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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

Guardianship of J.S., a Minor.

H036586

(Santa Clara County
Super. Ct. No. PR161732)

L.S.,

Petitioner and Respondent,

v.

G.M.,

Objector and Appellant.

I. INTRODUCTION

This case involves the contested guardianship of J.S., in which the superior court appointed L.S., the child’s maternal aunt, as guardian over the objection of the child’s father, G.M., and also granted visitation by G.M. Under Family Code section 3041, subdivision (a),¹ before granting custody of a child to a nonparent over the objection of a parent, a court must find that “granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of

¹ All further statutory references are to the Family Code.

the child.” The finding of detriment must be shown by clear and convincing evidence. (*Id.*, subd. (b).) Where, as in this case, the court finds by a preponderance of the evidence that the nonparent “has assumed, on a day-to-day basis, the role of [the child’s] parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, and . . . has assumed that role for a substantial period of time” (*id.*, subd. (c)), “this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary” (*id.*, subd. (d)). The court in this case determined that G.M. failed to rebut the presumption that parental custody by him would be detrimental and that custody by the nonparent L.S. is in the best interest of the child.

On appeal G.M. contends that the superior court erred in finding that L.S. was a de facto parent under subdivision (c) of section 3041, and erred in determining that he did not rebut the presumption under subdivision (d) of section 3041. For reasons that we will explain, we determine that the trial court properly granted L.S.’s petition to be appointed permanent guardian of the child,² and therefore we will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Petitions for Appointment of Guardian and Temporary Guardian

On July 18, 2007, following the death of the child’s mother, L.S. filed a petition to be appointed the child’s permanent guardian, and a petition to be appointed temporary guardian, pursuant to the Probate Code. In the petitions, L.S. stated that the child was born out of wedlock to her sister and G.M.; the child, who was seven years old at the time the petitions were filed, had been raised by mother with the support of L.S. and the maternal grandmother; the child had never lived at G.M.’s residence; and since mother’s death, the child had been living at L.S.’s house.

² This court granted the application of Legal Services for Children to file an amicus curiae brief in support of the child.

G.M. filed opposition, stating that he and the child were very close and that he wanted the child to live with him. On July 31, 2007, the superior court appointed L.S. as temporary guardian. G.M. subsequently filed amended opposition to the guardianship petition. In October 2007, the superior court appointed counsel to represent the child.

The temporary guardianship was extended repeatedly and G.M. was granted visitation. Pursuant to an order filed in early December 2007, G.M.'s visitation with the child included two and one-half hour visits twice during the workweek, and alternating Saturdays for five hours. The visits were to take place in the Santa Clara County area. G.M. was also allowed to talk to the child by telephone twice a week.

In April 2008, on recommendation of the court investigator Brenda Farrell-Thomas, the superior court ordered that the minor participate in a clinical mental health assessment with a licensed mental health professional. That assessment was ultimately conducted by Bonnie L. Faber.

On December 11, 2008, by stipulation of the parties and order of the superior court, the temporary guardianship was extended to January 21, 2009. The stipulation and order further provided that G.M.'s alternating weekend visitation was extended to include 9:00 p.m. on Friday through 8:00 p.m. on Saturday, with G.M. responsible for transportation.

On December 15, 2008, Farrell-Thomas, the court investigator, submitted to the court a confidential guardianship evaluation report, as well as written recommendations. Although she had "reservations," Farrell-Thomas concluded that a guardianship by L.S. was not necessary. Farrell-Thomas nevertheless believed that the child should spend significant amounts of time with L.S. and the rest of the maternal family. Farrell-Thomas recommended that the temporary guardianship remain in place through the end of the school year. She recommended that after June 15, 2009, the child reside with G.M., with L.S. to have care and control of the child on alternating weekends, during some holidays, and for a portion of the summer. Farrell-Thomas further recommended therapy for the

child, a parenting class for G.M., and therapy for G.M. and for L.S. regarding parenting and grief issues for the purpose of building a better parent-child relationship.

In June 2009, the parties attended a settlement conference and agreed to extend the temporary guardianship until May 2010. The parties also discussed a new visitation schedule for G.M., as well as a summertime visitation schedule for L.S. when the child was to reside with G.M. Disagreement arose amongst the parties over a stipulation that was drafted to memorialize the parties' discussions, and by October 2009, G.M. sought to have the guardianship matter set for trial.

However, on December 7, 2009, by stipulation of the parties and order of the superior court, the temporary guardianship was extended to May 4, 2010. On that date, a hearing was scheduled to determine whether a trial was necessary. The stipulation further indicated that the child had primarily lived with G.M. during the summer of 2009, and that L.S. had custody and control of the child on alternating weekends and for one, 10-day period. During the 2009 to 2010 school year, the child was to live primarily with L.S., and G.M. was to have care and control of the child on alternating weekends, and visitation for three and one-half hours on Wednesday evenings. For the Thanksgiving holiday, winter break, and mid-winter break, the child was to divide time between L.S. and G.M, and spring break was to be spent entirely with G.M. The child was to be enrolled in therapy.

B. The Hearing on the Petition for Appointment of Guardian

The parties were unable to resolve the matter, and an evidentiary hearing on the petition by L.S. to be appointed the child's guardian took place over several days in early August 2010. The evidence presented at the hearing included the following.

Mother and G.M. began a personal relationship in the mid-1990's but never lived together. At the time, G.M. was in a relationship and living with another woman and two children in San Jose. In 1997, G.M. married the woman, and in 1999, G.M., his wife, and

their two children moved from San Jose to Vallejo. At the time of the hearing on the guardianship petition, G.M.'s two older children were 22 years old and 17 years old.

Mother and G.M.'s son was born in 2000. At the time, mother was living in a house in San Jose with her sister L.S.; her sister's partner, who the child referred to as "uncle";³ and their five-year-old daughter. Mother and L.S. had purchased the house in 1990, taking title as joint tenants. Mother was helping raise L.S.'s daughter.

G.M., L.S., and the child's maternal grandmother, who lived in another state, were present at the hospital for the child's birth. G.M. was not listed on the child's original birth certificate. After mother and child left the hospital, grandmother helped mother care for the child for approximately three months. When mother returned to work after the child's birth, uncle's mother took care of the child during the workweek for approximately two years. Thereafter, the child's maternal grandmother, who came to live with the child, took care of the child while mother worked.

Shortly after the child was born in 2000, mother and L.S. purchased a house in Brentwood as an "investment." They again took title as joint tenants. According to uncle and grandmother, the maternal family went to the Brentwood house on weekends and then returned to San Jose for the workweek. Uncle saw G.M. at the Brentwood house twice, and he believed G.M. was at the San Jose house every few months to spend time with mother. Grandmother testified that in 2002, when the child was two years old, G.M. did not see mother very often, and that G.M.'s visits were usually in connection with him traveling for work.

In December 2003, mother and L.S. sold the Brentwood house and purchased a house "across the street" from their San Jose house. L.S., uncle, and cousin lived in the newly-purchased house, while mother, child, and grandmother remained in the other house. The child and his extended maternal family continued eating dinner together

³ L.S. and her partner were not married but had lived together since 1994. Because the child referred to L.S.'s partner as "uncle," we will also use that title.

almost every day, only now at the newly-purchased house. Mother, child, and grandmother would then walk home afterwards. Uncle testified that mother would not have dinner with them once every few months because she and the child were with G.M. According to uncle, G.M. would sometimes call mother monthly and ask to be picked up from the airport when he was traveling for work. Other times, mother would not see G.M. for three or six months.

In 2005, mother and L.S. decided to move so their children would be able to attend a better school. The sisters purchased houses about five minutes apart from each other, and again took title to each property in joint tenancy. Grandmother continued to live with mother and child. During the workweek, mother dropped off grandmother and the child at L.S.'s house. Mother commuted to work with uncle, and grandmother walked the child and cousin to and from school, which was three blocks from L.S.'s house. After school, grandmother assisted the child with homework. In the evening, everyone ate dinner at L.S.'s house, and then mother, child, and grandmother returned home. Mother took care of the child on the weekend, as well as the child's cousin if L.S. and grandmother were unavailable. Grandmother testified that it was "common for them to share the supervision of both kids."

The child was involved in various extracurricular activities, including a Chinese language class, soccer, hockey, martial arts, and a school chess program. L.S. explained that she and her sister liked to look for activities for the children, and they signed up their children together for martial arts and chess, for example. The child's "number one friend" lived in L.S.'s neighborhood, and the two were in the same grade together. The friend participated in the Chinese language class and the chess program with the child.

The child and his extended maternal family engaged in many activities together, such as hiking, camping, or visiting an aquarium, and they also took vacations together, including a trip to Mexico on a cruise. The maternal family also celebrated birthdays and holidays with the child.

Uncle testified that he taught the child how to walk, use the bathroom, play ball, kayak with an oar, go camping, and “stuff that normally father and son do.” Uncle was the coach for at least one of the child’s soccer teams, and he otherwise attended the child’s soccer games except if there was a conflict with his daughter’s games.

Grandmother testified that after the move to the better school district, mother saw G.M. on occasions when he was going to or returning from the airport to travel for work. Upon his return from a trip, he stayed at mother’s house until midnight. Uncle testified that G.M. was on the list of individuals authorized to pick up the child at school, and that G.M. sometimes picked up the child. Grandmother testified that G.M. attended one meeting with the child’s kindergarten teacher. In early 2007, G.M., mother, and child took a trip to the Philippines and a trip to Boston.

On June 28, 2007, mother died in a motorcycle accident. The coroner came to L.S.’s house that evening to notify the maternal family. The child was seven years old. The maternal family did not inform G.M. about mother’s death. They did not have his phone number and did not know where he lived or worked. After G.M. made unsuccessful attempts to contact mother, he eventually learned through a “web search” that mother had been in an accident. At some point thereafter, L.S. and G.M. had a discussion concerning the maternal family seeking a guardianship for the child. On July 18, 2007, L.S. filed a guardianship petition, and G.M. thereafter sought and obtained a judgment of paternity regarding the child. G.M. had previously signed a declaration of paternity in 2004.

The child had done well in school before mother’s passing, and L.S. believed it was important for the child to continue with his academic success. At the time of the guardianship hearing, the child was a “straight-A student.” Grandmother and L.S. volunteered at the child’s school after mother died and also attended his parent-teacher conferences. Grandmother never saw G.M. at the child’s school during second and third grades.

L.S. continued the child in many of the same extracurricular activities that he had participated in before mother's death, including a Chinese language class, soccer, martial arts, and chess. In addition, during the first summer after mother died, L.S. had the child participate in a six-week math enrichment course, which the child enjoyed. The child also continued to go on vacations with L.S.'s family. Since mother's death, L.S. and uncle had been paying for the child's expenses without any assistance from G.M.

At the guardianship hearing, L.S. described the child as "flourishing." According to L.S. and uncle, the child wanted to continue living with his maternal family and attending the same school with his friends.

L.S. testified that before her sister died, L.S. viewed the child as a son, and her sister similarly viewed L.S.'s child as a daughter. L.S. explained that her sister had helped "with the rearing and caring" of L.S.'s daughter. L.S. described her sister as follows: "[S]he's always been a maternal figure to me and I respect her. [¶] She's my eldest sister. We are friends. We connect together. We have similar beliefs. She is an important part of this family. She's a very good mother." After her sister's death, L.S. "took over [her] sister's parental role for [the child]." She continued to treat him like a son, and she treated her daughter and him "[e]qually the same." L.S. indicated that she had similar values as her sister and that she was trying to instill those values in the child. L.S. further stated that when uncle and she worked, grandmother took care of the child and L.S.'s daughter. L.S. explained that grandmother had been the "main care provider" for the child and L.S.'s daughter "throughout their lives."

L.S. acknowledged that her sister had wanted G.M. in the child's life "from the very beginning" and that her sister would have wanted contact to continue between the two. L.S. did not doubt that G.M. and the child loved each other and admitted that the child was attached to G.M. L.S. testified that she did not object to the child's relationship with G.M., and she believed she could co-parent the child with G.M.

L.S. testified that the existing schedule, where the child lived primarily with her family for the school year and primarily with G.M. for the summer, was “very okay” with her. She believed that it was “hard to uproot a child from his birth home” and that it was “cruel to have to force [the child] to readjust into a new environment.” L.S. believed the child’s summer visits with G.M.’s family would give the child the opportunity to develop an attachment “over a course of time so when [the child is] emotionally ready, he can tell and uproot himself.” She wanted the child to have time to “slowly adjust himself” and to “have a chance to slowly get to know the other family.”

Uncle testified that the relationship between the child and cousin was like “brother and sister.” Uncle testified that the child was like a son to him.

Grandmother testified that she was supportive of the child having a relationship with G.M., and that she valued that relationship. She admitted, however, that she had told G.M. that she would not visit G.M.’s house. She had stated to him, “I see too much my daughter suffering for years [sic].” Further, she had told the child that if he went to live with G.M., the child would not be welcome in her house. Grandmother testified that she had apologized to the child for making this statement and had told him that he would “always” be her grandson. In attempting to explain the statement, grandmother testified, “It’s just harmful, the broken home. We’re a family all together. Suddenly somebody want to take him out, you know [sic]. It’s harmful harm for me.”

Michael Kerner, Ph.D., a licensed psychologist, testified on behalf of L.S. as an expert “in the field of . . . detriment issues and factors affecting minor children, best interest . . . analysis, and factors affecting minor children and issues of child development and parenting issues in the context of custody disputes.” Dr. Kerner had reviewed materials relating to the case, including the evaluation by the court investigator Farrell-Thomas, a letter by Faber who had conducted a mental health assessment of the child, and deposition testimony by Farrell-Thomas, L.S., and G.M. Dr. Kerner also talked to L.S., uncle, and grandmother, but did not interview G.M. or the child.

Dr. Kerner testified that a child's emotional needs include consistency and stability. In this case, Dr. Kerner believed that the child's "primary attachment" was with the maternal family. He stated that the child had a "very primary attachment" to grandmother and L.S., and that uncle had been an "important role model" in his life. Dr. Kerner further observed that the child and his maternal cousin had been described as having a "sibling-like relationship." In considering the child's primary attachment, Dr. Kerner expressed concern about a "tremendous disruption to the child" if he were to live primarily with G.M. He considered grandmother, L.S., and uncle the "primary nurturing individuals" in the child's life, and believed that "[i]f you remove a child's basis for psychological support and nurturance in the world, you can damage the child . . . emotionally." Dr. Kerner referred to mother as a "massive pier holding this child up." He indicated that her death was a "massive loss of the super-structure" for this child and that to move the child to be with G.M. would be "pulling away other piers" for the child. In reference to the maternal family, Dr. Kerner stated that the child was "very, very fortunate that he had a number of other very involved family members." He believed that the child had "gone through this reasonably well" because the child was doing well in school. Dr. Kerner further referred to the "nurturance that the child had received, the quality of the care from schooling to extracurricular to all of the parenting and time that we put in to create a stable basis for our children to grow from. This speaks to [the] emotional needs of the child."

Dr. Kerner stated that if the child had been placed with G.M. after mother died, "[t]hat would have been akin to a nuclear explosion because he would have been uprooting all of the child's emotional stability" Dr. Kerner acknowledged, however, that some time had passed since mother's death and there was a "connection that [was] hard for [him] to speak to because [he had] not observed the child with" G.M. and he had not had an opportunity to interview G.M. He would have wanted to know more about the quality of the relationship between G.M. and the child, what the relationship meant to the

child, and how secure was the child with the attachment. Dr. Kerner explained that he had a concern about detriment if the child moved in with G.M. based on the information that he had been given in the case, but he could not give a recommendation because he had not had the opportunity to interview G.M., G.M.'s family, and the child, and interview the child with G.M. and with L.S.

Dr. Kerner also testified about the issue of "gate-keeping." If a custodial parent restricts a child's contact with the other parent, there may be "tremendous damage to a child of this age" and it may impair the child's relationship with the noncustodial parent.

Farrell-Thomas testified that she was employed by the superior court as a "mediator investigator" and that she was currently assigned to the probate and dependency courts. In 2007, the superior court assigned her to do an investigation for this case. At the guardianship hearing, the parties stipulated to her expertise, which covered custody evaluation and dependency mediation. During her investigation in this case, Farrell-Thomas spoke with, among others, the child, members of the maternal family, G.M., his wife, and his older son.

In her December 2008 report, Farrell-Thomas had stated that during one of her meetings with the child, he stated in a "near whisper" that he wanted to live with L.S. and that he would be happier there. When asked at the guardianship hearing about the significance of the child whispering to her, Farrell-Thomas testified that it "spoke a little bit to his personality." She thought the child "really struggled," that he was aware of the conflict between the parties, that he felt a connection to both parties, and that he "didn't want to displease anybody." Farrell-Thomas believed the child was "sincere at that moment" when he expressed a desire to live with L.S., and she "did not sense" that he was coached to make the statement.

Farrell-Thomas testified that when she conducted her investigation, she believed that L.S. had taken on the daily role of a parent with respect to the child. She testified that the child had referred to L.S.'s home as his home. During a meeting with L.S., her

daughter, and the child, Farrell-Thomas had observed that L.S. “seemed easily able to divide her attention between” the two children and provided “a lot of praising of both of them.” L.S. and the child appeared “very comfortable and relaxed with each other.” Farrell-Thomas also observed that the child seemed “a little more relaxed” and “much more talkative” when his cousin was present than when he was alone with Farrell-Thomas. In her report, Farrell-Thomas stated that the child appeared to have the “strongest bond” with his maternal grandmother, and that he also had a bond with L.S., uncle, and cousin. The child appeared “well-cared for” in L.S.’s home.

In observing G.M. and the child together, Farrell-Thomas also thought that they appeared “comfortable with each other.” According to Farrell-Thomas’s report, G.M. stated that mother primarily took the child to the doctor and he had attended only one or two of the child’s appointments. When she wrote her report, Farrell-Thomas was concerned that G.M. had not had any contact with the child’s school, even after Farrell-Thomas began her evaluation. She believed it was “important for children to know that the parents are invested in their academics and involved in their academics.” Farrell-Thomas also “had a hard time reconciling” G.M.’s statements that he was involved in the child’s life while also very involved in his other children’s lives. It was her sense that G.M.’s wife was the primary caretaker for his older children. Farrell-Thomas also had some “concerns” that G.M.’s wife “seemed to hesitate and would read off a paper at times” in response to questions by Farrell-Thomas.

In the course of her investigation, Farrell-Thomas also spoke with Lori Williams, the mental health professional who had “facilitated contact between” the child and G.M.’s family. According to Farrell-Thomas, Williams had indicated that the child “appeared to feel comfortable with the father and she felt they had a decent relationship and that he was desirous of spending more time, spending overnights at the father’s home.”

Farrell-Thomas sought to have an evaluation of the child's mental health, and the evaluation was eventually conducted by Faber. Faber had reported that the child appeared "settled into his current primary family . . . living with his maternal relatives" and seemed "very comfortable with and connected to his father."

Farrell-Thomas testified that her "overall recommendation," which she submitted in writing to the court in December 2008, was that it was "not detrimental" to place the child in G.M.'s care. In making this determination, she explained that "we basically look at the safety and general welfare of the child and also look at the emotional needs." Farrell-Thomas admitted that she "struggle[d]" in reaching a decision regarding emotional detriment. She believed that the child had an emotional bond with all the members of his maternal family, but that he did not have an emotional bond with G.M.'s side of the family. She testified that if this case involved a "best interest analysis, the outcome could be different."

Farrell-Thomas had not conducted any further interviews since her report in late 2008. She testified that if she conducted another evaluation or made another set of recommendations at this time, "they may be different." She indicated that if the child had continued under L.S.'s care in the same arrangement since her evaluation in 2008, then L.S. would have assumed the role of a parent on a day-to-day basis and provided a "stable placement for [the child] for a substantial period of time."

G.M. testified that prior to the child's birth, he had a "continuous relationship" with mother. G.M. testified that after the child's birth, he, mother, and child "functioned . . . as a family," and that the child called him "Dad." After the guardianship proceedings were instituted, G.M. indicated to a Solano County court investigator that his relationship with mother had been "on again-off again."

G.M. testified that, after the child was born in 2000, and until mother's death in 2007, he saw the child on average three times per week. Generally he visited with the child if he was in San Jose for work, and the visit usually occurred after work. At times,

G.M. travelled for work and might be gone for as long as one or two weeks. Mother often transported G.M. to the San Jose airport for work and then greeted him upon his return. According to G.M., mother moved to the Brentwood house for a period of time and he stayed there with her “from time to time.” G.M. also kept in contact with mother and child by e-mail and phone calls. G.M. testified that the three of them took “numerous” trips together, including to the Philippines and to Boston. G.M. acknowledged that the trip to the Philippines was “partly” a business trip for him, initially only mother was going to join him, he travelled to and from that country without mother and child, and mother paid for her and the child’s airfare. G.M. indicated that he missed only two of the child’s birthday parties before mother died. He also stated that he had been on a school list of individuals who were permitted to pick up the child, and that he had done so on “numerous occasions.” G.M. recalled attending only one parent-teacher conference regarding the child and he had not attended any such conference for his other children. G.M. attended some of the child’s soccer and hockey games.

G.M. testified that although he did not have “an official kind of agreement” with mother about providing monthly financial support for the child, he “financially support[ed]” the child “throughout the years.” He stated that if the child needed something, “usually we go out and buy it,” meaning either he or she “would pay for it.” G.M. acknowledged that he did not pay for the child’s private preschool tuition and that with respect to the child’s extracurricular activities, he paid only for drum class.

G.M.’s wife learned about mother in late 2006 or early 2007, after seeing an e-mail from mother to G.M. G.M. testified that he believed his wife also learned about mother’s child at that time. G.M. acknowledged that his wife was upset after learning about mother, but testified that he and his wife attended a one-week church retreat and “worked out . . . the issues.” He believed his wife had forgiven him. The child did not begin visiting G.M. at his Vallejo home until sometime in 2008, after the guardianship petition had been filed and upon the recommendation of Williams, the mental health

professional who was attempting to facilitate contact between the child and G.M.'s family. At the hearing on the guardianship petition in 2010, G.M. testified that his wife loved the child and was "supportive" of the child living with them in Vallejo.

G.M.'s older son lived at home, and his daughter lived in southern California. G.M. testified that he told them about mother and the child after mother had died and court proceedings had begun. G.M. was asked at the guardianship hearing whether it might have been difficult for his older children to learn about the child, who was at least seven years old by then. G.M. initially testified that he did not know, but he later testified that it may have been hard at the time but "right now, that's not the case."

G.M.'s parents and other relatives lived in the Vallejo area. G.M. indicated that on weekends, there was always a family gathering at his brother's or mother's house. G.M. testified that he and the child loved each other, they were "very close," and the child had bonded with him and the rest of the family. G.M. described various activities with the child, including going rafting, visiting a water park, playing video games, and traveling to Santa Cruz, Las Vegas, and Disneyland. The child's best friend had also visited G.M.'s house. G.M. testified that education is very important and that he believed the child would continue to do well in school.

G.M. admitted that prior to 2008, the child had not spent any holidays in G.M.'s home with the paternal family. In early 2009, he had objected to a recommendation by Farrell-Thomas concerning holidays, and had requested that the child spend every Thanksgiving, Christmas, New Year's day, and winter break in his care, with the maternal family being allowed to come to G.M.'s residence to celebrate.

G.M. wanted the child to live with him and indicated that the maternal family may visit anytime. According to G.M., the child on several occasions after mother's death expressed that he wanted to stay with G.M. He believed the child would "adapt" and "thrive" if the child moved in with him. According to G.M., the only difficulty for the child in transitioning to G.M.'s home would be with respect to going to a different

school. G.M. explained that his daughter had not wanted to leave school in San Jose to move to Vallejo, but that she had changed her mind after adjusting to the move.

The child spoke English and Chinese and had been taking a Chinese language class. G.M. was aware of Chinese language programs in the Vallejo area but had not contacted any of them to make any arrangements for the child. During the first summer that the child lived primarily with G.M., G.M. enrolled him in a “Bible vacation school,” which was one week, but did not enroll him in any other program. The court had ordered G.M. to enroll the child in a math enrichment program that summer, but G.M. testified that he was unable to do so because of the child’s visitation schedule with aunt. During the second and most recent summer that the child resided with G.M., G.M. enrolled the child in a drum class.

G.M. indicated that since the court proceedings had began, the maternal family had not communicated well or cooperated with him, and had made negative references to him in the child’s presence. For example, G.M. testified that the child had stated that someone said mother died because G.M. did not marry her. The child had also told him that after the child showed L.S. an item purchased by G.M., L.S. stated that the item was “ ‘nothing’ ” and that it “ ‘cannot replace love.’ ” G.M. also referred to an incident in which L.S. was screaming and yelling after a court proceeding, which caused a bailiff to enter and ask if everything was “okay.” G.M. believed that L.S. “goes ballistic” if “she doesn’t get her way.” G.M. further testified that L.S. failed to promptly provide the child’s social security number so that he may be enrolled on G.M.’s medical insurance, and failed to promptly respond to G.M.’s requests to alter the child’s visitation schedule.

C. The Statement of Decision and Appointment of L.S. as Guardian

On December 14, 2010, the superior court filed a detailed statement of decision. Among the court’s factual findings were that G.M. and the child “have had a father-son relationship, which mother encouraged, although meetings between father and son were occasional and primarily incidental to father visiting with mother in San Jose. Father did

not provide regular financial support for [the child], but would buy things for [the child] on his visits. Except for when [the child] would visit father after mother's death, [f]ather has played a minimal role in the day to day care of [the child] since he was born." The court observed that G.M. had claimed that mother and child had lived at the Brentwood house for a period of time and that he visited them there. The court found it "unlikely" that mother lived there for "any extended continuous period of time."

The superior court found that mother and L.S. "were extremely close" and observed that they viewed themselves as a "second mother" to each other's child. The court referred to the joint purchases of homes, the extended maternal family's living arrangements over the years, the care provided by grandmother for both sisters' children, and the joint vacations and joint birthday and holiday celebrations.

The superior court was in "agree[ment]" with the "factual analysis and observations" of the court investigator Farrell-Thomas, as reflected in her December 2008 report. The court quoted the following from Farrell-Thomas's report: "This evaluator has concerns about the Father's lack of involvement in [the child's] day to day activities (even after the commencement of the evaluation process), his business travel schedule, and his lack of attunement with [the child] and his needs. Additionally, this evaluator has concerns about how a move to another city and a new school will impact [the child] given the recent loss of his mother. In addition to the concerns, it was this evaluator's assessment that [the child] is doing well in the care of maternal aunt/temporary guardian. He appeared to be safe and well-cared for in the maternal aunt/temporary guardian's home. He has a strong bond and connection with the maternal grandmother. He is doing well in school and has good attendance."

The superior court stated, however, that it was not adopting the court investigator's recommendation against guardianship. The court determined that the court investigator had relied on the legal standard set forth in subdivision (a) of section 3041, but that this standard was "inapplicable at the time of trial." The court explained that "by

the time of trial in August of 2010,” L.S. had become a person described under subdivision (c) of section 3041, as the child had “been living with and was raised by aunt and [the child’s] maternal family for over three years since his mother’s death in June of 2007.” (Fn. omitted.) The court further determined that under subdivision (d) of section 3041, G.M. had “not shown by a preponderance of the evidence that there would be no detriment from parental custody and that custody by [L.S.] is not required to serve the best interest of [the child].” In reaching these determinations, the court considered 1) the nature and extent of the child’s relationship with L.S., 2) the child’s stated interest, and 3) the nature and extent of the child’s relationship with G.M.

First, in considering the child’s relationship with L.S., the superior court referred to Dr. Kerner’s testimony that children need continuity and stability, that the child’s “primary attachment” was with his maternal family, and that the child incurred a “massive loss of super-structure” when mother died suddenly. The court referred to Dr. Kerner’s expression of serious concern “about the effect of removal from the maternal family, the individuals responsible for nurturing [the child] since birth, given that [the child] had already lost his mother.”

The superior court determined that “[t]he evidence support[ed] Dr. Kerner’s concerns.” In describing that evidence, the court found that prior to mother’s death, “[t]he maternal family, including [the child], his mother, grandmother, [L.S.], uncle and cousin functioned as a large family unit. [L.S.] and mother bought all their houses together and held titles in joint tenancy. Until mother’s death, they share[d] parenting responsibilities, made joint decisions regarding the care of their children, and raised [L.S.’s child and mother’s child] together as a family. [L.S.] and mother shared the same values when it [came] to their children, even selling their houses and moving so that their children could attend school in a highly valued school district. Since [the child] was born and until mother’s death, uncle was the only male parental figure in [the child’s] daily life. Uncle potty trained [the child], helped him learn to walk, taught him about camping,

and coached his soccer team. [The child] and [L.S.'s child] are practically siblings, and the court investigator reported that [the child] was most comfortable with his cousin whom he has known since birth. [¶] The extended maternal family regularly ate dinner together and took vacations together. Both children were jointly cared for by grandmother when mother was alive and still now, and the court investigator reported that [the child's] strongest bond appeared to be with his grandmother. Ever since he was born, grandmother played a significant role in raising him and in the day-to-day care of him, the same role she still maintains now."

The superior court further found that after mother's death, L.S. and the maternal family "had assumed the role of [the child's] parents on a day-to-day basis . . . , fulfilling both the child's physical and emotional needs." L.S. had "discharged her responsibilities with love and devotion, treating [the child] as her own." She had "ensured" that the child was "fed and clothed, without any financial assistance from father." L.S. also volunteered with grandmother at the child's school, attended all parent-teacher conferences, and continued to support the child's schoolwork, friendships, and extracurricular activities, including "mother's desire to have [the child] learn Mandarin Chinese." The court found the evidence "undisputed that [the child] flourished in the care of his mother and the maternal family before and after the mother's death." Moreover, the child was "attached to his current home and all those who live with him," and his maternal family members "have continually fulfilled [his] physical and emotional needs." The court further found that while "[g]randmother, [L.S.], and uncle already played a significant role in [the child's] upbringing even before . . . mother's death," they had "collectively stepped into the void left by mother's untimely death." (Fn. omitted.)

Second, regarding the child's stated interest, the superior court explained that the appointed counsel for the child had "urged" the court to grant the guardianship petition by L.S., and had represented to the court that appointed counsel's position "was based on a determination of her client's best interests which included consideration of his stated

interests.” The court found that the “position” of the child’s appointed counsel was “consistent with” the evidence at trial regarding the child’s “stated interests.” In this regard, the court explained that it gave more consideration to the child’s statements to the court investigator, Farrell-Thomas, “who was an independent party reporting to the court,” that he wanted to live with L.S. and would be happier there, rather than to the claims by G.M. or the maternal family about the child’s wishes. The court observed that “[b]y all accounts,” the child was “an intelligent child” and his stated interests were “rational, reasonable, and understandable.” To that extent, the court explained: “He is with the same people he has been with since he was born, people who love him and he loves them. The person with whom he has the strongest bond, grandmother, and the person he is most comfortable with, [L.S.’s daughter who is his cousin], are part of his maternal family. His best friend . . . is in San Jose and lives only a few blocks away. He is doing extremely well in his current school and understandably would want to remain in the same familiar school district. His extra-curricular activities are in San Jose. And although there is no doubt that he loves his father, he still would get to see and stay with his father. Thus, the current arrangements will serve both desirable goals of maintaining stability and contact with father.”

Third, regarding G.M.’s relationship with the child, the superior court determined that there was a “father and son relationship” since the child’s birth, that the child undoubtedly loved his father very much, and that G.M.’s love for the child was “genuine.” The child also “appeared comfortable with his half-siblings, [G.M.’s] wife, and other members of [G.M.’s] family, as all of them appear to be with him as well.”

The superior court was concerned, however, that G.M. “may not have a realistic understanding of the role of primary caretaker for [the child].” It did not appear that G.M. “had ever been the primary parent for any of his children.” The court further observed that G.M.’s “insistence regarding the daily level of his involvement in [the child’s] life prior to the death of [the child’s] mother [was] inconsistent not only with his

circumstances of having a separate family in another county, of maintaining an extramarital relationship with mother, and of traveling frequently for work, but also inconsistent with some of his own statements.” The court pointed to G.M.’s acknowledgment to the court investigator, Farrell-Thomas, that he went to only one or two of the child’s doctor’s appointments with mother. He had also stated to Farrell-Thomas and testified at the guardianship hearing that his relationship with mother was continuous, but the court found the statements “inconsistent” with the “observations” of the maternal family, as well as G.M.’s prior description of the relationship to a Solano County court investigator as “ ‘on-again, off-again.’ ”

The superior court found that G.M.’s “attendance to the more mundane aspects of childraising [had] not significantly changed since the death of . . . mother.” G.M. told Farrell-Thomas that he had not had contact with the child’s second grade teacher or his then-current third grade teacher. Farrell-Thomas in her report had “expressed concern about [G.M.’s] lack of contact with [the child’s] school and health care providers, even after the commencement of the evaluation process.” The court further observed that G.M. had not made any financial contributions to the raising of the child since mother died, and he was directed by court order to enroll the child in a math enrichment program but claimed he could not do so because of the visitation schedule.

Lastly, the superior court expressed concern that G.M. lacked “insight into [the child’s] emotional needs.” The court stated: “Just as he appears to discount the emotional impact on his wife and their children as resulting from his relationship with another woman and having another child with her, [G.M.] appears to minimize potential difficulties [the child] may face with a move to Vallejo.”

The court acknowledged that G.M. had raised complaints about the maternal family engaging in “ ‘gate keeping,’ ” which occurs “when a parent restrict[s] a child’s contact with the other parent,” and “which results in detrimental emotional impact” on the child. G.M. had testified that the child felt as though he could not express his love for

G.M. in the presence of the maternal family, whereas G.M. had been supportive of the child's love for the maternal family. The court agreed that there were "concerns regarding gate keeping issues with [L.S.] and the maternal family," and that G.M. was "presently more receptive than the maternal family to a mutually warmer relationship." The court stated, however, that "the gate keeping concerns are insufficient to convince the court by a preponderance of the evidence that there would be no detriment from parental custody and that custody by [L.S.] is not required to serve the best interest of [the child]. Irrespective of any lingering resentment of [G.M.] by members of the maternal family, the court is persuaded they recognized and supported [the child's] love for and relationship with [G.M.]." The court found that L.S. had been "compliant with all visitation orders." Further, the court stated: "Grandmother's statement to [the child], although made out of love for [the child] and out of fear of losing him, was unfortunate. However, this single mistake does not wipe away the years of unconditional love, devotion, and day to day care of the child since birth. Grandmother, whom the court investigator described as having a 'very strong attachment to [the child] and unconditionally loves him,' had apologized to [the child] for her comment and had assured him that he would always remain her grandson. Having observed grandmother testify regarding her regrettable statement to [the child], the court finds her remorse sincere."

Lastly, the superior court concluded that the current visitation schedule should continue because the child had an "established relationship with [G.M.] that should be maintained and supported through visitation."

On December 14, 2010, a "judgment" was filed, granting L.S.'s guardianship petition and ordering that the current visitation schedule remain in effect. On February 9, 2011, G.M. filed a notice of appeal.

III. DISCUSSION

It is undisputed that L.S. and G.M. each love the child. As the superior court wisely observed in the statement of decision, “[i]t is very fortunate indeed for [the child] that [L.S.] and [G.M.] each recognizes and acknowledges the other’s love for the child.” The court also found that L.S. and G.M. “sincerely believe[d]” that it was “best for [the child] to reside in their respective homes.” The court recognized, however, that its decision “must be guided by the applicable law.” So, too, must our decision. Before considering the substance of G.M.’s contentions on appeal, we first consider the issue of appealability, provide a brief overview of the general legal principles governing a probate guardianship, and set forth the standard of review.

A. Appealability

As an initial matter, we address the issue of appealability. An order granting letters of guardianship is appealable. (Code Civ. Proc., § 904.1, subd. (a)(10); Prob. Code, § 1301, subd. (a); see *Guardianship of Donaldson* (1986) 178 Cal.App.3d 477, 485 [discussing former Probate Code section 2750].) On our own motion, we augment the record on appeal to include the “Order Appointing Guardian of Minor,” Judicial Council form GC-240, which was filed in the superior court on July 18, 2011, and which provides that letters of guardianship shall issue. (Cal. Rules of Court, rule 8.155(a)(1)(A).) G.M. filed his notice of appeal after the “judgment” granting L.S.’s guardianship petition was filed, but before the filing of the “Order Appointing Guardian of Minor,” which is a mandatory Judicial Council form. (See Cal. Rules of Court, rule 1.31(b); Cal. Rules of Court, appen. A, Judicial Council Legal Forms List.) We need not decide whether the earlier “judgment” was appealable. (See Cal Rules of Court, rule 1.31(g) [an “otherwise legally sufficient court order for which there is a mandatory Judicial Council form is not invalid or unenforceable because the order is not prepared on a Judicial Council form”].) We will liberally construe G.M.’s notice of appeal as applying to the subsequently-filed “Order Appointing Guardian of Minor,” and deem the notice of appeal as filed

immediately after entry of that order on July 18, 2011. (See Cal. Rules of Court, rules 8.100(a)(2), 8.104(d) & (e).) As both L.S. and the child have argued the merits of the appeal and have not sought dismissal, they would not be misled or prejudiced by our interpretation of G.M.’s notice of appeal. (See *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 202-203.)

B. General Legal Principles Regarding Probate Guardianship

The Probate Code provides that “[a] relative or other person on behalf of the minor . . . may file a petition for the appointment of a guardian of the minor.” (Prob. Code, § 1510, subd. (a).) “The probate court may appoint a guardian ‘if it appears necessary or convenient.’ (Prob. Code, § 1514, subd. (a).)” (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1122, fn. omitted.) The circumstances of the proposed guardianship may be investigated by a court investigator. (Prob. Code, § 1513, subd. (a); *Guardianship of Ann S., supra*, 45 Cal.4th at p. 1122.) A temporary guardianship may be established pending the appointment of a permanent guardian. (Prob. Code, § 2250 et seq.; *Guardianship of Ann S., supra*, 45 Cal.4th at p. 1122, fn. 3.)

“Early authorities held that in contested guardianship cases, parents were entitled to retain custody unless affirmatively found unfit. [Citation.] However, the unfitness standard fell out of favor and the best interest of the child, as determined under the custody statutes, became the controlling consideration. [Citations.] The Probate Code now specifies that the appointment of a guardian is governed by the Family Code chapters beginning with sections 3020 and 3040. [Citation.]” (*Guardianship of Ann S., supra*, 45 Cal.4th at p. 1122-1123; see Prob. Code, § 1514, subd. (b)(1).)

“Family Code section 3020, subdivision (a) declares that ‘the health, safety, and welfare of children shall be the court’s primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children.’ Under Family Code section 3040, subdivision (a), parents are first in the order of preference for a grant of custody, but ‘the court and the family’ are allowed ‘the widest

discretion to choose a parenting plan that is in the best interest of the child.’ (Fam. Code, § 3040, subd. (b).)” (*Guardianship of Ann S., supra*, 45 Cal.4th at p. 1123.) At the time of the guardianship hearing in this case, former section 3042, subdivision (a) provided that “the court shall consider and give due weight to the wishes of the child in making an order granting . . . custody” if the child “is of sufficient age and capacity to reason so as to form an intelligent preference as to custody.” (Stats.1995, ch. 91, § 38.)

Relevant here, section 3041, subdivision (a) provides that, before granting custody to a nonparent over the objection of a parent, the court must find that “granting custody to a parent would be *detrimental to the child* and that granting custody to the nonparent is required to serve the *best interest of the child*.” (Italics added.) “[A] finding that parental custody would be detrimental to the child shall be supported by clear and convincing evidence.” (§ 3041, subd. (b).)

In 2002, subdivisions were added to section 3041 concerning de facto parents and concerning a rebuttable presumption. (Stats. 2002, ch. 1118, § 3; see *Guardianship of Ann S., supra*, 45 Cal.4th at p. 1123.) Subdivision (c) of section 3041 states that “ ‘detriment to the child’ includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents.” Subdivision (d) of section 3041 states that, “if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.”

By the addition of these subdivisions, the Legislature has “emphasiz[ed] the importance of a stable home environment for the child.” (*Guardianship of Ann S., supra*,

45 Cal.4th at p. 1123.) “[T]he Legislature has determined that the critical finding of detriment to the child does not necessarily turn on parental unfitness. It may be based on the prospect that a successful, established custodial arrangement would be disrupted. [Citation.]” (*Ibid.*) More specifically, “section 3041, subdivision (d) reflects a legislative assessment that ‘continuity and stability in a child’s life most certainly count for something’ and ‘in the absence of proof to the contrary, removing a child from what has been a stable, continuous, and successful placement is detrimental to the child.’” (*H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, 1138 (*H.S.*).

“When the court appoints a guardian, the authority of the parent ‘ceases.’ [Citation.] The court has discretion to grant visitation [citation], but otherwise parental rights are completely suspended for the duration of a probate guardianship [citation]. The guardian assumes the care, custody, and control of the child. [Citation.]” (*Guardianship of Ann S., supra*, 45 Cal.4th at pp. 1123-1124.) The guardianship may continue until the child attains the age of majority. (Prob. Code, §§ 1600, 1601; *Guardianship of Ann S., supra*, 45 Cal.4th at p. 1124.)

C. Standard of Review

An order appointing a guardian is reviewed for abuse of discretion. (*Guardianship of Morris* (1951) 107 Cal.App.2d 758, 762-763.) When applying this standard of review, the superior court’s “findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.” (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.) Thus, “ “[t]he abuse of discretion standard measures whether, given the established evidence, the lower court’s action ‘falls within the permissible range of options set by the legal criteria.’ [Citation.]” [Citations.] We do not defer to the trial court’s ruling when there is no evidence to support it.” (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.) However, “ “[w]hen two or more inferences can reasonably be deduced from the facts, the

reviewing court has no authority to substitute its decision for that of the trial court.” ’
[Citations.] The burden is on the complaining party to establish abuse of discretion.
[Citations.] The showing on appeal is insufficient if it presents a state of facts which
simply affords an opportunity for a difference of opinion. [Citations.]” (*In re Marriage
of Rosevear* (1998) 65 Cal.App.4th 673, 682.) Moreover, “[w]here statement of decision
sets forth the factual and legal basis for the decision, any conflict in the evidence or
reasonable inferences to be drawn from the facts will be resolved in support of the
determination of the trial court decision. [Citations.]” (*In re Marriage of Hoffmeister*
(1987) 191 Cal.App.3d 351, 358.)

D. Determination that L.S. Assumed a Parental Role over the Child

G.M. contends that the superior court abused its discretion in “finding,” with
respect to L.S., that “de facto parent status” under section 3041, subdivision (c) “existed
prior to [the] death of mother.” G.M. argues that while mother was alive, the child was in
mother’s custody and mother fulfilled the role of parent. Consequently, L.S. could not
have assumed the role of the child’s parent, as described in section 3041, subdivision (c),
prior to mother’s death.

G.M. fails to establish an abuse of discretion in this case. Contrary to G.M.’s
contention, the superior court did *not* conclude that L.S. had assumed the role of the
child’s parent by virtue of her relationship with the child *prior* to mother’s death. Rather,
the court explained in its statement of decision that, “by the time of trial in August of
2010[, L.S. had] become a person described under section 3041, subdivision (c), as [the
child had] been living with and was raised by [L.S.] and [the child’s] maternal family for
over three years *since* his mother’s death in June of 2007.” (Fn. omitted, italics added.)
In other words, the court’s determination that L.S. had assumed the role of the child’s
parent was based on the three years *after* mother’s death.

In making this determination, the superior court did state that, “under the facts of
this case, the period of time for purposes of subdivisions (c) and (d) [of section 3041]

cannot be viewed in isolation, but must be considered in the context of the relationship of all concerned prior to mother's death in 2007." This statement, however, along with the court's subsequent discussion of the nature and extent of the child's relationships with L.S. and G.M. from the child's birth to the time of the guardianship hearing, reflect the court's recognition that, at the time of mother's death, L.S. and G.M. were not beginning relationships with the child on a blank slate. In order for the court at the guardianship hearing to properly evaluate what would be in the best interest of the child and what would be detrimental to the child (see § 3041, subd. (d)), the court properly considered the child's past relationships with L.S. and G.M., throughout the child's ten years of life by that point, rather than solely the most recent three years since mother's death. (See *Guardianship of L.V.* (2006) 136 Cal.App.4th 481, 496 [a parent's prior conduct with the child is relevant in determining the best interests of the child].) G.M. fails to establish error by the court in this regard.

E. Consideration of G.M.'s Parental Rights

G.M. argues that he has a constitutionally protected liberty interest in the care, custody, and control of the child. G.M. "contends that the [superior court] failed to consider his parental rights" and that the court's statement of decision "is devoid of any legal discussion regarding his constitutional rights as a father and instead focuses directly on an analysis of [the child's] best interests."

Parents have a fundamental liberty interest in the care, custody, and control of their child, and "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their [child]." (*Troxel v. Granville* (2000) 530 U.S. 57, 66 (plur. opn.)) Moreover, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." (*Santosky v. Kramer* (1982) 455 U.S. 745, 753.)

As we explained above, section 3041 sets forth the findings that the superior court must make in order to award custody of a child to a nonparent, over the objection of the parent. In *H.S., supra*, 173 Cal.App.4th 1131, a father petitioned for custody of his five-year-old child, who had primarily been cared for by the paternal uncle and his wife since birth. (*Id.* at p. 1136.) The superior court issued a permanent custody order awarding sole legal and physical custody to the uncle and aunt, and visitation to the father. (*Id.* at p. 1137.) On appeal, the Court of Appeal rejected the father’s contention that section 3041 violated his constitutional right to due process because it allowed nonparental custody based on a preponderance of the evidence standard of proof rather than a clear and convincing standard of proof. In determining that the statute was constitutional, the Court of Appeal recognized the due process right of parents, as well as the child’s interest in having “ ‘ ‘a placement that is stable [and] permanent.’ ” ’ [Citations.]” (*H.S., supra*, 173 Cal.App.4th at p. 1139, fn. omitted; see *id.* at p. 1139, fn. 11 [noting that there is a dispute in the appellate courts regarding “whether a child’s right to a stable and permanent placement rises to the level of a federal constitutional right”].)

In evaluating whether the evidentiary burdens set forth in section 3041 comport with due process, the Court of Appeal explained that “[s]ection 3041, subdivision (b) provides that detriment must be shown by *clear and convincing evidence*, subject to subdivision (d). Under subdivision (d), *de facto parent status* may be established by a *preponderance of the evidence*, and once shown, this status creates a rebuttable presumption of detriment. Reading the statutory provisions together, the statute does not alter the ultimate clear and convincing evidence standard imposed on a nonparent, including a de facto parent. Rather, the statute merely permits clear and convincing evidence of detriment *to be proven* by means of a rebuttable presumption when a nonparent has acted as the child’s de facto parent for a substantial period of time. Thus, section 3041, subdivision (d) does not eliminate the clear and convincing requirement for

detriment, but simply allows it to be met through the use of a rebuttable presumption.” (*H.S.*, *supra*, 173 Cal.App.4th at p. 1140, fn. omitted.)

The Court of Appeal further stated that “[g]enerally, a state does not violate due process by providing that proof of one fact establishes proof of another fact when there is a rational connection between the two facts. [Citations.] Here, it is rational to infer that removing a child from a long-standing stable home where the child’s physical and emotional needs are met constitutes a clear and convincing showing of harm to the child.” (*H.S.*, *supra*, 173 Cal.App.4th at p. 1140.) The Court of Appeal further determined that, through the “equalization of the burdens in the case of de facto parents,” where the de facto parent is afforded the benefit of the presumption after showing de facto status and the parent may rebut the presumption under the lowest standard of proof, “the Legislature has recognized the two important, and competing, interests of parental rights and child stability.” (*Id.* at p. 1141.) The Court of Appeal ultimately concluded that the statute comports with due process. (*Id.* at pp. 1140, 1141.)

In this case, G.M. did not contend in the superior court, nor does he contend on appeal, that section 3041 is unconstitutional on its face. As reflected in the superior court’s statement of decision, the court relied on section 3041 as the basis for the court’s conclusion that L.S. should be appointed guardian over the objection of G.M. Although the court did not explicitly refer in its statement of decision to G.M.’s liberty interest in the care, custody, and control of his child, the court by relying on and applying section 3041 necessarily considered that interest of G.M. As explained in *H.S.*, the evidentiary burdens contained in section 3041 reflect the legislative recognition of “the two important, and competing, interests of parental rights and child stability.” (*H.S.*, *supra*, 173 Cal.App.4th at p. 1141.) Accordingly, we reject G.M.’s contention that the court “failed to consider his parental rights” in its decision to appoint L.S. as guardian of the child.

F. Determination that G.M. Did Not Rebut the Presumption Concerning Detriment and Best Interest

We understand G.M. to contend that the superior court erred for several reasons when it concluded that he failed to rebut the presumption that parental custody was detrimental to the child and that the best interest of the child required custody by L.S. We consider each of G.M.'s contentions in turn.

First, we understand G.M. to contend that L.S. improperly obtained de facto parent status under subdivisions (c) and (d) of section 3041, "based on the length of time, and the manipulations available, to prolong the litigation process." G.M. fails, however, to cite anything in the record on appeal that shows L.S. improperly prolonged the proceedings in order to delay the hearing on her petition to be appointed permanent guardian. In fact, the record indicates that G.M. *stipulated* on more than one occasion to extending the temporary guardianship. G.M. also fails to provide legal authority to support the proposition that the time period in which it takes to resolve a guardianship proceeding may not be taken into consideration in determining de facto parent status. (See *Guardianship of L.V.*, *supra*, 136 Cal.App.4th at p. 495 [affirming the denial of a petition to terminate a guardianship and stating that continuity and stability in a child's living arrangement must be considered "regardless of whether the ongoing custody arrangement was established by court order or by the consent of a noncustodial parent"].)

Second, we understand G.M. to contend that L.S. should have been required to establish by clear and convincing evidence that parental custody was detrimental to the child and nonparent custody was required to serve the best interest of the child, and that L.S. failed to meet this burden. (See § 3041, subs. (a) & (b).) G.M. is incorrect, as L.S. *did* meet this burden. The superior court found that L.S. was a de facto parent as described in subdivision (c) of section 3041 and, as we have explained, G.M. fails to demonstrate error with respect to this determination by the court. Once de facto parent status is established, it "creates a rebuttable presumption that it would be detrimental to

place the child in the custody of a parent and the best interest of the child requires nonparental custody.” (*H.S., supra*, 173 Cal.App.4th at pp. 1137-1138; see § 3041, subd. (d).) This rebuttable presumption under section 3041, subdivision (d) “does not alter the ultimate clear and convincing evidence standard imposed on a nonparent, including a de facto parent. Rather, the statute merely permits clear and convincing evidence of detriment *to be proven* by means of a rebuttable presumption when a nonparent has acted as the child’s de facto parent for a substantial period of time. Thus, section 3041, subdivision (d) does not eliminate the clear and convincing requirement for detriment, but simply allows it to be met through the use of a rebuttable presumption.” (*H.S., supra*, 173 Cal.App.4th at p. 1140, fn. omitted.)

After finding that L.S. was a de facto parent, the superior court further found that G.M. failed to rebut by a preponderance of the evidence the presumption of detriment and best interest under subdivision (d) of section 3041. To the extent G.M. contends on appeal that there was sufficient evidence that *may* have supported a finding that he rebutted the presumption under subdivision (d) of section 3041, the evidence he cites is contradicted by substantial *other* evidence. In light of the standard of review, we may not reweigh the evidence on appeal. (See *In re Marriage of Rosevear, supra*, 65 Cal.App.4th at p. 682; *In re Marriage of Hoffmeister, supra*, 191 Cal.App.3d at p. 358.)

For example, G.M. asserts that the testimony of Farrell-Thomas, the court investigator, “established that it was not detrimental (physically or emotionally) for [the child] to live with” G.M. However, as explained by the superior court in the statement of decision, Dr. Kerner testified that children need continuity and stability, the child’s “primary attachment” was with his maternal family, and the child incurred a “massive loss of super-structure” when mother died suddenly. The court found that the evidence supported Dr. Kerner’s “concerns about the effect of removal from the maternal family, the individuals responsible for nurturing [the child] since birth, given that [the child] had already lost his mother.” In describing that evidence, the court found that prior to

mother's death, "[t]he maternal family, including [the child], his mother, grandmother, [L.S.], uncle and cousin functioned as a large family unit." The court further found that while "[g]randmother, [L.S.], and uncle already played a significant role in [the child's] upbringing even before . . . mother's death," they had "collectively stepped into the void left by mother's untimely death." (Fn. omitted.) Specifically, after mother's death, L.S. and the maternal family "had assumed the role of [the child's] parents on a day-to-day basis . . . , fulfilling both the child's physical and emotional needs." Moreover, grandmother, with whom the child had the "strongest bond," continued to play a "significant role in raising him and in the day-to-day care of him." The court found the evidence "undisputed that [the child] flourished in the care of his mother and the maternal family before and after the mother's death." The court also gave weight to the child's stated interest in living with L.S., as expressed to the court investigator, Farrell-Thomas. Lastly, the court was concerned that G.M. did not have "a realistic understanding of the role of primary caretaker for [the child]" and lacked "insight into [the child's] emotional needs." The evidence reflected that G.M. had not been "the primary parent for any of his children," his assertions concerning his daily level of his involvement in the child's life prior to mother's death was "inconsistent" with the evidence, even after mother's death his "attendance to the more mundane aspects of childraising [had] not significantly changed," he had not made any financial contributions to the raising of the child since mother died, and he failed to recognize the significance of "potential difficulties [the child] may face with a move to Vallejo."

Substantial evidence supports these findings by the court and that evidence provides compelling support for the court's determination that G.M. did not rebut by a preponderance of the evidence the presumption that it would be detrimental to place the child in his custody and that the best interest of the child requires custody by L.S. (§ 3041, subd. (d).) The evidence that G.M. identifies on appeal to rebut the detriment/best interest presumption suggests, at most, that two or more inferences might

be drawn by the trier of fact in his favor. In such a situation, however, “ ‘ “the reviewing court has no authority to substitute its decision for that of the trial court.” ’ [Citations.]” (*In re Marriage of Rosevear, supra*, 65 Cal.App.4th at p. 682.) G.M.’s showing on appeal with respect to the evidence of detriment and best interest is thus “insufficient,” as it “presents a state of facts which simply affords an opportunity for a difference of opinion” at most. (*Ibid.*)

Third, G.M. contends that the superior court “abused its discretion by failing to weigh his parental rights against those of the aunt, by failing to consider his role in [the child’s] life prior to mother’s death, by failing to consider his role in [the child’s] life since mother’s death, by failing to weigh Dr. Kerner’s admittedly unsubstantiated and incomplete opinion, as juxtaposed with Farrell-Thomas’[s] extensive analysis of the situation, and instead looked to only the testimony of aunt and the extended maternal family for evidence of continuity and stability, then granted aunt’s petition in misplaced reliance on *Guardianship of L.V.*, which facts are distinguishable from his.”

G.M.’s assertions are without merit. The court did consider G.M.’s parental rights in the context of section 3041, which reflects a recognition of “the two important, and competing, interests of parental rights and child stability.” (*H.S., supra*, 173 Cal.App.4th at p. 1141.) The court’s statement of decision also indicates that the court considered G.M.’s role in the child’s life before and after mother’s death, that it found evidence to support Dr. Kerner’s testimony, and that it did not rely exclusively on testimony from the maternal family in making its decision. Lastly, to the extent the facts in *Guardianship of L.V.* are distinguishable from the present case, G.M. still fails to demonstrate that the court’s order appointing L.S. as guardian was an abuse of discretion. G.M. on appeal “does not dispute” that the child “has been in a stable environment while living” with L.S., and he agrees that an “argument” may be made “that continuity does exist for [the child] in her home.” G.M. seeks a reweighing of the evidence which, on appeal, we may not do. (See *In re Marriage of Rosevear, supra*, 65 Cal.App.4th at p. 682.)

Fourth, G.M. asserts that the evidentiary burdens set forth in subdivisions (c) and (d) of section 3041 are unconstitutional as applied to him. In this regard, G.M. argues that he had an “active role” in the child’s life before mother’s death; that L.S. was able to start “the time running for de facto parent status” by filing the petitions for temporary and permanent guardianship shortly after mother’s death; that there were “ongoing efforts” by the court investigator Farrell-Thomas and the mental health professionals Faber and Williams to “reunify” the child and the paternal family; that the amount of visitation time between the child and G.M. increased over the course of the guardianship proceedings; that G.M. “became more and more the person who assumed on a day-to-day basis (at least to the extent allowed by the maternal family), the role of [the child’s] parent”; and that G.M. and the paternal family provided “care, comfort, and love to” the child when “given the opportunity.”

The record on appeal does not reflect that G.M. ever raised the issue of the constitutionality of section 3041 in the superior court. “ “[N]o procedural principle is more familiar to this Court than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” ’ [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881.) “ ‘As a general rule, a new theory may not be presented for the first time on appeal unless it raises only a question of law and can be decided based on undisputed facts.’ [Citations.]” (*In re P.C.* (2006) 137 Cal.App.4th 279, 287.) In this case, resolution of the constitutional challenge raised by G.M. requires reference to disputed facts.

Even assuming G.M. has not forfeited the constitutionality challenge, we find his contention unpersuasive. “An as applied challenge may seek . . . relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied It

contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right. [Citations.]” (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

In this case, G.M. fails to clearly articulate why subdivisions (c) and (d) of section 3041 are unconstitutional as applied. G.M. throughout his brief on appeal suggests that it was unfair or that he was placed at a disadvantage when L.S. was appointed temporary guardian, because it enabled L.S. to establish that she was a de facto parent when the guardianship proceedings continued for more than three years before a hearing and decision on L.S.’s petition. However, nothing in the record on appeal suggests that it was improper for L.S. to seek temporary guardianship pending a hearing on the petition for permanent guardianship, and it appears prudent that L.S. filed both the petitions for temporary and permanent guardianship within a few weeks after mother died. As the superior court found, L.S. and the rest of the maternal family “collectively stepped into the void left by mother’s untimely death.” (Fn. omitted.) G.M. also does not contend the superior court erred in granting the temporary guardianship, nor do we perceive any error where, as here, even G.M. acknowledges that assistance was needed from a mental health professional to facilitate the child having contact with G.M.’s family, who he had never met before. With respect to the length of time the temporary guardianship was in place before an evidentiary hearing was held on the permanent guardianship petition, G.M. does not identify anything in the record on appeal that would support the conclusion that L.S. or the court improperly delayed the evidentiary hearing. In fact, G.M. stipulated on more than one occasion to the extension of the temporary guardianship.

Further, part of the basis for the superior court’s decision that a permanent guardianship should be granted was the court’s finding that the extended maternal family, which included the child, functioned as a family unit both before and after mother’s

death. We observe that there was no evidence suggesting that either mother or the maternal family prevented G.M., prior to mother's death, from developing a strong relationship with the child or from demonstrating that he was fully committed to his parental responsibilities. The superior court found that, although mother "encouraged" a father-son relationship, "meetings between father and son were occasional and primarily incidental to father visiting with mother in San Jose." The court also found that G.M. did not provide "regular financial support" for the child prior to mother's death, and he had made "no financial contributions to the raising of [the child] since mother's death" except when the child was with him during visitation. Further, before and after mother's death, G.M. had only limited contact with the child's school and health care providers. The court determined that G.M. "played a minimal role in the day to day care of [the child] since he was born," except for when the child visited G.M. after mother's death. The court indicated that G.M.'s level of involvement with the child prior to mother's death was constrained by "his circumstances of having a separate family in another county, of maintaining an extramarital relationship with mother, and of traveling frequently for work." Further, G.M. acknowledges on appeal that during the temporary guardianship, "efforts" by various professionals, including more than one mental health professional, were necessary to "reunify" the child and the paternal family.

The record thus reflects that prior to mother's death, G.M. had the *opportunity* to foster the child's attachment to him and to the paternal family, the formation of that attachment was *not* prevented by mother or mother's family, and mother and the maternal family did *not* prevent any attempt by G.M. to demonstrate a full commitment to his parental responsibilities. By the time of mother's death, however, the child, at age seven, had had limited day-to-day care by G.M., had never lived with G.M., and did not know any other member of G.M.'s household. Certainly it is possible that a parent and a seven-year-old child may have developed such a relationship that, following a temporary guardianship of three years where the parent is allowed visitation, a court might

reasonably conclude that parental custody is *not* detrimental to the child and that the best interest of the child does not require custody by the proposed guardian. In this case, however, the temporary guardianship and ultimately the permanent guardianship reflected a continuation of the physical and psychological care and affection that had been provided by L.S. and other members of the extended maternal family unit since before mother's death. The superior court ultimately determined that parental custody by G.M. would be detrimental to the child and that nonparental custody by L.S. was in the best interest of the child. Substantial evidence supported these findings. We are not persuaded that the application of subdivisions (c) and (d) of section 3041 in this case impermissibly infringed upon G.M.'s parental rights.

IV. DISPOSITION

The order appointing guardian is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.