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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ALISON L.,

a Person Coming Under the Juvenile
Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.C.,

Defendant and Appellant.

B277791

(Los Angeles County
Super. Ct. No. DK08045)

APPEAL from a judgment of the Superior Court of Los Angeles County, Veronica McBeth, Judge. Reversed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

In 2014, C.C. was deemed to be the presumed father of Alison L. Alison has been placed with C.C. since 2015, when the dependency court removed her from Yesenia L. (Mother). After C.C. learned through genetic testing that he was not Alison's biological father, Mother's former boyfriend, J.G., informed the court that he was Alison's biological father and asked for presumed father status under Family Code section 7611, subdivision (d).¹ The court granted the request. C.C. appeals from that ruling.² We conclude that substantial evidence does not support the court's finding that J.G. is entitled to presumed father status, and in addition that the court failed to make the requisite finding under section 7612, subdivision (c), that designating only two parents would be detrimental to Alison. Therefore, we reverse the order granting J.G. presumed father status.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant parties are C.C., Mother, Alison (born Nov. 2011), J.G., and Mother's two children with J.G. (Ja. G. (born Oct. 2010) and Jo. G. (born March 2005)).³ In October 2014, the Los Angeles County

¹ Unspecified statutory references are to the Family Code.

² Alison also appealed, but has since abandoned the appeal.

³ In a prior appeal, we affirmed the jurisdictional and dispositional orders of the court removing the children from Mother's custody. We do not set forth the facts regarding those orders except to the extent they are relevant to this appeal.

J.G. and Mother are not parties to this appeal.

Department of Children and Family Services (DCFS) filed a petition alleging that the three children fell under Welfare and Institutions Code section 300, subdivisions (a), (b), and (j) due to Mother's physical abuse of J.G., domestic violence between Mother and J.G., and a violent altercation involving Mother and J.G.'s wife, Elizabeth G.

At the detention hearing, the court deemed C.C. to be Alison's presumed father and J.G. to be the presumed father of the other two children. The court ordered that J.G.'s children be released to him, but that Alison remain released to Mother.

In November 2014, DCFS filed an amended petition adding further allegations that Mother subjected Jo. G. and Ja. G. to excessive interviews regarding alleged sexual abuse by J.G.'s stepson, Carlos. In March 2015, the court sustained the allegations of the excessive interviews regarding alleged sexual abuse and of Mother's physical abuse of the children, and dismissed the other allegations. The court placed Alison with C.C. and ordered reunification services and monitored visits for Mother, authorizing C.C. to monitor the visits.

As of March 2016, the children continued to be placed with their respective fathers. DCFS stated in a status review report that both fathers provided for their respective children and complied with court orders.

At a review hearing on March 16, 2016, C.C. informed the court that he had learned through genetic testing that he was not Alison's biological father and no longer wished to be the presumed father. According to the status review report, C.C. believed that Alison should

be placed with Mother “because children need to be with their mothers.” The court asked for a written motion and continued the matter.

In April 2016, C.C. filed a Welfare and Institutions Code section 388 petition (388 petition) asking the court to vacate his presumed father status and order Alison placed with Mother. C.C. stated that Mother’s visits with Alison were going well and that it would be in Alison’s best interest for Mother to have sole custody. Mother’s visits were unmonitored, and DCFS was waiting for Mother to secure sleeping arrangements for overnight visits.

On June 8, 2016, J.G. filed a motion seeking presumed father status regarding Alison under section 7611, subdivision (d). He asserted that he took a DNA test on May 7, 2016, revealing that he was Alison’s father. He explained in a declaration that he and Mother were in a relationship for seven years and had two children together. Toward the end of their relationship, he learned that Mother was cheating on him and was pregnant. Mother told him she would have an abortion, but instead she moved in with C.C. after she and J.G. broke up. After Alison was born, J.G. did not suspect she was his daughter because Mother had said she was getting an abortion. When J.G. learned in March 2016 that C.C. was not Alison’s father, he assumed Mother had cheated on C.C. and did not consider whether he was Alison’s biological father.

J.G.’s wife, Elizabeth, told him Alison might be his biological daughter and urged him repeatedly to take a DNA test to determine if this was so. J.G. took the test on May 7, 2016 and learned he was likely

Alison's biological father. Elizabeth contacted C.C. and the caseworker to inform them, and she and J.G. asked if Alison could visit them.

C.C. and J.G. arranged a weekend visit with DCFS approval. After the initial visit on May 14, 2016, C.C. and J.G. agreed that Alison would stay with J.G. and Elizabeth every weekend. After two more weekend visits, on May 20 and May 27, Alison went to stay with J.G. and Elizabeth on June 3 while C.C. went to Mexico for one week.

J.G. stated in his declaration that Alison was happy during the visits and called him "daddy." He stated that he wanted to provide for her and wanted to start visits immediately in order to begin to build a relationship with her. He further stated that he was able to provide her food, clothing, and housing, and that he did not want to "miss out on any more time" with Alison.

C.C. was still in Mexico at the time of the June 15, 2016 hearing. Alison was staying with J.G. and Elizabeth until his return. The court continued the matter until June 27.

At the June 27, 2016 hearing, C.C. asked to withdraw his 388 petition. He explained that, after learning J.G. was the biological father, he initially was willing to give J.G. custody, but he had changed his mind. He stated that when Alison returned from her weekend visits with J.G., she was angry with Mother and stated that she did not want to be with Mother. According to C.C., Alison was happy during visits with Mother, so he worried that J.G. and Elizabeth were disparaging Mother, and he wanted to protect Alison.

J.G. reiterated his request for presumed father status, but the court declined to rule on the motion until it gathered more information.

The court ordered that Mother's visits be monitored, that Alison attend mental health therapy, and that the therapist provide a letter for the court. The court calendared a hearing for July 18, 2016.

At the July 18, 2016 hearing, C.C. stated that he wanted to continue presumed father status because of his bond with Alison. J.G. asked for presumed father status in addition to C.C., stating that he had had three weekend visits with Alison and had a relationship with her and held her out as his child. Mother asked that C.C. retain presumed father status because Alison was "very bonded" with him. Counsel for Alison stated that Alison identified C.C. as her father and had been raised by him for a significant portion of her life, was happy in her placement with him, and expressed that she missed him when she stayed with J.G. She further stated that adding J.G. as a presumed father would potentially result in a "family court battle," with three parents seeking custody of her. After hearing more argument, the court stated, "I'm going to make him presumed father." The court ordered visitation between Alison and J.G., including weekend overnights.

DISCUSSION

C.C. challenges the juvenile court's order deeming J.G. a presumed father. We conclude that J.G. failed to meet his burden of establishing his entitlement to presumed father status under section 7611, subdivision (d). Further, even if the evidence supported the finding, the juvenile court did not make the requisite finding under section 7612, subdivision (c), that recognizing only two parents would be detrimental to the child. For these reasons, we reverse.

I. *Section 7611*

“Dependency law recognizes three types of fathers: presumed, alleged and biological. [Citations.] [¶] . . . A presumed father is one who meets one or more specified criteria listed in section 7611 [Citation.] . . . [¶] Section 7611, subdivision (d) provides presumed parent status if ‘[t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.’ A person requesting presumed parent status under section 7611, subdivision (d) must have a ‘fully developed parental relationship’ with the child. [Citation.]” (*In re M.Z.* (2016) 5 Cal.App.5th 53, 63 (*M.Z.*.)

““The statutory purpose [of section 7611] is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.” [Citation.] A biological connection to the child is not necessary for the presumption of paternity to arise. [Citation.] Nor is it necessary for the person seeking presumed parent status to have entered into the familial relationship from the time of conception or birth. ‘[T]he premise behind the category of presumed father is that an individual who has demonstrated a commitment to the child and the child’s welfare—regardless of whether he is biologically the father—is entitled to the elevated status of presumed fatherhood.’ [Citation.]” (*Jason P. v. Danielle S.* (2014) 226 Cal.App.4th 167, 177 (*Jason P.*.)

“A person seeking presumed parent status has the burden of demonstrating compliance with the statutory requirements by a preponderance of the evidence. [Citation.]” (*In re Alexander P.* (2016) 4 Cal.App.5th 475, 492 (*Alexander P.*.) “While the juvenile court may

consider a wide range of factors in making a presumed parent determination, as appropriate to the circumstances [citation], the core issues are the person's established relationship with and demonstrated commitment to the child. [Citation.] In considering a challenge to a juvenile court's finding regarding presumed father status, we apply the substantial evidence test, drawing all reasonable inferences and resolving conflicts in the evidence in favor of the trial court's ruling, and refraining from any reweighing of the evidence. [Citation.]” (*In re M.R.* (2017) 7 Cal.App.5th 886, 898 (*M.R.*).

C.C. contends that J.G. failed to meet his burden of establishing entitlement to presumed father status. We agree. First, the evidence at the time of the July 18, 2016 hearing did not establish that J.G. had “a ‘fully developed parental relationship’ with the child. [Citation.]” (*M.Z., supra*, 5 Cal.App.5th at p. 63.) J.G. had had three weekend visits with Alison when he sought presumed father status. That evidence does not establish a developed familial relationship between J.G. and Alison at the time of the hearing. As J.G. stated in his declaration, he wanted to start visits with Alison in order to “begin to build a relationship with her.” (See *L.L.* (2017) ___ Cal.App.5th ___, 2017 Cal. App. LEXIS 677, at *10 [“Presumed parent status is afforded only to a person with a fully developed parental relationship with the child”]; *In re D.M.* (2012) 210 Cal.App.4th 541, 554 (*D.M.*) [in order for a man to be deemed a presumed father, “[h]e must prove that he has an existing familial relationship with the child such that his rights deserve the same level of protection as those of a biological mother. [Citation.] A biological father is not entitled to custody or to reunification services

merely because he wants to establish a personal relationship with his child.”].)

Second, J.G. did not prove that he had “openly [held] out the child as his . . . natural child.” (*M.Z.*, *supra*, 5 Cal.App.5th at p. 63.) The only evidence that J.G. has publicly asserted his parentage is his statement in his declaration that he told his two minor children, Ja. G. and Jo. G., that Alison was his daughter. Although this is some evidence of openly holding her out as his child, we cannot say that this is substantial evidence to support such a finding. (See *L.L.*, *supra*, ___ Cal.App.5th ___, 2017 Cal. App. LEXIS 677, at *18-19 [evidence sufficient that father held child out as his own “by telling family members, friends, and strangers [and] naming her as his child on insurance and other employment forms”]; *M.R.*, *supra*, 7 Cal.App.5th at pp. 893-894 [father held child out as his son “to his entire family, as well as to others outside of the family, such as teachers”]; *E.C. v. J.V.* (2012) 202 Cal.App.4th 1076, 1087 [factors to consider “[i]n determining whether an alleged parent has held a child out as his or her natural child” include “whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child”]; *Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, 375 (*Charisma R.*) [presumed parent status supported by evidence that parent “openly and publicly asserted her parentage in various forums and to numerous people”], disapproved in part on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512.)

It is true that section 7611, subdivision (d) “contains no durational requirement; it does not, for example, state that the child must be received or held out ‘for a significant period of time.’” (*Charisma R.*, *supra*, 175 Cal.App.4th at p. 370.) Nonetheless, “receipt of the child into the home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship.” (*Id.* at p. 374.) *Charisma R.* thus found substantial evidence to support the presumed parent finding where the parent attended the birth, shared parenting responsibilities for the first six weeks of the child’s life, cared full time for the child for the next seven weeks, held herself out as the mother in “a birth announcement, a baby shower, a gift registry, an online message board . . . and communications with various people,” such as a nurse, coworker, and strangers. (*Id.* at p. 375; compare *In re A.A.* (2003) 114 Cal.App.4th 771, 786 [presumed father status not supported where the respondent lived with the mother and the infant for one to three months, a period of time the court described as “exceedingly small”].) J.G.’s acknowledgment to his two minor children that Alison was his daughter is not in itself sufficiently unambiguous to constitute openly holding Alison out as his own.

DCFS contends that J.G.’s delay in seeking presumed father status was justified because he had no reason to suspect Alison was his biological child. However, the timing of his relationship with Mother does not support this contention. Alison was born in November 2011. J.G.’s declaration states that he was still in a relationship with Mother when he learned she was pregnant with Alison. Clearly, J.G. had reason to suspect that he might have been the child’s biological father.

(See *In re Zacharia D.* (1993) 6 Cal.4th 435, 452 (*Zacharia D.*) [biological father “failed to achieve presumed father status” and was not entitled to reunification services where he “engaged in at least a dozen acts of sexual intercourse with [the mother] over a two-week period,” and there was “no evidence that he had any reason to expect that this sexual relationship had not resulted in pregnancy”]; *In re Margarita D.* (1999) 72 Cal.App.4th 1288, 1297 [agreeing with the juvenile court that the father was dilatory in pursuing his parental rights and “indifferent to his possible paternity” where “he knew he had sexual intercourse with her at or near the time of conception,” and was aware the child was in the dependency system after her birth].) “While under normal circumstances a father may wait months or years before inquiring into the existence of any children that may have resulted from his sexual encounters with a woman, a child in the dependency system requires a more time-critical response. Once a child is placed in that system, the father’s failure to ascertain the child’s existence and develop a parental relationship with that child must necessarily occur at the risk of ultimately losing any ‘opportunity to develop that biological connection into a full and enduring relationship.’ [Citation.]” (*Zacharia D.*, *supra*, 6 Cal.4th at p. 452.)

The caselaw consistently explains that the reason “we presume a person is a child’s father, notwithstanding the absence of a biological connection, [is] in order to protect a *developed* familial relationship.” (*D.M.*, *supra*, 210 Cal.App.4th at p. 554, italics added; see *Alexander P.*, *supra*, 4 Cal.App.5th at p. 485 [“To qualify under subdivision (d), a person must have a ‘fully developed parental relationship’ with the

child.”]; *In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1091 (*Donovan L.*) [“In making parentage determinations under the [Uniform Parentage Act (§ 7600 et seq.)], courts seek to protect *existing* relationships rather than foster *potential* relationships.”]; *Jason P., supra*, 226 Cal.App.4th at p. 177 [““The statutory purpose [of section 7611] is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.””].)

Here, J.G. did not seek a relationship with Alison until four years after she was born, after taking a paternity test. He knew Mother was pregnant before his relationship with her ended, and he knew she had a baby after she moved in with C.C. On this record, we cannot say that there is substantial evidence to support the finding that J.G. is a presumed father under section 7611, subdivision (d).

Our conclusion that the order was not supported by substantial evidence is based on the facts at the time of the July 18, 2016 hearing. Of course, on remand the dependency court may reconsider the issue, taking into account circumstances and events that have taken place subsequent to the July 18 hearing.

II. *Kelsey S.*

DCFS argues that J.G. qualified as a *Kelsey S.* father (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816), but this argument was not raised below or considered by the dependency court and therefore has been forfeited. (See, e.g., *In re T.G.* (2015) 242 Cal.App.4th 976, 984 [failure to raise an

issue in the juvenile court “forfeits a parent’s right to pursue the issue on appeal”]; *In re Elijah V.* (2005) 127 Cal.App.4th 576, 582 (*Elijah V.*) [agreeing with agency that father could not raise *Kelsey S.* issue for the first time on appeal].) “[A] party seeking status as a father under *Kelsey S.* must be clear he wants to be so declared.” (*Elijah V., supra*, 127 Cal.App.4th at p. 582.)

Even if it had been raised, J.G. does not qualify as a *Kelsey S.* father. “A biological father may be accorded parental rights and become a *Kelsey S.* father when his attempt to achieve presumed parent status under section 7611, subdivision (d) is thwarted by a third party and he made ‘a full commitment to his parental responsibilities—emotional, financial, and otherwise.’ [Citations.] We consider his conduct before and after the child’s birth, including whether he publicly acknowledged paternity, paid pregnancy and birth expenses commensurate with his ability to do so, and promptly took legal action to obtain custody of the child. [Citation.] He must demonstrate a full commitment to his parental responsibilities within a short time after he learned that the biological mother was pregnant with his child. [Citation.] He must also demonstrate a willingness to assume full custody. [Citation.]” (*Elijah V., supra*, 127 Cal.App.4th at p. 583.) There is no evidence to support the conclusion that J.G. is a *Kelsey S.* father.

III. *Section 7612*

C.C. contends that, even if J.G. is properly deemed a presumed father, the record does not show that the juvenile court made the

finding required by section 7612, subdivision (c), that “recognizing only two parents would be detrimental to the child.”⁴ (§ 7612, subd. (c).) We agree that the court did not make the requisite finding.

“As a general rule, “there can be only one presumed father.”” [Citation.] However, ‘the Legislature enacted section 7612, subdivision (c) to allow courts to recognize that a child has more than two parents in certain limited contexts: “*In an appropriate action*, a court may find that more than two persons with a claim to parentage under this division are parents *if the court finds that recognizing only two parents would be detrimental to the child*. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled 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. . . .” [Citation.]’” (*M.Z., supra*, 5 Cal.App.5th at p. 64.)

“In enacting section 7612, subdivision (c), the Legislature expressed its intent that it ‘only apply in the rare case where a child truly has more than two parents, and a finding that a child has more

⁴ C.C. also argues that, under section 7612, subdivision (b), any confliction presumption of paternity should have been decided in his favor. The statute provides: “If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” (§ 7612, subd. (b).) The record indicates, however, that J.G. did not ask for the court to deem him a presumed father in place of C.C., but in addition to him, pursuant to section 7612, subdivision (c).

than two parents is necessary to protect the child from the detriment of being separated from one of his or her parents.’ [Citation.]” (*L.L., supra*, ___ Cal.App.5th ___, 2017 Cal. App. LEXIS 677, at *21.) The court’s finding of detriment within the meaning of section 7612, subdivision (c) is reviewed for substantial evidence. (*M.R., supra*, 7 Cal.App.5th at p. 899.)

DCFS contends the juvenile court made an implied finding under section 7612, subdivision (c). However, the court simply did not address whether this was one of those “‘rare cases’ in which a child ‘truly has more than two parents’ who are parents ‘in every way.’ [Citation.]” (*Donovan L., supra*, 244 Cal.App.4th at p. 1090.) The statute requires a finding that “recognizing only two parents would be detrimental to the child.” (§ 7612, subd. (c).) No such finding was made here. For this reason as well, the presumed father finding must be reversed. (See *L.L., supra*, ___ Cal.App.5th ___, 2017 Cal.App. LEXIS 677, at *22-23 [reversing the designation of a third parent under § 7612, subd. (c) where the court did not consider whether recognizing only two parents would be detrimental to the child]; *Donovan L., supra*, 244 Cal.App.4th at p. 1094 [no substantial evidence to support a finding of detriment under § 7612, subd. (c) where there was not an existing parent-child relationship].)

DISPOSITION

The order of the court finding J.G. a presumed father is reversed and the matter remanded.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.