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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re Z.G., a Person Coming Under the  
Juvenile Court Law.

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.J.,

Defendant and Appellant.

E064846

(Super.Ct.No. J258847)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lynn M. Poncin,  
Judge. Affirmed.

Michele Anne Cella, under appointment by the Court of Appeal, for Defendant  
and Respondent.

Jean-Rene Basle, County Counsel, Kristina M. Robb, Deputy County Counsel, for  
Plaintiff and Respondent.

Defendant and appellant R.J. (father) is the father of Z.G. (minor; a girl, born Jan. 2015). Father appeals from the juvenile court's order denying him status as a *Kelsey S.*<sup>1</sup> father and terminating his parental rights. For the reasons set forth below, we affirm the juvenile court's orders.

### **FACTUAL AND PROCEDURAL HISTORY**

On January 14, 2015, D.G. (mother)<sup>2</sup> went to the offices of plaintiff and respondent San Bernardino County Children and Family Services (CFS); mother had minor with her. Mother spoke with Julia Westcot, mother's social worker for her two older children who had open adoption cases. Westcot was unaware that mother had been pregnant with minor. When speaking with Westcot, mother vacillated "between wanting to keep the baby or not." On February 17, 2015, mother called social worker Konnie Montoya and stated that she wanted to relinquish custody of minor because she could no longer care for her. Mother brought minor to the CFS office and turned over physical custody of minor to Montoya. Mother declined to participate in reunification services and did not want to be involved in the dependency proceedings.

Mother told Montoya that she did not know the identity or whereabouts of minor's father. Mother stated that she and minor's father were never married. Montoya and her supervisor researched adoption home studies and chose Mr. and Mrs. G. for placement; minor was placed in their home.

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<sup>1</sup> *Adoption of Kelsey S.* (1992) 1 Cal.4th 816.

<sup>2</sup> Mother is not a party to this appeal.

On February 19, 2015, a Welfare and Institutions Code<sup>3</sup> section 300 petition was filed on behalf of minor, alleging minor came within subdivisions (b) (failure to protect); (g) (no provision for support); and (j) (abuse of sibling).

At the detention hearing on February 20, 2015, the juvenile court found a prima facie case for detention outside the home and placed minor in the temporary custody of CFS.

The jurisdiction and disposition report dated March 12, 2015, recommended the allegations in the petition be found true, the petition sustained, and no reunification services be provided to either parent. The report provided details regarding mother's child welfare and criminal history. Mother visited with minor and held her while minor slept during the visit. Mother stated she was glad minor was "going to a good home."

Minor continued her placement in the home of Mr. and Mrs. G., a concurrent planning home. Mr. and Mrs. G. continued to meet minor's needs and the placement remained appropriate.

On March 12, 2015, a declaration of due diligence was filed indicating that a search for minor's father was unsuccessful because his identity was unknown.

At the jurisdiction and disposition hearing on April 8, 2015, the court found true the allegations raised in the petition. It found that minor came within section 300, subdivisions (b), (g) and (j); denied services for mother and the unknown father; and set a section 366.26 hearing to establish a permanent plan for minor.

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<sup>3</sup> All statutory references are to the Welfare and Institutions Code unless otherwise specified.

On September 8, 2015, social worker Kimberly Robinson filed an Additional Information to the Court. Robinson reported that on September 3, 2015, she spoke with father. According to father, approximately three weeks prior he was informed by his sisters that mother had come to their home and told them that he was minor's father. Father acknowledged that there was a possibility that he could be minor's biological father because he and mother were "hanging out" around May 2014. The two of them, however, were not in a relationship. They did not stay in touch after they stopped "hanging out." Father stated that mother never told him directly that she was pregnant and he never saw her during the pregnancy. Father had not contacted mother after learning he was minor's father because he wanted to be certain that he was the father. If so, he stated he would "man up" and take care of minor. Robinson informed father about the upcoming section 366.26 hearing, and he confirmed he would attend the hearing.

The section 366.26 report dated September 10, 2015, recommended that parental rights be terminated and adoption selected as the permanent plan for minor. Minor remained in the home of Mr. and Mrs. G.; she was meeting developmental milestones; she was healthy and there were no mental health or emotional concerns; she related well to Mr. and Mrs. G. and recognized them as her parental figures.

Mr. and Mrs. G. resided in a four-bedroom home with minor and their son. Minor slept in a crib in the couple's bedroom; however, she also had her own designated bedroom. The home was described as neatly and comfortably furnished. They lived in a quiet and well-maintained neighborhood that was close to parks, grocery stores, schools

and medical facilities. Both Mr. and Mrs. G. were gainfully employed and did not have any medical issues or concerns.

At the section 366.26 hearing on September 10, 2015, father appeared. The court ordered father to undergo a paternity test and continued the hearing.

On October 1, 2015, Robinson submitted an additional information to the court. She reported that the paternity test results showed the probability of father's paternity being 99.99 percent. When father was informed of the results, he stated that he would like to gain custody of minor. He also stated that he did not have "anything going on" and explained that he was working but got laid off. Father indicated that paternal grandmother (PGM) and sisters could take custody of minor because he wanted to keep her in the family. He admitted there was a probability pregnancy could have occurred because his encounters with mother were unprotected. He, however, did not believe she would get pregnant because they were only together twice. Robinson recommended adoption with Mr. and Mrs. G. continue as the permanent plan.

On October 2, 2015, father filed a statement regarding parentage indicating he believed he was minor's parent and requesting that the court enter a judgment of parentage.

At the further section 366.26 hearing on October 2, 2015, the court acknowledged the paternity test results and continued the hearing to allow father time to file a section 388 petition.

On October 23, 2015, father filed a section 388 petition seeking to raise his status from biological father to quasi-presumed father. Father's petition requested presumed

father status asserting he was capable of assuming full custody; he was gainfully employed and could support minor. Father had a residence and access to age-appropriate necessities that minor might need; he had relatives willing to care for minor while father worked. Father relied on the holding of *Adoption of Kelsey S., supra*, 1 Cal.4th 816, to support his request.

In its opposition, CFS contended that father was a mere biological father, and it was in minor's best interest to remain with Mr. and Mrs. G. for adoption. CFS argued that after having unprotected sex with mother, father took no further action to determine whether mother was pregnant or whether he could be the father of minor. CFS also argued that thus far, father had not shown his commitment or support to minor other than appearing for a paternity test. Father was not determined to be the biological father until minor was nine months old; she did not know father and did not have a relationship with him.

An interim review report dated November 9, 2015, recommended that father's petition be denied, that parental rights be terminated, and the permanent plan of adoption be implemented. According to the report, father stated that he did not know about minor until about three months prior, when mother informed his sisters that he was minor's father. PGM reported that father initially did not want to get involved, but that PGM wanted custody of minor. Robinson discussed with father the reason as to why he waited three weeks to reach out to CFS after learning about minor. Father responded that he did not believe he was minor's father and did not want to get involved. According to father, mother was merely a friend that "he hooked up" with a couple of times after he was

released from prison in May 2013. The two never had a relationship and only “hooked up” twice. Father saw mother in the welfare office on one occasion in either February or March 2015, but they did not speak to each other. Father reported mother looked normal and there was no indication that she was either pregnant or had given birth. Father also explained that his sisters did not keep in contact with mother and none of his family members saw mother pregnant or were informed that she was pregnant.

Regarding father’s history, he was incarcerated from 2009 to 2013 for robbery with use of a firearm. While serving his time, father worked on changing his ways, including taking parenting classes and receiving his GED. Additionally, father served nine days for violating his parole in October 2014. Father expected to be off parole in May 2016. Father reported that he worked in construction from 5:30 a.m. until late in the evening. Father understood the need to make adjustments to his work schedule if he were to receive reunification services. Father was renting a room from his sister and had a crib and car seat for minor.

Minor remained with Mr. and Mrs. G., with whom she had been placed for eight and one-half months. She was thriving and was described as being very attached to Mr. and Mrs. G. and their son. Minor was receiving SART (screening, assessment, referral and treatment) services to assist her with development growth; she attended services weekly.

To Robinson, it was unclear whether father truly desired to take on the responsibilities of having minor placed in his care. Initially, he did not want to be

involved, and it was PGM who initiated contact with CFS three weeks after learning minor may be father's biological child.

On November 5, 2015, Mr. and Mrs. G. filed a request for De Facto Parent Status.

On November 9, 2015, the contested section 366.26 hearing and the hearing on father's section 388 petition went forward. The court also considered Mr. and Mrs. G.'s de facto parent request.

At the hearing, father testified. He stated that he was now in a position to take full custody and raise minor; he was employed and had a place to live. When PGM learned that minor could be father's child, she called the social workers and was told the procedures father needed to follow to determine minor's paternity. After PGM called, father called CFS and got in touch with the social worker. He was instructed to come to the next court date, at which time he was scheduled to take a paternity test.

Up until the time mother informed father's family that he could be minor's father, he had no indication that mother was pregnant. On cross-examination, father testified that he knew mother from school; mother was a friend of his sisters. After father was released from prison, he saw mother a couple of times. He moved out of PGM's home and never saw mother again. Father did not have a telephone number for mother and never asked for it. Father testified that he was aware unprotected sex could lead to pregnancy but never followed up with mother to ask her if she was pregnant.

Father first learned about minor after mother called father's sister and PGM and informed them that minor was getting adopted, and that she was father's child. PGM and his sister informed father of the news the same day. However, father waited three weeks

to contact the social worker. Father testified that it took him three weeks because he was thinking about “it” and he was barely getting his “stuff” situated. After thinking about it, he decided minor was his baby so he “manned up and did what [he] had to do.” At the time of the hearing, father had not seen minor and she had not been in his care at any time.

During cross-examination, father was asked why he believed it was in minor’s best interest to be removed from the bond she shared with Mr. and Mrs. G. Father’s counsel objected, arguing that minor’s best interest at that point in time was irrelevant. The court then asked, “Isn’t that part of the 388 petition . . . the child’s best interest?” Father’s counsel argued that the section 388 petition was just a “vehicle” to get the matter before the court, and stated if father qualified as a *Kelsey S.* father, then the law required that father was entitled to a section 361.2 hearing. Counsel went on to argue that the best interest of minor was irrelevant at a section 361.2 hearing; rather, whether it would be detrimental to minor to be placed with father. Counsel stated, “The best interest does not come into it whatsoever.” The court then sustained the objection.

After hearing father’s testimony and argument of counsel, the court stated that father had a responsibility, after having unprotected sex with mother, to find out if he fathered a child; and the court did not believe mother thwarted father from finding out about minor. There was no evidence father tried to reach out and talk to mother to find out if she was pregnant. Even after finding out that he could be the father, he continued to wait to assert his parental rights. After speaking with the social worker, father told her

he wanted PGM and his sister to have custody. Father's willingness to assume full custody of minor was not apparent when he first spoke with the social worker.

The court stated, "The father's conduct both before and after this child's birth indicates to this Court that he did not promptly attempt to assume his parental responsibilities, that he did not demonstrate a willingness himself to assume full custody of the child." The court then found that father did not rise to the level of a *Kelsey S.* father and was not entitled to presumed father status.

In sum, the court denied father's section 388 petition, found minor to be adoptable, and terminated his parental rights, selecting adoption as minor's permanent plan. The court also granted Mr. and Mrs. G. request for de facto parent status.

On November 9, 2015, father filed his notice of appeal.

## **DISCUSSION**

### **A. PRESUMED FATHER STATUS UNDER *KELSEY S.***

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

In this case, father filed a section 388 petition to be deemed minor's presumed father under *Kelsey S.*, *supra*, 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 section 361.5, and custody of his child. (*Zacharia D.*, at p. 451.)

Under Family Code section 7611, "a man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father

unless he both ‘receives the child into his home and openly holds out the child as his natural child.’” (*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)<sup>[4]</sup> and the related statutory scheme violates the federal constitutional guarantees of equal protection and due process for unwed fathers to the extent that the statutes allow a mother unilaterally to preclude her child’s biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child’s best interest. If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.” (*Kelsey S., supra*, 1 Cal.4th at p. 849, italics omitted.) Hence, a man may attain presumed father status even if the mother thwarts his efforts, if he at least initiates prompt legal action to seek custody of the child. (*Id.* at pp. 825, 849; see also *Zacharia D., supra*, 6 Cal.4th at p. 450, fn. 19.)

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<sup>4</sup> Former Civil Code section 7004, subdivision (a), is the predecessor to Family Code section 7611, and related statutes.

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.’” (*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.” (*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. (*Vincent M.*, 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.” (*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). During the hearing on the matter, the juvenile court believed that father failed to promptly assume his responsibilities and did not demonstrate a willingness to assume full custody of minor. Father admitted having unprotected sex with mother on two occasions. He, however, failed to follow up with her at any time to determine whether a pregnancy resulted from their encounters. Although mother did not inform father that she was pregnant, there is nothing in the record to indicate that she actively hid herself from father or prevented him from contacting her in any way. Moreover, father waited over three weeks to follow up with the social worker after learning that he could be minor’s father. Initially, father himself did not reach out to CFS. Instead, it was PGM who called CFS. PGM reported to the social worker that father did *not* want to get involved. She, however, wanted custody of minor. Father first contacted the social worker on September 3, 2015. When the social worker questioned father about his delay in contacting CFS, he stated that he did not believe minor was his. Almost one month later, around October 1, 2015, when the paternity results were disclosed to father, he indicated that, “although he doesn’t have ‘anything going on right now,’” he wanted his mother and sisters to take custody of

minor because he wanted to “keep her in the family.” In fact, it was not until father filed his section 388 petition on October 23, 2015, that he indicated his desire to assume custody of minor himself, over two months after learning about her.

In sum, the actions of father did not exhibit a prompt attempt on the part of father to assume his parental responsibilities. His first attempt was to cast those responsibilities onto other members of his family, rather than accept them himself. Only after two months did father actually decide to take on the responsibilities of caring for minor. Moreover, there is nothing in the record indicating that father, at any point, requested to see or visit with minor.

Father also asserts that mother thwarted his ability to assert his paternity. This assertion is not supported by the record. Although the evidence shows that mother informed the social worker and the court that the identity of the father was unknown, after father was informed about minor, he still failed to attempt to assume his parental responsibilities in a timely manner.

“[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.’” (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 160.)

The court in this case, in addressing whether father rose to the level of a *Kelsey S.* father, noted that father never followed up with mother after having unprotected sex with her, then when he “learned he could be the father of the child, again, it took him more

than three weeks to call the social worker.” The court went on to state that, “There is no testimony that [father] tried to reach out and talk to the mother, find out if she was pregnant. By his own testimony, he did not look at her at the welfare office to see if she was pregnant because he was with his girlfriend at the time. [¶] And then when he did have information that he could be the father, [father] continues to wait to assert his parental rights. [¶] In the *Zachariah D.* case the court says when the biological father was asked whether he attempted to find out whether the mother was pregnant after the romantic interlude, the biological father said, ‘No. It didn’t occur to me.’ And that’s when the *Zachariah D.* court talks about men having to be responsible once they have had unprotected sex with a woman to know whether or not they have impregnated that woman.” The court further stated, “But another factor this Court has to look at is that the father must demonstrate a willingness himself to assume custody of the child, and yet even in his own testimony, [father] says he told the social worker at first that he wanted his mother and sister to have custody of the child because in his words he had nothing going on. That to this Court is indicative of [father’s] attitude throughout this—well, I should say throughout this so-called relationship he has had with the mother of minor.”

The court made it a point to refute father’s counsel’s assertion that father immediately did what he could do to assert his parental rights. The court stated, “But based on his own testimony, he did not do it immediately. He waited. He had his mother call first. And he didn’t even ask his mother to call. It’s as if his mother took it upon herself to find out what was going on, and [father] just stood back and let someone else deal with the situation. [¶] *Kelsey S.* specifically says that the father knew or reasonably

should have known, and [father] did nothing to determine whether this woman became pregnant due to his actions—both their actions of having sex, unprotected sex, on more than one occasion. [¶] I am not finding that [father] promptly stepped forward to assert his legal rights. That he waited and sat back for approximately almost four weeks.”

The court concluded, “The father’s conduct both before and after this child’s birth indicates to this Court that he did not promptly attempt to assume his parental responsibilities, that he did not demonstrate a willingness himself to assume full custody of the child. [¶] [Counsel], the Court is finding based on the testimony presented that [father] does not rise to the level of a *Kelsey S.* father and thus is not entitled to presumed father status.”

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.

#### 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.

**DISPOSITION**

We affirm the findings and judgment of the juvenile court.

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MILLER  
J.

We concur:

HOLLENHORST  
Acting P. J.

McKINSTER  
J.