

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re SHAWN R., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

SEBASTIAN G. et al.,

Defendants and Appellants.

D069688

(Super. Ct. No. EJ3886A)

ORDER MODIFYING OPINION
AND DENYING PUBLICATION

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on October 13, 2016, be modified as follows:

At the end of the first page, insert a new paragraph at the bottom of the counsel listing which reads:

Neil R. Trop, under appointment by the Court of Appeal, for the
Minor.

There is no change in the judgment.

The requests for publication are denied.

NARES, Acting P. J.

Copies to: All parties

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(Super. Ct. No. EJ3886A)

APPEAL from orders of the Superior Court of San Diego County, Gary M. Bubis,
Judge. Reversed and remanded with directions.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant
and Appellant Sebastian G.

William Hook, under appointment by the Court of Appeal, for Defendant and
Appellant Karlie S.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Paula J. Roach, Deputy County Counsel, for Plaintiff and Respondent.

This matter involves two appeals and certain paternity issues that were raised in two related juvenile dependency cases that arose in early 2015. Karlie S. is the mother of Shawn R., who is the subject of these appeals and is now eight years of age. Karlie's former boyfriend, David R., is Shawn's presumed father.¹ Karlie is also the mother of Shawn's half-sibling, S.G., who is now four years of age, and her current boyfriend, Sebastian G., is S.G.'s presumed father.²

Sebastian and Karlie separately appeal from the juvenile court's findings and orders at a January 2016 combined six-month review and contested modification hearing. Challenging the sufficiency of the evidence, they both assert two principal claims of reversible error. First, they claim the court erroneously denied Sebastian's request that he be declared Shawn's presumed father under section 7611(d).³ Second, they claim that, because Sebastian qualified as a presumed father to Shawn under section 7611(d), the

¹ At the February 2015 detention hearing, the juvenile court declared that David is Shawn's presumed father under Family Code sections 7573 and 7611, subdivision (d) (hereafter section 7611(d)). All further statutory references are to the Family Code unless otherwise specified.

² At the detention hearing, the court declared that Sebastian is S.G.'s presumed father under sections 7573 and 7611(d).

³ Section 7611(d) provides in part: "A person is presumed to be the natural parent of a child if the person meets the conditions provided . . . in any of the following subdivisions: [¶] . . . [¶] (d) The presumed parent *receives the child into his or her home and openly holds out the child as his or her natural child.*" (Italics added.)

court erred by failing to find that Sebastian qualified as a third parent to Shawn under section 7612, subdivision (c) (hereafter section 7612(c)).⁴

For reasons we shall explain, we conclude the court erred both in denying Sebastian's request to be declared Shawn's presumed father under section 7611(d) and in denying his request that he be recognized as a third parent to Shawn under section 7612(c).

FACTUAL AND PROCEDURAL BACKGROUND

Karlie is the mother of three children. The oldest, Dustin, was adopted by Karlie's parents following a failed dependency reunification case. The other children, Shawn and S.G., who were born in February 2008 and July 2012 respectively are the subjects of the current dependency proceedings.⁵ David is Dustin and Shawn's biological father, and Sebastian is S.G.'s biological father. Sebastian and Karlie are unmarried, but they have lived together since 2010 when they met.

In mid-February 2015 the Agency detained Shawn (then almost seven years of age) and S.G. (two years of age) in a confidential licensed foster home following the execution of a search warrant at the mother and Sebastian's home. The search revealed that methamphetamine, drug paraphernalia, an unloaded sawed off shotgun, a BB gun, and ammunition were in the home within the reach of the boys. Sebastian and Karlie

⁴ Section 7612(c) provides in part: "In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be *detrimental to the child*." (Italics added.)

⁵ As noted, only Shawn is the subject of this appeal.

were arrested. Karlie admitted she had been a methamphetamine addict and she had used methamphetamine the previous day, and Sebastian admitted he had smoked marijuana the previous evening.

The Agency filed juvenile dependency petitions on behalf of Shawn and S.G. under Welfare and Institutions Code section 300, subdivision (b), alleging they were at risk of harm because methamphetamine was found in the home, Karlie admitted she had relapsed into her methamphetamine abuse, Sebastian was found in possession of marijuana at the time of his arrest, and the boys' fathers had failed, and were unable, to protect them.

When the social worker interviewed Shawn, he told her he lived in the home with his mother Karlie, younger brother S.G., and Sebastian, whom he identified as his father. Karlie identified David as Shawn's father and Sebastian as S.G.'s father. David told the social worker he is Shawn's biological father, he and Karlie had an informal custody arrangement under which Shawn visited him overnight twice a week, he picked Shawn up from school, and he talked with him on the phone.

Karlie, Sebastian, and David appeared at the detention hearing in late February 2015. On the day of the hearing, David filed a parentage inquiry⁶ indicating he was Shawn's biological father. On the verified form he asserted that he signed Shawn's birth certificate at the hospital where Shawn was born, that he stated on the birth certificate that he was Shawn's father, that Shawn had lived with him on and off, and that Shawn

⁶ The form is titled "Parentage Inquiry[/]Father's Questionnaire and Offer of Proof."

had been to his home a few times per month. He also asserted that Karlie had always told him he was Shawn's father; he told his girlfriend and a relative that Shawn was his child; he supported Shawn with supplies, food, clothes, shelter and money if it was available; and he was named as Shawn's father on hospital and school records.

At the detention hearing, David's counsel told the court that David had completed the parentage inquiry form, and she requested a finding that David was Shawn's presumed father under sections 7573 and 7611(d). Informing the court that David had submitted his paternity declaration, and referencing section 7611(d), David's counsel indicated that David had recently picked Shawn up from school, had supported Shawn, had acted as a father figure, and was at the hospital when Shawn was born. David's counsel also asked that Shawn be detained with David, arguing that David was the noncustodial, nonoffending father; that he could take care of Shawn because he had a relationship with Shawn; and that, although David's history reflected he may not have been much of a father to Shawn in the past, he was so now. As an alternative, David asked that his relatives who had appeared at the hearing that day be evaluated and considered as a placement option. A paternal uncle, a nonrelative extended family member (NREFM)⁷ (Jeremy G.), and David's girlfriend were present at the detention hearing.

⁷ Welfare and Institutions Code section 362.7 defines a NREFM as "an adult caregiver who has an established familial relationship with a relative of the child . . . or a familial or mentoring relationship with the child." That section permits a county welfare department to place a dependent child in the home of a NREFM. (*In re Michael E.*

Sebastian's counsel informed the court during the detention hearing that Sebastian had submitted his paternity declaration regarding S.G. and had completed the parentage inquiry form and that Sebastian was requesting a finding that Sebastian was S.G.'s presumed father under sections 7573 and 7611(d). However, Sebastian's counsel told the court, "*[Sebastian] at this time is not exercising a request to be presumed for [Shawn], but may in the future—would like to defer regarding [Shawn] as to whether he would like to become presumed in that matter.*" (Italics added.) Later in the hearing, when the court asked Sebastian's counsel whether Sebastian was seeking presumed father status for Shawn, she replied, "He's not requesting presumed [father status] for Shawn at this time, but he is for [S.G.]" Sebastian's counsel asked that S.G. and Shawn be placed with Sebastian, arguing that Sebastian viewed Shawn as his son and he had raised Shawn in his home since Shawn was two years old.

Karlie's counsel asked that Shawn be placed with David and that S.G. be placed with Sebastian. In the parentage inquiry form Karlie filed with the court as to Shawn, she indicated that David was Shawn's father and no other man was claiming to be the father; that David had not supported Shawn; and that David had agreed to be listed, and was listed, as the father on Shawn's birth certificate. In the parentage inquiry form Karlie filed with the court as to S.G., she listed Sebastian as S.G.'s father and indicated that S.G. had lived with Sebastian since his birth; that Sebastian supported S.G. financially and

(2013) 213 Cal.App.4th 670, 674, superseded by statute on another point as indicated in *In re Joshua A.* (2015) 239 Cal.App.4th 208.)

emotionally; and that Sebastian had agreed to be listed, and was listed, as the father on S.G.'s birth certificate.

Shawn and S.G.'s attorney opposed their placement with either Sebastian or David. However, regarding David, counsel stated she thought "it might be appropriate to put discretions in place."

The court found under sections 7573 and 7611(d) that David was Shawn's presumed father and Sebastian was S.G.'s presumed father. The court denied David's request that Shawn be placed with him, citing David's failure to reunify with a dependent child, the termination of his parental rights, a history of domestic violence, and questions regarding the person he was living with. The court found the Agency made a prima facie showing on the dependency petitions and ordered that Shawn and S.G. be detained in an approved licensed foster home.

Thereafter, in the Agency's March 2015 jurisdiction and disposition report, the social worker reported that Shawn told her he did not want to live with anyone other than his "Uncle J." (Jeremy G.). When the social worker asked Shawn who his father was, he replied, "Well I have two dad[s]. I have Sebastian [] and he is my dad who actually takes care of me and then there's my real dad but he doesn't do anything." Shawn also told her, "[David] doesn't even come visit me," and "I see my mom and dad [Sebastian] a lot and we play. I think it goes good."

According to the social worker, Karlie and Sebastian reported a strong desire to reunify with both Shawn and S.G. Sebastian told her that the plan was for Karlie to move out of the home and for the boys to be returned to him at the home. However, the social

worker explained to Sebastian that the Agency would not recommend that the court return Shawn and S.G. to his care until he had "ma[de] progress addressing the protective issues."

In her report, the social worker also reported that after the children were placed in foster care the foster parent facilitated daily phone calls between Shawn and S.G. and Karlie and Sebastian, as well as visits every other day. The caregiver reported to the social worker that Karlie and Sebastian had been very appropriate and positive in their interactions with the boys during the visits. The social worker also reported that, according to the caregiver, David visited Shawn at a birthday party held for Shawn in late February 2015 and had called him twice prior to that, but had not called to check on Shawn since then. Sebastian denied having a substance abuse problem. David failed to submit to drug testing, did not stay in contact with the Agency, and did not avail himself of services.

The social worker also reported that, according to Shawn's teacher, Shawn was "not absorbing much academically at the school" because he was focused on his removal from his home and his placement in a foster home. Shawn's teacher was concerned because one day Shawn came to school saying he would be kicked out of his foster home within 30 days. The caregiver reported that S.G. had adjusted well to the foster home and he did not appear distressed in any way.

With respect to jurisdiction and disposition, the Agency's report recommended that the court make true findings on the petitions, place Shawn and S.G. in a licensed foster

home, order the that the parents have reasonable visitation with the children, deny services to David, but provide services to Karlie and Sebastian.

In the Agency's addendum report prepared in early May 2015, the social worker reported that Karlie and Sebastian had quickly participated in recommended services and were doing well. However, the social worker expressed concern that both Karlie and Sebastian continued to deny any responsibility for the situation and continued to deny that they put Shawn and S.G. in danger. The social worker stated she "ha[d] attempted to explain to [Sebastian] that he still need[ed] to know what was going on especially when [Karlie] is taking [S.G.] over to the home of known criminal and drug user." The social worker reported she was concerned that "[Karlie] attended only one [Narcotics Anonymous] meeting a week for the first month she was in the program," but also reported that Karlie attended two meetings a week during the last three weeks. The social worker also reported that Sebastian attended two meetings a week for three weeks in March and two meetings a week in April.

The record shows that on May 8, 2015, Shawn and S.G. were placed in the care of the maternal great-grandmother, Frankie S., who had moved from Oklahoma to care for them. Karlie and Sebastian moved out of their home so that Frankie could move in and live there with the boys.

At a settlement conference in mid-May 2015, the court assumed jurisdiction, declared S.G. a dependent of the court, removed him from Karlie and Sebastian, placed him with Frankie S., and ordered reunification services for Karlie and Sebastian. A few days later, following a contested adjudication and disposition hearing, the court also

assumed jurisdiction in Shawn's case, removed him from Karlie and David, placed him with the same relative, and ordered services for Karlie and David. The court also ordered that Karlie and Sebastian have unsupervised visits.

Five months later in late October 2015, the Agency filed petitions under Welfare and Institutions Code section 388 asking the court to change the mother's visitation from unsupervised to supervised based on her continued substance abuse. A social worker reported that Karlie was arrested in mid-September for being under the influence of controlled substance and tested positive for methamphetamine in early August and mid-September. In early October the mother was arrested for possession of controlled substance paraphernalia. The court set a contested hearing on the modification petitions for December 8.

In the Agency's November 6, 2015, report for the six-month family reunification hearing, the social worker reported that Sebastian continued to participate and make progress on his case plan and he remained employed. Karlie made some progress, including completion of drug treatment, but she relapsed into drug use. Throughout the dependency case, Sebastian and Karlie's relationship had been "off and on" and they were not together in July. They regularly visited with and helped care for both boys. David did not stay in contact with the Agency and did nothing on his case plan. He did not seek visits with Shawn until November 2.

The social worker also reported that she contacted Sebastian on October 19 and informed him the mother had tested positive for drug use. Sebastian was upset as the mother had said she was not using. Sebastian told her, "The only thing I need right now

is to be closer to my kids. It hurts to see them go through this because they need their mother." He asked about what would happen with Shawn, and the social worker informed him that this was "difficult" because he was not Shawn's biological father. Sebastian stated he would not feel comfortable if Shawn were placed with David. The social worker encouraged Sebastian to talk to his attorney about his options.

On November 17, 2015, the date set for the six-month review hearing, the Agency filed on Shawn's behalf a second Welfare and Institutions Code section 388 petition seeking an order terminating David's reunification services early based on his lack of participation and visits. The court continued that hearing to December 8, the date set for the contested hearing on the previously filed modification petitions. The matter was continued to January 15, 2016.

A. January 15, 2016 Paternity and Modification Hearing

Sebastian filed a parentage inquiry form on January 15, 2016, in which he stated he was Shawn's father. He said Shawn lived with him in 2010, and he referred to him as "my boy" to family and friends. Sebastian indicated that he supported Shawn by providing food, money, and clothing. He had also enrolled Shawn in school.

At the contested hearing on that date regarding the Agency's two Welfare and Institutions Code section 388 petitions—one asking that Karlie's unsupervised visitation revert to supervised visitation, and the other requesting termination of David's mandated services—Sebastian's counsel asked under sections 7611(d) and 7612(c) that the court find that Sebastian was Shawn's presumed father (for the purpose of allowing Shawn to have three parents).

The court received the Agency's reports into evidence and heard testimony from Sebastian, David, and Tonya Brown, the Agency's supervising social worker in this matter.

1. *Sebastian's testimony*

Sebastian testified that Karlie and Shawn moved in with him in 2010 and he immediately began caring for Shawn. Sebastian helped Karlie enroll Shawn in school where he identified himself as Shawn's father. He helped Shawn with his homework. He went to school conferences and signed documents for Shawn's school. He provided food and clothes to Shawn and took him to the skate park and other activities. Sebastian also stated he taught Shawn how to ride his bike and throw a football, and he took Shawn to the family fun center and to the mall. He called Shawn "my son," and he told family, friends, and coworkers that Shawn was his son. Shawn called him "Daddy."

Sebastian also testified that Shawn would talk to him about David. Shawn told Sebastian that he loved David and he missed him. He also asked why David did not visit. Sebastian stated that David had visited Shawn over 30 to 40 times since 2010. Shawn spent the night at David's home at times, and the last time Shawn spent the night at David's home was in about January 2015. Prior visits between David and Shawn had gone well except for a couple of times when Shawn wanted to come home early.

Sebastian indicated he moved back into his home with Frankie, Shawn, and S.G. for a two-month visit with S.G., and he had been caring for both boys. He had been taking Shawn to school every day and picking him up. He had prepared breakfast, lunch and dinner for Shawn, had done his laundry, and had helped him with his homework.

On cross-examination, David's counsel asked Sebastian if he knew whether Karlie was still using drugs. Sebastian replied, "No, I'm not." David's counsel then asked Sebastian whether he was aware that Karlie recently had tested positive for drugs.⁸ Indicating he was not, Sebastian replied, "I am now."

Soon thereafter, still on cross-examination, Sebastian testified that he and Karlie were "trying to work things out" in their relationship. David's counsel asked Sebastian, "Would you feel comfortable if [Karlie] and Shawn were to be unsupervised?" Sebastian replied, "I sure would." David's counsel then asked Sebastian whether he would still feel comfortable with Karlie's being alone with Shawn even though she recently tested positive for drugs. Sebastian replied, "Well, I would say yes because she's a loving mother. She doesn't ever put her kids into danger." However, Sebastian immediately changed his testimony, stating, "But, you know, since she's tested positive, you know, no. I have to do what's best for my kids."

On redirect examination, the Agency's counsel asked Sebastian, "Can you tell when [Karlie] is under the influence?" Sebastian replied, "To be honest, no." The Agency's counsel then asked Sebastian how long he had known Karlie, and he responded, "Six, seven years." The Agency's counsel asked him, "You have never been able to tell when she's under the influence?" Sebastian replied, "No."

⁸ A social worker's October 2015 addendum report stated that Karlie tested positive for methamphetamine in early August and mid-September 2015.

The court asked Sebastian whether he would be prepared to raise both Shawn and S.G. on his own. Sebastian replied that he would. Sebastian later testified he was prepared to care for Shawn until he reached 18 years of age.

2. David's testimony

David testified that prior to this dependency case, Shawn visited with him three to four times a week. Shawn spent the night with him, and he took Shawn to school and picked him up. On many occasions Shawn spent multiple nights in a row at David's home. Shortly before this case began, Shawn stayed with David for three weeks straight because Sebastian and Karlie were fighting and David wanted to protect Shawn from the fighting.

David testified that Shawn lived with him and Karlie from the time of his birth until he was two years of age. After David and Karlie separated when Shawn was two years old, David continued to have overnight visitation with Shawn. However, David testified, Shawn lived with David's "brother-in-law and [his] sister while [Karlie] was incarcerated."

When asked whether he was requesting that Shawn be placed in his care, David replied, "Yes," and stated, "Because he is my son and I love him to death and he needs to be with his father if he's not able to be with his mother." He indicated that if the court did not place Shawn with him, he wanted to be able to visit Shawn.

David testified he did not agree with Shawn's placement with Sebastian. David indicated that Sebastian and Karlie fought often; Sebastian did not make good choices with respect to keeping Shawn safe; and on one occasion in around January 2015, after

Sebastian had been drinking and was arguing with Karlie as David was picking up Shawn, Sebastian punched David in front of Shawn. David testified that he and Sebastian had arguments "because [Sebastian] wants to try to throw me out of being Shawn's dad."

David also testified he called Shawn only a few times between the time this case began and the last hearing because he was unaware he was able to have contact with him. Since the last hearing, he had talked with Shawn a few times and he would have spoken to Shawn more often when he called, but he was not comfortable calling Shawn when Sebastian and the mother were present with Shawn. When he spoke with Shawn, it went very well. David testified, "[Shawn] told me that he loves me very much and he really wants to see me and told me about how school is going for him and his favorite video games." David said he told Shawn that he loved him and he wanted to see him, and he was sorry he had not seen him but that things should get better. He had Christmas presents for Shawn and had purchased food for Shawn and S.G. a couple months before the hearing.

3. Social worker's testimony

Tonya Brown, who had been overseeing this dependency case from its inception, testified that, to her knowledge, David had not had face-to-face contact with Shawn since the case began. After listening to Sebastian's testimony, she no longer recommended that Shawn and S.G. be placed with Sebastian because she did not believe he would protect them from Karlie. Brown explained that, although she did not believe Sebastian himself would harm Shawn or S.G., she believed he would continue to allow Karlie to come into

the home when she was under the influence of drugs and stay overnight and have unsupervised visits with the children. Brown stated she did not believe that Sebastian "would follow through on the court orders on that." She testified she would be "more apt" to recommend placement of Shawn and S.G. with Sebastian if Frankie stayed in the home because Brown believed that Frankie "would be forthcoming and monitoring the visits, making sure that [Karlie] did not come into the home." Thus, she would recommend placement with Sebastian only on the condition that Frankie remain in the home and that the mother not be in the home and her visits be at a visitation center.

Brown also testified that Sebastian would qualify as an NREFM,⁹ but indicated there was no guarantee that, as an NREFM, he would qualify as a placement option. She stated that, if the court considered Sebastian to be Shawn's legal father, she then had the option of recommending that Shawn be placed with him. Brown further testified that despite one of the social worker's admonishing Sebastian that he should not supervise Karlie's visits with Shawn and S.G., Sebastian did supervise such visits.

4. Arguments of counsel and the court's rulings

Addressing the paternity issue, the Agency argued that Sebastian qualified as a presumed father under section 7611(d) and that the court could find under section 7612(c) that Sebastian and David were both presumed fathers for Shawn if the court found that not recognizing them both as presumed fathers would be detrimental to Shawn. The Agency's counsel stated that David was not disqualified from being Shawn's

⁹ See footnote 3, *ante*.

presumed father and argued that it would be in Shawn's best interest for the court to recognize both David and Sebastian as presumed fathers in this case.

Sebastian's counsel argued that Sebastian qualified as a presumed father under section 7611(d) and that a weighing of the competing presumptions was required under section 7612, subdivision (e) (hereafter § 7612(e)). Counsel argued that David was an absent father to Shawn and had refused to participate in services, and thus Sebastian's presumption should be given greater weight and David's presumption granted under section 7573 in 2015 should be set aside. Counsel alternatively argued that if the court was not inclined to set aside David's presumption, the court should find it was in Shawn's best interest to have three parents pursuant to section 7612(c) so that Sebastian could be involved in Shawn's life. Karlie's counsel joined in these arguments and requests.

David's counsel, noting that the court had determined at the detention hearing that David was a presumed father under sections 7573 and 7611(d), opposed Sebastian's request for presumed father status. David's counsel argued that David was a presumed father under two statutes and his being a presumed father under 7611(d) meant he was not an absent father. She pointed to the testimony showing that David had visited Shawn; that Shawn loves and misses him; and that David is a father to Shawn, who sees him as a father.

David's counsel also argued the court should not weigh Sebastian's presumption, if it existed, against David's because David qualified as a presumed father under both section 7573 and section 7611(d). However, if the court decided to weigh the

presumptions, it should weigh them in favor of David. Counsel told the court that David was requesting the chance to reunify with Shawn.

David's counsel opposed a finding under section 7612(c) that Shawn would suffer detriment if he had only two parents (David and Karlie). She argued that in today's society, "[w]e're going to have a lot of stepdads and a lot of stepmoms and if we just grant every stepdad and every stepmom presumed [parent] status, we are going to be making a big mess of these children's lives." David's counsel asked the court to deny the Agency's modification petition to terminate David's services because it was not in Shawn's best interest, "especially when Shawn has a relationship with him."

Shawn and S.G.'s counsel argued that Sebastian qualified as a presumed father, and he could provide Shawn with stability and "an additional permanency option." Counsel also argued the court should grant the Agency's modification petition to require Karlie's visitation with Shawn and S.G. to be supervised, but he argued it would be in the children's best interests if the court denied the Agency's modification petition to terminate David's services. Counsel requested that Shawn and S.G. be placed with Sebastian on the condition that the maternal great-grandmother (Frankie) reside in the home "so that the Agency and the court will be sure that all the terms of visitation are enforced with regards to [Karlie's] not having unfettered access to the kids."

a. *Rulings*

After listening to the arguments of counsel, reading and considering the Agency's reports, and taking judicial notice of prior findings and orders, the court first denied Sebastian's request under section 7611(d) for presumed father status as to Shawn. The

court stated that "[t]his is a situation whereby [Sebastian's] own testimony there were 30 to 40 visits [by David since 2010]. [David] is not a very good father. I wouldn't want him for my father, but he's done enough and essentially this would allow any stepfather to come in and create these types of situations. I don't believe that's the nature of the statute."

The court then denied Sebastian's request under section 7612(c) that Shawn have three parents (Karlie, David, and Sebastian), concluding it could not find detriment to Shawn from his not having three parents.

The court granted the Agency's section 388 petitions reverting the mother's visitation to supervised visitation and terminating David's reunification services. Finding that placement of Shawn and S.G. with Sebastian on condition that Frankie reside in the home was not appropriate because it did not trust Sebastian to prevent Karlie from "sneak[ing] in," the court placed Shawn and S.G. with Frankie. The court continued reunification services for the mother and Sebastian, and confirmed the 12-month review date for April 21, 2016. Sebastian's and Karlie's timely appeals followed.

DISCUSSION

I. *SEBASTIAN'S ENTITLEMENT TO PRESUMED PATERNITY (SECTION 7611(d))*

Sebastian and Karlie first contend the court erroneously denied Sebastian's request that he be declared Shawn's presumed father under section 7611(d). Specifically, Sebastian asserts that "overwhelming" and "uncontroverted" evidence showed that he qualified for, and was entitled to, presumed father status as to Shawn under section 7611(d) because he received Shawn into his home and held him out as his son. In a

related claim, Sebastian also asserts that, because he was entitled to presumed father status under section 7611(d), the court should have "weighed his presumption against David's under section 7612[, subdivision (b) (hereafter section 7612(b))¹⁰] and found his [(Sebastian's) presumption] to be the weightier of the two."

Karlie similarly asserts the court erred by "failing to find that Sebastian qualified as Shawn's presumed father under [section 7611(d)]" because (she asserts) "the evidence showed he had received Shawn into his home and openly held out [Shawn] as his natural child." She also asserts the court erred by "failing to weigh [Sebastian's and David's] competing paternity presumptions as required by section 7612, subdivisions (b) and (e)."¹¹

Shawn and S.G.'s appellate counsel agrees with Sebastian and Karlie that the court erred in failing to grant presumed father status to Sebastian under section 7611(d).

¹⁰ Section 7612(b) provides in part: "If two or more presumptions arise under Section . . . 7611 that conflict with each other, . . . the presumption which on the facts is founded on the weightier considerations of policy and logic controls."

¹¹ The pertinent language of section 7612(b) concerning the weighing of competing section 7611 presumptions is set forth in footnote 10, *ante*. Subdivision (e) of section 7612 provides: "Within two years of the execution of a voluntary declaration of paternity, a person who is presumed to be a parent under Section 7611 may file a petition pursuant to Section 7630 to set aside a voluntary declaration of paternity. The court's ruling on the petition to set aside the voluntary declaration of paternity shall be made taking into account the validity of the voluntary declaration of paternity, and the best interests of the child based upon the court's consideration of the factors set forth in subdivision (b) of Section 7575, as well as the best interests of the child based upon the nature, duration, and quality of the petitioning party's relationship with the child and the benefit or detriment to the child of continuing that relationship. *In the event of any conflict between the presumption under Section 7611 and the voluntary declaration of paternity, the weightier considerations of policy and logic shall control.*" (Italics added.)

However, he states that "it is not the position of the minors that the juvenile court should have weighed Sebastian's presumption against David's presumption under [section 7612(b)] and found Sebastian to be Shawn's sole presumed father. Rather, . . . it is the minors' position that they would be best served by finding both David and Sebastian to be Shawn's presumed fathers under [section 7612(c)]."

In response the Agency, *reversing* the position it took at the January 2016 hearing that Sebastian *did qualify* as a presumed father under section 7611(d), claims on appeal that the court did not err because substantial evidence supports the court's finding that Sebastian *did not qualify* as a presumed father under section 7611(d). Specifically, the Agency asserts that "Sebastian did not meet the [section 7611(d)] element of holding Shawn out as his own child in that he did not take prompt legal action to become Shawn's presumed father, and his acknowledgement of Shawn as his own child was not unequivocal." The Agency also asserts that "Sebastian's lack of immediately assuming full responsibility for Shawn as his presumed father shows Sebastian *equivocated* in being anything other than a stepfather to Shawn." (Italics added.) Thus, the Agency maintains, the court did not err in failing to weigh paternity presumptions because, "[w]ithout Sebastian['s] qualifying as a presumed father, there is no presumption to weigh David's presumption against."

For reasons we shall explain, we conclude the court erred in denying Sebastian's request to be declared Shawn's presumed father under section 7611(d).

A. *Applicable Legal Principles*

California's Uniform Parentage Act (§ 7600 et seq.) distinguishes presumed fathers from "alleged" and "biological" fathers. (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1018) "Presumed father status ranks highest." (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801 (*Jerry P.*); see *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 824 (*Kelsey S.*) ["*presumed* fathers have far greater rights"].) "A father's status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is entitled." (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209 (*T.R.*.)

A presumed father is a person who "promptly comes forward and demonstrates a full commitment to his paternal responsibilities—emotional, financial, and otherwise[.]" (*Jerry P.*, *supra*, 95 Cal.App.4th at pp. 801-802, quoting *Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) Biology is not determinative. "A biological father can be a presumed father, but is not necessarily one; and a presumed father can be a biological father, but is not necessarily one." (*T.R.*, *supra*, 132 Cal.App.4th at p. 1209.) An individual is not entitled to the elevated status of presumed fatherhood unless he has have demonstrated "a commitment to the child and the child's welfare regardless of whether he is biologically the father." (*Id.* at p. 1205.)

"Section 7611 sets forth a number of rebuttable presumptions of paternity, mostly concerned with various forms of marriage or attempted marriage to the child's mother." (*T.R.*, *supra*, 132 Cal.App.4th at p. 1209, citing § 7611, subs. (a)-(c).) "The statutory purpose [of section 7611] is to distinguish between those fathers who have entered into

some familial relationship with the mother and child and those who have not." (*T.R.*, *supra*, 132 Cal.App.4th at p. 1209.)

Relevant here, as already noted, is section 7611(d). "Under section 7611[d], a person is presumed a parent if he or she 'receives the child into his or her home and openly holds out the child as his or her natural child.'"¹² (*In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1085-1086 (*Donovan L.*), quoting § 7611(d).)

One who claims he is entitled to presumed father status under section 7611(d) "has the burden of establishing, by a preponderance of the evidence, the facts supporting that entitlement." (*T.R.*, *supra*, 132 Cal.App.4th at p. 1210.) "A presumption arising under section 7611 is a 'rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence.'" (*Ibid.*, quoting § 7612, subd. (a).)

In evaluating whether a man has "receiv[ed a] child into his home and openly h[eld] out the child' as his own" within the meaning of section 7611(d), "courts have looked to such factors as whether the man actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child; whether he provided for the

¹² The pertinent language in section 7611(d) is set forth in footnote 3, *ante*.

child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental." (*T.R.*, *supra*, 132 Cal.App.4th at p. 1211.) "No single factor is determinative; rather, the court may consider all the circumstances when deciding whether the person demonstrated a parental relationship by holding out the child as his . . . own and assuming responsibility for the child by receiving the child into his . . . home." (*R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 774 (*R.M.*).

1. *Standard of review*

We review the juvenile court's presumed parentage determinations under the substantial evidence standard. (*In re A.A.* (2003) 114 Cal.App.4th 771, 782 (A.A.); *R.M.*, *supra*, 233 Cal.App.4th at p. 780.) We do not reweigh the evidence or disturb the juvenile court's credibility determinations; instead, we draw all reasonable inferences and resolve conflicts in the evidence in favor of the court's findings. (*R.M.*, at p. 780.) "If there is substantial evidence to support the ruling, it will not be disturbed on appeal even if the record can also support a different ruling." (*Ibid.*)

Analysis

Under the foregoing principles, in order to establish a rebuttable presumption under section 7611(d) that he qualified as Shawn's presumed father, Sebastian was required to establish two elements by a preponderance of the evidence: (1) he received Shawn into his home, and (2) he openly held him out as his natural child. (§ 7611(d); *T.R.*, *supra*, 132 Cal.App.4th at p. 1210.) Once established, such a presumption could be rebutted "only by clear and convincing evidence." (*Ibid.*, quoting § 7612, subd. (a).)

It is undisputed that Sebastian met his burden of establishing the first element of the claimed section 7611(d) paternity presumption; that is, he received Shawn into his home. The Agency acknowledged as much at the January 2016 hearing by arguing that Sebastian qualified as Shawn's presumed father under section 7611(d); and, on appeal, the Agency only claims that "Sebastian did not meet the [second section 7611(d)] element of holding Shawn out as his own child." Sebastian's uncontradicted testimony regarding the first element was that Karlie and Shawn moved in with him in 2010 and he immediately began caring for Shawn.

Sebastian also met his burden of establishing by a preponderance of the evidence the second section 7611(d) paternity presumption element, that is, that he openly held Shawn out as his natural child. As noted, a presumed father is a person who "promptly comes forward and demonstrates a full commitment to his paternal responsibilities—emotional, financial, and otherwise." (*Jerry P.*, *supra*, 95 Cal.App.4th at pp. 801-802, quoting *Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

Here, strong uncontradicted evidence shows Sebastian openly held Shawn out as his natural child by coming forward reasonably promptly and demonstrating a full commitment to his paternal responsibilities—"emotional, financial, and otherwise" (*Kelsey S.*, 1 Cal.4th at p. 849)—with respect to Shawn. When Shawn's dependency case commenced in late February 2015, Sebastian, Karlie, and Shawn (who was then almost seven years old) had been living together as a family since 2010. It is true, as the Agency points out, that Sebastian did not ask for presumed father status at the detention hearing. The Agency argues that Sebastian's failure to "immediately assum[e] full responsibility

for Shawn as his presumed father shows Sebastian equivocated in being anything other than a stepfather to Shawn." However, the evidence amply demonstrates that Sebastian's parental commitment to Shawn and his welfare was, and is, unequivocal. Sebastian's uncontradicted testimony at the January 2016 paternity hearing established that he immediately began caring for Shawn after Karlie and Shawn moved in with him in 2010. He helped Karlie enroll Shawn in school where he identified himself as Shawn's father, and he helped Shawn with his homework. Sebastian went to school conferences and signed documents for Shawn's school, he provided food and clothes to Shawn and took him to the skate park and other activities, he taught Shawn how to ride his bike and throw a football, and took him to the family fun center and to the mall to shop for clothes. He called Shawn "my son," and he told family, friends, and coworkers that Shawn was his son. Shawn called him "Daddy." In the Agency's May 2015 addendum report, the social worker commended Sebastian for quickly participating in recommended services. In the Agency's November 2015 status review report for the six-month family reunification hearing, the social worker reported that Sebastian continued to participate and make progress on his case plan, and he remained employed.

At the time of the January 2016 paternity hearing, although Karlie was not living with the family, Sebastian was living with Shawn at the maternal great-grandmother's (Frankie's) house and the Agency informed the court Frankie reported that Sebastian "has been really good" with Shawn and S.G. in making sure their day-to-day needs are taken care of. At the hearing the court asked Sebastian whether he would be prepared to raise

both Shawn and S.G. on his own, and Sebastian replied that he would. Sebastian testified he was prepared to care for Shawn until he reached 18 years of age.

At the April 2016 12-month review hearing in S.G.'s dependency case, the court, finding that Sebastian had "made substantive progress with the provisions of the case plan," placed S.G. with Sebastian.¹³

Based on the foregoing evidence, we conclude the court erred in denying Sebastian's request that he be declared Shawn's presumed father under section 7611(d), because (1) Sebastian has established he was entitled to a rebuttable presumption under section 7611(d) because he met his burden of demonstrating by a preponderance of the evidence that he received Shawn into his home and he openly held him out as his natural child; and (2) there is no substantial evidence to support the court's implied finding that the presumption was rebutted by clear and convincing evidence. (See § 7612, subd. (a) [presumption under section 7611 "may be rebutted in an appropriate action only by clear and convincing evidence"].)

We need not address Sebastian's and Karlie's related claim that the court should have weighed Sebastian's presumption against David's under section 7612(b)¹⁴ and found Sebastian's presumption to be the weightier of the two, because (as we shall

¹³ Sebastian's unopposed request for judicial notice of the court's April 2016 finding and placement order is granted. (Code Civ. Proc., § 909 ["reviewing court may for . . . any . . . purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal"]; *In re Zeth S.* (2003) 31 Cal.4th 396, 405; *In re C.F.* (2011) 198 Cal.App.4th 454, 463.)

¹⁴ See footnote 11, *ante*.

explain) the court erred in denying Sebastian's request that he be declared a *third* parent to Shawn under section 7612(c).

II. SEBASTIAN'S THIRD-PARENT STATUS (SECTION 7612(c))

Challenging again the sufficiency of the evidence, Sebastian and Karlie argue that, because Sebastian qualified as a presumed father to Shawn under section 7611(d), the court erred by failing to find that he also qualified as a third parent to Shawn under section 7612(c), which, as we explained in *Donovan L.*, *supra*, 244 Cal.App.4th at page 1079, provides that "in an appropriate action, 'if the court finds that recognizing only two parents would be detrimental to the child,' a court may find a child has more than two parents." (*Ibid.*, quoting § 7612(c).¹⁵)

Specifically, Sebastian argues that the court "erred in finding the evidence did not support a finding [under section 7612(c)] that recognizing only [two] parents would be detrimental to Shawn." Relying on this court's recent decision in *Donovan L.*, Sebastian asserts the court's failure to find he was a third parent to Shawn under section 7612(c) was error because "the instant case is precisely the type of case for which section 7612(c)

¹⁵ Section 7612(c) provides in full: "*In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled 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. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.*" (Italics added.)

was created; that is, the evidence clearly showed it would be detrimental to Shawn to not have Sebastian recognized as his third parent."

Karlie similarly asserts that "[t]he court erred by denying Sebastian presumed father status as to Shawn under section 7612[(c)]" because "insufficient evidence supported the court's finding that recognizing only David and Karlie as Shawn's presumed parents would not be detrimental to [Shawn]."

Agreeing with Sebastian and Karlie that the court erred by failing to recognize Sebastian as a third parent to Shawn under section 7612(c), Shawn and S.G.'s appellate counsel states that "Shawn's best interests would be best served by recognizing both Sebastian and David as Shawn's presumed fathers" because "Shawn desperately wants David to remain in his life" and "[t]he evidence bears out Sebastian's claim that he had demonstrated a commitment to Shawn and Shawn's welfare for several years."

However, the Agency, reversing on appeal the position it took at the January 2016 paternity hearing in favor of recognizing both Sebastian and David as Shawn's presumed fathers, contends that "because Sebastian did not qualify as a presumed father under section 7611," he has no claim to parentage and, thus, section 7612(c) "has no application in this case." Relying on *Donovan L., supra*, 244 Cal.App.4th 1075, the Agency also asserts that (1) "this is not an appropriate action to apply section 7612[(c)] given [that] the intent behind the statute was to resolve parentage when three parents are *acting as a parent in every way* to a child" (italics added); and (2) here, Sebastian "had not been Shawn's parent in every way."

For reasons we shall explain, we conclude the court erred in denying Sebastian's request that he be recognized as a third parent to Shawn under section 7612(c).

A. Background

At the contested January 2016 paternity hearing, Sebastian's counsel requested that Sebastian be declared Shawn's third parent under section 7612(c), arguing that it would be in Shawn's best interest. Karlie's counsel joined in that request.

The Agency's counsel also argued it would be in Shawn's best interest for the court to recognize both Sebastian and David as Shawn's presumed fathers. Specifically, the Agency's counsel stated, "I think based on the continued contact that [David] has had with Shawn, it would be . . . in Shawn's best interest to recognize the two [fathers, Sebastian and David,] as presumed in this case."

Shawn and S.G.'s counsel also supported Sebastian's request to be declared Shawn's third parent, arguing, "With regards to paternity, I am in agreement with [Sebastian's] being found a [section] 7611(d) father. I think that will provide Shawn with an additional permanency option and additional stability in that he could be placed with [Sebastian] as a father and maintain that sibling bond with [S.G.] and that they could both be placed together with [Sebastian]. That would be in Shawn's best interest, but I would ask that the court not set aside the presumed finding for [David] and that way [David] can still be involved in the case."

1. Ruling

The court denied Sebastian's request that he be declared Shawn's third parent under section 7612(c), finding there would be no detriment to Shawn by recognizing only

David and Karlie as Shawn's parents. The court stated: "[Sebastian] could qualify as a non-relative extended family member. He could get placement of [Shawn], mandated services could be terminated for both parents [(Karlie and David)] and [Sebastian] could adopt Shawn. So there's a way to get there. Let's say that . . . [Karlie] does what she is supposed to do and they [(Karlie and Shawn)] reunify, [Sebastian] can remain in Shawn's life because he is going to be the mother's boyfriend, so there's no detriment to Shawn."

Later, the court addressed its finding that it could not find detriment to Shawn from his not having three parents. The court stated, "My ears went up when [Sebastian] said that he thinks unsupervised visits with [Karlie] would be just fine. What have we been doing here? [H]e essentially said—and it's right in line with what [Karlie] says[,] 'There's nothing wrong here, just move along. I don't have a drug problem. Ignore those positive [drug] tests.'"

The court also stated, "I think [Sebastian] has bought into [Karlie's] total denial, but [he] is a good guy. I think he loves these kids. He's going everything he can, but he's got to understand what the risk is. I don't think he quite appreciates what the risk is."

The court told Sebastian he needed to learn to recognize when Karlie is using methamphetamine, and added, "I don't know know[] what you're learning in these classes if you don't know this stuff."

B. *Analysis*

Sebastian and Karlie, supported by Shawn and S.G.'s appellate counsel, challenge the sufficiency of the evidence to support the court's order denying Sebastian's section

7612(c) third-parent request and its finding that there would be no detriment to Shawn by recognizing only David and Karlie as his parents.

The Agency's response—that "this is *not an appropriate action* to apply section 7612[(c)]" (italics added) because Sebastian "ha[s] not been Shawn's parent in every way"—is unavailing.

In *Donovan L.*, *supra*, 244 Cal.App.4th 1075, we explained that "'an appropriate action' for application of section 7612[(c)] is one in which there is an *existing* parent-child relationship between the child and the putative third parent, such that 'recognizing only two parents would be detrimental to the child.'" (*Donovan L.*, at pp. 1093-1094, quoting § 7612(c).) We also explained in *Donovan L.* that the legislative purpose of section 7612(c) is to "'protect[] children from harm by *preserving the bonds* between children and their parents' [citation] and avoid the "'disastrous emotional, psychological, and financial consequences for a child, who may be separated from one or both of the parents *he or she has always known.*"'" (*Donovan L.*, at p. 1089.)

We conclude there is no substantial evidence to support the court's implied findings that (1) Shawn would suffer no detriment as a result of the court's denial of Sebastian's request to be recognized as Shawn's third parent under section 7612(c), and that (2) this case is not an "appropriate action" for application of section 7612(c). There is no substantial evidence from which a reasonable trier of fact could conclude that "an *existing* parent-child relationship" (*Donovan L.*, *supra*, 244 Cal.App.4th at pp. 1093-1094) is lacking between Shawn and Sebastian, the putative third parent. We have already concluded for reasons discussed, *ante*, that strong uncontradicted evidence

establishes that Sebastian openly held Shawn out as his natural child by coming forward reasonably promptly and demonstrating a full commitment to his paternal responsibilities—"emotional, financial, and otherwise" (*Kelsey S.*, 1 Cal.4th at p. 459)—with respect to Shawn. Thus, we agree with Shawn's appellate counsel's assertion that "Sebastian's commitment to Shawn was unequivocal."

There also is no substantial evidence from which a reasonable trier of fact could conclude that Shawn would suffer no detriment as a result of the court's recognizing Karlie and David as Shawn's sole parents. Uncontradicted substantial evidence establishes that Sebastian immediately began caring for Shawn after Karlie and Shawn moved in with him in 2010. He provided food and clothing to Shawn, helped Karlie enroll Shawn in school where he identified himself as Shawn's father, helped Shawn with his homework, took Shawn to the skate park and other activities, taught Shawn how to ride his bike and throw a football, and took Shawn to the family fun center and to the mall to shop for clothes. Sebastian called Shawn "my son" and told family, friends, and coworkers that Shawn was his son. Shawn called him "Daddy." When a social worker interviewed Shawn following his detention, he identified Sebastian as his father. Later, when the social worker asked Shawn who his father was, he replied, "Well I have two dad[s]. *I have Sebastian and he is my dad who actually takes care of me* and then there's my real dad but he doesn't do anything." (Italics added.) Referring to Sebastian, Shawn also told her, "I see my mom and dad a lot and we play. I think it goes good." We agree with the assertion by S.G. and Shawn's appellate counsel that Shawn would suffer detriment "should he lose either Sebastian or David."

The Agency's assertion that section 7612(c) "has no application in this case" because Sebastian "did not qualify as a presumed father under section 7611" is unavailing because we have concluded that Sebastian did qualify as Shawn's presumed father under section 7611(d).

Given Sebastian's demonstrated full and unequivocal commitment to his paternal responsibilities with respect to Shawn, recognizing Sebastian as Shawn's presumed father (under § 7611(d)) and third parent (under § 7612(c)) will effectuate the legislative purpose of section 7612(c) by protecting Shawn from harm through the preservation of not only the half-sibling bond that exists between Shawn and S.G., but also the existing bonds between Shawn and both Sebastian and David. (See *Donovan L.*, *supra*, 244 Cal.App.4th at p. 1089.)

For all of the foregoing reasons, we conclude the court's order denying Sebastian's request to be declared Shawn's third parent under section 7612(c) must be reversed and the matter remanded to the juvenile court with directions to vacate that order and enter a new order granting Sebastian's request.

DISPOSITION

The juvenile court's January 15, 2016 orders denying (1) Sebastian's request to be declared Shawn's presumed father under Family Code section 7611, subdivision (d), and (2) Sebastian's request to be declared Shawn's third parent under Family Code section 7612, subdivision (c), are reversed. The matter is remanded to the juvenile court with

directions to vacate those orders and enter new orders granting Sebastian's foregoing requests.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.