion, we review such a decision for an abuse of discretion. (Cf. *In re Jesusa V.* (2004) 32 Cal.4th 588, 606.)

Here, the court had to resolve competing presumptions of paternity. Javier is S.'s biological father and the parties stipulated that he was a presumed father. Further, it is

implied in the court's findings that the court considered Javier to be a presumed father as discussed in *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*). The court also found that Patrick had established that he too was a presumed father. Faced with these competing presumptions, the court focused on the "weightier considerations of policy and logic." (See § 7612, subd. (b).) However, Patrick claims the court abused its discretion in resolving competing presumptions of paternity by: (1) giving undue weight to biological paternity; (2) improperly relying on *Kelsey S., supra*, 1 Cal.4th 816 to give "constitutional weight" to Javier's claim of paternity; and (3) disregarding Dr. Simon's expert opinion. We reject each contention.

A. The Court's Consideration of Javier's Status as S.'s Biological Father

As a threshold matter, to the extent Patrick asks us to reweigh the evidence presented to the family law court, we cannot do so. We have no power on appeal to judge the credibility of witnesses or to reweigh the evidence. (*Kimble v. Board of Education* (1987) 192 Cal.App.3d 1423, 1427.) That said, we find nothing in the record that supports Patrick's claim that the court improperly considered or gave undue weight to Javier's status as S.'s biological father. To the contrary, the court painstakingly considered the evidence and law in reaching its decision. In doing so, the court noted that there was not an "automatic preference for biological fathers when there are competing presumed fathers." (See *In re Jesusa V., supra*, 32 Cal.4th at p. 608.) There simply is no merit to Patrick's contention that the court gave undue weight to Javier's status as S.'s biological father.

B. The Court's Implied Finding That Javier was a *Kelsey S.* Father

While the court did not place too much weight on Javier's status as S.'s biological father, it correctly noted the importance of the biological father-child relationship. As our high court stated in *Kelsey S.*, *supra*, 1 Cal.4th 816: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and makes uniquely valuable contributions to the child's development." (*Id.* at pp. 836-837, citing *Lehr v. Robertson* (1983) 463 U.S. 248, 262.) Patrick maintains the court's reliance on *Kelsey S.* was misplaced and that it erred in finding Javier a *Kelsey S.* father. We are not persuaded.

In *Kelsey S.*, the California Supreme Court held the parental rights of a biological father who has made timely efforts to fulfill his parental responsibilities cannot be terminated unless there is a finding he is unfit. The court considers his conduct before and after the child's birth, including whether he publicly acknowledged paternity, paid pregnancy and birth expenses commensurate with his ability to do so, and promptly took legal action to obtain custody of the child. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) He must demonstrate a full commitment to his parental responsibilities within a short time after he learned the biological mother was pregnant with his child. (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1060.) He must also demonstrate a willingness to assume full custody. (*Kelsey S.*, *supra*, at p. 849.)

The biological father has the burden to establish the facts that show he is a presumed father under the *Kelsey S.* standard. (*Adoption of O.M.* (2008) 169 Cal.App.4th 672, 679-680.) In our review of whether Javier met this burden, we apply the substantial evidence test. (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.) We do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate 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 substantial evidence supporting a contrary conclusion. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) Here, we are satisfied Javier met the criteria to be a *Kelsey S.* father.

Javier assumed the role of father during Sharon's pregnancy. Javier and Sharon lived together and prepared the nursery. Javier financially supported Sharon during this time. He attended Sharon's doctor appointments and the two held themselves out as the parents of the unborn child. Sharon, however, filed a restraining order against Javier shortly before S.'s birth and then hid from Javier after she received money from him following S.'s birth. Javier is S.'s biological father, and the court found he would have willingly assumed the role of S.'s father if Sharon had not taken S. and hid from Javier.

In addition, although the court questioned the diligence of Javier's efforts to initially locate Sharon and S., this effort increased over time. Before S. turned one year old, Javier hired a private investigator to find S. and hired an attorney to assert his parental rights. He filed his paternity action and the court found that he was "very

diligent in his pursuit of parenting [S.]." He also provided financial support to S. through Ana, including providing food, clothing, and toys.

In short, the evidence shows that Javier accepted the responsibility for S.'s future and is attempting to grasp the opportunity to develop his biological relationship with S. into a full and enduring relationship. We are satisfied with the family law court's conclusion that the evidence shows Javier wanted to bond with S. during his first year of his life, but was unable to do so because Sharon hid S. from Javier. Substantial evidence therefore supports the court's finding that Javier is a *Kelsey S.* father.

C. Dr. Simon's Expert Opinion

Patrick's final contention is that the court abused its discretion by disregarding Dr. Simon's expert opinion. We disagree.

In the proceeding below, the family law court served as the finder of fact. "Although a [fact finder] may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633.) Further, so long as it does not do so arbitrarily, a fact finder may entirely reject the testimony of an expert, even where there is no opposing expert and the expert testimony is not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890; *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 507-509.)

Dr. Simon opined that it was in S.'s best interest to remain with Patrick. He stated that scientific studies show a child under two years of age, like S., forms an attachment with a critical primary caregiver. A "critical primary caregiver" is the person who feeds, bathes, dresses, plays with, reads to, and provides love and affection to the child on a

daily basis. Dr. Simon also opined that taking even a young child from the critical primary caretaker with whom he had bonded would have profound negative consequences on the child. Dr. Simon, however, did not meet S. or observe either Patrick or Javier interacting with S.³

The court stated it understood Dr. Simon's opinion, but was not convinced that the probable detriment to S. if he was removed from Patrick's custody outweighed the potential benefits of Javier, his biological father, raising S. More importantly, the court was not convinced Patrick established he was S.'s critical primary caregiver. The only significant evidence of Patrick's role as the critical primary caregiver was Patrick's own testimony. While Patrick's brother testified to seeing Patrick taking care of S., the court noted the brother's testimony was limited in both time and scope. In addition, the court was troubled that Patrick's mother, with whom he lived, did not testify about Patrick's care of S. In summary, the court was concerned "[t]here was no solid, corroborating evidence to support Patrick's testimony that he was a primary critical caregiver to [S.] during the approximately ten (10) months [S.] and Sharon lived with Patrick before Sharon died. Neither is the court convinced based on the evidence presented that Patrick was so intimately involved in taking care of [S.] as an infant, both before and after Sharon died, that he reached the status of critical primary caregiver." Thus, contrary to

³ In Patrick's opening brief, he stated that Dr. Simon testified. The record does not contain any transcript of Dr. Simon's testimony. Because Patrick, as the appellant, bears the burden of providing an adequate record and of showing that prejudicial error occurred (*Maria P. v. Riles, supra*, 43 Cal.3d at pp. 1295-1296), we assume the court's summary of Dr. Simon's testimony contained in the judgment is accurate (cf. *Denham, supra*, 2 Cal.3d at p. 564; *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039).

Patrick's claim, the court did not disregard Dr. Simon's testimony, but carefully evaluated it and found that Patrick did not establish he was a primary caregiver for S.: "Absent this scientific attachment described by Dr. Simon, there would be no profound negative impact on [S.] if he were to be removed from Patrick's custody."

In summary, the court did not arbitrarily disregard Dr. Simon's testimony. It appropriately considered it and found that Patrick had not presented convincing evidence that he fit the definition of a critical primary caregiver. Because the court did not find Patrick satisfied the main criterion underlying Dr. Simon's opinion, it weighed the opinion accordingly. There was no abuse of discretion.

D. Conclusion

As the family court noted, "[t]his was a very difficult case." The court carefully reviewed the evidence presented, analyzed the applicable law, and considered S.'s best interest. While both parties indicated a strong desire to be declared S.'s legal father, it fell upon the family law court to determine who would best serve S.'s interests moving forward. The court made factual findings as to each parties' respective claim to be S.'s legal father and weighed them against each other while considering policy and logic. Although such a decision was not any easy one, the family law court, as the fact finder, was in the best position to weigh the evidence and evaluate the credibility of the witnesses. In our limited role here, we find no abuse of discretion occurred.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.