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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Adoption of F.K., a Minor.

D.K. et al.,

Plaintiffs and Appellants,

v.

G.H.,

Defendant and Respondent.

G.H.,

Plaintiff and Respondent,

v.

C.L.,

Defendant;

D.K. et al.,

Objectors and Appellants.

E054024

(Super.Ct.Nos. ADORS900056 &
FAMSS903157)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael J. Torchia, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.

Gradstein & Gorman, Jane A. Gorman; John L. Dodd & Associates and John L. Dodd for Plaintiffs, Appellants and Objectors D.K. and D.E.

William D. Caldwell, under appointment by the Court of Appeal, for Plaintiff, Defendant and Respondent G.H.

No appearance for Defendant, C.L.

No appearance for Minor.

The trial court (1) awarded G.H. (Father) father status pursuant to *Kelsey S.*¹ (2) denied the petition of D.K. and D.E. (collectively “the adoptive parents”) to adopt F.K.; and (3) denied the adoptive parents’ and Adoptions Unlimited, Inc.’s (the Agency) petition to terminate Father’s parental rights to F.K. The adoptive parents contend the trial court erred because Father does not meet the criteria for *Kelsey S.* father status. We reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

We present (1) the biological mother’s and adoptive parents’ version of the events, followed by (2) Father’s version of the events, and then (3) the procedural history.

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

A. VERSION OF EVENTS: MOTHER AND THE ADOPTIVE PARENTS

C.L. (Mother) is F.K.'s biological mother. Mother knew Father for approximately 10 years before they began a romantic relationship in August 2008. Mother and Father broke up after being together approximately one month. In October 2008, Father and Mother went to a hospital and discovered that Mother was pregnant with F.K. Mother told Father that he was F.K.'s father, and Father never denied paternity. However, Father was "cold" upon learning that Mother was pregnant. Father wanted Mother to have an abortion, but Mother refused. Father and Mother argued. During the argument, Father struck Mother and pushed her from his truck. Mother reported the incident to the Colton Police Department.

In October 2008, Mother was living with a girlfriend. At the beginning of November, Mother moved into her mother's (Grandmother) house. Father did not call Mother or visit Mother. Father did not attend medical appointments with Mother, despite Mother informing him of her appointments. Father did not pay for Mother's medical expenses or purchase any pregnancy or baby supplies. Father did not provide Mother with any financial or emotional support during her pregnancy.

In January 2009, Mother decided that adoption would be the best option for F.K., because Mother could not support the baby on her own, and Father "just wasn't involved at all." Mother selected D.K. and D.E. as F.K.'s adoptive parents because they had previously adopted Mother's older child—F.K.'s half-brother. In mid-January 2009, Mother moved into a motel room that was paid for by the adoptive parents. Mother kept Father informed of where she was living via phone calls and text messages.

The adoptive parents also paid for Mother's food, clothing, and transportation to medical appointments.

F.K. was born in May 2009. During F.K.'s birth, a nurse told Mother that Father was at the hospital, but Mother did not see Father at the hospital. D.K. was in the delivery room with Mother, and cut the umbilical cord. F.K. was placed in the adoptive parents' care when he was born. The adoptive parents gave F.K. his first bottle and his first diaper.

A few hours after F.K. was born, Mother told her sister that F.K. died. Mother lied to her sister because Mother's family opposed Mother's decision to place F.K.'s older half-brother for adoption, and Mother believed her family would also oppose her decision to place F.K. for adoption. Mother told the Agency that F.K.'s birth father was unknown. Specifically, Mother reported that F.K. was conceived during a one-night stand in Ensenada, Mexico. Mother told the Agency that she met the birth father in a club, they never exchanged telephone numbers or addresses, and she had been too intoxicated to recall his name. Mother lied to the Agency because she did not want the Agency asking Father if he approved of the adoption. Mother did not believe that Father was interested in F.K.

Mother relinquished her parental rights to F.K. on June 3, 2009. Mother later learned that Father was seeking custody of F.K. At that point, Mother tried to regain her custody rights to F.K. Mother was concerned about Father having custody of F.K. because Father consumed drugs, dealt drugs, was involved with gangs, and had physically abused Mother. Father told Mother that during a drug deal, his vehicle was

shot at by gang members. The Agency did not allow Mother to rescind her relinquishment of F.K.

The adoptive parents reside in Washington. The adoptive parents took F.K. to Washington in early June 2009, when he was approximately 10 days old. In June 2010, the adoptive parents took time off work and traveled to San Bernardino County for Father's deposition. Father did not appear at the deposition. Father did not attend because he was unable to find a ride to the deposition. D.K. offered to pay for a taxi cab for Father, but Father refused.

The deposition was rescheduled for September 2010. During the deposition, D.K. and Father were alone together for a period of time. D.K. took the opportunity to tell Father about F.K.'s personality, F.K.'s relationship with his half-brother, and F.K.'s preschool. Father did not respond nor did he ask questions about F.K. D.K. offered to have Father visit F.K., but Father said "he was not interested. He wanted full custody or nothing." D.K. continued "blabbering on" about F.K., but eventually stopped because he "felt odd" talking with "no response" from Father.

As of March 2011, Father had not sent any letters or cards to F.K. Father also had not sent any gifts or financial support to F.K. Father never requested to visit F.K. Mother and the adoptive parents have an open relationship. The adoptive parents were willing to have Father contact F.K., because they are proponents of open adoption, and believe children benefit from knowing their birth parents.

B. VERSION OF EVENTS: FATHER

We now present Father's version of the events. In October 2008, Mother was living with her friend. In the early months of the pregnancy, Mother moved-in with Father and his family; Father lives with his mother. During the time that Mother and Father lived together, Mother was provided with food at Father's family's home. Father never asked Mother to have an abortion; he always wanted F.K.

Sometime before January 2009, Mother and Father broke up. When Mother and Father broke up, Mother was living at Grandmother's residence. After Mother and Father broke up, Father only spoke to Mother once or twice. Mother and Father discussed custody of F.K.; they planned on Mother having F.K. "on the weekends, weekdays, stuff like that"; Father was okay with Mother keeping F.K. Father always knew Mother's contact information during her pregnancy, and Mother updated him on where she was living.

Father was unemployed during the entirety of Mother's pregnancy. After the two broke up, Father never offered to give Mother money. Father never bought maternity clothes for Mother, or any supplies for Mother during the pregnancy. Father never paid for any of Mother's medical expenses. Mother was on Medi-Cal during her pregnancy; Father never attempted to repay Medi-Cal. Father assumed Mother's family was supporting Mother during her pregnancy.

A couple of weeks after Mother and Father broke up, Mother told Father that she suffered a miscarriage. Mother informed Father of the miscarriage either via telephone or text message; however, Mother may have mentioned the miscarriage out of anger.

Father believed the baby died, but Father began to suspect Mother lied to him about the miscarriage when Mother called to tell Father about medical appointments. Father explained that he would have gone to the doctor's appointments and emotionally and financially supported Mother, as best he could, if he had known that she was pregnant and had not miscarried.

While Mother was giving birth, Mother's aunt called Father to inform him of the news. Father went to the hospital. Father told hospital staff that he was F.K.'s father, but the hospital staff did not allow Father to see F.K. When Father was at the hospital, he discovered that Mother planned to place F.K. for adoption. The day after F.K. was born, Grandmother told Father that Mother said F.K. died after delivery. A few weeks after F.K.'s birth, Father "found out for sure" that Mother placed F.K. for adoption. In mid-June, Father filed an action for custody in family court, but never notified the adoption agency of his plan to stop the adoption; Father never asked Mother about the adoptive parents.

Father planned to be a single father, and not share custody with Mother. Father had not worked full-time since F.K. was born. Father worked as an "[a]rt designer, trainer, [and he] climb[s] palm trees." Father worked approximately four hours per week for a tree cutting company, and earned 10 dollars per hour. Father was supported by himself and his mother. Father purchased a week's worth of clothes for F.K., when Father filed for custody, because he expected F.K. would be placed in his care. Father had some concerns about F.K. being emotionally disturbed by the removal from the

adoptive parents' home. Father explained that the move might be disturbing "[b]ecause it's something new, just like when you go to school."

Father stated that he has never been in a gang; however, he recalled gang members shooting at his truck. Father explained that he was "just [in] the wrong place at the wrong time." Father did not believe he was targeted by gang members.

In regard to missing the June 2010 deposition, Father explained that he refused D.K.'s offer to pay for a taxi because he wanted to arrive at the deposition on "[his] own terms." Father confirmed that he did not ask D.K. any questions about F.K. when the two were together during the September 2010 deposition. Father explained that he did not ask questions because he "wanted to figure it out [himself]." Father did not ask D.K. for F.K.'s address when they were together during the deposition. Father stated that he had not had any contact with F.K. since F.K.'s birth. Father testified that he had not sent F.K. a card or letter, and that he had not sent any financial support for F.K. directly to the adoptive parents or through the Agency or attorneys.

C. PROCEDURAL HISTORY

On June 3, 2009, Mother relinquished custody of F.K., listing D.K. and D.E. as the prospective adoptive parents. On the relinquishment form, Mother listed F.K.'s father as unknown. D.K. and D.E. filed a petition to adopt F.K. on June 12, 2009. In the petition, the birth father was listed as unknown. Also on June 12, the Agency filed a petition to terminate the parental rights of F.K.'s "unknown" father. (Fam. Code, § 7662, subd. (a).)

On June 15, 2009, Father filed a petition to establish a parental relationship with F.K., requesting custody and/or visitation. Father listed the respondent as Mother. Father wrote that he did not have information about F.K. because Mother claimed the child died; however, Mother also sent him text messages claiming to have placed the child for adoption. Mother and Father attended mediation on July 2, 2009. At the mediation, Mother and Father agreed to (1) stop the adoption process; (2) have F.K. returned to California; and (3) complete a paternity test.

On July 10, 2009, the *probate* court granted the Agency's petition—terminating the parental rights of F.K.'s unknown Father, who may have the name Michael.² On July 20, 2009, the *family* court addressed Father's case, and ordered (1) Mother to inform Father of F.K.'s location; (2) Mother to return F.K. to California; (3) Mother and Father to participate in paternity testing; and (4) the district attorney's child abduction unit to assist in returning F.K. to California.

On September 25, 2009, the probate court received a letter from the district attorney's child abduction unit reflecting that Father's related case was pending in the family court. The Agency filed a petition to terminate Father's parental rights to F.K. On November 10, Father failed to appear at the hearing on his custody and visitation petition. On December 9, Father failed to appear at the hearing for (1) DNA/paternity issues, and (2) his custody and visitation petition.

² We infer that the adoption matter was handled by the probate court, as opposed to the family court, from the minute orders related to the adoption case which reflect "Probate Hearing Held (other)."

At a hearing on February 19, 2010, it was revealed that Father was F.K.'s biological father. The trial court consolidated Father's family court case with the probate/adoption case. The trial court concluded that there was no need to vacate the order terminating the unknown father's rights to F.K., because the order mentioned that the unknown father's name might be Michael, so the order did not apply to Father. The adoptive parents filed notice of their intent to join the Agency's petition to terminate Father's parental rights.

During opening statements, Father explained that he was not contending he was a presumed father. Rather, he was a *Kelsey S.* father, in that Mother prevented Father from being able to reach presumed father status. Thus, Father asserted that in order for the court to terminate his parental rights, the Agency would have to show he was unfit to parent, by clear and convincing evidence.

A trial was held. The trial court issued a ruling in favor of Father, finding he was a *Kelsey S.* father. The trial court found that Father assisted Mother during her pregnancy by providing her with food and shelter for "a few months." The trial court concluded that Mother and Father "had virtually no contact" after their breakup, but that could be explained by Mother's miscarriage lie. The trial court found that Father filed for custody of F.K. within weeks of F.K.'s birth.

The trial court concluded that Father "learned of the child's whereabouts, but did not undertake any efforts to communicate with the child or send him any cards or gifts." Additionally, the trial court found, "[Father] has not made any effort to reach out to [F.K.] and at least establish some bond with him." Later in its ruling, the trial court

wrote, “[D.K.] has resisted all efforts of [Father] to establish a parental bond with [F.K.]” The trial court also wrote that Father may have had difficulty establishing a parental bond with F.K. due to Father’s limited financial resources. The trial court awarded Father *Kelsey S.* father status. The trial court (1) denied the petition to terminate Father’s parental rights; (2) denied the petition for adoption, because Father objected to it; and (3) ordered the parties to meet and confer about the custody and transfer of F.K. The trial court declined to make any further orders related to custody.

DISCUSSION

The adoptive parents contend the trial court erred by awarding Father *Kelsey S.* father status. We agree.

“If a man is the presumed father of a child, the child cannot be adopted without his consent (Fam. Code, § 8604, subd. (a)), unless the trial court finds, on statutorily specified grounds, that he is unfit. (Fam. Code, §§ 8604, subd. (b), 8606.) If, however, he is not a presumed father of a child, the child can be adopted without his consent, and his parental rights can be terminated, unless the court determines it is in the child’s best interest for him to retain his parental rights. (Fam. Code, § 7664, subd. (b).)” (*Adoption of Daniele G.* (2001) 87 Cal.App.4th 1392, 1394-1395 (*Daniele G.*) [Fourth Dist., Div. Two].)

“In *Kelsey S.*, however, our Supreme Court held that a biological father ‘has a constitutionally cognizable opportunity interest in developing a relationship with his child.’ [Citation.] ‘The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that

biological connection into a full and enduring relationship.’ [Citation.] Accordingly, [the foregoing] ‘statutory scheme [related to consent to adoption] 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.’ [Citation.]” (*Daniele G.*, *supra*, 87 Cal.App.4th at p. 1395.)

Thus, in order to be classified as a *Kelsey S.* father, who has the authority to veto an adoption, a biological father must “‘promptly come[] forward and demonstrate[] a full commitment to his parental responsibilities—emotional, financial, and otherwise.’ [Citation.] ‘In particular, the father must demonstrate “a willingness himself to assume full custody of the child—not merely to block adoption by others.” [Citation.] A court should also consider the father’s public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.’ [Citation.]” (*In re Charlotte D.* (2009) 45 Cal.4th 1140, 1148.)

This court has previously applied the substantial evidence standard of review when considering whether a trial court erred in awarding *Kelsey S.* father status. (*Daniele G.*, *supra*, 87 Cal.App.4th at p. 1395.) Thus, we follow our precedent and

apply the substantial evidence standard of review.³ ““It is well settled that whenever a finding or judgment of the trial court is attacked as being unsupported, the power of the reviewing court begins and ends with the determination of whether there is any substantial evidence, contradicted or uncontradicted which will support the conclusions reached by the trial court. [Citation.]”” (*Adoption of D.S.C.* (1979) 93 Cal.App.3d 14, 24 [Fourth Dist., Div. Two].)

We consider each factor in turn. The first factor we address is whether Father publicly acknowledged paternity before and after F.K.’s birth. Father testified that he never doubted F.K. was his son and that Mother lived with him for a few months while she was pregnant. Mother’s aunt called Father when Mother was in labor, to let him know that the baby was being born. Father stated that he informed hospital staff that he was F.K.’s father. Once Father discovered F.K. was alive, he told people that he had a son. Given that (1) Father has not disputed F.K. is his son, (2) Mother may have lived with Father for a portion of her pregnancy; (3) Mother’s relative knew to call Father during the birth; (4) Father told hospital employees that he was F.K.’s father; and (5) Father told people he had a son, we conclude there is substantial evidence that Father publicly acknowledged paternity.

³ The adoptive parents assert that the issue presents a mixed question of law and fact, which means this court should “exercise[] its ‘independent judgment in measuring the facts against the applicable legal standard.’ [Citation.]” In light of our precedent, we disagree with the adoptive parents’ standard of review assertion. (*Daniele G.*, *supra*, 87 Cal.App.4th at p. 1395.)

Second, we consider the evidence that Father paid pregnancy and birth expenses commensurate with his ability to do so. Father stated that he was unemployed the entire time Mother was pregnant with F.K. According to Father, Mother lived with him and his family during a portion of her pregnancy, and during that time Mother ate the food at Father's family's home. While Mother was pregnant, Father did not purchase any supplies or maternity clothes, and he did not pay for any of Mother's medical expenses. Mother was on Medi-Cal during her pregnancy, and Father has not made any attempts to repay Medi-Cal for Mother's pregnancy expenses.

In sum, during the pregnancy and birth time period, the record reflects that Father financially assisted Mother by helping her to live with his family early in her pregnancy, but otherwise did not help with medical expenses or other pregnancy expenses. After Mother and Father broke up, he did not provide financial assistance to her during the few weeks that he believed she was still pregnant. The foregoing is substantial evidence that Father paid pregnancy and birth expenses commensurate with his ability to do so, during the period that he believed Mother was pregnant, given that there is evidence Father was unemployed. In other words, it is possible that Father had limited income due to being unemployed and therefore was unable to provide financial assistance to Mother during her pregnancy.

Third, we consider whether substantial evidence supports the finding that Father took prompt legal action to obtain custody of the child. In June 2009, Father filed a petition to establish a parental relationship with F.K., requesting custody and/or visitation; F.K. was born May 2009. Father filed his petition approximately two weeks

after F.K. was born. We note that Father failed to appear at hearings and his deposition, which delayed matters. Father missed the deposition due to car trouble, and when offered a taxi ride by D.K., Father refused it. Despite these delays following the initiation of proceedings, we conclude that substantial evidence supports the trial court's finding of prompt legal action on the part of Father, due to the filing of the petition within approximately two weeks of F.K.'s birth.

Fourth, we consider whether substantial evidence supports the finding that Father, as well as he could under the circumstances, “‘demonstrate[d] a full commitment to his parental responsibilities—emotional, financial, and otherwise.’ [Citation.]” (*In re Charlotte D.*, *supra*, 45 Cal.4th at p. 1148; see also *In re Jerry P.* (2002) 95 Cal.App.4th 793, 812 [“under the circumstances”].)

We address Father's demonstration of his emotional commitment, and then address his demonstration of his financial commitment. Father has never sent F.K. a card or letter. Father never asked for F.K.'s address. Father has never met F.K. When Father and D.K. were alone at Father's deposition, D.K. told Father about F.K.'s personality, F.K.'s relationship with his half-brother, and F.K.'s pre-school. Father did not respond. Father did not ask questions about F.K. or the adoptive parents. Father did not ask D.K. if he could visit F.K. Father and D.K. testified about the foregoing in March 2011—when F.K. was approximately one year, ten months old.

Given that Father has not made any attempt, over nearly a two-year period, to present himself to F.K., either through a discussion with the adoptive parents, through a card or pictures, or through visiting F.K., there does not appear to be any evidence that

Father has made an effort to form a bond with F.K., or even introduce himself to F.K. Father expressed little interest in learning about F.K. by not asking any questions about F.K., or the adoptive parents who were raising F.K. Given the state of the record, we conclude that there is not substantial evidence of Father demonstrating a full commitment to his emotional parenting responsibilities.

Since the time F.K. was born, Father has not provided any financial assistance to the adoptive parents. Father never sent money for F.K. directly to the adoptive parents or through the attorneys or the Agency. Father stated that the only purchase he has made for F.K. was a week's worth of clothes; however, it appears from the record that he never sent the clothes to F.K. Additionally, Father has never sent F.K. a Christmas gift or birthday gift. Given that Father has provided no financial assistance for the first year and ten months of F.K.'s life, we conclude that there is not substantial evidence of Father demonstrating a full commitment to his financial parenting responsibilities.

In sum, there is not substantial evidence of Father demonstrating a full commitment to his financial and emotional parenting responsibilities. Since there is not substantial evidence supporting this factor, we conclude that the trial court erred in awarding Father *Kelsey S.* status.

We note that in the trial court's findings, it wrote, "[D.K.] has resisted all efforts of [Father] to establish a parental bond with [F.K.]" However, the trial court contradicted this finding in that the trial court also wrote, "[Father] has not made any effort to reach out to [F.K.] and at least establish some bond with him" Further, the trial

court concluded, “[Father] learned of the child’s whereabouts, but did not undertake any efforts to communicate with the child or send him any cards or gifts.”

Thus, it is unclear if the trial court found that (1) Father made efforts, but his efforts were obstructed by D.K.; or (2) Father made no efforts to establish a bond with F.K. In our review of the record, we were unable to locate evidence indicating that Father made efforts demonstrating a full commitment to his parenting responsibilities. Father testified that he never asked D.K. for F.K.’s address. Father stated that he never sent F.K. a card, letter, Christmas gift, or birthday gift. Father also said that he never tried to provide financial support for F.K. Given the record, it is not clear what efforts the trial court may have been referring to in its findings.

In Father’s Respondent’s Brief, he writes, “[A]ppellants assert Father did nothing *after* the child’s birth to assume the mantle of fatherhood other than file a paternity case.” Father does not respond to this assertion or explain why this assertion is incorrect. Father does not explain to this court what evidence reflects Father’s demonstration of a full commitment to his parenting responsibilities. At one point in the Respondent’s Brief, Father alludes to his inability to visit F.K. out-of-state due to limited financial resources. While Father’s exact finances are not clear from the record, there is evidence that he is unemployed. Assuming that Father had limited financial resources, there is still nothing in the record explaining why he did not ask for F.K.’s address, or send cards or pictures to F.K. through the attorneys, or ask the adoptive parents for updates on F.K.’s health, or send F.K. a birthday present, or send the adoptive parents a package of diapers. While Father’s circumstances may explain his

failure to visit F.K., they do not explain a complete lack of involvement in F.K.'s life for nearly two years. Thus, to the extent Father is asserting he could not demonstrate a full commitment to parenting due to limited financial resources, we find such an argument to be unpersuasive.

In another section of Father's Respondent's Brief, he refers to evidence that he planned on being a single father. It is unclear exactly why Father has mentioned this evidence, but to the extent Father could assert that evidence of his plans show a full commitment to parenting, we disagree with such an argument. A father must *demonstrate* his full commitment to parenting. (*In re Charlotte D.*, *supra*, 45 Cal.4th at p. 1148.) Father's mention of his plans to be a single father does not constitute a *demonstration* of his commitment. A demonstration typically involves an action, not a mere discussion of plans. (See generally *In re Elijah V.* (2005) 127 Cal.App.4th 576, 583 [sending diapers for one year and \$300 is insufficient]; see also *In re Sarah C.* (1992) 8 Cal.App.4th 964, 972-973 [caring for the child for a few months and contributing money once is insufficient]; *In re Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1541 [attending the child's birthday parties and giving presents is insufficient].) Thus, to the extent Father raises the argument, we are not persuaded that a mention of his plans to be a single father demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise.

DISPOSITION

We reverse the judgment of the trial court related to Father's *Kelsey S.* status, the denial of the petition to terminate Father's parental rights, and the denial of the adoption

petition. The trial court is directed to enter a judgment against Father, G.H., on his claim that he is a *Kelsey S.* father. Parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

CODRINGTON
J.