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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY  
SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

E053153

(Super.Ct.No. J234085)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr. Affirmed in part; reversed in part.

Lisa A. Raneri, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Jeffrey L. Bryson, Deputy County Counsel, for Plaintiff and Appellant.

## I

### INTRODUCTION<sup>1</sup>

J.F., a boy born in May 2004, is the subject of this appeal by J.M., mother's boyfriend, who assumed a parental role toward J.F. after his birth until the child and his older siblings were detained in July 2010. During the course of the dependency proceedings from July 2010 until March 2011, J.F.'s biological father, T.R., came forward and was found to be the presumed father by the juvenile dependency court.

J.M. appeals from findings and orders of the juvenile court concerning his relationship with J.F., including the court's determination that J.M. is not the presumed father of J.F. and that J.M. committed a fraud on the family court.

We grant respondent's request for judicial notice but we deny the motion to dismiss the appeal as moot. We affirm the findings and orders of the juvenile court except we reverse the finding that J.M. committed extrinsic fraud.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

#### *A. Family Law Case*

In September 2009, before these dependency proceedings began and when mother was incarcerated, J.M. filed a family law petition to establish paternity and an application for child custody and visitation involving J.F. J.M. executed a

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless stated otherwise.

declaration stating, “we have one minor child [J.F.] together.” J.M. asserted he was the caretaker parent and “[w]e have developed a very close father-son relationship. . . . I respectfully request that the court grant me sole legal and sole physical custody of our son. . . . [¶] I have had physical custody [*sic*]and raised him as my own since his birth. . . . The youngest child, J.F., is my son.” On September 22, 2009, the family court awarded legal and physical custody to J.M. More than a year later, the family court entered a judgment of paternity dated December 16, 2010, and giving legal and physical custody of J.F. to J.M.

#### *B. Detention*

In July 2010, Children and Family Services (CFS) for the County of San Bernardino filed an original dependency petition involving J.F. The petition alleged mother and J.M.’s failure to protect, no provision for support, and abuse of sibling. (§ 300, subs. (b), (g), & (j).) The petition identified J.M. as J.F.’s legal guardian. It further alleged that mother and J.M. abused alcohol and engaged in domestic violence and J.M. had driven a vehicle while intoxicated with J.F. as a passenger. Mother had hit J.F.’s older sister. Mother was incarcerated and J.F.’s father was unknown.

CFS had received a referral about J.F. and his two siblings on July 19, 2010. Mother was arrested on charges of child endangerment and battery. J.F.’s sister, who was 12 years old, and his brother, who was nine years old, said mother was usually “drunk and angry” and would confine J.F. and his brother to their room. When mother was angry at her boyfriend, J.M., she threw a glass at the

sister's foot, cutting and bruising it. Mother chased the sister out of the house and locked her out. Mother hit the sister regularly. Mother also hit J.F.'s brother but not J.F. Mother and J.M. fought often, yelling and screaming at one another. Mother admitted being drunk and fighting and arguing with J.M. The maternal uncle expressed concern about the children and mother and J.M.'s alcohol and domestic violence issues. Mother and J.M. agreed to let J.F. and his siblings stay with the maternal uncle.

At the detention hearing, the juvenile court ordered the children detained and mother was ordered to complete a paternity inquiry. J.M. claimed he was a documented legal guardian. The court ordered J.M. to have visitation contingent upon confirmation of his status.

### *C. Jurisdiction/Disposition*

On August 18, 2010, the jurisdiction/disposition report recommended the court find J.M. was an alleged father and not entitled to services. Mother and J.M. had an intermittent relationship for 10 years. Mother, J.M., and the children all lived together, supported by J.M., who worked as an electrician. J.F. and his siblings described mother and J.M.'s drug and alcohol use, paranoia, physical abuse, and quarrels. Mother's ex-husband, D.F., the father of J.F.'s siblings, confirmed mother's history of drinking and child neglect.

Between 1998 and 2010, the family had 17 or 18 prior referrals in San Diego and San Bernardino and a previous dependency proceeding. Mother had a history of multiple criminal bookings. Mother was in prison in 2008 and 2009 for

an alcohol-related offense. In August 2010, mother pleaded guilty to child endangerment. (Pen. Code, § 273a, subd. (a).)

Mother admitted being an alcoholic but equivocated about having a current problem. She admitted there were episodes of domestic violence with J.M. CFS interviewed J.M. who accused mother of being “usually drunk or high on drugs” and “demanding and abusive.” They yelled at one another and she threatened to call the police and accuse him of domestic violence. J.M. believed mother had a bi-polar disorder because of her moodiness. He denied drinking or using violence. He claimed he protected the children from mother.

The maternal uncle and J.F.’s sister indentified T.R. as J.F.’s father. Mother denied T.R.’s paternity, claiming J.M. was J.F.’s father. J.M. requested a paternity test. J.M. said mother had several sexual relationships but he loved J.F. and wanted to participate in reunification services if he was the father—although not if they were not biologically related.

In August 2010, J.M. submitted the 2009 family law documents to show he was J.F.’s father. The documents were reviewed by deputy county counsel, Jamila Bayati, who concluded they were not complete because they were not conformed by a judicial officer. Bayati called the office of Brian Miles, J.M.’s family law attorney, and informed a paralegal “the paternity issue had not yet been resolved, as follow up action was necessary. . . [and] advised . . . that there was an open Juvenile Court case, so no family court action may be taken in contravention to the Juvenile Court’s jurisdiction.”

CFS described J.M. as a “marginal caretaker”: “There does not appear to be any policy or equitable reasons to recognize Mr. [M.] as the child’s . . . father. In addition, he is not the . . . ‘legal guardian.’ . . .” CFS recommended J.M. not receive services.

At the jurisdictional/dispositional hearing on August 20, 2010, mother acknowledged that T.R. could be J.F.’s father. J.M. requested paternity testing and the hearing was continued for testing and to give notice to T.R.

The children were placed with their maternal uncle in August 2010. In September 2010, CFS filed a first addendum report including the paternity test excluding J.M. as J.F.’s father. Mother had accused T.R. of rape but there was no record of a rape charge against T.R., in which mother was the victim. Between 1995 and 2009, T.R. had a criminal history of 20 criminal offenses, including domestic violence, robbery, and grand theft, and various crimes involving mother. In one incident in July 2004, T.R. scratched mother’s car because mother had been provoking him about the baby, J.F. Meanwhile, mother had been violating the court order by harassing the children.

At the hearing on September 28, 2010, J.M. requested to be declared a presumed father with “makeup visits.” The court ordered paternity testing for T.R. In the second addendum report, CFS stated that J.F. missed J.M. and wanted to see him. T.R. wanted custody of J.F. if he was found to be the biological father. At a hearing on November 19, 2010, J.M. renewed his request for visitation with J.F. as the presumed father. The court continued the matter. In December 2010,

CFS provided the paternity results showing T.R. to be J.F.'s biological father.

T.R. asked to begin reunification services immediately.

In February 2011, CFS recommended T.R. receive reunification services with J.F. J.F. had enjoyed visiting successfully with T.R. who helped him with homework and took him to the park and library. At the hearing on February 1, 2011, J.M. again sought visitation with J.F. The court confirmed a contested paternity hearing for J.M. and simultaneously authorized overnight weekend visits between T.R. and J.F. and placement of J.F. with T.R. "by approval packet."

#### *D. The Contested Hearing*

##### *1. The Social Worker's Testimony*

On February 8, 2011, the CFS social worker testified that T.R. was "the most appropriate and presumed father for [J.F.]" T.R. was on probation for the offense of driving under the influence in April 2009. Although T.R. had a "rough past," he was earning an associate's degree and planning to attend nursing school. He had been married for five years and was living in a stable home. He was successfully acting as a father toward J.F. There was no information to support mother's assertion that she had been raped by T.R.

About J.M., the social worker observed he and mother had exposed J.F. to "a very toxic environment" involving alcohol abuse and emotional and physical domestic violence, causing emotional trauma to J.F. J.M. was also unwilling to support J.F. financially. CFS did not recommend or offer services or visitation to

J.M. The social worker acknowledged J.F. had a long relationship with J.M. and called him “dad.”

## *2. J.M. 's Testimony*

J.M. testified he considered himself to be J.F.'s father and engaged in paternal activities like reading and going to the park. J.M. and mother lived together for about nine years. Mother said he was J.F.'s father. J.M. had brought J.F. home after he was born. J.F., his siblings, and mother lived in the house J.M. owns. J.M. had supported J.F. and paid for all his medical and dental expenses. He was willing to continue all support. He denied that he had ever declined services or said he was unwilling to provide support. A week before, J.M. had seen J.F. in the courthouse. J.F. called him “daddy” and asked why they did not see each other anymore.

J.M. met T.R. when J.F. was born. Mother told people either that T.R. was not the father or that he had raped her. T.R. had stalked mother and vandalized her car. T.R. threatened mother that he was going to take J.F. away. T.R. did not try to establish a relationship with J.F.

J.M. admitted he and mother had an alcohol problem and engaged in verbal conflicts. He denied hitting mother, causing bruising. J.M. threw dishes when he was angry but not on July 19, 2010. He was not aware that mother had physically abused the children. But J.M. had removed J.F. from the home to protect him from mother.

In 2009, J.M. had hired a lawyer to obtain a custody order from the family court when mother was in jail for a DUI and J.M. needed legal authority to obtain medical treatment for J.F. He did not claim to be the biological father. He did not remember when he obtained the custody order or judgment from the family court but he was not trying to evade the dependency case. He did not understand the legal principles of jurisdiction.

### *3. The Juvenile Court's Findings and Orders*

The juvenile court requested records from the family court case and briefing from the parties. The family court records show that J.M.'s lawyer in the family law case initiated proceedings for a default judgment in November 2010 and obtained the judgment on December 16, 2010.

The juvenile court ruled on March 14, 2011, that J.M. had an "incidental" relationship to J.F. T.R. was the biological father and the presumed father under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. The court found it was in J.F.'s best interest to grant visitation rights and reunification services to T.R.

The juvenile court further found that J.M. was not a party to the dependency proceedings and the judgment from the family court was void because it was entered on December 16, 2010, after the juvenile court had assumed jurisdiction. J.M.'s declaration of paternity was set aside. The court found J.M. had acted in bad faith and committed "extrinsic fraud" in the family case.

The court sustained the section 300 petition regarding J.F. pursuant to subdivisions (b), (g), and (j). The court declared J.F. a dependent and granted

reunification services to T.R. and mother. No services were ordered for J.M. J.M. promptly appealed in March 2011.

### III

#### CFS'S MOTION TO DISMISS

After this appeal was filed, the juvenile court proceedings continued. On September 2, 2011, CFS filed a status review report recommending that J.F. remain with T.R. and the dependency be dismissed based on T.R.'s successful completion of the case plan. The court followed CFS's recommendation and dismissed the petition, terminated jurisdiction, and granted legal and physical custody to T.R. (Evid. Code, §§ 452, 459.)

CFS has filed a motion to dismiss the instant appeal as moot. (*In re Michelle M.* (1992) 8 Cal.App.4th 326, 330.) We agree with J.M. that the present appeal involves a determination of presumed fatherhood, an issue of public importance. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 817, fn. 87; see *In re P.A.* (2011) 198 Cal.App.4th 974, 979, 985.) It also concerns a finding of fraud against J.M. We deny the motion to dismiss.

### IV

#### PRESUMED FATHER STATUS

No one disputes that T.R. is J.F.'s biological father. J.M. argues in multiple ways on appeal that substantial evidence supports that J.M., not T.R., is the presumed father of J.F. The standard of review is abuse of discretion. (*In re M.C.* (2011) 195 Cal.App.4th 197, 213.)

J.M. cannot claim to be a presumed father based on his voluntary declaration of paternity (Fam. Code, § 7573) because, as the parties concede, no such declaration is part of the record on appeal. Instead, J.M. must base his claim to be a presumed father under Family Code section 7611, subdivision (d), which presumes parentage if a child is received into the father's home and the father openly holds out the child as his natural child.

What substantial evidence demonstrates, however, is that J.M. assumed a parental role toward J.F. early on but he did not go so far as to claim him as his natural child. (*In re J.H.* (2011) 198 Cal.App.4th 635, 646.) In the 2009 filings with the family court, J.M. did not maintain he was actually J.F.'s father. Rather, J.M. used ambiguous language indicating he was "like" a father to J.F. During the dependency proceedings, J.M. expressed doubts about his paternity and seemed to waver about the degree of his commitment to parenting J.F. Because J.M. did not unequivocally claim J.F. as his natural child, he cannot rely on cases like *In re Jesusa V.* (2004) 32 Cal.4th 588, in which each man competing for presumed father status claimed the minor as his natural son. Performing parental functions does make someone a presumed father without the additional element of holding out a child as one's natural child. (*In re Jose C.* (2010) 188 Cal.App.4th 147, 162.)

The present case also differs from the analogous case of *In re Nicholas H.* (2002) 28 Cal.4th 56, in which only one man claimed to be the presumed father, even though he admitted he was not the biological father. The candidate for

presumed father was named on the child's birth certificate and the true biological father could not be identified or located. J.M. cannot compare himself or the present circumstances to *Nicholas H.*

Our conclusion that the juvenile court properly found J.M. was not a presumed father disposes of this aspect of the appeal. Nevertheless, we briefly address his companion claim that T.R. was not a presumed father under *Kelsey S.*, because T.R. did not come forward until J.F. was six years old and after T.R. was contacted in the dependency proceedings and submitted to a positive paternity test.

As respondent asserts, however, the juvenile court had the separate authority to grant reunification services to T.R. as J.F.'s biological father if it was in the best interests of J.F. (§ 361.5, subd. (a)), independent of any findings under *Kelsey S.* Even if J.M. had standing to challenge the court's orders regarding T.R. (*In re J.H.*, *supra*, 198 Cal.App.4th at p. 647), substantial evidence still supported granting services to T.R. The record demonstrates that T.R. was highly motivated and suitable to parent his son.

We also reject J.M.'s argument that the court's separate findings under section 361.5, subdivision (a), and Family Code section 7611 constituted competing paternity presumptions that need to be weighed against each other under Family Code section 7612. First, there was no paternity presumption for J.M. because the trial court declined to find that J.M. qualified as a presumed father. (*In re J.H.*, *supra*, 198 Cal.App.4th at p. 647.) Family Code section 7612

applies to competing presumptions under Family Code sections 7610 and 7611, not to separate determinations made under section 361.5, subdivision (a), and Family Code section 7611. The recent case of *In re P.A., supra*, 198 Cal.App.4th 974, does not apply because it involved competing presumptions under the Family Code, not competing findings under the Family Code and the Welfare and Institutions Code.

In sum, we reject all the grounds for J.M.'s contention that the dependency court should have found him to be the presumed father of J.F.

## V

### EXTRINSIC FRAUD

The elements of fraud are a knowing misrepresentation made with intent to induce reliance, justifiable reliance, and damages. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) Extrinsic fraud is “where the defrauded party was deprived of the opportunity to present his or her claim or defense to the court, that is, where he or she was kept in ignorance or in some other manner, other than from his or her own conduct, fraudulently prevented from fully participating in the proceeding.” (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1068.)

The record concerning the family case is unclear. In 2009, J.M. sought family court orders allowing him to obtain medical treatment for J.F. while mother was in prison. No judgment was entered at that time. In August 2010, San Bernardino County Counsel contacted the office of J.M.'s family lawyer to ask

about the pending orders and notified J.M.'s lawyer about the dependency proceedings. Later, J.M.'s lawyer apparently took steps to perfect the judgment in November and December 2010. The juvenile court properly found the family judgment was void, a finding not challenged by J.M. on appeal.

Substantial evidence, however, does not support the juvenile court's additional finding that J.M. committed extrinsic fraud. We agree the only reasonable inference to be drawn from the evidence is that J.M. was confused about issues of jurisdiction and the distinction between family and dependency proceedings and the family attorney complicated the matter by seeking a judgment after being contacted by county counsel.

The evidence of fraud cited by CFS does not withstand scrutiny. On October 22, 2009, J.M. signed a form declaration stating "A Voluntary Declaration of Paternity form has been signed . . . ." But no such declaration exists. Instead, J.M. must have been referring to the lengthy declaration he executed in support of the ex parte order to show cause, dated September 1, 2009, in which he does not claim biological paternity but describes his relationship with J.F. as being like father and son. Even if J.M. had executed a voluntary declaration of paternity, it would have been understandable as an effort to provide medical care for J.F. (See *Librers v. Black* (2005) 129 Cal.App.4th 114, 126.)

J.M. did not commit fraud when he executed the declaration under the Uniform Child Custody Jurisdiction and Enforcement Act in which he asserted he

did not know of any person claiming custody of or visitation rights to J.F. No evidence exists in the record that, in September 2009, T.R. was making any claims about J.F. T.R. did not assert any rights about J.F. until November 2010 after he became involved in the dependency proceedings at the behest of CFS. At that point, a lay person like J.M. might reasonably assume that the court, whether the family court or the juvenile court, knew about T.R.'s interest in J.F. Although J.M.'s family attorney submitted the void judgment to the family court, that action did not exhibit "purposeful fraud" by J.M. who seemed understandably mystified about the relationship between the two kinds of courts. The court's finding that J.M. committed extrinsic fraud against the court or T.R. in seeking and obtaining the family judgment is not supported by substantial evidence.

## VI

### DISPOSITION

We affirm the findings and orders of the juvenile court that J.M. was not the presumed father of J.F. We reverse the finding that J.M. committed extrinsic fraud.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P.J.

KING

J.