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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.C.,

Defendant and Appellant.

E056486

(Super.Ct.No. J241689)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A.

Buchholz, Judge. Affirmed.

Christy C. Peterson, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Adam E. Ebright, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

J.C. (father) appeals from orders of the juvenile court denying his petition under Welfare and Institutions Code¹ section 388 and terminating his parental rights to minor, N. Father contends the juvenile court erred in finding that he was not a presumed father or a *Kelsey S.*² father and in terminating his parental rights without a showing of parental unfitness. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

On November 14, 2011, S.M. (mother)³ gave birth to N. at 35 weeks gestation. She had not received prenatal care, and N. tested positive for heroin at birth. N. remained hospitalized for his premature birth and positive toxicology. On November 15, mother surrendered N. under Health and Safety Code section 1255.7. San Bernardino County Children and Family Services (CFS) filed a petition under section 300, subdivision (g). Father's identity and whereabouts were then unknown. The court found a prima facie showing and detained N.

CFS filed a jurisdiction/disposition report on December 6, 2011. The report stated that a social worker had responded to the hospital where N. was born and had been informed that "the unidentified mother had safely surrendered the baby" and "did not identify a father and his whereabouts are unknown." The unknown parents had not

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

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

³ Mother is not a party to this appeal.

reclaimed N. during the 14-day “Cooling Off” period. N. was released from the hospital on November 23 and placed in a concurrent planning home. At the jurisdiction/disposition hearing on December 9, the juvenile court found the allegations of the petition true and set the matter for a hearing under section 366.26.

On February 15, 2012, counsel for CFS moved for an order that father appear in the case and formally request that paternity testing be done. The motion stated that counsel had “just been informed that the mother has informed [father] that he is the biological father of said child, and he now wants a paternity test to determine if he is the father of this child.” At the hearing on February 24, the court ordered paternity testing for father. The same day, the court confirmed April 9 as the date for the section 366.26 hearing. The paternity test results showed the probability of father’s paternity as 99.99 percent.

On March 27, 2012, CFS filed a subsequent petition under section 342, alleging that N. came within section 300, subdivision (b). The petition alleged that N. was at risk of physical harm or neglect because father was residing with mother, “who is a known heroin addict, has mental health problems, and has a domestic violence conviction.” The petition further alleged father knew or should have known of mother’s addiction, mental health, and violence issues. Finally, the petition alleged a risk of physical harm because of unsafe living conditions in father’s home, including “mold, a rodent problem, piles of debris or clutter in almost every room, and unfinished carpentry.”

The detention report for the section 342 petition stated that the social worker had interviewed mother on March 21, 2012. Mother reported she had been working as an

exotic dancer when she and father began an “on again off again,” nonexclusive sexual relationship that lasted about a year. Mother lived with father for several months. When she was about six months pregnant, mother told father she was pregnant but she was unsure if he was the father. Mother had no prenatal care. Her own mother (grandmother) took her to the hospital in November 2011 for treatment of her heroin addiction, and the doctors found the baby was in extreme distress from mother’s drug use. Mother had an emergency Caesarean section. Mother told the social worker she had called father two days after the birth to tell him she was giving the child up for adoption.

The social worker interviewed father on March 13, 2012. Father described mother as “highly erratic, and at times, explosive.” She would disappear for days and then call to beg for money. Father always took her back in because he was sorry for her and wanted to take care of her. He stated he had no idea she was on drugs because mother hid her drug use, and he had never been around addicts. He later stated, however, that his brother had died of a cocaine overdose. Father stated he learned of the child’s birth for the first time on December 14, 2011, when he had met with mother and saw she was no longer pregnant. Mother told him she had delivered the child a month earlier and had given him up for adoption.

Father told the social worker he had last seen mother in December and had spoken to her on the phone in January, when she told him she was no longer on drugs. Father talked about getting back together with mother so they could raise the child together if mother completed a drug treatment program. Father later said he had seen mother at his home for a couple days in February. The social worker visited father’s home on

March 21, 2011. Father's former wife, C.B., who still worked for father, was at the house and told the social worker that mother lived there. Mother came downstairs dressed in a bathrobe and invited the social worker into the bedroom that mother and father shared. The house was cluttered with piles of items, and there was evidence of water damage and mold. Mother said she had moved back into father's home in January and had been living there ever since. They wanted to raise the child together, and she was happy father was trying to get the child back. Mother said she was no longer using drugs.

C.B., who continued an amicable relationship with father despite their divorce, told the social worker that mother had been living at father's house for the past two months, but she occasionally left for a few days, and C.B. believed she was using drugs. C.B. said mother had been hallucinating and talking to nonexistent people. C.B. reported father "is well aware that the mother does drugs and knew that she was using throughout her pregnancy." C.B. stated that Mother had used her pregnancy to extort money from father, even though he knew she was using the money to buy drugs.

While the social worker was at the house, mother took a telephone call from father. Mother reported that father was angry at her for speaking with the social worker. Mother said father's "intention was to lie to the court and say that he was not with her and have her come back into the picture after the baby was returned to him."

The social worker also interviewed grandmother, who reported that mother had been addicted to heroin for two years and father had known of the addiction for a long time. Grandmother confirmed mother was still using drugs—she had tested positive for

methamphetamine two weeks earlier and father knew that. Grandmother reported mother had been diagnosed with a bipolar disorder and she became violent when using drugs.

The social worker reported that father had no criminal history and had tested negative for drug or alcohol use. Father admitted he had earlier lied to the social worker when he said he had not seen mother since December, and he admitted mother had been at his home briefly.

At the detention hearing on the subsequent petition, the juvenile court found that a prima facie case had been established.

CFS filed a section 366.26 report on March 27, 2012. The social worker stated that N. had been given Methadone to help him deal with withdrawal symptoms from his heroin addiction at birth. He was meeting all developmental milestones and appeared to be strongly attached to his prospective adoptive parents. He had been placed in the adoptive home upon his release from the hospital on November 23, 2011.

On April 13, 2012, father filed a request to change court order “seeking custody of [N.] or alternatively reunification services for him,” “frequent and liberal visitation,” and presumed father or *Kelsey S.* father status. Father stated the following changed circumstances: “Paternity testing has determined I am [N.’s] father. I am very committed to [N.’s] well being and wish to have him placed with me. I am a loving and caring individual with lots of experience with children I have a stable income and can provide a loving and supportive home for [N.]” Father attached a reply to the detention report, in which he stated he had learned on December 11, 2011, that mother had given birth; he had known she was pregnant but believed her due date was around

February 2012. She had previously sent him a text message that stated, “you aren’t the father u never were get over it idiot,” which was his last communication with her before the child was born. He did not know mother had given birth on November 14. On December 11, mother refused to answer any questions about the baby. On December 13, father consulted an attorney to learn how to proceed in finding out if he was the father. On December 16, father’s attorney filed an ex parte paternity action in Los Angeles County Superior Court. Mother did not appear in court, and grandmother told father’s attorney that father was not the father of the baby. When father learned he had filed the action in the wrong court, he filed again in San Bernardino County Superior Court and obtained a court order giving him access to mother’s hospital records and the case worker’s files. Father asserted he had not known that mother was using drugs during the pregnancy. He stated that during the pregnancy, he offered to go to the hospital with mother but she declined. Father provided numerous letters from friends and family attesting to his good character.

On April 23, 2012, CFS filed a jurisdiction/disposition report and response to father’s section 388 petition. The social worker stated father had been born in Peru but was raised in the United States. He obtained a Bachelor of Science degree and was self-employed. He had been married twice and both separations were amicable. He did not use alcohol and had no criminal history or child welfare history.

The social worker did not believe it was in N.’s best interest to be placed with father. She disagreed with father’s response to her report and questioned his veracity. She believed father learned of N.’s birth on November 16 rather than December 11, and

that he knew mother was addicted to heroin during the pregnancy. She questioned his decision to move mother into his home after N.'s birth, knowing she was a drug addict. She asserted that father showed poor judgment, "actively hid information" from the court and had done nothing to assure prenatal care for his unborn child.

A. Addendum Report

On June 11, 2012, CFS filed an addendum report. The social worker stated she had re-interviewed mother and grandmother on June 4, and they reported that mother and father were still in contact. Mother attended a drug treatment program in May and visited with father weekly after that. Mother confirmed that father knew about her drug use during her pregnancy and that he did not attempt to get her prenatal care. Early in their relationship, father had paid mother for sexual acts. Mother believed she had told father about N.'s birth within a week after the birth and had gone to dinner with him within two weeks of the birth. The social worker again stated her belief that father was trying to "manipulate everything about this case."

B. Hearing on Section 388 Petition

The juvenile court held an evidentiary hearing on father's section 388 petition on June 12 and 13, 2012. Father testified that he learned mother was pregnant in September 2011, and he had offered to go to the hospital with her. She declined and later told father she was not pregnant. In October, she confirmed she was pregnant and that he was the father. Father asked her if she was getting prenatal care, and she told him no. He contacted grandmother, who confirmed that mother refused to go to any prenatal appointments. Father did not remember if he had offered to pay for prenatal care. He

believed mother was about five months pregnant and that her due date was February 2012.

In early November father cut off communication with mother after she told him he was not the father and that she had been with other men. On December 11, they met, and father saw she was no longer pregnant; she told him she had the baby, but she refused to give him any information. The next day, she told him she had given the baby up for adoption. Father contacted an attorney, who filed a paternity action on his behalf.

Father testified that he was happy to learn he was N.'s biological father, and he shared the news with friends and family. He had completed construction on his home and eliminated safety issues identified by CFS. He had family and friends to support him.

He admitted he had been dishonest with the social worker about reconnecting with mother after N.'s birth, and that it had been a mistake to allow mother back into his home. He stated he did not know mother was using drugs during her pregnancy. He did not learn she had used drugs until he obtained the medical report that indicated N. was addicted at his birth. He did not plan to have any future contact whatsoever with mother. Father admitted he had seen mother about four times in the last month but they had not resumed a sexual relationship. In response to questioning by the juvenile court, father stated he never talked with mother during her pregnancy about what would happen to the baby after it was born.

Mother testified she and father had been intimate, although they had never lived together, and she had been dating others as well. Their sexual relationship ended before

N.'s birth. During her pregnancy, she thought father might be the father, but he was just "one of the people." She could not remember when she told him about N.'s birth but thought it had been within a month after the birth. She did not receive any prenatal care; she had not asked father to pay for such care, and he did not offer. However, father had given her \$2,000 during her pregnancy for food and to help her. She confirmed that she used drugs during her pregnancy, but she did not remember if she had told father. She then said she thought she had told him but he had not been listening. She had seen father about four times in the previous 30 days. She and father had discussed raising N. together, but father later changed his mind and wanted to raise N. alone. She testified that father had paid her for sexual favors in the past but then said it was more like he was helping her out.

Grandmother testified that she took mother to the hospital in November 2011 "for detox and to get her into rehab." Grandmother had been shocked to learn mother was 35 weeks pregnant because she believed mother was only 12 to 15 weeks pregnant. She thought father was a friend who was helping mother with her drug problems. Father told her he was there to help "because [his] brother died of overdose." Grandmother told father in text messages that mother refused to go for prenatal care. Grandmother was upset with father for giving mother money because she used it for drugs.

At the hearing, the court stated both mother and father had credibility issues. The court found that father did not qualify as a presumed father under either Family Code section 7540 or 7611. The court noted father claimed not to have known of mother's drug habit until February 2012. The testimony on the issue was inconsistent, but the

court found grandmother's testimony "very compelling" as to father's knowledge. The court next noted the evidence was inconsistent as to when father found out mother was pregnant, and the court found that he knew of the pregnancy "at least by September 2011." The court found that father continued his relationship with mother until November 9, when mother told him he was not the father, and that father did not resume contact with mother until December 11. The court found that father had not taken mother to any medical appointment, had not paid for any prenatal care, and never offered to pay for prenatal care. The court further found that father did not provide support for mother, and mother and father did not discuss the baby's future until after the baby was born; however, neither mother nor anyone else prevented father from assisting mother before the baby's birth. After learning of mother's pregnancy, father never made any attempt to establish paternity or seek any type of custody before the baby's birth; all his actions took place after he learned the baby was placed for adoption. The court concluded father failed to meet his burden to establish he is a *Kelsey S.* father. The court further found that it would not be in N.'s best interest to have father declared a presumed or *Kelsey S.* father. The court found that father was merely a biological father and denied the section 388 petition.

C. Section 366.26 Hearing

Immediately after the hearing on father's section 388 petition, the juvenile court dismissed the subsequent petition as moot and proceeded to the section 366.26 hearing. The juvenile court found N. adoptable, found that no exceptions to adoption existed, and terminated all parental rights.

III. DISCUSSION

A. Presumed Father / *Kelsey S.* Father Status

Father contends the juvenile court erred in finding he was not a presumed father or a *Kelsey S.* father.

1. Standard of Review

“When deciding whether a parent meets the requirements under *Kelsey S.*, appellate courts have reviewed the ruling for substantial evidence. [Citations.] The burden is on the biological parent ‘to establish the factual predicate’ for *Kelsey S.* rights. [Citation.] To the extent that the issue is a mixed question of law and fact, we exercise our independent judgment in measuring the facts against the applicable legal standard. [Citation.]” (*In re Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1539.)

2. Analysis

“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. Absent such a showing, the child’s well-being is presumptively best served by continuation of the father’s parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother.

“A court should consider all factors relevant to that determination. The father’s conduct both *before and after* the child’s birth must be considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume

his parental responsibilities as fully as the mother will allow and his circumstances permit. 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.” (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849, fns. omitted, original italics.)

To establish *Kelsey S.* status, the burden on a biological father is high. In *Adoption of Michael H.* (1995) 10 Cal.4th 1043, the court reiterated that the father must “show[] that he promptly came forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned or reasonably should have learned that the biological mother was pregnant with his child.” (*Id.* at p. 1060.) The court further stated that a father “cannot compensate for his failure to [promptly come forward to offer support] by attempting to assume his parental responsibilities many months *after* learning of the pregnancy.” (*Id.* at p. 1054.)

In *In re D.A.* (2012) 204 Cal.App.4th 811, the court held that a biological father had demonstrated *Kelsey S.* father status when “[d]uring [the] mother’s pregnancy he expressed his desire for a genetic test to determine whether he was the baby’s father, he took [the] mother to prenatal medical appointments, and he offered to help with any associated expenses.” (*In re D.A.*, *supra*, at p. 824.) The mother cut off contact with him, and he could not learn her whereabouts until after the child was born. He then again

requested a paternity test, but none was performed before the child was detained because of the mother's delays. After testing determined that another man was not the biological father, the father attended the next hearing and informed the court that if he was the biological father, he wanted to form a relationship with the child. The genetic test results showed he was the biological father, and he requested presumed father and visitation. He attended every hearing after that and had consistently requested visitation. (*Id.* at pp. 824-825.)

Similarly, in *In re M.C.* (2011) 195 Cal.App.4th 197, the court found that a biological father had established the requirements for *Kelsey S.* status when he had held himself out as the father from the time he learned the mother was pregnant. The mother had lived with him the first four months of her pregnancy. "He acknowledged paternity to [the mother], his family and his fiancée, financially provided for [the mother] for a time and ensured that she received prenatal care," and he stated he always intended to be a father to the child. (*In re M.C., supra*, at p. 220.) The mother had left the father, did not tell him where she was going, and did not leave any contact information, but after she renewed contact, the father "responded promptly and began providing support for [the child] He maintained communications with [the mother] until she was imprisoned, expressed his desire to be part of [the child's] life and facilitated arrangements so his daughter could begin to know her paternal relatives. When the dependency action was initiated, [the father] came from Oklahoma to attend each hearing and continued to fight for custody of [the child]." (*Id.* at pp. 220-221.)

Here, in contrast to the facts in *In re D.A.* and *In re M.C.*, the evidence showed father took no prompt action to assume his parental responsibilities once he learned of mother's pregnancy in September. Father broke off communications with mother on November 9 when she told him he was not the father, and he did not resume contact with mother until after the birth. Father did not take mother to any medical appointment and did not pay for or offer to pay for any prenatal care. Father did not provide support for mother, and they did not discuss the baby's future until after the baby was born; however, neither mother nor anyone else prevented father from assisting mother before the baby's birth. After learning of mother's pregnancy, father never made any attempt to establish paternity or seek any type of custody before the baby's birth; all his actions took place *after* he learned the baby had been placed for adoption. Moreover, father never made any announcement of paternity until after he received confirmation through the paternity test results.

The juvenile court resolved conflicts in the evidence, and we must accept the court's resolution of those conflicts. (*In re William K.* (2008) 161 Cal.App.4th 1, 11.) We conclude substantial evidence supports the trial court's determination that father failed to "show[] that he promptly came forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned or reasonably should have learned that the biological mother was pregnant with his child." (*Adoption of Michael H., supra*, 10 Cal.4th at p. 1060.)

B. Termination of Parental Rights

Father contends the juvenile court erred in terminating his parental rights without a showing of parental unfitness. The paternal rights of a *Kelsey S.* father cannot be terminated unless he is found unfit. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) Here, however, the trial court found that father was not a *Kelsey S.* father. Thus, the trial court was not required to make a finding of parental unfitness as to father before terminating his parental rights.

IV. DISPOSITION

The orders appealed from are affirmed.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

RICHLI

J.