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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.S. et al., a Person Coming Under
the Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

C.N. et al.,

Defendants and Appellants.

E053863

(Super.Ct.No. RIJ111580)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and
Appellant C.N.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and
Appellant E.P.

Hassan Gorguinpour, under appointment by the Court of Appeal, for Defendant and Appellant K.G.G.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant E.N.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

This case involves the mother, C.N. (Mother); three biological fathers; and four children. E.P. is the biological father of L.P. (L.) and C.P. (C.); E.N. is the biological father of G.S. (G.); and K.G. is the biological father of D.S. (D.).

Mother appeals the termination of her parental rights to all four children at a Welfare and Institutions Code section 366.26 hearing.¹ She claims on appeal that the juvenile court erred by failing to apply the parental benefit exception of section 366.26, subdivision (c)(1)(B)(i). E.N. joins Mother's argument and claims that his rights to G. should be reinstated along with Mother's should we reverse the termination of Mother's parental rights. E.P. appeals the termination of parental rights to L. and C. by joining Mother's argument and also claims his parental rights should be reinstated if Mother's rights are reinstated.

K.G. appeals the termination of his parental rights to D. after the denial of his section 388 petition and a section 366.26 hearing on the following grounds: (1) because

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

he took every step reasonably available to him after he learned that he was the biological father of D., the court violated his rights to due process and equal protection by denying him the rights of a presumed father under *Kelsey S.*²; and (2) because he was a quasi-presumed father under *Kelsey S.*, the court violated his right to due process by terminating his parental rights without any evidence that he was an unfit parent.

I

PROCEDURAL AND FACTUAL BACKGROUND

A. *Original Section 300 Petition Involving D. and G.*

This case began in 2006. Mother called the Riverside County Department of Public Social Services (the Department) on February 15, 2006, and explained that she could no longer care for 20-month-old D. and seven-month-old G. She was married to J.S. (whom she named as D.'s father), and she identified a man named R.A. as G.'s father. R.A. was denying paternity. Mother and J.S. could not take care of either child, so the children were taken into custody and placed in foster care. A section 300 petition was filed for them. Mother admitted attempting to commit suicide a few months prior.

In a jurisdictional/dispositional report, it was recommended that family reunification services be granted to Mother and J.S. J.S. was considered the presumed father of both children. Mother had been molested by her father. She had refused to be evaluated by a psychiatrist in order to be put on medication. She did think she might be suffering from postpartum depression. She was planning to join the army, and J.S. was

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

going to take care of the children. R.A. wanted nothing to do with G. and said he was not the father.

Mother had no stable living arrangement. Her mother was involved in her own family reunification plan with Mother's brothers.

In an addendum report, it was reported that J.S. was not the biological father of either D. or G., and he did not want any further involvement. On March 29, 2006, Mother filed for divorce from J.S. At that time, Mother was dating E.P.

A contested jurisdictional/dispositional hearing was conducted on May 10, 2006. Mother was present at the hearing. J.S. was excused from the case. The juvenile court found the allegations against Mother in the petition true as to both D. and G. Reunification services were granted. It was reported that R.A. had committed suicide, and Mother was now claiming that a man named R.M. was D.'s father.

Mother was six months pregnant with E.P.'s baby. She had not participated in services, including missing random drug tests, and her living situation was unstable. Visitation continued to be consistent and appropriate. Mother showed some progress in a second addendum report by claiming to have secured a job and having negative drug tests. On November 14, 2006, reunification services were continued.

Two additional reports were filed in January and February 2007, that included information that E.P. and Mother had a stable living arrangement, Mother had completed her case plan, and E.P. had a job. At the 12-month review hearing held in February 2007,

the juvenile court ordered that D. and G. would be returned to Mother's custody and that she would be offered family maintenance services.

B. *Section 300 Petition for L. and the section 342 Petition for D. and G.*

On August 3, 2007, a status review report was filed for D. and G. It was reported that E.N. could be the biological father of G. E.N. was incarcerated in New Mexico for sexual assault on a minor. Mother was 22 years old and had given birth to L. about seven months earlier. It was believed that R.M. was D.'s father, but he could not be located. Both D. and G. were developing normally, although G. was possibly delayed. Mother was struggling to support her family. She and E.P. were unemployed. It was recommended that family maintenance services be continued.

On August 7, 2007, a section 342 petition was filed for D. and G. alleging severe abuse under section 300, subdivisions (a), (b), and (e). A section 300 petition was filed for L. alleging failure to protect (*id.*, subd. (b)) and abuse of a sibling (*id.*, subd. (j)).

It was reported that D., G., and L. were taken to the Riverside County Regional Medical Center for immunization shots. G. had red marks and some kind of skin infection. He had normal bruises on his back. D. had a bruise to his eye socket and marks on his hips. Mother's and E.P.'s explanations as to how the injuries were sustained were not consistent with the injuries. Mother had claimed that D. had fallen on the shower floor while trying to get in the shower while she was watching him. E.P. stated that he was watching D. when he fell and hit his head on the wall. Mother reported she did not know how D. received the bruises on his hips.

The examining doctor could not explain the hip bruises or back bruises but concluded they would have not been caused by the same fall that resulted in the eye injury. The hip injuries were not consistent with falling in the shower. In April 2007, Mother had to be hospitalized for suicidal comments, which she denied making.

A paternity test was ordered for E.N. D. and G. were in foster care, and L. was in the care of E.P.'s mother. Mother and E.P. were still unemployed and did not have housing. On September 25, 2007, the juvenile court continued the matter.

An addendum report was filed on February 27, 2008. On February 26, 2008, a detective forwarded the case to the Riverside County District Attorney's Office to file a charge of child abuse against Mother and E.P. Mother had been diagnosed with bipolar disorder. It was recommended that reunification services be terminated and that a section 366.26 hearing be set. However, at a hearing on March 3, 2008, the juvenile court continued reunification services on the amended petitions.³

An addendum report was filed on November 12, 2008. The Department asked that reunification services be terminated and that a section 366.26 hearing be set. E.P. reported that he and Mother had broken up. He had two jobs since the last addendum report. Mother claimed to have three jobs and was attending school.

Mother and E.P. had verbally abused the one potential family member who would have taken all three children. D. and G. were starting to exhibit behavioral problems, and

³ The reporter's transcript for the proceeding was not included in the record.

it would be difficult to find an adoptive family for them. It was established that E.N. was G.'s father.

Addendum reports were filed in December 2008 and January 2009. It was again recommended that reunification services be terminated and that a section 366.26 hearing be set. The Department had been unsuccessful in finding an adoptive family for the three children. Visitation went well, although Mother had a difficult time controlling all three children at one time. At some visits, L. had not wanted the foster mother to leave. Mother and E.P. had moved into a two-bedroom apartment and had room for all three children. Mother claimed that she had three jobs but never provided any pay stubs to the Department. E.P. was not going to be charged with child abuse. Mother continued to receive therapy and showed signs of a personality disorder.

E.N. was set to be released on parole. He had been convicted of statutory rape and would be required to register as a sex offender upon his release.

A contested review hearing under section 366.21, subdivision (e) was conducted on January 14, 2009. A social worker for the Department testified at the hearing. Although the Department commended Mother for having a job and going to school, it was concerned that she had not addressed her problematic relationships and care of the children. The Department was also concerned with Mother's continued contact with her mother and father and their access to the D., G., and L. E.P. was ill-equipped to handle all three children while Mother went to work.

At this point, D. and G. had been in eight placements due to problems in the foster homes. The social worker admitted that she had approved Mother's current home, Mother was participating in her case plan and was employed. The juvenile court noted that the case had been continued far longer than any other case in the court, and it was not an easy case to decide. Further, foster care had not provided stability because the children had had to be moved multiple times. The juvenile court took the matter under submission in order to further review the reports.

On January 27, 2009, the juvenile court found that the Department had not shown by a preponderance of the evidence that it would be to the children's detriment if they were returned to Mother's or E.P.'s care. L., D., and G. were returned to Mother's care with family maintenance services. E.P. received continued family reunification services and could live with Mother. E.N. was given reunification services.

On July 16, 2009, the Department recommended that that dependency proceedings be terminated and that Mother regain custody of D., G., and L. R.M. was located and excluded as a possible father for D. It reported Mother and E.P. were bonded to the children.

Since the last proceeding, Mother had once again been evicted from her apartment and was five months pregnant. Mother and E.P. had provided pay stubs to the Department but had at the same time applied for and received welfare benefits. It was established the pay stubs were likely fraudulent. Further, Mother had not been attending school as she had previously reported. E.P. and Mother had gotten married. E.N. had to

live in New Mexico due to lack of employment opportunities in California and had only two visits with G. The Department did not recommend that he be given custody.

At a hearing conducted on July 28, 2009, the juvenile court continued family maintenance services. Services to E.N. were terminated.

Another report filed in January 2010, showed progress by Mother and E.P. C. had been born. Family maintenance was continued for six months.

C. Filing of Section 300 Petition for C. and Section 387 Petitions for D., G., and L.

On May 25, 2010, the Department filed an original section 300 petition for C. C. was eight months old, and his father was listed as E.P. E.P. and Mother had taken C. to the emergency room. E.P. reported that L. had fallen on top of C. and that C. threw up his formula. When C. woke up from a nap, E.P. heard a popping sound, and C. made a cry that E.P. had not heard before. Mother was not present and told E.P. over the telephone to take C. to the emergency room. C. was diagnosed with a broken rib, and further tests were pending. The injury to C. appeared suspicious, and it was not the type of injury that would be sustained by another child falling on him. C. was admitted to the hospital.

On May 25, 2010, the Department filed section 387 supplemental petitions for D., G., and L. alleging the same grounds as the section 300 petition for C. The three older children were detained in foster care. X-rays showed that C. had 11 to 15 prior rib fractures in his short lifetime. Mother denied any knowledge of how he sustained these

injuries. E.P. reported the only injury to C. was when L. tripped and fell on him. A police investigation was ongoing.

D., G., and L. were interviewed. They claimed that they had been abused by nonrelated family members, including being slapped in the face, “popped” in the mouth, and grabbed by a man with long fingernails. They had witnessed Mother and E.P. slap each other.

On May 26, 2010, a detention hearing was held on the section 300 and 387 petitions. All four children were ordered detained from Mother and their fathers. Reunification services were ordered for Mother and E.P. An amended section 300 petition was filed. There were allegations of serious physical harm (§ 300, subd. (a)), failure to protect (*id.*, subd. (b)) and severe physical abuse (*id.*, subd. (e)). Mother and E.P. asked that C. be tested for brittle bone disease, which was ordered by the juvenile court.

On July 23, 2010, the Department filed an *ex parte* application to terminate visitation for all four children. According to the application, C. had 14 rib fractures in various stages of healing, he was failing to thrive, and he had developmental delays. A test of C.’s bone density showed that his bones were normal. A doctor examined C. and determined the fractures were inflicted and due to compression of his chest. C. was unable to sit up on his own despite being nine months old. It was recommended that visitation be suspended due to the potential for abuse and a report that Mother and E.P.

attempted to follow the foster mother home after a visit. The request was denied by the juvenile court since the visits were and would remain supervised.

On June 23, 2010, the Department filed jurisdiction/disposition reports for all four children. It was recommended that the four children remain detained and that family reunification services be denied. It requested that a section 366.26 hearing be set.

D. was interviewed. He had not seen anyone squeeze or spank C. He indicated that Mother and E.P. would spank him and G. on the bottom if they got in trouble. Mother was also interviewed and indicated that a prior roommate may have injured C. E.P. also had no explanation for C.'s extreme injuries, also stating it could have been a prior roommate. Both Mother and E.P. did not see that they would benefit from additional services. D., G., and L. did not appear to have any injuries. Due the extent of the injuries to C., it was not recommended that either Mother or E.P. take custody of the children.

An addendum report was filed on July 13, 2010, in anticipation of the contested jurisdiction/disposition hearing. C. had made progress in foster care. He had gained weight and was sitting up. Mother and E.P. blamed the Department for their problems and saw themselves as good parents.

An addendum report was filed on July 30, 2010. During a scheduled visitation, Mother had gotten into an argument with one of the social workers, insisting that D. did not have any emotional problems and that she did not abuse her children. She did not

believe C.'s test results showing that he did not suffer from brittle bone disease. C. had made great improvements in foster care, including starting to crawl and grabbing objects.

The three older children did not ask about Mother and E.P. D. and G. had spent more time out of Mother's custody than in her custody since their birth. The children were showing problems with attachment. It was discovered at a hearing that the brittle bone disease test was very painful and lengthy; the tests given to C. were for rickets and had been negative. The court ordered documentation on the feasibility of testing C. for brittle bone disease.

Addendum reports were filed on September 9, 2010. D., G., and L. were doing well in foster care. G. and D. were in school. C. had gained weight and was developing appropriately. A letter from C.'s examining physician included with the report discounted that C. could be suffering from brittle bone disease based on his medical history and the absence of fractures since C. had been placed in foster care.

The contested jurisdictional hearing was conducted on September 14, 2010. Dr. Lorena Vavanco, a forensic pediatrician who had examined C., testified. Dr. Vavanco explained that if C. had brittle bone disease, there were other features such as different skin and joints, which C. did not exhibit. Not only did C. have the rib fractures, he was also very underweight for his age. All of the tests for vitamin D deficiency and rickets came back negative; there was no reason to do further brittle bone disease testing. Mother's records were reviewed, and she gave no indication of brittle bones.

The juvenile court sustained the allegations in the section 300 and 387 petitions. It was to the court clear that C. had been severely abused and that the court needed to protect him. No reunification services would be offered. A section 366.26 hearing was set.

D. Reports for Hearing Section 366.26 Hearing and K.G.'s Notification

A section 366.26 report was filed on December 23, 2010. The Department was recommending adoption for all four children. D. and G. were going to need therapy and both were bonded to the prospective adoptive father. L. had no behavioral concerns. C. was doing very well and was bonded to the prospective adoptive parents. According to the report, this was the ninth placement for D. and G., L. had had seven placements, and C. had had two. The adoptive family was willing to adopt all four children.

There was no apparent emotional reaction by the children toward Mother and E.P. when the visits ended. The three older children wanted to change their names to match the adoptive family. They never asked to see Mother or their fathers. The adoptive parents were not willing to have visitation after adoption.

On January 12, 2011, a hearing was held to continue the section 366.26 hearing and, for the first time, K.G. was present at the hearing. He was seeking a continuance of the section 366.26 hearing to establish if he was D.'s father. He did not know if he was the father, and he requested a paternity test. On the statement regarding parentage, he did not check the box indicating that he believed that he was D.'s father and was requesting a judgment of parentage. K.G. indicated at the hearing that he had been stationed in Iraq

and Afghanistan (although he did not provide any dates) and that he did not know about the case until the prior weekend. Paternity testing was approved by the juvenile court.

An addendum report was filed on May 18, 2011. On March 9, 2011, it was reported to K.G. that he was D.'s father; he appeared shocked and got very pale. K.G. was told he could relinquish his rights to D. He wanted to discuss the issue with his family.

The adoptive parents had reported that after visits with Mother and E.P., D. and G. both would defecate in their pants the following day. Further, G. was being moved to another school due to his disruptive behavior. D. also had vomited twice prior to visits with Mother and E.P.

D. and G. had disclosed that they had been hit by E.P. with a belt. They also saw E.P. squeeze C.'s head until he screamed. L. did not understand why she had to visit with E.P. All three children were bonded to the adoptive family and wanted to live with them. Mother and E.P. appeared unconcerned about the reactions the children were having after the visits. Mother was described as "emotionally unsupportive" during visits.

It was reported that Mother had contacted K.G. through a website in January 2011. The Department had attempted to contact K.G. on several occasions since he had been told in March that he was D.'s father, but he had not returned any of the calls. The Department felt that it was not in D.'s best interest to be placed with K.G. because of the long history of instability and the stability in the new home.

K.G. was present at the section 366.26 hearing on May 25, 2011, but it was continued to June 6. K.G. wanted custody of D. He requested visitation, but it was denied. Visitation was terminated for Mother and E.P.

On May 31, 2011, K.G. filed a section 388 petition. He alleged that Mother had waited to disclose to him that he was the father of D. in order to delay the proceedings. He was innocent in not coming forward earlier. He requested that the petition be amended to add him as D.'s father, to grant him presumed father status, and to place D. with him. K.G. asserted his right pursuant to *Kelsey S.* to be granted presumed father status. He wanted custody of D.

Mother filed a section 388 petition on June 6, 2011, asking that the children be returned to her care and the proceeding be terminated. She was in college and in a stable home. E.P. filed a section 388 petition asking that reunification services be reinstated for C. and L. He had been employed since August 2010. E.P. also filed a letter asking the juvenile court to consider returning L. and C. to him. He disclosed in the letter that the adoptive parents were his paternal aunt and uncle.

The Department opposed the section 388 petitions. It argued that D. was bonded to his adoptive family and it was not in D.'s best interest to grant services or custody to K.G.

E. *Section 366.26 Hearing and Section 388 Petitions*

The section 366.26 and 388 hearings were held on June 9, 2011. The juvenile court heard the section 388 petitions first. It denied Mother's and E.P.'s section 388

petitions, finding that they had not shown changed circumstances and that it would not be in the best interests of the children to grant the petitions. As for K.G.'s section 388 petition, we will discuss the proceedings, *post*, but it was denied by the juvenile court. Further, the juvenile court terminated the parental rights of E.P., E.N., K.G. and Mother, freeing all four children for adoption, as will be set forth in more detail, *post*.

Mother, K.G., E.N. and E.P. filed timely notices of appeal from the termination of parental rights.

II

BENEFICIAL PARENT RELATIONSHIP EXCEPTION

Mother claims that the beneficial parent relationship exception under section 366.26, subdivision (c)(1)(B)(i) applied since she and her four children shared a significant bond.⁴

A. *Additional Factual Background*

At the section 366.26 hearing, Mother argued that there was a strong bond between her and the four children. She argued for legal guardianship with a hope of reunifying in the future. E.P. also argued that there was strong bond between him and L. Minors' counsel requested termination of parental rights.

⁴ E.P. joins in this argument as it applies to L. and C. E.N. also joins as to G., but it is clear there was no parental bond between him and G. They do not provide any further argument.

The juvenile court found as to all four children sufficient evidence that supported termination of parental rights and that no exception to the termination of rights applied. Adoption was in the best interests of the children.

B. *Analysis*

At the section 366.26 hearing, the sole issue “‘is whether there is clear and convincing evidence that the child is adoptable.’ [Citations.]” (*In re Josue G.* (2003) 106 Cal.App.4th 725, 733; see § 366.26, subd. (c).) “Adoption, where possible, is the permanent plan preferred by the Legislature.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan, unless it finds that termination of parental rights would be detrimental to the child under one of the seven exceptions set forth in section 366.26, subdivision (c)(1)(A) and (c)(1)(B)(i) through (v). (See *In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.)

The parental benefit or “beneficial relationship” exception is set forth in section 366.26, subdivision (c)(1)(B)(i). The exception applies where “[t]he parents . . . have maintained regular visitation and contact with the minor and the minor would benefit from continuing the relationship.” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) The parent has the burden of proving that the exception applies. (*Id.* at p. 826.) “The parent must do more than demonstrate ‘frequent and loving contact[,]’ [citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a ‘parental role’ in the

child's life.” (*Id.* at p. 827.) “In other words, for the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.)

We review the court's finding on this issue for substantial evidence. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Mother argues that throughout this five-year process, she had custody of all four children and took care of their basic needs. She points to visits where the children were happy to see her and to the fact that D. cried after one visit when she had to leave. Mother also argues that disruption of the relationship between her and the four children was going to have an impact on their development, and they would be greatly harmed by the loss of their significant relationship with her. Mother discounts the fact that D., G., and L. wanted to be adopted, claiming they were too young to understand that their relationship with Mother would end.

Mother was brought into the system in 2006 when she could not care of D. and G. The record does support that Mother maintained consistent visitation with the four children throughout the proceedings. However, these visits eventually were not beneficial to at least D. and G., who started to show deep signs of distress from these visits. Both had defecated in their pants after the visits. Moreover, D. was reported to be vomiting and complaining of a sick stomach prior to the visits. L. did not ask about

Mother prior to or after visits, and there was no evidence of a bond between her and Mother.

Moreover, Mother fails to acknowledge that C. suffered serious and severe abuse while in her custody, and it was suspected that D. also suffered abuse. D., G., and L. had to be detained and were taken from Mother and E.P. because D. arrived at a routine doctor's visit with bruises that appeared to the doctors to be possible child abuse. Although charges were not filed against E.P. and Mother, the Department recommended termination of their parental rights. However, the juvenile court disagreed and returned D., G., and L. to Mother's custody with a family maintenance program in January 2009.

In May 2010, while in the custody of E.P. and Mother, C. suffered the multiple rib fractures, and he was failing to thrive. He was under a year old at the time, and many of the rib fractures had occurred in the past. It is clear that C. had suffered abuse throughout his short lifetime. Further, once out of the custody of Mother and E.P., D., G., and L. reported that nonrelated family members had abused them.

D., G., and L. did not ask about Mother and E.P. while in foster care and had no emotional attachment at the conclusion of visits. They were bonded to their adoptive parents and were thriving in their care. D. and G. had actually spent more time in foster care than in Mother's custody since their births.

There simply was no benefit for these four children to remain in Mother's care. They thrived in the stable environment that the adoptive family provided. Mother had no greater bond with these children than a friendly nonparent relative. (*In re Angel B.*,

supra, 97 Cal.App.4th at p. 468.) On the other hand, there was significant abuse occurring in the home that showed a real chance of serious harm rather than a benefit from continuing the relationship. The juvenile court properly concluded that the parental benefit exception did not apply in this case. Since it did not apply to Mother, and both E.N. and E.P. make no argument how the beneficial parental exception applied to them, the juvenile court's order terminating parental rights as to all of them is affirmed.

III

PRESUMED FATHER STATUS FOR K.G.

K.G. argues that the court violated his rights to due process and equal protection by denying him the rights of a presumed father pursuant to *Kelsey S.* Further, since he was a "quasi-presumed" father, the juvenile court had to conclude that he was an unfit parent before terminating his parental rights and violated his rights to due process by failing to do so.

A. *Additional Factual Background*

The juvenile court heard K.G.'s section 388 petition prior to terminating his parental rights. K.G. argued he had done everything that he could since finding out he was D.'s father.

K.G.'s counsel argued that absent a showing that K.G. was an unfit parent, the child's well-being was presumptively best served by continuation of the father's parental relationship. It would be a grave miscarriage of justice to terminate rights based on K.G. not attempting to find out whether Mother was pregnant. K.G. had been in constant

contact with his attorney since learning the paternity results. The Department argued that there was a sibling relationship and that K.G. had an obligation to check with Mother whether she was pregnant after engaging in unprotected sex. The Department also argued that K.G. had not tried to contact them from March until May, when he finally asked for visitation.

Minor's counsel joined in objecting to giving K.G. presumed father status and granting services. It would not be in D.'s best interest. The Department argued that the emotional problems that D. was having with visitation were not only because of Mother and E.P., but because of the instability in his life. Allowing K.G. to have visitation would only make it worse. Mother clarified that she married J.S. when she was already eight months pregnant with D.

The juvenile court found that there was new evidence that K.G. was the biological father of D. It believed that the question was whether it was in D.'s best interests to grant services or custody to K.G. It felt that D. and the siblings had been through "horrific abuse and neglect." The juvenile court ruled, "[D.] is six-years old and appears to be extremely bonded to his siblings and appears to be thriving in his adoptive home with his siblings. All the siblings are together. So the court does find, that, at this time, that it is not in the best interest of the minor child to grant the 388 motion and find [K.G.] to be the presumed father. The motion is denied."

B. *Analysis*

Under the dependency statutes, presumed fathers have far greater rights than biological fathers. (*In re Zachariah D.* (1993) 6 Cal.4th 435, 448-449 (*Zachariah D.*)) Only a presumed father is entitled to reunification services under Welfare and Institutions Code section 361.5 and custody of his child. (*Id.* at p.451.)

Under Family Code section 7611, “a man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father unless he both ‘receives the child into his home and openly holds out the child as his natural child.’ [Citation.]” (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051, italics omitted, citing Fam. Code, § 7611, subd. (d).) In order to demonstrate a full commitment to his parental responsibilities, the biological father must immediately attempt to assume full parental responsibilities as soon as he reasonably knows of the pregnancy. (*In re Julia U.* (1998) 64 Cal.App.4th 532, 541.)

K.G. relies almost exclusively on *Kelsey S.* to support his claim that the juvenile court erred by denying him presumed father status. The Supreme Court in *Kelsey S.* held that Civil Code “section 7004, subdivision (a) and the related statutory scheme violates the federal constitutional guarantees of equal protection and due process for unwed fathers to the extent that the statutes allow a mother unilaterally to preclude her child’s biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child’s best interest. If an unwed father promptly comes forward and demonstrates a full commitment to his

parental responsibilities -- emotional, financial, and otherwise -- his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.” (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849, italics omitted.) Hence, a man may attain presumed father status even if the mother thwarts his efforts if he at least initiates prompt legal action to seek custody of the child. (*Id.* at pp. 825, 849; see also *Zacharia D.*, *supra*, 6 Cal.4th at p. 450, fn. 19.)

This case presents a different circumstance than *Kelsey S.* given the belated stage of the dependency process in which the presumed father issue was raised. (See *Zacharia D.*, *supra*, 6 Cal.4th at p. 453.) “[U]p until the time the section 366.26 hearing is set, the parent’s interest in reunification is given precedence over a child’s need for stability and permanency.’ [Citation.] ‘Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ [Citation.] ‘The burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue. Section 388 provides the “escape mechanism” that . . . must be built into the process to allow the court to consider new information.’ [Citation.]” (*Id.* at p. 447.)

“*Zacharia D.* held that biological fathers who appear after the end of the reunification period must file a section 388 petition to revive the issue of reunification services. [Citation.]” (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 956.) The court noted that it was not presented with the issue of a father who comes forward “‘*early in the dependency process*, and who displays a commitment consistent with the standard set

forth in *Kelsey S.*” but is thwarted from achieving presumed father status by the mother. (*Id.* at p. 958.)

Vincent M. followed *Zacharia D.* and also held that a biological father’s ““only remedy”” to assert paternity and receive reunification services after the expiration of the reunification period is to file a section 388 petition to modify. (*In re Vincent M., supra*, 161 Cal.App.4th at p. 954-955.) *Vincent M.* expressly stated, “The section 388 petition will not be granted unless there are changed circumstances or new evidence demonstrating it is in the child’s best interest to grant reunification services or custody.” (*Id.* at p. 955.)

K.G. argues that *Zacharia D.* and *Vincent M.* do not apply here because he sought to gain custody of D. under *Kelsey S.*, not to revive reunification services as was the situation in these prior cases. He contends that section 388 is insufficient on its face to protect his right to preserve his parental relationship until the court finds detriment. He asks this court to restrict the findings in *Zacharia D.* and *Vincent M.* to situations involving a request for reunification services and to hold that, in assessing whether custody or presumed father status should be granted once a section 366.26 hearing has been set, a finding of detriment is required in order to avoid a violation of his due process rights. We decline to restrict the cases to the request for reunification services, as the court specifically noted in *Vincent M.* that “[t]he section 388 petition will not be granted unless there are changed circumstances or new evidence demonstrating it is in the child’s best interest to grant reunification services or custody.” (*In re Vincent M., supra*, 161

Cal.App.4th at p. 955.) The *Vincent M.* court provides support for filing a section 388 petition even if seeking custody or presumed father status

The juvenile court did not abuse its discretion by refusing to find that K.G. was the presumed father. K.G. waited four months before making a request for custody. He had unprotected sex with Mother and did not present evidence that he had tried to determine whether this resulted in a pregnancy. In the context of the proceedings here -- D. had been in the dependency proceeding since 2006 -- there simply was nothing to support that K.G. should be granted *Kelsey S.* status. Hence, there was support for the juvenile court making its determination denying custody of D. to K.G. pursuant to a section 388 petition.

To succeed on a section 388 petition, a petitioner must establish “by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) “The grant or denial of a section 388 petition is committed to the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is clearly established.” (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.)

Here, K.G. came forward in January 2011, after reunification services had been terminated and a section 366.26 hearing had been set. At that time, K.G. did not admit paternity but wanted paternity testing. K.G. did not check the box for voluntary paternity. K.G. was advised in March that he was the father. K.G. did nothing until a

hearing in May, where for the first time he requested visitation and custody of D. There is nothing in the record pertaining to K.G.'s living situation, his ability to care for D., or his background.

On the other hand, by the time K.G. came forward, D. was in his ninth placement. He had suffered abuse at the hands of E.P. and another nonrelated person. He had no stability in his lifetime until he was placed with the adoptive family. D. showed significant signs of detriment when his new stable environment was threatened, i.e., by having severe emotional reactions after his visits with Mother and E.P. D. was in an adoptive home with siblings with whom he was extremely bonded. While we realize that K.G. was not the cause of D.'s tumultuous life, K.G. also did not immediately declare paternity and pursue the Department to gain custody. The juvenile court did not abuse its discretion by concluding that once again disrupting D.'s life was not in his best interests.

K.G. further contends that the juvenile court could not terminate his parental rights at the section 366.26 hearing because his rights could not be terminated unless there was a finding that he was a unfit parent. Such failure to consider that he was an unfit parent prior to terminating his parental rights violated his rights to due process.⁵ However, after denying K.G.'s section 388 petition and concluding he was not entitled to presumed father status, K.G. was a mere biological father. A mere biological father's parental

⁵ K.G. notes that although his counsel filed a section 388 petition, that it was really a motion for constitutional protection under *Kelsey S.* However, as set forth extensively above, K.G.'s only remedy since reunification services had been terminated was to file a section 388 motion.

rights may be terminated in the absence of an unfitness finding, without violating due process. “[P]arental rights may be terminated based solely upon the child’s best interest and without any requirement for a finding of detriment or unfitness’ [Citations.]” (*In re Jason J.* (2009) 175 Cal.App.4th 922, 933-934.) As K.G. was not entitled to an unfit-parent finding, there was no due process violation.

At oral argument, K.G. relied upon *In re Z.K.* (2011) 201 Cal.App.4th 51. In that case, the father disappeared with the couple’s son. The mother finally found the boy in foster care (because the father had been arrested) and immediately requested custody. At the time of the request, however, the dependency proceeding had progressed to a section 366.26 hearing. (*Z.K.*, at pp. 56-57.) The juvenile court terminated the mother’s parental rights without making a finding of detriment. (*Id.* at pp. 62-63.) On appeal, mother argued that the juvenile court violated her due process rights when the court terminated her parental rights without finding by clear and convincing evidence that placing Z.K. in her custody would be detrimental to the minor. (*Id.* at p. 63.) The appellate court, relying only on the fact that parents have a fundamental interest in the care, companionship, and custody of their children, reversed the juvenile court’s order terminating parental rights because the government never proved by clear and convincing evidence that placement with the mother would be detrimental to the child. (*Id.* at pp. 64-65.)

This case is readily distinguishable. As set forth, *ante*, a biological father does not automatically have the right to seek custody or reunification services. (See *In re Jason J.*,

supra, 175 Cal.App.4th at pp. 933-934.) Only a presumed father is entitled to custody. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 451.) Moreover, in *Z.K.*, the appellate court recognized that, despite the mother's failure to file a section 388 petition or any other document seeking custody, the parties were all aware that she was seeking custody from the moment that she entered the case. Here, K.G. first came forward on January 12, 2011, seeking a continuance to establish if he was D.'s father. He did not request custody of D. or indicate that he was assuming parentage. K.G. was notified in March 2011 that he was D.'s father. Rather than immediately requesting custody, K.G. disappeared and did not contact the Department. It was not until a hearing conducted on May 25, 2011, that he finally requested custody. K.G. was not in the same position as the mother in *Z.K.*

Hence we reject K.G.'s claim that his due process rights were violated.

IV

DISPOSITION

The juvenile court's orders are affirmed in their entirety.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.