Filed 5/29/14 In re A.B. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.B., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. J.B. et al., Defendants and Appellants.	E059999 (Super.Ct.No. RIJ114530) **OPINION**

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

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and Appellant, J.B.

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

Pamela J. Walls, County Counsel, and Anna M. Marchand, Deputy County Counsel, for Plaintiff and Respondent.

C.R. (father), the father of A.B. (minor), appeals from an order of the dependency court terminating his parental rights. Minor's mother, J.B. (mother), "joins in the arguments of father, finding them to be sound and persuasive."

On appeal, father contends that the juvenile court erred in failing to recognize him as minor's presumed father, and in denying his petition under Welfare and Institutions Code[1] section 388. We disagree and affirm the judgment.

I

PROCEDURAL AND HISTORICAL FACTS

On August 7, 2012, the Riverside County Department of Public Social Services, Child Protective Services (Department), filed a juvenile dependency petition regarding minor, an infant.

Minor was born on July 13, 2012; she was hospitalized and diagnosed with Failure to Thrive. Mother was incarcerated and minor had been living with a maternal great-aunt. At the time the petition was filed, father was not named on the birth certificate; his name and address were unknown to the Department. The maternal great-aunt did not have any information about the child's paternal relatives. Mother failed to disclose father's identity when she initially communicated with the Department.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

On August 8, 2012, the juvenile court detained minor; she was released from the hospital eight days later, on August 16, and placed in a foster home equipped to care for medically fragile children. Mother's attorney denied permission for a social worker to interview mother regarding the allegations. The social worker was unsuccessful in being available to accept the collect telephone calls from mother while she was in prison. Notwithstanding, the Department reported that mother had explained that minor's father's identity was unknown to her and that the child resulted from a casual sexual encounter while she was temporarily living in Missouri.

On October 11, 2012, the juvenile court established jurisdiction. Mother appeared telephonically and stated that she did not know the identity of minor's father. The juvenile court removed minor from the parents' custody under section 361, subdivision (c)(1) and (5). The court denied reunification services for mother. The court also denied reunification services for the unknown father under section 361.5, subdivisions (a) and (b)(1).

A selection and implementation hearing was scheduled for February 8, 2013, which was continued to April 12, 2013. In the interim, mother had been released from incarceration but failed to maintain contact with the Department. The Department contacted mother's sister inquiring about mother's whereabouts; the sister reported that she did not have any contact information for mother. The father's identify remained unknown.

At the hearing on April 12, 2013, mother disclosed identifying information about father. The court continued the hearing and the Department searched for father. On April 16, 2013, father telephoned the Department.

Father explained that mother had previously informed him that she had aborted the baby; he did not know mother gave birth to minor. He learned of minor's existence a few months before mother had disclosed his name to the court. Mother told father that minor had been born and was living with a maternal great-grandmother in Missouri. Father believed that minor looked like his other children; he was willing to participate in paternity testing. A paternity test confirmed that father is minor's biological father. In the midst of scheduling his paternity test, father was arrested and incarcerated on June 18, 2013, for an alleged probation violation.

On September 30, 2013, father filed a Request to Change Court Order under section 388. He asserted that he fell within the category defined as a "Kelsey" father. He sought reunification services and visitation with minor.

On October 31, 2013, the court held a hearing on father's section 388 petition, in conjunction with the section 366.26 hearing.

Father testified that he had known mother for six or seven years. He explained that he learned that mother was pregnant, but believed that during the first couple of months of pregnancy, "she had a tubular pregnancy and lost the baby." He was unable to confirm who had provided this information to support his belief. Eventually, mother visited father at his residence in either November or December of 2012; she told him that

she had given birth to minor. She made this visit with father during a brief time when she was free from incarcerations.

Defendant believed that minor was living with a relative in Missouri and testified that he made approximately ten unsuccessful attempts to inquire about visiting minor. Father finally spoke to relatives in Missouri in May 2013. While under the belief that minor was living in Missouri, father never attempted to travel to see minor because he was on "house arrest" and legally prohibited from leaving California. Father testified that he made attempts to reach mother's sister. Eventually, mother's sister sent father a message to telephone her. Father telephoned mother's sister and learned about the juvenile dependency proceeding. Father explained that he did not take any further steps to find minor between December 2012 and April 2013 because he was hoping "she would show up" and he was occupied with another child custody proceeding regarding his other children.

Mother also testified. She stated that she did not disclose father's identity because the maternal, great-grandmother was attempting to gain custody of minor. However, mother visited father at his home in November 2012 and informed him that minor had been born. Mother also told father that minor was living in Missouri with the maternal, great-grandmother. Once mother learned that the maternal, great-grandmother would not be gaining custody of minor, mother disclosed father's identity to the Department. Mother stated that father had not known she was pregnant with minor and admitted that she had misled father.

The juvenile court stated that the testimonies of father and mother were not credible. The court found father was minor's biological father. The court also found that father had no relationship with minor; that there were no changed circumstances supporting the section 388 petition; and it was not in minor's best interests to change the prior court order. The court noted that father failed to take prompt legal action once he was informed of minor's birth, despite the fact that he had access to counsel and was involved in other custody battles involving other children.

Prior to the hearing, on January 28, 2013, minor had been placed in a prospective adoptive home. Minor had adjusted to her new home and was strongly bonded to the prospective adoptive family. Based on these facts, together with all the evidence, the juvenile court denied father reunification services under section 361.5, subdivision (a); found minor adoptable; and terminated parental rights.

Both father and mother appeal from the trial court's order. Mother joins in father's opening brief.

II

DISCUSSION

A. *Father Is Not Minor's Presumed Father*

Father contends that the juvenile court erred in failing to recognize him as minor's presumed father at the section 366.26 hearing "because the court was bound by the implied dispositional finding that he is [minor's] presumed father."

Specifically, at the contested dispositional hearing on October 11, 2012, the court found that "*unknown father* is a person described by Welfare and Institutions Code

361.5(a) and (b)(1). Reunification services are denied as not being in the best interest of the child." (Emphasis added.) Based on the language of section 361.5, subdivision (a), which refers to a "statutorily presumed father[,]" minor makes the argument that the court "determined that [minor's] then unknown father is her statutorily presumed father for dispositional purposes, [and] both the court and the parties were bound by that final determination."

The Department contends that father "forfeited the argument he was a statutorily defined presumed father by failing to raise the issue in the juvenile court and merely advances this theory for the first time on appeal." We agree.

If a parent fails to object or raise an issue in the juvenile court, the parent is prevented from presenting the issue on appeal. (*In re Lorezo C.* (1997) 54 Cal.App.4th 1330; *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) Raising an issue on appeal that was not asserted in the lower court "'amounts to nothing more than an attempted sandbagging of the trial court.' [Citation.]" (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 813.)

Here, father never raised the issue that he was minor's presumed father. When he filed his section 388 request to change court order, he stated that he wanted the following order changed: "The Court at a contested jurisdictional hearing declared the minor a dependent of the court under W&IC section 300(b), (g) & (j). The Court denied reunification services to the mother pursuant to W&IC sections 361.5(b)(10) & (11) and denied services to the 'unknown' father at the time pursuant to W&IC sections 361.5(a) and (b)(1)." Father then went on to state that he was unaware of minor's birth and the

dependency and "respectfully requested the Court extend family reunification services to the father and authorize visitations for father's relatives." Father explained that he "falls within the definition of a 'Kelsey' father. Father was thwarted by the mother to establish paternity and a chance to reunify with his daughter."

In the section 388 petition and during the hearing on the petition, father never mentioned that the court had previously found him to be a "presumed father" at the disposition hearing.

Notwithstanding, father's argument also fails on the merits because the court never made a finding that father was the presumed father.

A statutorily presumed father is a man that "'promptly comes forward and demonstrates a full commitment . . . to paternal responsibilities – emotional, financial, and otherwise[.]'" (*In re Jovanni B.* (2013) 221 Cal.App.4th 1482, 1488.) Under Family Code section 7611, if a man has neither legally married nor attempted to marry the mother of his child, the man cannot become a presumed father unless he both "receives the child into his home and openly holds out the child as his natural child." The purpose in statutorily defining a presumed father "is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not." (*In re M.C.* (2011) 195 Cal.App.4th 197, 212.) An unwed father must both openly and publicly admit paternity and physically bring the child into his home. (*Ibid.*) The unwed father bears the burden to establish foundational facts supporting presumed status. (*Ibid.*)

Here, the record demonstrates that the juvenile court never made an implied finding of paternity in the dispositional orders. Once establishing jurisdiction on October 11, 2012, the juvenile court removed minor from the parents' custody and denied a period of reunification. Section 361, subdivision (c)(1), permits the juvenile court to remove a child from her home upon clear and convincing evidence that the child would be in substantial danger of harm if returned home and a nonoffending parent fails to appear and present a plan of safekeeping for the child. In this case, minor could not be returned to mother's custody and there was no identified father or other nonoffending parent. In order to protect minor from harm, the court clearly identified that minor required protective placement from any parent, known or unknown.

The court proceeded to address whether reunification services were appropriate. Section 361.5, subdivisions (a) and (b), provide, in part, as follows:

"(a) Except as provided in subdivision (b), or when the parent has voluntarily relinquished the child . . ., whenever a child is removed from a parent's or guardian's custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians. Upon a finding and declaration of paternity by the juvenile court or proof of a prior declaration of paternity by any court of competent jurisdiction, the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child.

"(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following:

"(1) That the whereabouts of the parent or guardian is unknown . . . ."

Section 361.5, subdivision (a), therefore, permitted the juvenile court to order services to a biological father, not just a presumed father. However, when the mother claimed that she did not know minor's father's identity, the court denied services on the ground that the whereabouts of the biological father were unknown.

The record demonstrates that mother may have concealed father's identity as "unknown" for some time. However, father's argument that the juvenile court impliedly found him to be a presumed father is unavailing. A statutorily presumed father is a person who is known to the court so that access to the proceedings and reunification services are made available. Here, father was not known, identified or present to carry his burden of proof to establish himself with presumed father status. There were also no facts in evidence at the time of the disposition hearing to support any conclusion that the juvenile court could have awarded this unidentified, unknown, absent father with presumed father status.

Based on the above, there was no error in failing to recognize father as the presumed father.

B. *The Juvenile Court Did Not Err in Denying Father's Section 388 Petition*

Father contends that the court abused its discretion in denying his section 388 petition. We disagree.

In this case, father filed a section 388 petition for the purpose of achieving presumed father status under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. Under the dependency statutes, presumed fathers have far greater rights than biological fathers. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449 (*Zacharia 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.)

As discussed above, 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.)

Father relies on *Kelsey S.* to support his claim that the juvenile court erred in failing to grant his section 388 petition and denying him presumed father status. The Supreme Court in *Kelsey S.* held that Civil Code "section 7004, subdivision (a)[2] 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

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[2] Civil Code former section 7004, subdivision (a), is the predecessor to Family Code section 7611, and related statutes.

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 any 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.) *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 pp. 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.)

In this case, father filed a section 388 petition to be deemed minor's presumed father under *Kelsey*, *supra*, 1 Cal.4th 816. 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.)

In this case, there is no evidence to show that father attempted to achieve presumed father status under section 7611, subdivision (d), once he learned of minor's birth. Initially, mother told father that she had lost the baby prior to giving birth. However, mother eventually disclosed that minor had been born and was living; father waited nine months after he learned about minor before filing a section 388 petition. There is no evidence that father made any effort to receive minor into his home. At the time of the section 388 hearing, father had difficulty recalling when mother had informed him about minor.

Father had known the maternal grandmother for a number of years and had been to her home. Father, however, never contacted the maternal grandmother about minor. According to his testimony, father tried to get in contact with a maternal aunt; she responded in April of 2013. The maternal aunt provided father with a telephone number to the maternal great-grandmother. It appears that father contacted the maternal great-grandmother in April 2013, when he received the contact information from minor's aunt. When father reached the maternal great-grandmother by telephone, she disclosed that minor was not living with her. During this time period of December 2012 to April 2013, father made no other efforts to demonstrate a commitment to his parental responsibilities. Significantly, he believed minor was "fine" if she was with the maternal great-grandmother and there was nothing he could do with minor residing in Missouri.

"[A] *biological* father's 'desire to establish a personal relationship with a child, without more, is not a fundamental liberty interest protected by the due process clause.' [Citation.] '"Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." [Citation.]' (*Lehr v. Robertson* (1983) 463 U.S. 248, 260, italics omitted.)" (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 160, emphasis in original.)

Father complains that mother's conduct precluded him from making a parental commitment to minor. While this may have been during the first months of minor's life; the disclosure made by mother in November or December 2012 failed to make much of a difference in father's efforts to parent minor. Father explains that this was a direct result of mother lying to him about mother's actual location. However, there is nothing to

indicate that father intended to do more than visit with minor while she was in the alleged care of a maternal relative. Not once had father indicated that he was going to take minor in as his child and take full parental responsibility for minor. Also, we note that father had two other children and he had retained a lawyer to assist him in custody issues related to these two children. Father never enlisted the assistance of his attorney to either find minor or to assert his parental rights to her. In April of 2013, when father learned that minor was a dependent of the juvenile court and placed in a foster home, father appeared to be interested in minor.

The court, in addressing whether father rose to the level of a *Kelsey S.* father noted that "[w]hat [*Kelsey S.*] stands for is that a father must take prompt legal action to seek custody of the child.' In this case, father "found out between November of '12 and December of '12, sometime - - we kind of narrowed the window to that time period. He testified that he was in a custody battle or had an attorney and was in a custody action with that attorney with his other two children. [¶] At no time did he seek any legal action in this case. Not knowing that the Department of Public Social Services was involved, not knowing that the child had been detained, he sought no legal action. His reasoning was he didn't know the child's last name and didn't know mom's last name. He had an attorney. There was nothing that he did in order to, what I call, rise to the level of that *Kelsey S.* father. [¶] He states now that he's making a full commitment to the parental responsibilities. I have nothing from November of '12 forward until paternity is established. I have nothing. I have nothing, emotional, financial or otherwise. I have nothing to get him to that level of a *Kelsey S.* father"

The court then went on to state that it did not find either father or mother to be credible. "I get to judge the credibility of the parties. I feel that their testimony is self-serving, and it's not credible. I do find that he's the biological father, absolutely. . . . I do not find that he made a timely full commitment to the parental responsibilities, including emotional, financial or otherwise. I have no evidence or no testimony or nothing that he's done other than requesting the paternity test."

The court noted that when a father seeking *Kelsey S.* status, without making a full commitment to the parental responsibilities, "any actions of a third party are irrelevant if somebody has thwarted his abilities to come forward" under *In re Elijah V.* (2005) 127 Cal.App.4th 576. "So the arguments and the testimony of how Mom has thwarted Dad's ability to come forward sooner, he knew since November. He was out of custody. Even though he was on monitored status through home confinement, there was nothing from that date until April, from what I can tell from the testimony, as well as the documents that have been introduced into evidence."

The court stated that it did not even get to the change of circumstances for the section 388 petition based on the above. However, even if it did, the court stated that "the best interest is really what is going to be the biggest prong here[,]" especially in light of dad's confinement in prison. Based on dad's commitment the court stated that even if he were to be provided with services, it could not find that "it's in the best interest of the minor child. I find that family reunification services, if I were to offer them, would be detrimental to the minor. I find this because it would only delay permanency for this minor. . . . [¶] This child does deserve permanency."

Based on these reasons, the court denied father's section 388 motion. The court could not make a finding of changed circumstances. The court then stated, "[e]ven if I could make that finding of change of circumstances, I cannot find that it is in the best interest of the minor child. The child has been in the home – – out of both parents' home her entire life. This child is over a year old. Delaying this case any further would only be detrimental to the child in delaying the permanency for the child."

Based on the above, we cannot find that the trial court abused its discretion in denying father's section 388 petition. The court listened to all the evidence and indicated it had read the entire record. It was thoughtful and careful in its deliberations. There is nothing in the record to indicate that the court's decision was made in an arbitrary, capricious or patently absurd manner. We discern no abuse of discretion.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.