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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.A., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

O.L.,

Defendant and Appellant.

E059253

(Super.Ct.No. SWJ1100543)

O P I N I O N

APPEAL from the Superior Court of Riverside County. John M. Monterosso,
Judge. Affirmed.

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

Pamela J. Walls, County Counsel, and Julie Koons Jarvi and Kristine Bell-Valdez,
Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, O.L., the biological father of S.A., a girl born in December 2012, appeals orders terminating parental rights and placing S.A. for adoption. (Welf. & Inst. Code, § 366.26.)¹ He claims the juvenile court erroneously terminated parental rights without finding he was a *Kelsey S.*² or a “quasi-presumed” father, and, accordingly, an unfit parent. We disagree and affirm the challenged orders.

II. BACKGROUND

Plaintiff and respondent, Riverside County Department of Public Social Services (DPSS), took S.A. into protective custody in December 2012, shortly after she was born in a hospital. Neither S.A. nor her mother tested positive for any drugs, but hospital staff contacted DPSS after learning that S.A. had seven half siblings who had been removed from the mother’s care.³ The mother’s reunification services for her older children were terminated in October 2012; the mother had a criminal history and a history of using methamphetamine and other controlled substances; she was unmarried, transient, unemployed, in the country illegally, and had no means of supporting S.A.

Shortly after S.A. was born, the mother told a social worker that “Douglas,” whose last name she did not know, was S.A.’s father. Douglas was at the hospital when S.A.

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 Before S.A. was born, the mother also had an eighth child who was in the care of her paternal grandparents. The mother is not a party to this appeal.

was born, but was arrested the following day on an outstanding felony warrant, and did not have a chance to sign S.A.'s birth certificate. The mother and Douglas were homeless until December 2012 when they began living with S.A.'s maternal grandmother. The mother and Douglas had been together "off and on for a year," and wanted to "try to be a family" together.

In December 2012, DPSS filed a petition alleging S.A. was at risk of harm, in part because the mother and Douglas led a transient lifestyle, had no provisions to support S.A., and the mother had an open dependency case in which her reunification services for her seven older children had been terminated. (§ 300, subds. (b), (g), (j).) At the detention hearing, the court found Douglas was S.A.'s alleged father. In early January, the mother finally provided DPSS with Douglas's last name and he was interviewed in local custody. Douglas affirmed he was S.A.'s biological father and that he was committed to caring for S.A. and participating in services, but he was at risk of being deported to Mexico.

At the jurisdictional/dispositional hearing on January 18, Douglas completed a JV-505 form (Statement Regarding Parentage), indicating he believed he was S.A.'s biological father and asking the court to find he was S.A.'s presumed father. At the hearing, the mother said she believed Douglas was S.A.'s biological father, but there were other men who could be the father and she did not have their names. The court ordered a paternity test for Douglas and continued the hearing to February 20. On

February 13, the paternity test results became available and showed that Douglas was not S.A.'s biological father.

On February 20, DPSS filed an amended petition striking the allegations regarding Douglas and alleging that the identity and whereabouts of S.A.'s biological father were unknown. At the continued hearing on February 20, the mother provided the first names of two possible fathers, Guillermo and Octavio. She did not know their last names. She was ordered to provide DPSS with any additional information she could gather about the possible fathers. The court proceeded to the jurisdictional/dispositional hearing, found the allegations of the amended petition true, declared S.A. a dependent, bypassed services for the mother (§ 361.5, subd. (b)(10)), and set a section 366.26 hearing on June 19, 2013.

On February 27, 2013, DPSS declared it had been unable to ascertain the identity and whereabouts of S.A.'s father and applied for an order authorizing it to serve notice of the proceedings by publication. The request was granted. On May 23, 2013, DPSS filed proof of its publication of the proceedings in The Press-Enterprise on April 25, May 2, 9, and 16. The notice ordered "Octavio unknown" and anyone else claiming to be the father of S.A. to appear at the June 19 section 366.26 hearing and show cause why parental rights should not be terminated. Prior to the June 19 hearing, DPSS filed an adoption assessment report which concluded S.A. was generally adoptable due to her young age and good health, and her caretakers were willing to adopt her.

O.L. appeared in court at the section 366.26 hearing on June 19. With the assistance of a Spanish language interpreter, he requested a paternity test and appointed counsel. He told the court he was “with” the mother when she became pregnant and might be S.A.’s father. He explained that when he and the mother first had sexual relations, the mother told him she believed she was around one month pregnant, but she also said she could have been ill, rather than pregnant. He did not use contraceptives because he believed the mother was pregnant. After learning that a paternity test showed another man was not the father, O.L. believed he could be the father and wanted a paternity test to be certain.⁴ Over county counsel’s objection, the court found O.L. was an alleged father, ordered a paternity test for him, and continued the hearing to July 22.

The paternity test showed O.L. was likely the biological father of S.A. At the continued section 366.26 hearing on July 22, counsel for O.L. made an offer of proof that, if called to testify, O.L. would testify the mother told him she was pregnant when he first began having sexual relations with her. As her stomach grew, she repeatedly told O.L. she knew who the father was, and it was not O.L. Much later, he found out the mother was *not* pregnant and had simply not been feeling well. After S.A. was born and taken into protective custody, the mother called O.L. and asked him to take her to visit S.A. O.L. and the mother visited S.A. when she was around one month old, and O.L. noticed that the baby “looked somewhat like him.” Still, O.L. did not come forward to

⁴ On June 19, O.L. completed a JV-505 form, indicating he had visited S.A. two times.

ascertain his paternity until after he discovered “the other guy” was not the father. O.L. was living alone in a studio apartment; he had been working as a gardener for six years; he was earning \$1,500 to \$2,000 per month; and he was supporting himself and his parents, who did not work anymore. He had no criminal or drug history and he could arrange for child care while he worked. The other parties stipulated to O.L.’s proffered testimony and waived cross-examination.

Through his counsel, O.L. asked the court to place S.A. with him or provide him with services. O.L.’s counsel conceded that, because O.L. was a biological father, “[t]he test at this point in time . . . is whether [custody or services for O.L. were] in the best interest of the child.” O.L.’s counsel argued O.L. had reasonably stepped forward and asserted his paternal rights as soon as he learned that the man the mother said was the father was not the father, and S.A. could be his child.

Minor’s counsel pointed out that, according to O.L.’s stipulated testimony, he knew of the dependency proceedings around January 2013, and reasonably should have known that S.A. could be his child when, at that time, he took the mother to visit the child and saw she looked like him. Minor’s counsel further argued it was not in the best interest of S.A. to offer O.L. custody or services, because S.A. was in a stable, loving home with two of her half siblings, and her caretakers were willing to adopt her. County counsel joined the arguments of minor’s counsel, and also emphasized that O.L. should have known his sexual relationship with the mother could have caused her to become pregnant by him.

County counsel argued O.L.'s requests for custody or services should be denied because he did not come forward after knowing S.A. had been born and was the subject of an open dependency case. Both county counsel and minor's counsel argued that neither custody nor services for O.L. would serve the best interest of S.A. The court noted that the question before it was whether S.A.'s best interest would be served by granting O.L. custody or services, not whether O.L. was a fit or unfit parent, and there was no evidence O.L. would be an unfit parent or a danger to S.A. But S.A. was in a stable placement and bonded to a family that was willing to adopt her. Further, the court faulted O.L. for not coming forward and attempting to ascertain his paternity as soon as he learned S.A. had been detained.

The court agreed that the question before it was whether it was in the best interest of S.A. to grant O.L.'s requests for custody or reunification services. The court denied O.L.'s requests on the ground it was not in S.A.'s best interest to be placed with O.L. or that O.L. be given reunification services. The court pointed out there was no evidence O.L. was a danger to S.A. or an unfit parent, and the evidence "seems to be to the contrary. He's a hard working man who has no criminal history and could likely provide a good home and stable environment for [S.A.]" Still, S.A. was living in a stable, prospective adoptive home with two of her half siblings, and had O.L. come forward when he first learned of the proceedings when S.A. was only one month old, it would have been "far less traumatic or detrimental" to S.A. to be "uproot[ed]" and placed with O.L. In this sense, the court faulted O.L. for his delay in coming forward and asserting

his parental rights. The court said “there had to be at least a light bulb going off over his head” when S.A. was detained, and he should have come forward at that time. The court found S.A. was adoptable, terminated parental rights, and selected adoption as her permanent plan. O.L. timely appealed.

III. DISCUSSION

O.L. claims he qualified as a *Kelsey S.* father or “quasi-presumed father,” and the court therefore reversibly erred in denying his requests for custody or services absent a showing of his unfitness as a parent. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) We reject this claim on its merits.

“The Uniform Parentage Act (Fam. Code, § 7600 et seq.) . . . provides the statutory framework by which California courts make paternity determinations. [Citations.] Under this statutory scheme, California law distinguishes ‘alleged,’ ‘biological,’ and ‘presumed’ fathers. [Citation.] ‘A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an “alleged” father. [Citation.]’ [Citation.] ‘A biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status’ [Citation.]” (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1018, fn. omitted.)

Presumed fathers are accorded far greater parental rights than alleged or biological fathers. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449.) “[O]nly a presumed, not a mere biological, father is a ‘parent’ entitled to receive reunification services under section

361.5” or custody of a dependent child. (*Id.* at pp. 451, 456.) Presumed father status is governed by Family Code section 7611. (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1018.) The statute prescribes the conditions a man must meet in order to qualify as a presumed father, and mere biological paternity is not one of them. (See *ibid.*) Most of the conditions apply to men who have married or have attempted to marry the child’s mother. (Fam. Code, § 7611, subds. (a)-(c).) As an unwed father, O.L. could have become a presumed father of S.A. if he received her into his home and openly held her out as his natural child. (Fam. Code, § 7611, subd. (d); *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051.)

The court in *Kelsey S.* held that Civil Code former section 7004, subdivision (a), the predecessor to Family Code section 7611, and related statutes, violate the federal constitutional guarantees of equal protection and due process of 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.” (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) Under such circumstances, the *Kelsey S.* court held “[i]f an unwed [biological] 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.” (*Ibid.*)

O.L. claims he qualified as a *Kelsey S.* father or a “quasi-presumed” father because he promptly came forward and demonstrated his full commitment to his parental responsibilities to S.A. as soon as he learned Douglas was not S.A.’s father and he, therefore, might be the girl’s father. Thus, he argues, the court was required to grant his request for custody or services absent a showing he was an unfit parent. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849; see also *In re T.G.* (2013) 215 Cal.App.4th 1, 4-5 [“With respect to *Kelsey S.* fathers and presumed fathers . . . the juvenile court cannot terminate parental rights without finding, by clear and convincing evidence, that placement with the father would be detrimental.”].) We disagree.

“The burden is on a biological father who asserts *Kelsey S.* rights to establish the factual predicate for those rights.” (*Adoption of O.M.* (2008) 169 Cal.App.4th 672, 679.) In reviewing the juvenile court’s implied finding that O.L. did not meet this burden, we apply the substantial evidence test. (*Id.* at pp. 679-680.) “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.]” (*Id.* at p. 680.) “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.” (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

Here, substantial evidence supports the juvenile court’s implied finding that O.L. was not a *Kelsey S.* or quasi-presumed father entitled to custody or services, absent a showing he was an unfit parent. Simply stated, substantial evidence supports the court’s

finding that O.L. did not come forward and demonstrate his full commitment to S.A. *as soon as he knew he could have been S.A.'s father*. When the mother and O.L. first began having sexual relations, the mother told O.L. she thought she was already one month pregnant. But she also said she may have been ill, not pregnant. Despite knowing the mother *might not be* pregnant, O.L. took no precautions against impregnating her. Thereafter, the mother was visibly pregnant; she did not hide her pregnancy from O.L.

Furthermore, O.L. was aware of the dependency proceedings for S.A. almost from their inception. He visited S.A. with the mother when S.A. was only one month old, after S.A. was detained. At that time, O.L. thought S.A. “looked somewhat like him.” Still, O.L. made no attempt to come forward in the proceedings, ascertain whether he was S.A.’s biological father, and demonstrate his full commitment to his parental responsibilities, until he learned Douglas was not S.A.’s biological father. Under these circumstances, O.L. did not come forward promptly enough to protect his parental rights.

In determining whether an unwed father has promptly come forward and demonstrated a full commitment to his parental responsibilities, the court must consider all relevant factors, including the father’s conduct both before and after the child’s birth. (*Kelsey S., supra*, 1 Cal.4th at p. 849.) O.L. should have attempted to ascertain whether he was S.A.’s biological father no later than January 2013, when he learned of the dependency proceedings for S.A. As the trial court pointed out, had O.L. come forward at that time, it would have been far less traumatic and detrimental to S.A. to be removed from her caretakers and placed in O.L.’s care.

The court's observation in *In re Zacharia D.* is particularly applicable here: "While under normal circumstances a father may wait months or years before inquiring into the existence of any children that may have resulted from his sexual encounters with a woman, a child in the dependency system requires a more time-critical response. Once a child is placed in that system, the father's failure to ascertain the child's existence and develop a parental relationship with that child must necessarily occur at the risk of ultimately losing any 'opportunity to develop that biological connection into a full and enduring relationship.' [Citation.]" (*In re Zacharia D., supra*, 6 Cal.4th at p. 452.)

Furthermore, "[f]or a biological father who does not assert paternity until after the expiration of any reunification period, the 'only remedy' is to file a petition to modify under section 388." (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 955; accord, *In re Zacharia D., supra*, 6 Cal.4th at p. 453.) At the continued section 366.26 hearing on July 22, 2013, when S.A. was seven months old, the court properly considered whether S.A.'s best interests would be served by placing her with father (see § 388), and reasonably concluded, based on substantial evidence, that they would not. At the time of the hearing, S.A. was in a prospective adoptive home with two of her half siblings, and she was bonded to her prospective adoptive parents. The court reasonably concluded that placing S.A. with O.L. or providing O.L. with services were not in the best interests of S.A.

IV. DISPOSITION

The orders terminating parental rights and placing S.A. for adoption are affirmed.

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KING
J.

We concur:

RICHLI
Acting P. J.

MILLER
J.